Jones v Giffuni Bros.
2018 NY Slip Op 30027(U)
January 5, 2018
Supreme Court, New York County
Docket Number: 155303/2013
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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JANETTE JONES,

Index No. 155303/2013

Plaintiff,

-against-

GIFFUNI BROS., MERIT OPERATING CORP., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC., MANETTA INDUSTRIES and WJL EQUITIES CORP.,

Defendants.

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GIFFUNI BROS. and MERIT OPERATING CORP.,

Third-Party Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and CONSOLIDATED EDISON, INC.,

Third-Party Defendants

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Fourth-Party Plaintiff

-against-

MANETTA INDUSTRIES and WJL EQUITIES CORP.,

Fourth-Party Defendants.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendant WJL Equities Corp. (WJL) moves for summary judgment dismissal of the complaint and cross-claims against it. Consolidated Edison Company of New York, Inc., Consolidated Edison Inc. (collectively Con Ed), and Manetta Industries (Manetta) each "cross move" for summary judgment as well. Plaintiff Janette Jones (Jones) and defendants Giffuni Bros. (Giffuni) and Merit Operating Corp. (Merit)(these defendants collectively Giffuni) oppose the motion and "cross motions."

Background

Jones commenced this action to recover for personal injuries arising from a trip and fall over uneven sidewalk flags on the west side of First Avenue between 83rd and 84th Streets on July 15, 2012 (WJL Affirmation in Support [Supp], Exs B, D and E). Giffuni owns the building abutting the accident site and Merit managed the property, which was located at 353 East 83rd Street (Building).

At her deposition Jones testified that she tripped on an extension joint in front of a standpipe attached to the Building and circled the location in a photograph (Supp, Exs D and F). There are three rows of sidewalk flags running parallel to the Building (Supp, Ex H). Plaintiff tripped where two sidewalk flags in the same row met in the row closest to the Building (Supp, Ex F). These two flags are abutted by flags in the next--middle-- row of sidewalk flags (Sup, Ex F).

Work History Near Accident Site

On September 1, 2009, Con Ed engaged Manetta to perform a sidewalk excavation "on the west side of First Avenue between 83rd and 84th Streets, at 103 feet from the northwest corner of East 83rd Street and one foot from the curb line.[1]

[1] Despite the permit stating it was 109 feet from the corner, the evidence shows that it was in fact 103 feet. Evidence included testimony from John Saker of Con Ed who measured the

The shape of the opening was a trench, and its size was 14-feet long by 3.5-feet wide" and five feet deep with a pavement surface depth of five inches of concrete and a base of dirt (Giffuni Opposition to WJL [Giffuni Opp to WJL] at ¶¶ 14, 17). The New York City Department of Transportation (DOT) issued a permit and Manetta was to open the sidewalk and after work was performed to backfill it (Supp at ¶¶ 25-28). Manetta's work was temporary, after excavation Manetta had to "plug the area . . . and it was just to cover the area that was excavated" (Supp at ¶ 28).

On September 15, 2009, Giffuni wrote to DOT complaining that Manetta did not properly backfill the area and did not use an appropriate psi (pounds per square inch) concrete. Giffuni further sent DOT pictures showing that the sidewalk had already begun to crack (Giffuni Opp to WJL at ¶ 53). DOT responded on September 22, 2009 that the sidewalk would be repaired. When it had not been repaired, on November 19, 2009, Giffuni again wrote to DOT enclosing additional photographs depicting a defective condition that had developed after Manetta's work (Giffuni Opp to WJL at ¶ 54). On April 12, 2010, Giffuni wrote DOT for a third time complaining that

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area himself when the work was performed(Supp at ¶¶ 25, 28). Permit measurements, moreover, include estimates and were not always exact (Supp at ¶ 33).

the sidewalk still remained unrepaired (Giffuni Opp to WJL at ¶ 55).

On April 15, 2010, someone complained to the City about the sidewalk triggering a Corrective Action Request (CAR), which stated that there was a one-foot portion of concrete broken out and that concrete patchwork and three flags needed restoration (Supp at ¶ 24). DOT sent the CAR to Con Ed (Giffuni Opp to WJL at ¶ 18). The area in the CAR was the same area where Manetta had performed work (Supp at ¶ 24). A call log indicates that within a few hours "an SSC [subsurface construction Con Ed crew] responded to a DOT call regarding a broken section of concrete one foot down, and two an a half inches southwest of East 83rd Street" (Giffuni Opp to WJL at ¶¶ 19, 41). The SSC crew located the hole on the sidewalk, placed a steel plate on it and asphalt around it (Giffuni Opp to WJL at ¶ 19). On April 22, 2010, Con Ed generated an Opening Ticket for the location for repairs of a permanent nature to be made within 60 days (Supp at ¶ 27; Giffuni Opp to WJL at ¶ 55).

On June 25, 2010, Giffuni again wrote to DOT because repairs had still not been made (Giffuni Opp to WJL at ¶ 55).

Con Ed sent WJL an Opening Ticket dated July 2, 2010 to perform repair work to the sidewalk. The location for the work to be performed was 103 feet from the south corner of the block and one foot from the curb (Giffuni Opp to WJL at ¶ 69). There was also a Con Ed order for paving and restoration dated July 7, 2010 requiring WJL to remove and restore the three sidewalk flags but not requiring excavation or backfilling (Supp at ¶¶ 12,16; Giffuni Opp to WJL at ¶ 70). The July 2, 2010 Opening Ticket and the July 7, 2010 Paving and Restoration order "appear[] to be" for the same work (Giffuni Opp to WJL at ¶ 71). The flags that were replaced were five feet from the standpipe (Supp at ¶ 17, Ex K; WJL Reply at ¶ 8, Exs C and D). The work was performed on July 15, 2010.

Experts

WJL's expert, Joseph C. Cannizzo, P.E., reviewed numerous documents related to this action and visited the site on October 6, 2016 (Cannizzo Aff at ¶ 6). He noted that WJL performed its work at 103 feet and any reference to work performed at 193 feet was a mistake (Cannizzo Aff at ¶ 10). Mr. Cannizzo explains that WJL did not do work where the plaintiff fell; rather, the work WJL and Manetta performed was five feet from the accident location (Cannizzo Aff at ¶¶ 8,

13).[2] He further states that "the process of [permanent] concrete sidewalk restoration [that WJL performed] could not cause or create a raised sidewalk where plaintiff was said to have tripped and fallen" (Cannizzo Aff at ¶ 8). It is Mr. Cannizzo's opinion that "the raised flag condition in the area of the accident was caused by trapped water that froze, expanded, that lifted the slab that did not return to its original elevation when the ice melted" (Cannizzo Aff at ¶ 17). He opines that "based on a reasonable degree of engineering certainty the work performed by WJL did not cause or create a raised sidewalk flag" (Cannizzo Aff at ¶ 14).

Giffuni's expert, Scott E. Derector, explains that the height differential at the expansion joint where plaintiff tripped was "causally related to the settlement of the middle concrete panel that was located adjacent to the ground expansion joint and to the south of it" (Derector Aff at ¶ 32).[3] He points out that there is no evidence that the subgrade and foundation material directly beneath the concrete sidewalk panels were compacted in accordance with DOT

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[2]Mr. Cannizzo states that the location of the accident was "120'-11' feet from the north curb of East 83rd Street" and found the distance to be 5'-6' North of the limits of WJL's restoration work (Cannizzo Aff at ¶¶ 10, 13).

[3]Mr. Derector also noted that there was no recent work at 193 feet north of the north curb of East 83rd Street (Derector Aff at ¶ 20).

specifications (Derector Aff at ¶ 33). Significantly, he opines that "the work performed by Con Ed, Manetta and/or its representatives was causally related to the height differential that was allegedly involved" in plaintiff's accident. He says nothing about WJL (Derector Aff at ¶ 35).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

WJL has met its prima facie burden. It established that it solely performed concrete restoration work at the direction

of Con Ed and did not work on the foundation or subsoil (Supp, Ex I at 69). Neither expert states that the work performed by WJL affected any height differential; rather, although based on different theories, the problem is believed to have stemmed from the foundation or subgrade (Cannizzo Aff at ¶¶ 8, 15-16; Derector Aff at ¶ 35).

In opposition, Giffuni does not raise a material question of fact. There is no real dispute that work was not performed at the exact site where plaintiff fell but approximately five feet away (*Lynch v Con Ed of New York, Inc.*, 2008 WL 10727216 [Sup Ct, New York County 2008] [merely showing that defendant performed work in a general area is not enough to defeat a motion for summary judgment]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005] [absent some evidence connecting defendant's work to the situs of plaintiff's injury, defendant entitled to summary judgment]).

Any argument that WJL worked in the "wrong location"--at 193 feet north of the west curb of East 83rd Street--is belied by the evidence. First, the documents Giffuni relies upon are admittedly illegible (Giffuni Opp to WJL at ¶¶ 70, 91, 94, 96 n. 4). Second, Cannizzo concluded that to the extent that 193 feet is noted on the application and the permit, it should have been 103 feet and that in any event "193 NNC of East 83rd

Street is located north of the property line . . . and it is [his] opinion that there has been no restoration of the concrete sidewalk at that location for at least ten (10) years" (Cannizzo Aff at ¶ 10). Finally, Mr. Derector also noted that there was no recent work at 193 feet north of the north curb of East 83rd Street (Derector Aff at ¶ 20).

Giffuni also raises the possibility that work performed in April 2010 by an emergency crew may have impacted the sidewalk. Giffuni acknowledges that there is "no notation of who performed the opening" in April 2010 (Giffuni Opp to WJL at ¶¶ 19, 41, 89). A WJL employee testified, however, and it is unrefuted that documents relating to April 2010 establish that work at the site was performed by Con Ed. Furthermore, the WJL employee had never seen an order for paving or restoration from Con Ed to WJL for work in April 2010 (Supp, Ex I at 63; *Trundle v 225 East 57th Street Owners, Inc.*, 2013 NY Slip Op 32705[U] [Sup Ct, New York County 2013]). There is no evidence to support a conclusion that WJL performed the April 2010 emergency work.

Most importantly, neither expert states that the work performed by WJL, whatever the location may be, could have caused the height differential that caused plaintiff's accident (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136,

140 [2002]; *Kelly v Mall At Smith Haven, LLC*, 148 AD3d 792 [2d Dept 2017]).

Because WJL established that it was not negligent in connection with plaintiff's accident and no party raised a triable issue of fact as to WJL's liability, WJL's motion for summary judgment is granted (*Witte v Incorporated Village of Port Washington North*, 114 AD2d 359 [2d Dept 1985]).

Both Manetta and Con Ed's motions[4] for summary judgment are denied as untimely as they were made after October 15, 2016 without a proper showing of good cause (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]; Giffuni Opps to Con Ed and Manetta Cross Motions, Exs B ["Any party that seeks to make a summary judgment motion must do so within 60 days after 8/15/16 . . ."]).[5] The issues presented in the motions were not the same ones as those presented by WJL and in reviewing WJL's motion it did not appear that any

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[4] The motions were improperly denominated cross motions (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 86-87 [a cross motion is a motion by any party against the party who made the original motion]).

[5] Manetta maintains that it has good cause for missing the summary-judgment deadline because depositions were being taken in August 2016. The summary-judgment-motion cutoff, however, was in October 2016--60 days after depositions were ordered to have been completed--and was set in the very same order that fixed the August 2016 depositions. Manetta, moreover, did not explain what information it needed in October 2016 that it did not already have in order to make its motion nor did it ever seek an extension of time to move.

non-moving party was entitled to judgment (*see* CPLR 3212[b]; *see also Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017]).

Accordingly, it is

ORDERED that WJL's summary judgment motion is granted and the complaint and all cross-claims against it are dismissed, with costs and disbursements to WJL as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of WJL; it is further

ORDERED that the action is severed and continued against the remaining defendants; it is further

ORDERED that the caption be amended to reflect the dismissals; and it is further

ORDERED that counsel for WJL shall serve a copy of this order on the County Clerk and Clerk of the Trial Support Office who are directed to mark the court's records to reflect the changes in the caption herein.

This is the decision and order of the court.

Dated: January 5, 2018

HON. JENNIFER G. SCHECTER