

Robinson v City of New York

2013 NY Slip Op 32434(U)

October 8, 2013

Sup Ct, New York County

Docket Number: 104888/2011

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/11/2013

[* 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 : 104888/2011
ROBINSON, C. PRICE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT CAL: # 47

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**

FILED

OCT 11 2013

COUNTY CLERK'S OFFICE
NEW YORK



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

Dated: 10-8-13
OCT 08 2013

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

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

-----X

C. PRICE ROBINSON,

Plaintiff,

-against-

DECISION/ORDER
Index No. 104888/2011
Seq. No. 002

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF SANITATION, and
"JOHN DOE" an unknown operator,

Defendants.

-----X

KATHRYN E. FREED, JSC:

FILED

OCT 11 2013

COUNTY CLERK'S OFFICE
NEW YORK

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.....1-4.(Exhs. A-L)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....2.(Exhs. A-B)
REPLYING AFFIDAVITS.....3.....
EXHIBITS.....
OTHER.....

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

Plaintiff moves for an order pursuant to CPLR§3212 for summary judgment on liability.

Defendants oppose. After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

Plaintiff allegedly sustained physical injuries on September 11, 2010, when, while riding his bike and attempting to make a right turn off of Avenue C onto East 3rd Street in New York County, he slipped on an accumulation of brown gelatinous grease in the roadway, and fell off the bike.

Prior to plaintiff's fall, Mr. Raymond Jackson, an eye witness to the entire event subsequently testified that he observed a New York City Department of Sanitation ("DSNY") garbage truck parked on the northwest corner of Avenue C and East 3rd Street "for about 15, 20 minutes." (Exh. C, Jackson dep. p. 19, line 20, p. 23, line 20). Mr. Jackson also testified that garbage trucks frequently park at this intersection in order to go into a nearby deli called "Maria's." Jackson also testified that he observed grease spewing off the truck and observed plaintiff's bike slip on said grease. Additionally, according to the affidavit of another witness, Ms. Shane Dolly, the patch of grease "extended from the west curbside out into the southbound lane. The grease film patch covered the entire southbound lane. In order to avoid contact with the grease, a person traveling in the southbound lane would be required to veer into oncoming traffic in the north bound lane" (see Dolly Aff., Exh. D).

As a result of the fall, plaintiff sustained a right intertrochanteric fracture which required surgery. Consequently, he filed a Summons and Complaint on or about April 20, 2011, and issue was later joined. Plaintiff's Bill of Particulars was served on October 19, 2011. Plaintiff testified at a General Municipal Law§ 50-h hearing on February 2, 2011 and at a deposition on May 18, 2012. On May 23, 2012, depositions of the City's witnesses were conducted. Michael Macchia, a Supervisor at the Department of Sanitation and Abraham Lopez, a New York City Department of Transportation record searcher were deposed.

Upon deposing these two witnesses, plaintiff's counsel claims that neither of them possessed any direct or actual knowledge regarding the subject accident. Counsel was also unable to identify or produce any crew member from the subject garbage truck. Thus, on July 18, 2012, via a Notice of Discovery and Inspection, plaintiff's counsel "began demanding information which was aimed

at identifying a crew member of the subject City garbage truck.” (Motion, p. 6). However, defendant City objected to all but one of these demands.

On October 2, 2012, at a compliance conference, Hon. Barbara Jaffe rendered a written order directing the City to exchange outstanding discovery within 30 days. However, the City failed to comply, prompting plaintiff’s counsel to make a motion to compel. The City, via the affidavits of two City attorneys, claimed that discovery had been destroyed during Hurricane Sandy. Plaintiff’s Counsel, however, claims that he began demanding the production of same some four months prior to the hurricane, and to date, has not received “any witness or documentation that would lead to additional facts surrounding this case.” (*Id.* p. 6).

Appended to plaintiff’s Aff. in Support as Exh. N, is an affidavit of Rose Marie Gagliardi, Esq., an attorney affiliated with the DSNY. Said affidavit states in pertinent part that DSNY received a request from Corporation Counsel on October 2, 2012, wherein Corporation Counsel requested Route Cards, the District Order Book and the Carting Book for September 11, 2010 for Avenue C and East 3rd Street. Ms. Gagliardi states that she personally conveyed the request to the Manhattan 3 garage. The carting book was received, however, the route cards were not. She also states that DSNY was unable to obtain the requested discovery in the week thereafter due to the impact of Hurricane Sandy which was particularly devastating to the area wherein Manhattan 3 garage is located. On November 20, 2012, Ms. Gagliardi was advised that the route cards, maintenance and repair documentation were all destroyed in the storm.

On February 19, 2013, this Court rendered an Order addressing plaintiff’s Motion To Compel. In said Order, the Court stated in pertinent part that “to the extent that certain discovery was destroyed due to Hurricane Sandy which was beyond the City’s Control, the motion is denied

with prejudice.” (Aff. in Opp., Exh. A). On March 1, 2013, plaintiff filed his Note of Issue.

Positions of the parties:

Plaintiff asserts that he is entitled to summary judgment as no material issues of fact exist. He argues that for a municipal defendant to be liable for negligence, a plaintiff must demonstrate that the defendant owed a duty to plaintiff; that defendant breached said duty; and that plaintiff was injured as a result of a breach of said duty. Plaintiff also argues that he has made a prima facie showing that the City owns, operates and maintains the DSNY trucks in New York County; that according to Mr. Macchia’s testimony, City garbage truck crews take a 15 minute breakfast break beginning at 8:00 am; on the date in question, a garbage truck at the northwest corner of Avenue C and East 3rd Street took a break at about that time to get breakfast at Maria’s deli; and while the truck was parked, it spewed a large amount of grease into the roadway, which constituted a breach of the City’s duty to plaintiff because the City created the defective condition.

The City argues that the alleged eye witness, Mr. Jackson, is not credible in that during his deposition, he admitted to an extensive criminal history with more than five incarcerations, and acknowledged a history of homelessness, psychiatric diagnoses and treatments, as well as a regular use of alcohol and crack cocaine. Additionally, he testified to have imbibed “a little vodka” on the day of the accident. (Motion, Exh. C, p. 31, lines 22-23). He also testified that he had not read his sworn statement prior to signing it and did not personally create it (*id.* 15, lines 15-18).

The City also argues that Shane Dolly’s affidavit is not relevant in that she did not actually observe the grease spewing from the DSNY truck, and only observed the presence of a greasy film at the location of the accident. It is important to note that at the time of the instant motion, Ms. Dolly’s deposition had yet to occur in that it was scheduled for June 6, 2013. Therefore, the Court

does not know if in fact her deposition was actually conducted, and if so, what her testimony entailed. The City further argues that contrary to plaintiff's contentions, the only admissible evidence of what allegedly occurred emanates from the claimed eyewitness account of Mr. Jackson. The City argues that not even plaintiff's testimony itself directly attributes the grease to a DSNY truck, in that he claimed that he did not observe the grease before sliding on it. Thus, the question of liability is plainly a matter for a jury.

Conclusions of law:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled as a matter of law” (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.3d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

In the case at bar, plaintiff relies solely on the eye witness account of Mr. Jackson, and the fact that Mr. Macchio testified that it is a habit of DSNY trucks to park in the vicinity of the accident to go into a specific deli on their break. However, the Court does not find this sufficient to establish

a prima facie entitlement to summary judgement. Indeed, the Court's decision is not based on Mr. Jackson's habits or character, in that it is axiomatic that a trial court's limited role on a summary judgment motion is to determine whether triable issues of fact exist and does not extend to evaluating witness credibility (see *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]; *Powell v. HIS Contrs., Inc.*, 75 A.D.3d 463, 465 [1st Dept. 2010]; *Creighton v. Milbauer*, 191 A.D.2d 162,166 [1st Dept. 1993]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

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

DATED: October 8, 2013

ENTER:

OCT 08 2013

FILED

OCT 11 2013

COUNTY CLERK'S OFFICE
NEW YORK



Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT