

Boyarski v City of New York

2013 NY Slip Op 33276(U)

December 10, 2013

Supreme Court, New York County

Docket Number: 114029/2011

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 107598/2010
BOYARSKI, JOEL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT CALL # 6

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
DEC 17 2013
NEW YORK
COUNTY CLERK'S OFFICE
DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12-10-13
[DEC 10 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

-----X

JOEL BOYARSKI and ELEANOR BOYARSKI

Plaintiffs,

-against-

DECISION/ORDER
Index No. 114029/2011
Seq. Nos. 006

CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., SKANSKA USA
CIVIL, INC., individually and doing business as S3 TUNNEL
CONSTRUCTORS, INC., J.F. SHEA CONSTRUCTION,
INC., individually and doing business as S3 TUNNEL
CONSTRUCTORS, INC., SCHIAVONE CONSTRUCTION
CO., LLC, individually and doing business
as S3 TUNNEL CONSTRUCTORS, INC., and S3
TUNNEL CONSTRUCTORS, INC., and URANOS
CONSTRUCTION CORP.,

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

FILED

Defendants. DEC 17 2013

**NEW YORK
COUNTY CLERKS OFFICE**

KATHRYN E. FREED, J.S.C.:

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

PAPERS Seq.006	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	...1-2 (Exs A-I)..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIRMATIONS.....	... 3-4.....
REPLYING AFFIRMATIONS.....	...5.....
OTHER.....

FILED

SEP 11 2010
NEW YORK
FEDERAL BUREAU OF INVESTIGATION

PAPERS Seq. 007	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	..1-2(Exs A-H)..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIRMATIONS.....	.3.....
REPLYING AFFIRMATIONS.....	..4.....
OTHER.....

PAPERS Seq. 008	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	..1-2(Exs A-I)..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIRMATIONS.....	3(Exs A-B), 4,5
REPLYING AFFIRMATIONS.....	.4.....
OTHER.....

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

In motion sequence 006, defendants Skanska USA Civil, Inc., individually and doing business as S3 Tunnel Constructors, Inc., J.F. Shea Construction, Inc., individually and doing business as S3 Tunnel Constructors, Inc., Schiavone Construction Co., LLC, individually and doing business as S3 Tunnel Constructors, Inc., and S3 Tunnel Constructors, Inc. (collectively, the S3 Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims.

In motion sequence 007, defendant Consolidated Edison Company of New York, Inc. (Con Ed) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims.

In motion sequence 008, defendant the City of New York (the City) moves, pursuant to CPLR 3211 (a) (7) to dismiss the complaint and any cross claims for failure to state a claim, or in the alternative, for summary judgment, pursuant to CPLR 3212, dismissing the complaint and any cross claims.

These three motions are consolidated for disposition.

Factual and procedural background:

This negligence action seeks to recover damages for serious injuries allegedly suffered by plaintiff Joel Boyarski as the result of an accident occurring on March 14, 2009 at the southwest corner of East 72nd Street and Second Avenue in New York, New York (the Site). Boyarski testified that he was attempting to cross Second Avenue in the eastbound direction when he stepped off of an uneven portion of curb/sidewalk, which caused him to trip and fall (S3 Defendants' exhibit C at 15-22). The portion of the curb where Boyarski fell was extended by additional asphalt adjacent to a catch basin (id.). Boyarski described the uneven sidewalk area as follows:

“[t]here was a part of where the concrete area had ended and where there was an additional add on which was made up of the tar and that tar area was lower than the concrete area and the tar area was not in a very definitive line so it was uneven along the edge of that”

(the City's exhibit E at 14).

As a result of the fall, Boyarski allegedly suffered serious injuries, including torn ligaments in his left ankle, which required surgical intervention. Boyarski alleges that the defendants performed negligent work and/or negligently failed to maintain, manage and/or control the Site. His wife, plaintiff Eleanor Boyarski alleges a spousal derivative claim.

Positions of the parties:

Motion Sequence 006

The S3 Defendants argue that summary judgment must be granted in their favor, because they did not create any defect at the Site causing Boyarski to fall. In support of their motion, the S3 Defendants rely on the testimony of their senior project manager, Aledin Jalelaty, and a

photograph taken of the Site and surrounding area on January 22, 2009 (January 22nd Photo), the last day that the S3 Defendants performed work there.

It is not disputed that the S3 Defendants performed work at the Site, and that their work involved installing asphalt in the area where Boyarski fell. Specifically, their job entailed cutting up a portion of the sidewalk with a saw and then paving over that portion with asphalt, including the area of the catch basin (S3 Defendants' exhibit F at 25, 54). The purpose of this work was to create a larger roadway for traffic by reducing the sidewalk from approximately 20 feet to 7 feet (S3 Defendants' exhibit F at 22).

Therefore, the issue on this motion is whether the S3 Defendants created the alleged defective condition which caused Boyarski to fall.¹ As the moving party, the S3 Defendants have the initial burden of making a prima facie case that they did not create the hazardous condition (*Bruk v Razag, Inc.*, 60 AD3d 715 [2d Dept 2009]). However, based on the evidence submitted, they have not met this burden. Jalelaty's testimony and the January 22nd Photo are inconclusive in determining whether or not the S3 Defendants created the alleged defective condition.

At his deposition, Jalelaty testified that the S3 Defendants paved the cut up portion of the sidewalk in one session, and that the asphalt that they installed would not look like the defective asphalt in the pictures taken after the accident (S3 Defendants' exhibit F at 73-74). Jalelaty further testified that the post-accident photographs appear to show that the asphalt was dug up and patched after the completion of the S3 Defendants' paving work (S3 Defendants' exhibit F at 73). However, as to the actual condition of the Site and the asphalt on the day that the S3

¹ In their motion papers, the S3 Defendants do not dispute where Boyarski fell or that the curb/sidewalk was defective.

Defendants completed their work, Jalelaty admittedly could not recall. This deposition testimony is not enough to affirmatively establish that they did not create a defective condition as a matter of law. It is inconclusive and insufficient to support the granting of the drastic remedy of summary judgment.

Further, the January 22nd Photo is also inconclusive, as it does not clearly depict the actual condition of the Site. The Photo was taken from the opposite corner of the accident location and the condition of the curb and sidewalk cannot be ascertained from the view it presents. Based on the foregoing, the S3 Defendants have not met their burden and summary judgment is denied.

Motion Sequence 007

Con Ed argues that summary judgment should be granted in its favor, because it was not involved in any work at the Site, and, thus, could not have created any hazardous conditions causing Boyarski to fall. To support its motion, Con Ed submits the deposition testimony of Abraham Lopez, a record searcher for the New York City Department of Transportation (DOT), and Jennifer Teasley, a specialist for Con Ed, as well as DOT records.

Lopez testified that two of the nine permits issued for the area of Second Avenue between 71st and 72nd Streets were issued to Con Ed (Richardson affirmation, exhibit E at 8-10). The first permit, issued on June 20, 2008, was for opening the sidewalk in front of 1359 Second Avenue for a maximum of five feet (*id.* at 10). However, after an inspection was made on November 19, 2008, the inspector noted that “work not done, permit expired” (*id.* at 19). The second permit, issued on December 11, 2008, was for opening the roadway and/or sidewalk in front of 1353 Second Avenue for 19 feet (*id.* at 10). This permit was valid from January 3, 2009 to February 1, 2009 (*id.*). It has not, however, been established whether Con Ed completed work under this

permit.

Con Ed argues that this second permit does not evidence that work was, in fact, completed and that Con Ed performed work at the exact location of Boyarski's accident. This permit does not conclusively establish Con Ed performed work at the Site, and this inconclusiveness raises a question of fact. The issue remains as to whether Con Ed did perform work at the Site. Con Ed asserts that it did not, but this permit evidences that Con Ed may have been involved in work in the area. Further, Jalelaty testified that he saw Con Ed performing work at the Site, which involved breaking the sidewalk. This, too, raises an issue of fact as to whether Con Ed played a role in creating the hazardous condition that caused Boyarski to fall. Therefore, summary judgment cannot be granted.

Motion Sequence 008

The City moves to dismiss the complaint and any cross claims on the grounds that it had no prior written notice of the alleged hazardous condition, as required by the Administrative Code of the City of New York § 7-201 (c), and that it did not cause or create the alleged condition. Boyarski, Con Ed, and the S3 Defendants all oppose. However, their opposition focuses not on whether there was written notice or whether the City created the hazard, but, instead, focuses on the City's additional exchange of records, made on July 8, 2013, after Boyarski filed the note of issue, and after this instant motion was served. Boyarski, Con Ed, and the S3 Defendants argue that the late exchange of these additional records failed to give them an opportunity to depose witnesses with knowledge about these records and to make further inquiries about the records to determine their relevance.

On July 8, 2013, the City produced records from the Department of Environmental

Protection (the DEP) pertaining to the Site and surrounding area for the period of March 14, 2007 through March 14, 2009. The records consist of work orders and service reports.

Boyarski, Con Ed, and the S3 Defendants assert that the exchange does not contain the parameters of the search that was conducted, who conducted the search, when the search was conducted, what records the search consisted of, and what the subject matter of these records consisted of. They argue that they should be permitted to depose a DEP records witness about these records and the search conducted. In response, the City asserts that it obtained these records from the DEP on its own direction to ensure that it did not have anything to do with the alleged hazardous condition, and that such discovery was never a part of any order, nor was it requested by any party. The City argues that these records are irrelevant and that the opposition fails to point to any DEP record as being material and creating a question of fact.

The City has presented more discovery in the case, which the other parties in the action have not had an opportunity to investigate further. Denying the parties this opportunity would be a disadvantage to them on this motion. The City produced the DEP records, whether it had to or not, and they are now part of discovery.

Conclusions of law:

The two main issues to be decided on this motion are (1) whether the City had prior written notice, pursuant to Administrative Code of the City of New York § 7-201 (c), which “limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location” (*Katz v City of New York*, 87 NY2d 241, 243 [1995] [internal citations omitted]), and, if prior written notice is lacking, (2) whether “the municipality affirmatively

created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008] [internal citations omitted]).

At the very least, without an opportunity to depose a DEP witness, Boyarski is at a potentially serious disadvantage to meet his burden of proving that the City had prior written notice (see *Katz v City of New York*, 87 NY2d at 243 [plaintiff has burden of pleading and proving prior written notice]).

In support of its motion, the City relies on the testimony of two DOT record searchers to show that the City did not have prior notice based on the DOT records produced. The City does not refer to the DEP records in its moving papers. Boyarski argues that the City can certainly make claims that the DOT records prove there is no prior notice, but the same claims cannot be made for the DEP records. Boyarski should have an opportunity to depose a DEP records searcher when such discovery may be very relevant to the issue of whether there was prior written notice and whether the City actually created the defect through an act of negligence.

The court agrees that, if it granted summary judgment to the City without a deposition on the DEP records, it would in essence be ruling that the parties have no right to an examination before trial of a witness where the City claims no prior written notice was given supported by the records alone.

This is not a situation where a party is requesting more discovery out of the blue. Here, new evidence was produced by one of the parties, post note of issue and post service of this motion, which may lead to information relevant to the issues that need to be decided on this motion. The other parties to this action must have an opportunity to inquire further about the

DEP records. Therefore, the City's motion is denied, but without prejudice. The court will permit the parties to depose a witness from the DEP in regard to the DEP records produced on July 8, 2013.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants Skanska USA Civil, Inc., individually and doing business as S3 Tunnel Constructors, Inc., J.F. Shea Construction, Inc., individually and doing business as S3 Tunnel Constructors, Inc., Schiavone Construction Co., LLC, individually and doing business as S3 Tunnel Constructors, Inc., and S3 Tunnel Constructors, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that defendant Consolidated Edison Company of New York, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that defendant the City of New York's motion for summary judgment is denied without prejudice with leave to renew if so advised; and it is further

ORDERED that the parties may take the deposition of a Department of Environmental Protection witness, provided that such deposition be completed by no later than 30 days from the service of a copy of this order with notice of entry; and it is further

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

DATED: December 10, 2013

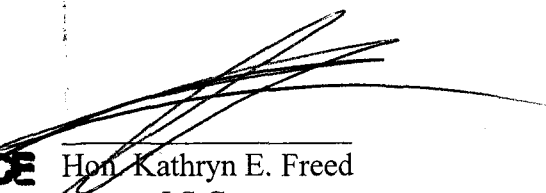
FILED

ENTER:

DEC 10 2013

DEC 17 2013

**NEW YORK
COUNTY CLERK'S OFFICE**


Hon. Kathryn E. Freed
J.S.C.
**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**