

Plana v Coalition for the Homeless, Inc.

2013 NY Slip Op 32321(U)

September 26, 2013

Sup Ct, New York County

Docket Number: 109975/2010

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

Index Number : 109975/2010
PLANA, ANTONIO
vs.
COALITION FOR THE HOMELESS
SEQUENCE NUMBER : 004
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

FILED

OCT 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 9/26/13

[Signature], 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 2

-----X
ANTONIO PLANA,

Plaintiff,

-against-

Index No.: 109975/2010

COALITION FOR THE HOMELESS, INC.,

Defendant.

-----X
COALITION FOR THE HOMELESS, INC.,

Third-Party Plaintiff,

-against-

Index No.: 590295/2010

JUDLAU CONTRACTING, INC., TROCON INC.,
CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC., CONSOLIDATED EDISON, INC.,
FELIX ASSOCIATES, LLC, and RED HOOK
CONSTRUCTION GROUP-I, LLC,

FILED

OCT 01 2013

Third-Party Defendants.

**NEW YORK
COUNTY CLERK'S OFFICE**

YORK, J.:

Motion sequence numbers 003, 004, 005, 006, and 007, are consolidated for disposition. In this action, plaintiff Antonio Plana seeks to recover for personal injuries which he allegedly suffered as a result of a trip and fall. Several of the defendants now move for summary judgment.

In motion sequence 003, third-party defendant Judlau Contracting, Inc. (Judlau), moves, pursuant to CPLR 3212, for an order granting summary judgment as to it.

In motion sequence 004, third-party defendant Trocon Inc. (Trocon), moves, pursuant to CPLR 3212, for an order granting summary judgment as to it.

In motion sequence 005, third-party defendant Red Hook Construction Group-I, LLC, (Red Hook) moves, pursuant to CPLR 3212, for an order granting summary judgment as to it

In motion sequence 006, defendant/third-party plaintiff Coalition for the Homeless, Inc. (Coalition), moves, pursuant to CPLR 3212, for an order granting summary judgment as to it.

In motion sequence 007, third-party defendant Felix Associates (Felix) moves, pursuant to CPLR 3212, for an order granting summary judgment as to it.

FACTUAL ALLEGATIONS

On May 29, 2009, plaintiff tripped and fell when he was walking in front of a building allegedly owned by Coalition which was located at 129 Fulton Street, between Nassau Street and Dutch Street. Plaintiff alleges that the cause of his fall was due to a slightly raised portion of a black asphalt patch which may have been used to repair a crack in the sidewalk.

On July 28, 2010, plaintiff commenced an action alleging personal injuries against Coalition. On April 1, 2011, Coalition commenced a third-party action against Judlau, Trocon, Consolidated Edison Company of New York, Inc., Consolidated Edison, Inc., Felix, and Red Hook. Coalition maintains that all of these entities were working on construction projects in the vicinity of its premises, and that their work in the area may have caused or contributed to the condition on which plaintiff tripped. Judlau, Trocon, Red Hook, Coalition, and Felix now move, pursuant to CPLR 3212, for summary judgment.

MOTION SEQUENCE 003

Judlau, a contractor, was retained by the City of New York to replace water mains located on Fulton Street in Manhattan, New York. Michael Lovino (Lovino), Judlau's project manager, testified that while its work did take place during the time period of plaintiff's accident, Judlau performed work on the street, and the work did not extend to the curb or sidewalk on Fulton Street between Dutch Street and Nassau Street. Lovino testified that the job was a "curb-to-curb job" (Lovino EBT, at 23), that the black asphalt on which plaintiff allegedly tripped was

not placed by Judlau, and that Judlau "didn't do any mass excavation in the sidewalk. It was all on the roadway" *Id.* at 34, 45, 76.

Judlau argues that because it did not cause or create the condition on which plaintiff tripped, and because it did not provide asphalt patching, or remove curbs or any portion of the sidewalk near plaintiff's accident, summary judgment must be granted. Judlau argues that there is no evidence that it failed to lag an excavation wall, that any sidewalk was undermined, or that Judlau's work caused the subject sidewalk to crack.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). Based upon the testimony of Lovino, Judlau has met its burden, and has demonstrated that it is entitled to summary judgment. Therefore, the burden shifts to the motion's opponent to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557 (1980).

