Cardona v City of New York
2016 NY Slip Op 30561(U)
March 29, 2016
Supreme Court, New York County
Docket Number: 150593/11
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

WILLIAM CARDONA, SR.

INDEX NO. 150593/11

MOT. DATE

- v -

MOT. SEQ. NO. 002, 003

THE CITY OF NEW YORK and OLSON'S CREATIVE LANDSCAPING CORP.

The following papers, numbered 1 to ____ were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits No(s). 1

Notice of Cross-Motion/Answering Affidavits — Exhibits No(s). 2

Replying Affidavits No(s). 3

This is a personal injury action arising from a trip and fall. In motion sequence number 002, defendant Olson's Creative Landscaping Corp. ("Olsons") moves for summary judgment dismissing plaintiff's complaint and all cross-claims against it (CPLR § 3212). Defendant The City of New York (the "City") cross-moves for summary judgment on its indemnity claim against Olsons. Plaintiff opposes Olsons' motion.

In motion sequence number 003, The City of New York moves for summary judgment in its favor dismissing plaintiff's complaint and all cross-claims. Plaintiff opposes and Olsons partially opposes the City's motion. Issue has been joined and the motions have been timely brought after note of issue was filed. Since the motions are interrelated, they are hereby consolidated for the courts consideration and disposition in this single decision/order. The court's decision follows.

The following facts are not in dispute. On September 21, 2010, around 9am, plaintiff fell on 103rd Street in front of 159 East 103rd Street, New York, New York. Plaintiff explained at his deposition:

> Q. What happened just before you fell?
> A. At this moment, I was walking towards Third Avenue – no, on Lexington the subway was there. That street is very congested. So people were com ing. So I moved to the right, so, upon moving, I stopped in between the sidewalk and where the tree was and there I lost my balance. So, it was, then, when I fell.

Dated: March 29, 2016

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

...

Q. Did you see the tree before you fell?
A. I saw the tree.

...

Q. Can you please describe for me how you fell?
A. Like I said before, people were coming I moved a little to the right, that's when I stepped and my step gave out. I lost my balance and I fell. I fell in side the dirt.

Plaintiff testified that the tree well dirt was two inches lower than the sidewalk.

Donald Olson testified at a deposition on behalf of Olsons. Mr Olson is the project manager for Olsons, which had a contract with the City to do tree plantings entitled Street Tree Planting of New and Replacement Street Trees Contract (the "Contract"). Pursuant to the Contract, the City retained Olsons to perform work in connection with the block planting of new and replacement street trees in Community Boards 1 through 12 in Manhattan. This work includes, *inter alia,* the removal of stumps and dead trees; expansion of tree pits, saw-cutting and removal of sidewalk for new tree pits, excavation, preparation for all tree pits, furnishing, planting, transplanting, maintaining and replacing various types of trees in prepared new, existing and lawn tree pits, installation of granite block pavers, and restoration of new and existing abandoned tree pits.

Olsons was further required to provide proof of commercial general liability insurance covering Olsons as the n amed insured and the City as an additional insured in connection with the work performed under the Contract. Olson is further required to indemnify the City for any and all claims arising out of or in anyway related to the work performed under the Contract. Further, Olsons and the City expressly agreed that the indemnification obligation hereunder contemplated (1) full indemnity in the event of liability imposed against the City without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the City either causing or contributing to the underlying claim . . ."

The City issued a permit to Olsons on March 31, 2010 and was valid from April 1, 2010 to July 1, 2010 for work on East 103rd Street from 3rd Avenue to Lexington Avenue. Mr. Olson testified that based on Olsons records, Olsons removed a dead tree and a tree stump in front of 159 East 103rd Street on or about April 2010. Further, the existing pit was enlarged at that time.

Q. The next column to the right of that pit size?
A. Correct, it's linear feet – no that's square feet, 14.7, that's what we actually made the pit larger by, 14.7 feet, and the other one was 32.7 feet.
Q. So the first one, the pit was enlarged?
A. Yes.
Q. And it was enlarged by 14.7 linear feet?
A. No. 14 square feet.
Q. 14 square feet?
A. 14.7 square feet.
Q. How about the second one?
A. I would say that's enlarged by 32.7 – could be 7 square feet.

