Rolon v City of New York
2013 NY Slip Op 32190(U)
September 9, 2013
Supreme Court, New York County
Docket Number: 100069/2010
Judge: Kathryn E. Freed

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT *Justice* PART 5

Index Number : 100069/2010
ROLON, IVETTE
vs
CITY OF NEW YORK
Sequence Number : 006
SUMMARY JUDGMENT Cal: 186

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9-9-13
SEP 09 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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 5

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IVETTE ROLON,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND EMPIRE CITY SUBWAY COMPANY (LIMITED), NICO ASPHALT PAVING INC., and ROCK E. SMALL PLUMBING,

Defendants.

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EMPIRE CITY SUBWAY COMPANY (LIMITED),

Third-Party Plaintiff,

-against-

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

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DECISION/ORDER
Index No. 100069/2010
Seq. No. 006

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2.(exhs. A-M)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....4-5(exhs. A-F, A-M)
REPLYING AFFIDAVITS.....	.....6.....
EXHIBITS.....	.....
OTHER.....(Cross-Motion).....	.....3 (exhs.A-F)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant Empire City Subway Company LTD, ("ECS"), moves for an Order granting

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summary judgment, dismissing plaintiff's complaint and any cross-claims and also pursuant to CPLR §3212, granting summary judgment on its cross-claims against co-defendant Nico Asphalt Paving, Inc., ("Nico"), sounding in common law and contractual indemnification, and for failure to procure insurance, and/or granting ECS reimbursement of attorney's fees for defending this action.

Nico cross moves for an Order pursuant to CPLR§3212 granting summary judgment and dismissing the first and second amended complaints and the third-party summons and complaint. Toward this end, it advises that it adopts and incorporates the factual evidence and legal arguments set forth by ECS.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries allegedly sustained on September 17, 2009, when she tripped and fell as she was crossing the roadway from the west side of 1st Avenue to the east side of 1st Avenue, at its intersection with 104th Street in New York County. In her Notice of Claim and Bill of Particulars, she alleges that as she was crossing in the crosswalk, she tripped and fell due to an excavated and improperly resurfaced trench running parallel to the east side of 1st Avenue in the intersection.

Subsequent to her accident, plaintiff served a summons and complaint on defendants on or about December 22, 2009. She then sought leave to amend her complaint which was subsequently granted. She then amended her complaint on July 1, 2011, adding defendant Nico as a party. Another amendment was sought via motion, which was granted. The second amended complaint was then served on May 2, 2012. All defendants served their respective Answers with the exception of the newest party to be added, Rock E. Plumbing. ECS impleaded Nico, ECS's subcontractor for paving work related to its work on City streets, including any paving work performed at the site of

Moreover, plaintiff argues that while in his affidavit, Mr. Gordon denies that any work was performed under Permit No. M01-2008184-057, said permit was actually issued for the purpose of "intersection cutting to replace concrete roadway" for the location of 1st Avenue and East 104th Street, valid from July 16, 2008 to August 15, 2008. (Aff. in Opp., Exh. D). Plaintiff also argues that annexed as Exhibit E is a DOT HIQA Inspection Report, which indicates that ECS performed work at the subject location from July 16th to August 15th of 2008, pursuant to Permit No. M01-2008184-057, which is a different job from ECS job 114195SB. Consequently, plaintiff argues that because Mr. Gordon's affidavit is contradicted by existing records, this in itself constitutes a triable issue of fact warranting the denial of summary judgment.

As to Nico's cross motion, plaintiff argues that John Denegall's affidavit is defective in that it is not properly dated, and therefore, should be disregarded. Additionally, plaintiff argues that Mr. Denegall's affidavit is self serving in that he bases his conclusion solely on a review of photographs of the accident location, without conducting a search or review of any records. Plaintiff also argues that Nico's cross motion is premature in that its deposition has yet to be conducted and it has not yet provided all existing discovery. Insofar as these records have not been provided to plaintiff for her review, and she has not been afforded the opportunity to cross examine Mr. Denegall, his affidavit should be deemed inadmissible.

Conclusions of law:

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836,837 [1986]; *see Petersel v. Good*

Samaritan Hosp. of Suffern, N.Y., 99 A.D.3d 880, 880 [2d Dept. 2012]; *Willis v. Galileo Cortlandt, LLC*, 106 A.D.3d 630 [2d Dept. 2013]; *Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 320 [1st Dept. 2006], *affd* 8 N.Y.3d 931 [2007]). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff's opposition (see *Perez v. Rodriquez*, 25 A.D.3d 506 [1st Dept. 2006]).

In the case at bar, the Court first grants ECS' motion for summary judgment. The Court finds that ECS has met its initial burden of establishing a prima facie showing that it did not cause or create the subject defect, via the evidence it has proffered. ECS sufficiently proved that it did not perform any work in the northern crosswalk or on the block north of 1st Avenue between 104th and 105th Streets. The Court also finds that plaintiff has not met her shifting burden in that she has failed to submit evidence demonstrating triable issues of fact as to whether ECS actually created the subject defect. It is well settled that actual notice "must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v. New York Univ.*, 12 A.D.3d 200, 201 [1st Dept. 2004]; see also *Sosa v. 46th St. Dev. LLC*, 101 A.D.3d 490 [1st Dept. 2012]).