Coalition contends that Judlau's daily logs from March of 2009 demonstrate that extensive excavation took place in the street adjacent to 129 Fulton Street, two months before plaintiff's accident. Coalition argues that Judlau had backfilled a trench with temporary asphalt similar to the asphalt used to cover the crack in the sidewalk where plaintiff allegedly fell. Coalition maintains that there remains uncertainty as to whether proper lagging was used to prevent undermining and ensure the structural integrity of the sidewalk.

To defeat a motion for summary judgment, the opposing party must demonstrate: "the existence of facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred. However, such proof must permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence"

Flores v City of New York, 29 AD3d 356, 358 (1st Dept 2006) (internal citations and quotation marks omitted).

Here, while Coalition attempts to raise an issue of fact by alleging that Judlau used temporary asphalt in the past, and questions whether work undermining in the street resulted in the patch where plaintiff fell, such arguments are merely speculative. Coalition fails to demonstrate that Judlau performed work on the subject sidewalk. Furthermore, even if Judlau may have utilized temporary asphalt in the street, Coalition fails to demonstrate with evidence or testimony that Judlau's work continued into the sidewalk area.

Therefore, because Coalition fails to raise an issue of fact that Judlau caused or created the condition of the subject sidewalk, Judlau's motion for summary judgment must be granted.

MOTION SEQUENCE 004

Trocon is a general contractor which had a contract with the New York City Department of Design and Construction for curb, sidewalk, and reconstruction work to take place in 2009. The work area extended from Gold Street to Church Street along Fulton Street. Trocon also completed underground and surface work on Fulton Street from Gold Street to South Street.

Trocon first argues that Coalition was not the statutory owner of the subject sidewalk and that it cannot be held liable under Section 7-210 of the New York City Administrative Code. Section 7-210 of the New York City Administrative Code provides that "[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition." Trocon alleges that, in 2006, the Metropolitan Transit Authority (the MTA) exercised the power of eminent domain to acquire a portion Coalition's premises in order to facilitate the construction of a handicap accessible elevator entrance to the Fulton Street transit center.

Trocon bases its argument regarding ownership solely on an affidavit submitted by expert witness, Chester DiLorenzo, P.E., L.S. (DiLorenzo). The affidavit states that Coalition was not

the owner of the premises adjacent to the sidewalk where plaintiff fell, and that plaintiff's accident occurred on a very slightly raised portion of the sidewalk within boundaries of both permanent and temporary easements which were held by the MTA.

DiLorenzo's affidavit states:

"[a]s set forth more fully herein, it is my opinion within a reasonable degree of certainty that the parcel of land immediately adjacent to the portion of sidewalk where plaintiff, Antonio Plana, claims to have fallen on May 29, 2009 was owned by the Metropolitan Transportation Authority ("MTA")."

DiLorenzo Affidavit, ¶ 4.

Although Trocon relies upon the affidavit of DiLorenzo to support its claim that plaintiff's accident took place at a location where an easement existed, the affidavit does not reach this conclusion. Instead, the affidavit states that the land "immediately adjacent" to where plaintiff fell was owned by the MTA, and does not state that the land where plaintiff actually fell was owned by the MTA. Therefore, DiLorenzo's affidavit fails to conclusively demonstrate that Coalition was not the owner of the location where plaintiff fell.

Furthermore, "[i]t is well settled that easement rights derive from use and enjoyment. The easement owner gains no right to possess or occupy the land." *Paradise Point Assn., Inc. v Zupa*, 22 AD3d 818, 819 (2d Dept 2005) (internal citations omitted). Here, the easements which the MTA obtained were for construction purposes, and there is no indication that there was a transfer of ownership of the property.

Trocon next argues that it did not perform work on the subject sidewalk until July or August of 2009, and that plaintiff's accident in May of 2009 preceded its work. Anthony Santora (Santora), the vice-president of Trocon, testified that Trocon performed work at the intersection of Fulton Street and Nassau Street, and that it did not work on the subject sidewalk until July or August of 2009, after the date of plaintiff's accident. Trocon contends that the defect where plaintiff fell existed prior to its work in the area.