Mr. Olson explained how Olsons excavates a tree pit. It is dug up by a Bobcat, a motorized device with a shovel, which removes all the soil, mulch and anything else in the tree pit. Then Olsons plants a new tree and adds top soil to about the level of the sidewalk.

Tessa Leverone appeared for a deposition on behalf of the City. Ms. Leverone is a forester employed by the New York City Department of Parks ("Parks Department"). She identified a letter dated July 29, 2010 written by Jennifer Greenfeld, director of Street Tree Planging for The Central Forestry Horticulture Natural Resources Division of the Parks Department. In that letter, Ms. Greenfeld indicated that Olson's work had been completed based upon a review of a final punch list. Ms. Leverone further explained:

> Q. Do you know if anybody from the [Parks] Department would inspect the mulch around the tree pit or the tree wells or the punch list items or the contract?
> A. Yes.
> Q. How do you know that?
> A. It's something that I have added to a punch list.
> Q. What do you look for in and around 2010, 2011, to your knowledge?
> A. They are looking for the soil level in the tree pit, ideally, that the soil is flush with the sidewalk.
>
> ...
>
> Q. After looking at Plaintiff's Exhiibit No. 3 back on December 16, 2013, were the items that Olson's was required to follow under the contract com plied with from that document?
> A. It appears so, yes.

Parties' Arguments

Olson sargues that based upon the City's approval of Olsons final punch list items, Olsons cannot be held to owe a duty for non-negligent work which it performed nearly five months before plaintiff's accident. Olsons further contends that there is not proof that it created or caused the allegedly defective condition nor did it have either actual or constructive notice of same.

The City maintains in its cross-motion that it is entitled to contractual indemnification. Otherwise, the City argues that it is entitled to summary judgment dismissing plaintiff's claims because it did not have prior written notice (Admin Code § 7-201[c][2]) nor did it cause or create the defective condition.

In opposition to both motions, plaintiff maintains photographs of the subject tree well taken a day after plaintiff's accident show that it is depressed below the level of the surrounding sidewalk. Otherwise, plaintiff maintains that neither Olsons nor the City met its burden on the motions. As to Olsons, plaintiff argues that "[t]he mere fact that [the City] signed off on [Olsons'] work does not establish *prima facie* that Olsons did not cause or created the depressed area that caused plaintiff's fall. As for the City's motion, plaintiff argues that the City has not established that it caused and/or created the condition and that the final punch list which the City "sign[ed] off" on raised a triable issue of fact.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary

judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue *(Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first address the City's motion for summary judgment. It is undisputed that the City did not have prior written notice of the alleged defect, a depressed tree well. While plaintiff maintains that there is a triable issue of fact as to whether the City caused and/or created the defective condition, the court disagrees. Since there was no prior written notice of the defect, the City can only be held liable for affirmative negligence if its work immediately resulted in the allegedly dangerous condition or a special use confers a special benefit upon the City (see i.e. *Yarborough v. City of New York*, 10 NY3d 726 [2008]). Here, plaintiff does not claim that the City created the depressed tree well. Rather, plaintiff claims that the City negligently checked off a punch list which indicated that Olsons work was satisfactory. Plaintiff's theory of the City's liability is not that it affirmatively caused the depressed tree well but that it negligently inspected Olsons work. Since there is no triable issue of fact as to whether the City caused or created the depressed tree well, the City's motion for summary judgment must be granted.

The court now turns to Olsons motion. Olsons argues that based upon the evidence showing that the it completed its contract with the City in a satisfactory manner, along with Mr. Olson's testimony about how it typically performed the subject work, Olsons is entitled to summary judgment. The court agrees. Plaintiff's theory of liability as to Olsons is that it caused or created the alleged defect, a height differential between the tree well, by negligently performing the underlying work. Yet plaintiff has failed to raise a triable issue of fact on this point. Plaintiff has not come forward with any proof which would permit a reasonable fact-finder to reach the conclusion that Olsons negligently performed it work. Absent such a showing, the court must granted Olsons' motion for summary judgment.

In light of the court's grant of summary judgment to the City, the court declines to address the City's cross-motion for summary judgment on its indmenification claims against Olsons since they are moot.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the Olsons and the City's motions for summary judgment are granted; and it is further

ORDERED that the City's cross-motion is denied; and it is further

ORDERED that plaintiff's complaint and all cross-claims are dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: March 29, 2016
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.