

Green v Tully Constr., Co., Inc.
2013 NY Slip Op 30173(U)
January 14, 2013
Supreme Court, New York County
Docket Number: 116002/2009
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN

J.S.C.

PRESENT: _____

Justice

PART 1

Index Number : 116002/2009

GREEN, ALAN R.

vs.

TULLY CONSTRUCTION

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ No(s). _____

Answering Affidavits -- Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

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

FILED

JAN 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 14, 2013

_____, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
ALAN R. GREEN and KATHLEEN GREEN,

Plaintiffs,

INDEX NO. 116002/09

-against-

TULLY CONSTRUCTION, CO., INC.,

FILED

Defendant.

JAN 30 2013

-----X
JOAN A. MADDEN, J.:

**NEW YORK
COUNTY CLERKS OFFICE**

Defendant Tully Construction, Co., Inc. ("Tully") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint. Plaintiffs oppose the motion.¹

The proponent of a motion for summary judgment "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." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, *supra* at 324.

Plaintiffs seek to recover damages for personal injuries sustained by plaintiff Alan Green on June 27, 2008. Green alleges he was caused to trip and fall at approximately 11 a.m. in the crosswalk of East 49th Street and the intersection of the northeast corner of Park Avenue. At his

¹As the court noted on the record, plaintiffs' counsel failed to appear for oral argument on defendant's motion. Defendant's counsel contacted the office of plaintiff's counsel, and was told that the motion was not on their calendar and no attorney was available to come to court. At the request of defendant's counsel, the court agreed to submit the motion without oral argument.

deposition, Green testified that after taking two steps off the corner into the crosswalk, he stepped into a hole in the roadway and fell.

Defendant Tully previously moved for summary judgment asserting that no work was performed at the accident location by Tully or on Tully's behalf, prior to the date of the accident. In a decision and order dated November 9, 2010, the Hon. Judith J. Gische denied the motion, finding that the issuance of a Street Opening Permit, which included the roadway at East 49th Street and Park Avenue, was sufficient to warrant further discovery as to whether Tully perform work at the accident site. Judge Gische also found that defendant's reliance on the Status of Milled Locations report was "unavailing," as it was "unclear who prepared the document or whether it is accurate."

It is undisputed that Tully had a contract with the City to "mill" locations in Manhattan and the Bronx, in preparation for roadway resurfacing. Tully explains that milling is the removal of 1½ to 2 inches of the top layer of the surface of roadway, prior to laying new asphalt. Tully states that the contract did not specify the locations in Manhattan, but the New York City Department of Design and Construction ("DDC") would issue Task Orders for the street locations to be milled. Tully subsequently entered into a subcontract with Fleet Trucking, Inc. for Fleet to perform all of the milling at the locations for which Task Orders were issued.

Although Tully admits that DDC issued a Task Order dated August 20, 2007 for three separate locations which included "E.49th Street – FDR Drive to 6th Ave," Tully maintains that no mill work was actually performed at that location by or on behalf of Tully. Tully explains the August 2, 2007 Street Opening Permit for milling work at East 49th Street and Park Avenue, which was valid from August 6 to November 3, 2007, was based the City's advance list of

locations that it was considering having milled. Tully's witness William Urig testified that after the issuance of the August 20, 2007 Task Order, it received a "verbal directive" from the City "calling off that location." Urig testified that the "verbal directive" would have come by either a call to him or "out in the field where they just directed the Fleet guys not to mill Park Avenue." He also testified that Charles McHugh, the City's outside consultant "resident engineer," prepared the Status of Milled Locations reports for 2007 and 2008, which list all the locations milled by Fleet Trucking from April 9 through November 20, 2007, and March 1, 2008 through August 25, 2008. It is undisputed that neither report lists the East 49th Street and Park Avenue accident site as one of the milled locations.

In the alternative, Tully argues that even assuming Fleet milled the accident site, after the milling work was completed, the City paved the locations. Tully asserts that plaintiff's photograph of the accident location does not show the roadway in a milled condition, but a paved asphalt surface. Tully argues that the "irrefutable evidence" establishes that the accident site "was never milled by Tully or Fleet on behalf of Tully at any time prior to the date of plaintiff's accident and there is no material issue of fact on this issue requiring a trial."