Coalition argues that, pursuant to the contract with the New York City Department of Design and Construction, around May of 2009, Trocon was performing construction work on Fulton Street, which consisted of removing and replacing sidewalks. Coalition argues that Santora testified that Trocon was occasionally required to perform temporary asphalt patches on sidewalk cracks like the one upon which plaintiff claims to have tripped.

Coalition maintains that while Santora testified that Trocon did not perform work on the subject sidewalk until July or August of 2009, Trocon's own work logs, which Coalition submits as exhibits, establish that two Trocon employees were digging at or near the subject sidewalk on the day before plaintiff's accident. Santora also testified that Trocon installed temporary asphalt at or around 129 Fulton Street "[p]robably at some point in time" but could not state whether or not it installed the patch on which plaintiff allegedly tripped. Santora EBT, at 101.

The Court of Appeals has held that "[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *see also Psihogios v Stavropoulos*, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

Here, because the testimony of Santora presents questions of fact as to the scope of Trocon's work in front of 129 Fulton Street on the day before plaintiff's accident, and whether Trocon's work may have contributed to the condition on which plaintiff allegedly tripped, Trocon's motion for summary judgment must be denied.

MOTION SEQUENCE 005

In sequence 005, Red Hook argues that summary judgment must be granted in its favor because it did not perform any work on the sidewalk where plaintiff's accident occurred until after the accident.

Christopher Lynch (Lynch), president of Red Hook, testified that, in May of 2009, Red Hook, a commercial construction company, was performing construction work at 127 Fulton

Street to convert the 10-story commercial building into residential lofts. Red Hook contends that it first obtained sidewalk permits from the City of New York in connection with its work in October of 2008, and that it performed no work on the sidewalk where plaintiff fell until after the date of plaintiff's accident.

Lynch testified that there were numerous reasons why the commencement of the sidewalk work was delayed until after May 29, 2009, including that Red Hook was unable to obtain access to the sidewalk to perform its work because Judlau and Trocon were performing work in the area. Lynch testified that the work was also delayed until after May of 2009, due to financial issues with the owner of the premises. However, Lynch could not produce any documents to support when Red Hook's work commenced in the area because the company and records moved locations.

Coalition argues that the sidewalk opening permits issued by the Department of Transportation authorized Red Hook to begin excavating the sidewalk nine months before the accident. The permit which Coalition submits, states that permission for the work was valid from "10/06/08 to 11/21/2008" and was granted to "Red Hook Const. Group-1, LLC" for the purpose to "OPEN SIDEWALK" and to "OPEN SIDEWALK TO INSTALL FOUNDATION" on Fulton Street from Dutch Street to Nassau Street. Coalition contends that while Lynch testified that he believed that Red Hook's work on the sidewalk started several months after plaintiff's accident, the failure of Red Hook to submit any records or daily reports to demonstrate when the work commenced or what type of work was taking place, raises a question of fact.

The lack of records submitted by Red Hook raises a question of fact as to what type of work it was performing on the subject sidewalk before plaintiff's accident. Furthermore, the existence of the permit, which was issued for the months prior to the accident, also raises a question of fact as to whether work was being performed during that period on the subject sidewalk. Therefore, because Red Hook fails to meet its burden and demonstrate that no issues of fact exist, Red Hook's motion for summary judgment must be denied.

MOTION SEQUENCE 006

In motion sequence 006, Coalition moves for summary judgment. Coalition is a non-profit organization which is located at 129 Fulton Street, adjacent to the sidewalk where plaintiff's accident took place. Coalition contends that summary judgment should be granted in its favor because it was not the statutory owner of the subject premises and therefore, cannot be held liable under Section 7-210 of the New York City Administrative Code.

Coalition argues that the sidewalk where the accident took place was subject to easements taken by the MTA for purposes of installing an elevator to provide handicap access to the Fulton Street subway station. Coalition maintains that based upon the affidavit of DiLorenzo, a portion of the building where plaintiff's accident took place was subject to easements.

As discussed previously in motion sequence 004, the affidavit by DiLorenzo raises a question of fact as it states that the land "adjacent" to where plaintiff fell was owned by the MTA on May 29, 2009, but does not state that the land where plaintiff actually fell was under any easement obligations. The maps which Coalition submit demonstrate that Coalition's entire building was not subject to easements, rather the easements were located in a smaller area inside the corner of the building. It remains unclear from the maps whether the easements extended to the exterior sidewalk in the area where plaintiff fell.

Furthermore, the easements which the MTA obtained were for construction purposes and did not transfer ownership of the property. Coalition's verified answer states that it owned the premises which abuts the sidewalk where plaintiff fell, and plaintiff maintains that at the time of his accident, the MTA had yet to begin construction on the elevator and Coalition had full and unrestricted access to utilize the building.

Alan Tarzy, Esq., (Tarzy), counsel for plaintiff, affirms that he conducted a search of the property records relating to 129 Fulton Street on the official New York City "ACRIS" website and found that there was no recorded deed filed with the County Register's Office for the transfer of title for any portion of the premises to the MTA. Tarzy states that the only deed of record is

the 2002 deed by which Coalition acquired title.

Coalition also contends that the asphalt patch which plaintiff attributes as being the cause of his accident is a "non-actionable trivial defect" for which Coalition cannot be held liable. Generally, "[t]he owner or possessor of a property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it." *Freidah v Hamlet Golf and Country Club*, 272 AD2d 572, 572- 573 (2nd Dept 2000).

Here, plaintiff submits an expert report from Scott M. Silberman (Silberman), a professional engineer. Silberman states that based upon "the applicable laws, rules, regulations, and ordinances that the defect constituting a tripping hazard and trap for pedestrians walking in the vicinity." Silberman Affidavit, ¶ 11. Silberman concludes that the condition on the sidewalk was a "trap because the height differential is sufficient to catch someone's foot and cause them to fall and be injured" and that it was a hazard which should have been properly repaired by the owners. *Id.*

Coalition fails to submit an expert report which discusses the alleged defect, and it remains unclear as to whether Coalition had constructive notice of the defect. Therefore, because issues of fact exist as to ownership of the subject premises, and whether Coalition had constructive notice of the alleged sidewalk defect, Coalition's motion for summary judgment must be denied.

MOTION SEQUENCE 007

Felix, a contractor which performed a test pit project on Fulton Street, argues that summary judgment must be granted in its favor because it did not create the subject condition on which plaintiff tripped.

Guy Melita (Melita), the job supervisor of Felix, testified that Felix's work on the project

at Fulton Street took place in the street and was completed two to three years prior to plaintiff's accident. Melita maintains that Con Edison has failed to provide any documents, sworn testimony, or evidence which contradicts his testimony.

In opposition to Felix's motion, Con Edison argues that a permit was issued in 2008 for Fulton Street, which indicates that Felix was the contractor for the job. Con Edison submits a copy of the "Street Open Permit" valid from "2/22/2008 to 3/22/2008" with the specific location submitted as "Fulton St, Nassau St, Dutch St." The permit was "TO OPEN THE ROADWAY AND/OR SIDEWALK."

While the work regarding the permit was for 2008, Melita testified that his work with Felix at Fulton Street took place in 2006 or 2007, which predates the permit. Furthermore, Melita testified that he did not perform a record search of the documents, and that he was not sure if Felix maintained records pertaining to work which they performed on Fulton Street in 2009. Despite the testimony of Melita, it remains unclear as to when Felix's work occurred and whether its work took place at the subject sidewalk.

Therefore, because Melita's testimony and the permit raise questions of fact as to what work Felix conducted on the sidewalk before the accident took place, and whether this work, if any, may have contributed to the condition where plaintiff fell, Felix's motion for summary judgment must be denied.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that third-party defendant Judlau Contracting, Inc.'s motion for summary judgment (sequence 003) is ^{severed and ~~granted~~} granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that third-party defendant Trocon, Inc.'s motion for summary judgment

(sequence 004) is denied; and it is further

ORDERED that third-party defendant Red Hook Construction Group-I, LLC's motion for summary judgment (sequence 005) is denied; and it is further

ORDERED that defendant/third-party plaintiff Coalition for the Homeless, Inc.'s motion for summary judgment (sequence 006) is denied; and it is further

ORDERED that third-party defendant Felix Associates, LLC's motion for summary judgment (sequence 007) is denied.

Dated: 9/26/13

ENTER:

Lu
J.S.C.

LOUIS B. YORK
J.S.C.

FILED
OCT 01 2013
NEW YORK
COUNTY CLERK'S OFFICE