

Qu Yun Wei v City of New York
2011 NY Slip Op 33529(U)
December 29, 2011
Sup Ct, NY County
Docket Number: 108011/07
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE PART 5
Justice J.S.C.

Index Number : 108011/2007
WEI, QI YUN
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT
CAL # 135

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 3
MOTION CAL. NO. _____

this motion to/for _____

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1,2
3
4,5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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NYS SUPREME COURT - CIVIL

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JAN 09 2012

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COUNTY CLERK'S OFFICE

Dated: 12/29/11
DEC 29 2011

BARBARA JAFFE *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
QI YUN WEI,

Plaintiff,

-against-

Index No. 108011/07

Motion Subm.: 10/4/11
Motion Seq. Nos.: 003,

DECISION & ORDER

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF TRANSPORTATION,
FELIX ASSOCIATES, LLC, GRECO BROS. READY
MIX CONCRETE CO. INC., and CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

Defendants.
-----X

BARBARA JAFFE, JSC:

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By notice of motion dated May 23, 2011, defendant Felix Associates, LLC (Felix) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiff opposes.

By notice of motion dated June 3, 2011, defendant Greco Brothers Ready Mix Concrete Inc. (Greco) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiff opposes.

By notice of cross motion dated August 12, 2011 and submitted on default, defendant

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Consolidated Edison Company of New York, Inc. (Con Ed) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. By notice of motion dated September 14, 2011 and submitted on default, plaintiff moves for an order extending her time to file a note of issue.

The motions are consolidated for decision.

I. PERTINENT BACKGROUND

On November 19, 2006, plaintiff was allegedly injured when she tripped in a hole and fell in the street and crosswalk located at the intersection of Henry and Catherine Streets in Manhattan. (Affirmation of Paul A. Eschmann, Esq., dated May 23, 2011 [Eschmann Aff.], Exh. A). On or about June 6, 2007, plaintiff commenced an action against defendants City and the New York City Department of Transportation (collectively, City). (*Id.*).

On or about November 13, 2008, plaintiff commenced a second action against the remaining defendants, and by decision and order dated February 4, 2010, the two actions were consolidated. (*Id.*, Exhs. B, E).

In plaintiff's bill of particulars dated November 30, 2009, she alleges that her accident occurred at or about the southern crosswalk at the intersection of Henry and Catherine Streets. (*Id.*, Exh. I).

By affidavit dated February 8, 2011, Con Ed employee George A. Canzaniello states that he fruitlessly searched Con Ed's records for opening tickets, paving orders, emergency tickets, and complaints for the accident location for the two years before and including plaintiff's accident. (*Id.*, Exh. L).

At an examination before trial held on April 8, 2011, plaintiff testified that she was

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walking on Catherine Street and crossed over to Henry Street, where her foot became trapped in a hole around the middle of the street, causing her to fall. She observed no construction in the area. (*Id.*, Exh. J).

By affidavit dated May 12, 2011, John Breslin, Felix's vice president, states that a search of Felix's records for work performed between 2003 and November 19, 2006 reflects that Felix performed no work at the intersection of Henry and Catherine Streets, specifically the southern crosswalk. In the affidavit, Breslin states that he was duly sworn, and the affidavit is duly notarized. (*Id.*, Exh. K).

By affidavit dated June 1, 2011, Joseph Greco, Greco's president, attests that he fruitlessly searched Greco's work records for the accident location, that Greco only delivers wet concrete and performs no work related thereto, and that Greco made no concrete deliveries to the location. Greco also states that he was duly sworn, and the affidavit is duly notarized.

(Affirmation of Vincent P. Crisci, Esq., dated June 3, 2011 [Crisci Aff.]).

II. FELIX'S MOTION

A. Contentions

Felix denies having performed any work at the accident location, or otherwise controlling or maintaining it. (Eschmann Aff.).

Plaintiff contends that Breslin's affidavit is inadmissible, and that Felix has thus failed to support its motion with admissible evidence. She also argues that the records search was insufficient absent a post-accident search as work may have been performed before the accident in anticipation of Felix's work after the accident, and because Breslin did not personally conduct the search or authenticate the records as business records. Moreover, she maintains that having

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failed to mention that Felix was a Con Ed contractor, Canzaniello does not establish that Felix performed no work at the location and that, in any event, no Felix employee has yet been deposed. (Affirmation of Herbert Subin, Esq., dated Aug. 17, 2011 [Subin Aff.]).

In reply, Felix asserts that plaintiff submits no proof showing that it performed any work at the location, that Breslin's affidavit is admissible as he swore to the truth of its contents when he signed it before a notary, and that plaintiff has failed to show that further discovery is necessary. (Reply Affirmation, dated Aug. 22, 2011).

B. Analysis

A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk. (*Cino v City of New York*, 49 AD3d 796 [2d Dept 2008]). Here, Felix has offered admissible evidence demonstrating that it performed no work at the location of plaintiff's accident, specifically the southern crosswalk at the intersection of Henry and Catherine Streets, thus establishing, *prima facie*, that it did not create the defect which caused plaintiff's accident. (See *Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [contractor met burden by submitting affidavit from manager stating that records showed no work at location]; *Melcher v City of New York*, 38 AD3d 376 [1st Dept 2007] [contractor established that it performed no construction work where accident occurred]; *Arrucci v City of New York*, 45 AD3d 617 [2d Dept 2007] [contractor submitted affidavit from officer attesting that it performed no work at location]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006] [contractor showed it did not perform work where plaintiff allegedly fell]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005] [no evidence that contractors performed any work where plaintiff fell]).

In opposition, plaintiff submits no evidence showing that there are triable issues as to whether Felix performed work at the location, and there is no merit to plaintiff's argument that Breslin's affidavit is inadmissible, as he was duly sworn and the notary averred that it had been sworn before him. (*See Furtow v Jenstro Enter., Inc.*, 75 AD3d 494 [2d Dept 2010] [finding affidavit admissible as affiant recited that he had been duly sworn and it contained jurat stating that it had been sworn to before notary public]; *see also Sparaco v Sparaco*, 309 AD2d 1029 [3d Dept 2003], *lv denied* 2 NY3d 702 [2004] [court did not err in accepting affidavit, in which affiant stated that he had been sworn, where notary notarized affidavit but omitted "sworn before me" language in jurat]; *Faustini v Palladino*, 280 AD2d 291 [1st Dept 2001] [defendant's sworn affidavits constituted evidence in admissible form]).

Plaintiff's assertion that further discovery may lead to relevant evidence is speculative and without evidentiary basis. (CPLR 3212[f]; *see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]; *Rubina v City of New York*, 51 AD3d 761 [2d Dept 2008] [no evidentiary basis showing that further discovery may lead to relevant evidence concerning whether contractor created defect]; *Arrucci*, 45 AD3d at 617 [plaintiffs failed to establish what additional facts might be disclosed which would demonstrate that issue of fact existed as to whether contractor did work on roadway]).

III. GRECO'S MOTION

A. Contentions

Greco denies having performed any work at or delivering any concrete to the location, and argues that even if it delivered concrete there, it provided no services or engaged in any

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activities that would have caused the hole in which plaintiff fell. (Crisci Aff.).

Plaintiff asserts that Greco's affidavit is inadmissible and that he did not specify what records he searched or authenticate them as business records, and that she should have the opportunity to depose a Greco employee. (Subin Aff.).

In reply, Greco argues that plaintiff offers no evidence that Greco may be held liable here, and that Greco's affidavit is admissible. (Reply Affirmation).

B. Analysis

For the same reasons as set forth above (*supra*, II.B), Greco has established its *prima facie* entitlement to dismissal, and plaintiff has raised no triable issue or demonstrated a need for further discovery from Greco.

IV. CON ED'S MOTION

Based on Canzaniello's affidavit, Con Ed has established, *prima facie*, that it performed no work at the location of plaintiff's accident, and plaintiff offers no evidence showing the existence of a triable issue as to Con Ed's liability.

V. PLAINTIFF'S MOTION

Absent any dispute that previously scheduled examinations before trial have not yet been completed, plaintiff's motion to extend her time to file a note of issue is granted.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Felix Associates, LLC's motion for summary judgment is granted, and the complaint and any cross claims are dismissed against said defendant with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an

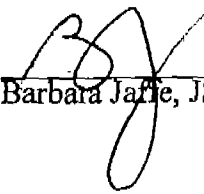
[* 8]
appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that defendant Greco Bros. Ready Mix Concrete Co. Inc.'s motion for summary judgment is granted, and the complaint and any cross claims are dismissed against said defendant with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that defendant Consolidated Edison Company of New York, Inc.'s motion for summary judgment is granted, and the complaint and any cross claims are dismissed against said defendant with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff's motion to extend the time to file a note of issue is granted, and plaintiff is directed to file her note of issue on or before February 1, 2012.

ENTER:


Barbara Jaffe, JSC

DATED: December 29, 2011
New York, New York

FILED

JAN 09 2012

**NEW YORK
COUNTY CLERK'S OFFICE**