SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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MARGARET DAVIES,

Plaintiff,

-against-

GILMAN CONSTRUCTION CO. INC., BIGMAN BROS., INC. and PIECE MANAGEMENT, INC.,

Defendants.
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DECISION & ORDER
Index No. 150062/2013

Mot. Seq. 002

The motion by defendant Piece Management, Inc. (Piece) for summary judgment dismissing plaintiff's complaint is denied because there are issues of fact relating to Piece's control over the area that contained the wire over which plaintiff tripped.

Background

This personal injury action arises out of plaintiff's alleged trip and fall over a wire located on the mezzanine level of Bloomingdale's department store on November 19, 2011 at 8:30 a.m. Plaintiff was a buyer for Bloomingdale's and was helping the jewelry department prepare to open for customers.

The Bloomingdale's store where the accident occurred was undergoing renovations in anticipation for the Thanksgiving season when plaintiff allegedly fell. Defendant Gilman purportedly served as general contractor and defendant Bigman was allegedly retained as a subcontractor for electrical work by both Gilman and Piece.

Piece argues that it was retained by Bloomingdale's to transport and install temporary showcases because Gilman's renovations (the installation of *permanent* showcases) were behind schedule. Piece contracted with Bigman to help Piece disconnect and reconnect the temporary showcases. Piece claims that plaintiff testified that she fell near a permanent fixture showcase belonging to the vendor Ippolita Boutique. Piece says it did not perform any work on permanent fixture showcases. Piece also argues that even if the fall occurred near temporary showcases, the showcases Piece worked on were placed on pads and the wiring was done within the showcase. Piece insists it did not do any work with wiring outside a showcase or work with the type of cable found in the vicinity where plaintiff fell.

Plaintiff alleges that the wire was coming out of either a column or the floor depending upon which of the seven witnesses' accounts are believed. Plaintiff argues that at the time of her fall, temporary showcases were delivered so that the jewelry department could open for business despite the fact that the permanent showcases had not arrived. Plaintiff claims that a jury could find that plaintiff tripped over a metallic electrical cable coming out of the floor in an area where a temporary showcase was to be installed. Plaintiff points to conflicting testimony about the accident and insists that the jury could find that Piece failed to properly secure the area.

Bigman and Gilman also oppose Piece's motion. Gilman states that because Piece worked directly for Bloomingdale's, Piece is unable to argue that Gilman served as the general contractor for the entire project. Gilman also points to the contract between Piece and Bloomingdale's, which Gilman asserts shows Piece was responsible for cleaning up the areas in which it worked.

Bigman claims that there were only three permanent showcases on the day plaintiff was injured: Roberto Coin, John Hardy and Ippolita. Bigman says it connected the electrical wiring for those display cases prior to the date of plaintiff's accident and that it was not working on those permanent displays when plaintiff tripped. Bigman insists that all other displays were temporary. Bigman says both Gilman and Piece were working as general contractors because both companies inspected the area for obvious dangers and defects.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac*

d'Amiante Du Quebec, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"[A] plaintiff in a negligence claim must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Aracelis On v BKO Express LLC*, 45 NYS3d 68, 70, 2017 NY Slip Op 00281 [1st Dept 2017] [internal quotations and citation omitted]).

In the instant motion, it is undisputed that there are multiple, conflicting accounts regarding where plaintiff fell and the origin of the wire that allegedly cause plaintiff to trip. But these issues of fact matter for this motion only if there is a *material* issue of fact, i.e., one that supports a theory in which Piece could be held liable for plaintiff's accident.

Location of the Accident

Bigman's witness, Diego Lorenz, testified that he believed the area where plaintiff tripped was managed by Piece and that Gilman had specifically told him that the work he was doing at that time (the power and the lighting in certain walls) was not part of Gilman's scope of work (Lorenz tr at 81-83). Non-party Andrea Minnichi (plaintiff's co-worker) testified that plaintiff fell near a temporary showcase (Minnichi tr at 119). Non-party Lynne Bertoldo claimed that plaintiff fell near where a showcase was supposed to be installed (Bertoldo tr at 45-46).

Despite the fact that plaintiff testified that she fell near a permanent showcase (the Ippolita showcase), for which Piece says it was not responsible, other witnesses presented accounts under which Piece might be held liable – that plaintiff fell near a temporary showcase. The fact that plaintiff's account might be favorable to Piece does not mean that the Court can ignore the testimony of other witnesses. On a motion for summary judgment, the Court cannot

conditions . . . Contractor shall control and suppress noise, dirt, debris and dust during construction and leave the premises broom clean upon completion" (Sain affirmation, exh O ¶ 8).