Indeed, the Court finds plaintiff's reliance on the 311 complaint to be misplaced. The 311 complaint and subsequent response by the DOT refer to the intersection, and not the crosswalk, where all parties agree plaintiff's accident occurred. Moreover, the 311 complaint refers to a "sunken trench," whereas the subject defect has been identified as a "recent excavation that has not been restored." (See Denegall Aff. annexed as Exh. D, Nico's cross motion).

The Court also finds unavailing, plaintiff's argument that there exists a 2–8 permit M01-2008184-057, and related HIQA document which conclusively establishes that ECS performed a

second job. This allegation is belied by Mr. Gordon's affidavit wherein he states that "no work was performed under M01-2008184-057." Exh. H, ¶ 7. Furthermore, the HIQA document is not evidence that work was actually performed under the permit. Plaintiff has failed to provide any conclusive evidence establishing a causal connection between the trench running north to south with ECS's trench, running east to west.

The Court also finds that Nico, via the Denegall affidavit, sufficiently establishes its entitlement to summary judgment. Since the alleged defect is undisputedly composed of concrete, and Nico's work is exclusively limited to asphalt restoration, it is clear that it did not create the defect. Additionally, plaintiff has not produced any evidence of Nico's alleged "failure to maintain."

Despite the fact that it determines that neither ECS or Nico were responsible for plaintiff's purported injuries, the Court also grants ECS's motion for summary judgment on its cross claim for contractual indemnification and denies Nico's motion for summary judgment dismissing said cross claim. Following a careful review of the indemnification provision contained in the contract between these parties, the Court finds that ECS is entitled to contractual indemnification against Nico for the costs it incurred in defending the instant action (see *Di Perna v. American Broadcasting Cos.*,200 A.D. 2d 267 [1st Dept. 1994]).

Said indemnification provision provides:

> Indemnification. Supplier shall defend, indemnify and hold harmless Verizon its parents, subsidiaries and affiliates, and its and their respective directors, officers, partners, employees, agents, successors and assigns ("indemnified parties") against any claims, demands, lawsuits, damages, liabilities, judgments and settlements of every kind ("claims") that may be made: (a) by anyone for injuries (including death) to persons or damages to property, including theft, resulting in whole or in part from the acts or omissions of Supplier or those persons furnished by Supplier, including its subcontractors (if any); (b)by persons furnished by Supplier and its subcontractors (if any); under workers' compensation or similar acts, (c) by anyone in connection

> with or based upon products, services, information or work provided by Supplier and its subcontractors (if any) or contemplated by this Agreement, including claims regarding the adequacy of any disclosures, instructions or warnings related to any such products or services; and (d) under any federal securities laws and under any other statute, at common law or otherwise arising out of or in connection with the performance by Supplier contemplated by this Agreement or any information obtained in connection with such performance. The foregoing indemnification shall apply whether Supplier or an indemnified party defends such claim and whether the claim arises or is alleged to arise out of the sole acts or omissions of the Supplier (and/or any subcontractors of Supplier) or out of the concurrent acts or omissions of Supplier (and/or any subcontractor of Supplier) and any indemnified parties. Supplier further agrees to bind its subcontractors (if any) to similarly indemnify, hold harmless and defend the indemnified parties.

Indeed, the broad language contained within this clause specifically contemplates indemnification as a defense even if the claims are proven to be baseless. *Di Perna v. American Broadcasting Cos., 200 A.D.2d* at 269-271.

The Court further finds that Nico's argument that this clause violates GOL§ 5-322.1 is devoid of merit. GOL§5-322.1 "declares void agreements purporting to indemnify contractors against liability for injuries contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be whole or in part." In this case, this section is inapplicable because the indemnification clause at issue does not purport to indemnify ECS against its own negligence. Moreover, the Court is not convinced that this contract provision violates the statute because the phrase "to the fullest extent permitted by law" is not present, in that it does not provide any support that such a provision is necessary.

Lastly, ESC's argument that ESC breached their contract via its failure to procure insurance must be granted based on Nico's failure to specifically address this issue.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant Empire City Subway Company Ltd. ("ECS") motion for summary

judgment dismissing plaintiff's complaint and all cross claims is granted; and it is further

ORDERED that ECS's motion for summary judgment on its cross claims against Nico Asphalt Paving, Inc. ("Nico"), sounding in contractual indemnification and for failure to procure insurance is granted; and it is further

ORDERED that Nico grant ESC reimbursement of attorney's fees for its defense of the instant action; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: September 9, 2013

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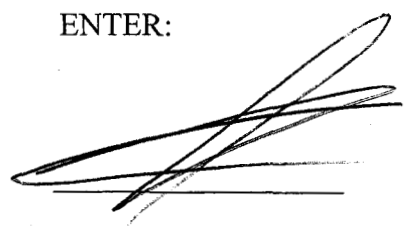

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Hon. Kathryn E. Freed
J.S.C.

FILED
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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