Schneiderman v City of New York
2011 NY Slip Op 33503(U)
December 23, 2011
Supreme Court, New York County
Docket Number: 116003/07
Judge: Cynthia S. Kern
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SCANNED ON 1/4/2012

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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ARLENE GAIL SCHNEIDERMAN,

Plaintiff,

Index No. 116003/07

-against-

DECISION/ORDER

THE CITY OF NEW YORK, THE NEW YORK CITY AUTHORITY TRANSIT, CONSOLIDATED EDISON COMPANY OF NEW YORK and FELIX ASSOCIATES, LLC,

Defendants.

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FILED
JAN 04 2012
NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Answering Affidavits	2
Affirmations in Opposition to the Cross-Motion	
Replying Affidavits	3
Exhibits	4

Plaintiff commenced the instant action to recover damages for personal she allegedly sustained when she tripped and fell on the roadway of Eighth Avenue north of the north crosswalk of the intersection of Eighth Avenue and Bleecker Street in New York City. Defendant Felix Associates ("Felix") now moves for summary judgment dismissing plaintiff's claims and any and all cross claims and counter claims against it. The court grants Felix's motion for the reasons set forth below.

The relevant facts are as follows. Plaintiff alleges that on September 5, 2006, she tripped

and fell in the roadway three or four feet north of the crosswalk at Eighth Avenue near Bleecker Street. When she walked into the roadway to cross the street, her foot went down and got stuck in a hole causing her body to fall forward into the street. Felix now moves for summary judgment on the ground that it performed no work at the accident location prior to the date of the accident and is therefore an improper party to this action.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership,* 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, Felix is entitled to summary judgment as it has made out its prima facie case that it did not perform work at the accident location. As set forth in the affidavit of John Breslin, the Vice-President of Felix from 2003 to the present with personal knowledge of the work Felix performed during his tenure, the only work performed by Felix at Eighth Avenue prior to the date of the accident was in 2005 and 2006 between Jane Street and a location approximately fifteen feet south of West 12th street ("Project QED988") and "not at or near the intersection of Bleecker Street and Eighth Avenue, where the subject accident occurred."

In addition, Michael Mauro, the foreman on Project QED988, was shown a map of the area around plaintiff's accident at his deposition and asked to point to the area where Felix

worked on the project. Mr. Mauro pointed to an area approximately fifteen feet south of the intersection of Eighth Avenue and 12th Street which is not near the location of plaintiff's accident. The affidavit of Mr. Breslin and the testimony of Mr. Mauro, both persons with personal knowledge of the work done by Felix, is sufficient to satisfy Felix's prima facie showing requirement.

Plaintiff, however, has failed to raise any triable issues of fact sufficient to defeat Felix's motion for summary judgment. Plaintiff argues that the existence of permits issued to Felix to do work near the location of the accident mandates the denial of summary judgment. Although permits issued to Felix by the City encompass the location of plaintiff's accident, the mere fact that a permit was issued to Felix authorizing it to perform work on a stretch of road which included the site of plaintiff's accident is insufficient to raise a question of fact as to whether such work was performed at the accident location. *See Amarosa v City of New York,* 51 A.D. 3d 596, 597 (1st Dept 2008), *Bermudez v City of New York*, 21 A.D.3d 258 (1st Dept 2005); *see also Lynch v City of New York*, 13 Misc.3d 1205(A) (Sup. Ct. N.Y. Cty. 2006).

Plaintiff relies on *Torres v City of New York*, 83 A.D.3d 577 (1st Dept 2011) to support her argument that the mere fact that a permit was issued to Felix is sufficient to raise a question of fact as to whether it created the defect at the location of the accident. However, *Torres* is distinguishable from the present case. In *Torres*, a plaintiff brought claims against Con Edison for injuries she sustained when she tripped and fell as the result of a three-inch-deep depression in the roadway. The court found that although defendant Con Edison denied that it ever worked at the exact location of the accident, several permits issued to Con Edison to excavate and repave the street at the intersection where plaintiff fell was sufficient to create an issue of fact

defeating summary judgment. However, in coming to this conclusion, the court in *Torres* relied on the testimony of a New York City employee who testified that apart from the City's repair of two potholes nearby, there was no record of any street work in the vicinity of the intersection by any other party than Con Edison. Unlike *Torres*, plaintiff in the instant action has not provided evidence demonstrating that there was no record of any street work in the vicinity of plaintiff's accident by any party other than Felix. Therefore, the holding in *Torres* is not applicable to the instant action.

In addition, plaintiff's reliance on *Bral v City of New York*, 221 A.D.2d 283 (1st Dept 1995) and *Whitfield v City of New York*, 16 Misc.3d 1115(a) (Sup. Ct. Kings Cty 2007) are also without merit. In *Whitfield,* the court denied summary judgment for defendant where the defendant brought the motion before the close of discovery and the only evidence presented by the defendant to support its assertion that it did not perform work at the site of the plaintiff's accident was an affidavit by a principal of the defendant company stating that although permits were issued to perform work in the area of the accident, there was no evidence of work performed at the cite of the plaintiff's injury. The *Whitfield* court found that presentation of the affidavit alone before the close of discovery that was otherwise unsupported by other "strong evidence" that the contractor did not perform work at the location of the accident was insufficient to grant summary judgment in defendant's favor. Similarly, in *Bral,* the First Department denied defendant's motion for summary judgment where the only evidence produced by defendant to support its argument that it did not perform any work at the location of the accident was a claim made by its principal that was otherwise unsupported.

Whitfield and *Bral* are both distinguishable from the present case in that Mr. Breslin's

affidavit is supported by other evidence – the deposition testimony of Mr. Mauro as well as a diagram-map that is included in the contract between Felix and the City of New York depicting the scope of the work to be performed on Eighth Avenue demonstrates that the project did not extend to the location of plaintiff's accident. Moreover, unlike in *Whitfield*, the discovery in the instant action has been completed.

Accordingly, Felix's motion for summary judgment is granted and plaintiff's complaint and any cross-claims are dismissed as against Felix only. This constitutes the decision and order of the court.

Dated: 12/23/11

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.

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