Entler testified that there were multiple jobs going on at the subject Bloomingdale's at the time of plaintiff's accident and that Piece was hired to help relocate showcases so the store could open in time for the Thanksgiving holiday season (Entler tr at 11-12). Entler also testified that Piece's "scope of work was to disconnect showcases from one area, relocate them to another area, and do all the final electrical connections on the existing rough" (*id.* at 15). Entler further testified that he supervised Bigman's work wiring the showcases to an existing floor box or electrical whip (*id.* at 35). Entler also claimed that while supervising the wiring, he walked around the premises, picked up debris and ensured that "everybody was working in a, you know, a safe manner" (*id.* at 49). Entler testified that he inspected the area to make sure there were not any dangerous conditions (*id.* at 50).

Piece's contract with Bloomingdale's and Entler's testimony supports a finding that there are issues of fact because Piece had a duty to keep the work area safe. A jury could decide that plaintiff fell near a temporary showcase in an area under the supervision and control of Piece. The witnesses' testimony makes clear that Piece was brought in by Bloomingdale's to complete a task separate and apart from Gilman's work. This contradicts Piece's argument that Gilman was the general contractor for the entire project and that Piece was not responsible for clean up. Plus, Piece contracted directly with Bloomingdale's rather than with Gilman, which indicates Piece (rather than Gilman) served as the general contractor for the work Piece was hired to perform.

Although Piece insists that all of its work with electrical boxes were done within the showcase and that it did not work with the type of wires over which plaintiff tripped, Lorenz's

make credibility determinations. A jury must decide where plaintiff fell and who was responsible for keeping that area safe.

Nature of Gilman's Work

Gilman's witness, John Moloney, testified that the Ippolita permanent showcase was installed at least two weeks prior to plaintiff's accident and the other two permanent showcases (Coin and Hardy) were installed by November 15 (Moloney tr at 78). Moloney claimed that at the time of plaintiff's accident there were only three permanent showcases and that a significant number of temporary showcases were delivered to Bloomingdale's on November 17 and 18 (*id.* at 78-80).

This testimony demonstrates another issue of fact. Because the permanent showcases installed by Gilman were completed at least four days before the accident, a jury might conclude that plaintiff tripped over a wire stemming from work that was completed the morning of her accident– that is, from the temporary showcases installed by Piece. Conversely, the jury could find that a wire was sticking out from the already-completed permanent showcases or from another location.

Scope of Piece's Work

Piece's argument that its scope of work did not involve any wires protruding from a column or that it was not responsible for clean up is contradicted by both its contract with Bloomingdale's and the testimony of its own witness, William Entler. The contract between Piece and Bloomingdale's provides that "Contractor has full access to the site of the work to ascertain all site conditions and limitations and Contractor shall be responsible for all site

testimony also prevents the Court from granting Piece's motion. Lorenz claimed that the location where plaintiff fell was under Piece's management because Gilman instructed him that the power and lighting in this area was not in the scope of Gilman's work (Lorenz tr at 81). A jury might believe Piece's claim that it did not do this type of work and assign Piece no liability, but the Court cannot ignore this issue of fact.

Lorenz's testimony about the wire that allegedly cause plaintiff's accident further compels denial of Piece's motion. Lorenz testified that he observed a data cable near plaintiff after her accident but he could not remember the color although Lorenz insisted that the wire was coming from the wall (Lorenz tr at 33-41). Lorenz further testified that there was a greenfield raceway (a conduit that is used in a wall so that a cable can be pulled inside of it to ensure the cable is protected) in the area where plaintiff fell (*id.* at 40). Lorenz testified that about two and a half hours before plaintiff tripped he was told that the equipment for that location would not arrive that morning (*id.* at 42). Lorenz said he pushed the greenfield raceway into the wall, which at that point did not contain a cable (*id.* at 43). Lorenz speculates that someone must have pulled the data cable through the conduit and that is what plaintiff tripped over (*id.*).

If the jury believes this story, then they must reach a conclusion about the party responsible for overseeing this area. Lorenz says it was Piece.

Summary

It is not this Court's role, on a motion for summary judgment, to credit or dismiss certain accounts of where plaintiff tripped. Witnesses testified that there was a rush to complete the electrical wiring and that workers had stayed overnight (into the morning of plaintiff's accident) in order to allow the store to open for customers (Lorenz tr at 66-67). The Court is unable to rule

as a matter of law that Piece had no duty of care to plaintiff given that there are several conflicting accounts as to exactly where plaintiff tripped and which wire(s) caused her to trip, that Piece's contract with Bloomingdale's required Piece to clean up and Piece's employee (Entler) testified that one of his responsibilities was to ensure that the job site was safe.

Accordingly, it is hereby

ORDERED that Piece's motion for summary judgment is denied.

This is the Decision and Order of the Court.

Dated: April 24, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC