

<b>Garrett v Halcyon Constr. Corp.</b>
2011 NY Slip Op 30887(U)
April 5, 2011
Supreme Court, New York County
Docket Number: 114797/09
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

*Hon. Judge A. ... Mader*

PART 11

Index Number : 114797/2009

GARRETT, TIMOTHY

vs

HALCYON CONSTRUCTION

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the annexed memorandum Decision + OR -*

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

FILED

APR 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated:

*April 5, 2011*

J.S.C.

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

☐ SUBMIT ORDER/JUDG.

☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----X  
TIMOTHY GARRETT,  
Plaintiff,

-against-

Index No. 114797/09

THE HALCYON CONSTRUCTION CORP.,  
CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., UNITED CONSTRUCTION  
WEATHERPROOFING COMPANY, INC., DELANEY  
ASSOCIATES, LP,  
Defendants.

**FILED**

APR 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
Joan A. Madden, J.

Defendant United Construction Weatherproofing Company, Inc. ("United") moves, and defendant Delaney Associates, LP ("Delaney") cross moves, for summary judgment dismissing the complaint and any cross claims asserted against them (motion seq. no. 001). Defendant The Halcyon Construction Corp. ("Halcyon") separately moves for summary judgment dismissing the complaint and any cross claims against it (motion seq. no. 002).<sup>1</sup> Plaintiff Timothy Garrett ("Garrett") opposes the motions and cross motion. For the reasons stated below, United's motion and Delaney's cross motion are granted, and Halcyon's motion is denied.

Background

Garrett alleges that he sustained personal injuries on June 23, 2009, at approximately 11:05 p.m. when he tripped and fell as the result of a dangerous condition located on a portion of the sidewalk on Central Park South/West 59th Street, New York, New York ("Central Park

<sup>1</sup> Motion seq nos. 001 and 002 are consolidated for disposition.

South”) near its intersection with 7th Avenue, across the street from 210 Central Park South, New York, New York.

Garrett brought this action on or about October 21, 2009, asserting claims of negligence against each of the named defendants for allowing the portion of the sidewalk where he fell to become and/or remain in a dangerous condition which caused Garrett’s accident. On or about September 17, 2010, Garrett commenced an action against the City of New York under Index No. 112332/2010 and that action is currently pending before Justice Geoffrey D. Wright.

At a hearing pursuant to General Municipal Law §50-h, Garrett testified that he was familiar with the area in which the accident occurred and had probably walked through that area within one week of the accident. Transcript of 50-h Hearing of Garrett at 47-48.

Garrett testified that at the time of the accident, he approached the crosswalk and intended to head south on 7th Avenue on his way to work as a doorman at a building located at 235 West 56<sup>th</sup> Street, New York, New York. Id. at 5, 7. However, Garrett states that while stepping from the sidewalk into the crosswalk on the north side of Central Park South, he tripped on an uneven surface, possibly a piece of metal or a difference in the elevation of portions of the sidewalk. Id. at 10, 15.<sup>2</sup> Garrett testified that he did not notice any active construction or machinery in the area at the time of the accident nor did he notice any garbage or debris. Id. at 34.

An ambulance came for Garrett approximately ten minutes after the accident and took him to Roosevelt Hospital. Id. at 18. As a result of the accident, Garrett asserts that he sustained

---

<sup>2</sup> Delaney submits photographs provided by Garrett in its moving papers which allegedly show the condition of the sidewalk where Garrett fell. Delaney asserts that the photographs “document the north side of the street adjacent to Central Park, at the intersection with 7th Avenue as the loss location.” Affirmation in Support of Cross Motion ¶8. Delaney further asserts that the photographs are “focused on a metal curb protector” and that the “concrete curbing between the metal curb protector and the square sidewalk slabs appears to be broken up.” Id.

multiple injuries, including a broken right tibia, which required surgery as well as physical rehabilitation. *Id.* at 19-20, 25.

Garrett asserts that he returned to the site of the accident some weeks after he was released from the hospital and took photographs of the area, although he did not identify a specific picture at his 50-h hearing which showed the exact place where the accident occurred. At that time, Garrett observed that construction was being performed in the area and saw certain construction machinery, but did not see any workers (at least in the immediate vicinity of the accident) and did not notice the names of any construction companies. *Id.* at 43-44. Garrett contends that the condition of the sidewalk was different at the time he returned than it was on the date of the accident.

At some time after the accident, Garrett's attorney made a Freedom of Information request to the City of New York for information regarding the names of entities that were performing work on the same block where Garrett fell. Garrett identified United, Delaney, and Halcyon from the information received pursuant to this request and commenced this action against them and Consolidated Edison Company of New York, Inc.

The moving defendants answered the complaint and, before depositions were taken, each separately moved or cross-moved for summary judgment on the ground that it did not perform work in the area where Garrett fell.

In support of its motion, United submits the affidavit of Craig Policastro ("Policastro"), a Vice President of United, who denies that United performed any work in the immediate vicinity of Garrett's accident. According to Policastro, United performed entry renovation work at 222 Central Park South, New York, New York, which is located across the street and to the west of the accident site, pursuant to a contract (the "United Contract") with Gainsborough Studios, Inc.

("Gainsborough"), dated June 11, 2009.<sup>3</sup> Policastro Aff. ¶3. The United Contract has been submitted as an exhibit to United's moving papers. Additionally, Policastro states that United's work pursuant to the United Contract was commenced on July 14, 2009, which is several weeks after the June 23, 2009, accident. Id.

Delaney, an emergency sewer repair contractor, acknowledges that it performed work on the block of the accident, but asserts that this work did not impact the area of the accident. Delaney was retained to perform repairs of a sewer line on Central Park South by the City of New York, Department of Environmental Protection (the "DEP"). Delaney submits a schematic, permits, and work orders (the "Schematic") which document the area where Delaney purports to have performed its work. Frank Forte ("Forte"), a partner of Delaney, states that Delaney's work involved digging up and replacing a 26' x 7' section of the sidewalk across the street from the site of the accident and a "small perpendicular trench in the street." Forte Aff. ¶3. It appears from the Schematic that Delaney's work was performed about half a block or more to the west of the accident location, and the trench only reached about halfway across the roadway. The Schematic designates May 27, 2009, as the start date of Delaney's work and appears to designate July 19, 2009, as the completion date. Forte states that Delaney did not perform any other work in the area. Id. at ¶4.

Halcyon asserts that it did not perform any work on the sidewalk where the accident occurred, and that it did not perform any work in the area of the accident for more than three months before the accident occurred. James Pellizzi ("Pellizzi"), an employee of Halcyon who serves in the capacity of Superintendent, states that Halcyon had performed work "involving a

---

<sup>3</sup> The initial United Contract called for work to be performed in two phases with Phase 1 consisting of steel work and masonry work and Phase 2 consisting of sidewalk replacement work. However, United has put forth a letter to Policastro, dated June 12, 2009, which amends the United Contract, in part, by deleting the Phase 2 work.

broken water main in the vicinity of [Central Park South],” pursuant to a contract, Contract GE346, between Halcyon and the DEP, entered into on or around January 8, 2008, whereby Halcyon agreed to perform “Reconstruction and Replacement of Broken Water Mains on an Emergency Basis for the City of New York.” Pellizzi Aff. ¶¶2-5. However, Pellizzi states that Halcyon’s work was performed in the roadway rather than on the sidewalk. *Id.* at ¶9. He also states that Halcyon’s only work in the vicinity of the accident was performed on January 31, 2009, February 22, 2009, March 7, 2009, and March 14, 2009.

Garrett opposes United’s motion and Delaney’s cross motion on the grounds that they have not submitted sufficient evidence to succeed on their motion and cross motion and that further discovery is required. Garrett argues that United’s Contract is not sufficiently probative evidence of the date it began work and that the evidence presented by United and Delaney does not demonstrate that no other work was performed by them at the accident site.

In opposition to Halcyon’s motion, Garrett argues that Pellizzi’s affidavit is not sufficiently probative evidence that work was only performed on the four days Pellizzi identified and that it is unclear whether Pellizzi was in a position that enabled him to access all applicable work records, and that more discovery is required.

In reply, Halcyon argues that it has put forth sufficient evidence that it did not perform any work on or about the area where Garrett’s accident occurred and that Garrett has failed to provide sufficient evidence to controvert this showing.

### Discussion

On a motion for summary judgment, the proponent “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 from the case...” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d

851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). Mere “conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to create a triable issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); see also Abbenante v. Larry E. Tyree Co., Inc., 228 A.D.2d 529, 530 (2<sup>nd</sup> Dep’t 1996).

Here, United has sustained its burden on summary judgment and Garrett has failed to controvert its showing. The United Contract shows that the work United performed on Central Park South was on the opposite side of the street and to the west of the location of the accident. Additionally, United has presented the affidavit of Policastro in which he affirms that United’s work on Central Park South did not commence until July 14, 2009, which is about three weeks after the accident. Moreover, Garrett’s argument that United may have performed other work on the block at or prior to the time of the accident amounts to pure speculation which is not sufficient to create a triable issue of fact. Zuckerman v. City of New York, 49 N.Y.2d at 562. Next, that United was performing work in the vicinity of the accident, is not sufficient to raise a triable issue of fact where the evidence shows that United’s work was confined to a separate location that would not impact the condition of the accident site. See e.g. Billera v. Paolangeli, 20 A.D.3d 743 (3<sup>rd</sup> Dep’t 2005)(defendant contractor who had performed work near site of plaintiff’s fall was entitled to summary judgment where it was shown that the area of the fall was not adversely impacted by defendant’s work).

Delaney has also met its burden on summary judgment. The Schematic shows that the scope of Delaney’s work was confined to an area to the west of the accident site on the sidewalk



of the opposite side of the street and the southern portion of the roadway on Central Park South. Additionally, Forte states that Delaney performed no other work at or near the site of the accident. Garrett does not offer any evidence to contradict this showing and puts forth only speculation as to Delaney's potential liability. However, while summary judgment dismissing the complaint is appropriate, this action does not appear to have been brought in bad faith or to be frivolous and, as such, Delaney's request that costs and attorneys' fees is denied.

In contrast, Halcyon has not met its burden of demonstrating its entitlement to summary judgment. Halcyon has not submitted a copy of its contract to perform work on the water main, nor has it submitted documents detailing the scope of the work performed on each of the days prior to the accident such that the proximity of its work to the site of the accident could be determined. Additionally, Pellizzi's affidavit is insufficient to demonstrate that he has personal knowledge of all the work performed on each of the four days Halcyon was working in the vicinity of the accident prior to its occurrence. Next, even assuming arguendo that Halcyon performed all its work in the roadway, Halcyon has not shown that its work would not impact the sidewalk if it was performed in close proximity. Additionally, that a City engineer signed off on all of Halcyon's work is not sufficient to show that Halcyon's work caused no damage to the sidewalk where, as here, Halcyon has presented no proof that a City engineer inspected the area of the sidewalk where the accident occurred and determined that no damage was done as a result of Halcyon's work. In any event, such evidence may be insufficient to resolve all factual questions as to Halcyon's liability. See Munoz v. Consolidated Edison Company of New York, 198 AD2d 145 (1<sup>st</sup> Dept 1993)(noting that inspector's finding that paving work performed by defendant was satisfactory nine months prior to plaintiff's fall was insufficient to eliminate the possibility that a defect in defendant's work caused the accident); Murphy v. Omer Construction

Co., Inc., 242 AD2d 964, 966 (4<sup>th</sup> Dept 1997)(City's approval of paint used by defendant contractor to cover yellow road lines did not insulated contractor from liability).

Finally, as this action arises out of the same accident that is the subject of an action against the City of New York pending in a City part, the remainder of this action is transferred to that part and consolidated with that action as set forth below.

### Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant United Construction Weatherproofing Company, Inc. (motion seq. no. 001) is granted; and it is

ORDERED that the cross motion for summary judgment by defendant Delaney Associates, LP (motion seq. no. 001) is granted in so far as it seeks dismissal of the complaint and all cross claims against it but is denied to the extent that it seeks to have costs and attorneys fees assessed against plaintiff Timothy Garrett; and it is further

ORDERED that the motion for summary judgment by defendant The Halcyon Construction Corp. (motion seq. no. 002) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety as against defendants United Construction Weatherproofing Company, Inc. and Delaney Associates, LP; and it is further

ORDERED that this action is transferred to Justice Geoffrey Wright for consolidation with Garrett v. City of New York, Index No. 112332/2010, an action before him in which the City of New York is a defendant which arises out of the same accident at issue herein; and it is further

ORDERED that the remainder of this action is consolidated before Justice Wright with  
Timothy Garrett v. City of New York, Index No. 112332/2010 under New York County Index  
 No. 112332/2010 and the consolidated action shall bear the following caption:

Timothy Garrett,

Plaintiff,

-against-

The City of New York and The Halcyon  
 Construction Corp.

Defendants.

**FILED**

APR 12 2011

NEW YORK  
 COUNTY CLERK'S OFFICE

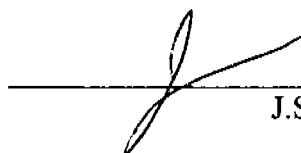
And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the  
 pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with  
 notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and  
 shall mark his records to reflect the consolidation and the amendment of the caption; and it is  
 further

ORDERED that a copy of this order with notice of entry shall also be served upon the  
 Clerk of the Trial Support Office (room 158), who is hereby directed to transfer this action to  
 Justice Wright and to mark the court's records to reflect the consolidation.

Dated: April 5, 2011

  
 J.S.C.