In opposing the motion, plaintiffs submit only an attorney's affirmation which merely attacks Tully's proof. Plaintiffs argue that Tully "unfairly characterizes" Judge Gische's decision denying summary judgment and that Tully has not cured the deficiencies in its first motion and fails to eliminate issues of fact. Plaintiffs argue that Tully's motion relies on the deposition testimony of William Urig, who according to plaintiff has "limited knowledge" of specific work sites. Plaintiffs argue that Tully had the exclusive milling contract and that while the Task Order covers a broad area, East 49th Street from the FDR Drive to 6th Avenue, the Street Opening

Permit is more specific in referring to East 49th Street and Park Avenue.

Plaintiffs point to Urig's testimony that he was not aware of anyone from Tully present at the work sites, and as far as he knows no one inspected the work. Plaintiffs argue that based on the Task Order, the City had in fact directed Tully to mill from the FDR Drive to 6th Avenue. Quoting Urig's testimony, plaintiffs object that he has no direct knowledge as to where work was in fact performed, his testimony is equivocal and speculative, and he has no direct knowledge that work was not performed at Park Avenue. Plaintiffs argue that Tully is relying on the same unsworn and unverified documents it relied on in the prior motion. Plaintiffs object that the Status of Milled Locations report for 2008 was recently served post-EBT without any attempted explanation, foundation or verification. Plaintiffs also argue that the statement by defendant's counsel that the work depicted in the photos does not show milling is "unfounded," as Urig admitted he was never at the site in question or any other sites where Tully was contracted to perform work.

In its reply papers, Tully responds to plaintiffs' assertion that it has failed to cure deficiencies in its first motion, as noted by Judge Gische, who questioned Tully's reliance on the Status of Milled Locations report. According to Tully, Judge Gische found that reliance on the document was not warranted because it was unclear who prepared the document and whether it was accurate. Tully now relies on the deposition testimony of its project manager, William Urig, who explained that the Status of Milled Locations reports were prepared by the City's consultant engineer McHugh, whose name appears on the top left corner of the reports as the "Resident Engineer," and that McHugh sent the reports to him personally on a regular basis during the course of the milling project. Tully asserts that no testimony or other evidence has been adduced

to suggest the reports are inaccurate, so it would be “pure speculation” for the court to conclude that they are. Tully explains that at the conclusion of Urig’s testimony, plaintiff requested the 2008 Status of Milled Locations report and that is why the document was served at that time. Tully argues that even though Urig never went to the accident site, his testimony as to the condition as depicted in plaintiff’s photos does not render his opinion without basis, since Urig testified that he was involved with Tully’s construction projects for seven years, and construction projects for another company for 13 years. Tully also argues that “one does not need to have any knowledge of construction to determine whether a roadway is in a paved or unpaved condition.”

Based on a review of the record, the court concludes that Tully is entitled to judgment as a matter of law dismissing the complaint. Contrary to plaintiffs’ assertion, the Status of Milled Locations reports and the deposition testimony of defendant’s witness William Urig regarding those reports, are sufficient to establish conclusively that neither Tully nor Fleet performed any milling work at the site of plaintiff’s accident, East 49th Street and Park Avenue. At best, the Task Order and the Street Opening Permit show that the accident site was one of the locations being considered for milling work. However, as Urig explained at his deposition, the resident engineer for the project prepared the Status of Milled Locations reports listing the locations where the milling work was ultimately and actually performed, and it is undisputed that the site of the accident, East 49th Street and Park Avenue, is not among the locations listed on the reports. Plaintiffs have now had an opportunity to conduct and complete discovery and they have neither uncovered any document nor adduced any testimony showing that any work was performed by or on behalf of Tully at the location of plaintiff’s accident, and therefore connecting Tully to the

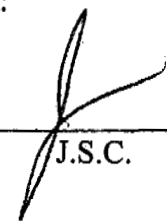
accident site.² Under these circumstances, Tully is entitled to summary judgment dismissing the complaint. In view of this determination, the court need not address Tully's argument in the alternative that plaintiffs' photograph of the accident location does not depict the roadway in a milled condition, but as a paved asphalt surface.

Accordingly, it is

ORDERED that motion by defendant Tully Construction Co, Inc. for summary judgment dismissing the complaint is granted, and the complaint in its entirety is dismissed, and the Clerk is directed to enter judgment accordingly.

DATED: January 14, 2013

ENTER:



J.S.C.

FILED
JAN 30 2013
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²Plaintiff filed the note of issue on May 25, 2012 certifying that discovery is complete.