EXHIBIT 22

Cited
As of: October 17, 2026 5:43 PM Z

Mishgy, LLC v. City of New York

Supreme Court of New York, Kings County

November 27, 2007, Decided

13261/06

Reporter
17 Misc. 3d 1132(A) *; 851 N.Y.S.2d 71 **; 2007 N.Y. Misc. LEXIS 7728 ***; 2007 NY Slip Op 52239(U) ****; 239 N.Y.L.J. 1

[**1]** Mishgy, LLC, Plaintiff, against City of New York and Demicco Bros., Inc., Defendants. Fump, LLC, Plaintiff, against City of New York and Demicco Bros., Inc., Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

Core Terms

flush, traffic, street, reconstruct, disclosure, front, evidentiary, obstruct, closure, ingress, egress

Headnotes/Summary

Headnotes

[*1132A] **[**71]** Municipal Corporations--Tort Liability--Owners of property abutting roadway construction may recover for economic loss resulting from disruption only with expert proof of negligence.

Counsel: **[***1]** Plaintiff was represented by Michael S. Gold, Esq.

Defendant City of New York was represented by Warren Shaw, Esq. of the Corporation Counsel of the City of New York.

Defendant Demicco Bros., Inc. was represented by Robyn J. Leader, Esq. of Cafora Klar Gallo Vitucci Pinter & Cogan.

Judges: Jack M. Battaglia, Justice, Supreme Court.

Opinion by: Jack M. Battaglia

Opinion

Jack M. Battaglia, J.

In these separate actions, Mishgy, LLC and Fump LLC, each the owner of real property abutting Flushing Avenue in Brooklyn, seek compensation from the City of New York and its contractor, Demicco Bros., Inc., for alleged economic loss resulting from a major reconstruction of the Avenue. The three-year reconstruction project extended over three miles of roadway, and included water mains, sewers, catch basins, hydrants, sidewalks, curbs, lighting, and trees, at a contract cost in excess of $ 40 million. Defendants move for summary judgment of dismissal.

Mishgy, LLC is the owner of real property designated 1127 Flushing Avenue, which it leased in January 2000 to Shing Corp. for use as a gas station and convenience store. Fump, LLC is the owner of real property designated 1052 Flushing Avenue, which it leased in November 1999 to Mocha **[***2]** Management, LLC for use as a carwash and convenience store. Mishgy and Fump each allege that, because of the disruption to the businesses of their respective lessees caused by the reconstruction project, it lost rental income, in the case of Mishgy of at least $ 98,155.00, and in the case of Fump of at least $ 119,017.74. The disruption is alleged to have begun in April/May 2004, and to have continued into 2007.

Mishgy and Fump allege that the reconstruction project reduced vehicular traffic on Flushing Avenue and deprived motorists of access to the respective properties and the vehicle-related services provided on the premises. (The allegations of the respective Verified Complaints, and most of the papers submitted by the parties on these motions, are identical except as to certain particulars; to the extent the papers are identical, citations to the record in this opinion will be to the papers as they appear on the Mishgy motions.) Specifically, Mishgy and Fump each allege that the City

and Demicco "neglected and negligently failed to maintain the street in front of the Premises in an open and accessible condition, resulting in the partial closure of the street and impeding the ingress **[***3]** and egress to the plaintiff's property and driveway in front of the Premises," and that "when ingress and egress was accessible it was only limited and not reasonable, thereby resulting in Plaintiff's and its agents' loss of business and income." (Verified Complaint, PP 9, 14.) Mishgy and Fump allege further that the "situation [was] exacerbated by the defendants' changing the traffic pattern on Flushing Avenue from two ways to one way, thereby further diverting vehicular traffic away from the Premises." (*Id.,* P 12.)

As to Demicco, moreover, Mishgy and Fump allege that its contract with the City "provided that said construction work in front of the premises was to be performed in a manner so as to maintain ingress and egress to the premises so that the plaintiff, its agents and general public would have at all times reasonable access to and from the premises, but that Demicco, "in breach of its contractual obligation and in negligently performing its work in front of the premises, blocked the ingress and egress to the Premises and thereby denied the public access." (*Id.,* at 21-22.)

[**2]** No disclosure has taken place in either of the actions. Demicco demanded a bill of particulars from **[***4]** each of the plaintiffs, and each complied, but the additional pleading does not materially alter or supplement the allegations in the complaint. Movants proceed, therefore, on the basis of affidavits and argument from caselaw. The City offers the Affidavits of Suzanne Elstein, who provides the evidentiary foundation for photographs taken of the Mishgy and Fump properties on April 4, 2007; and the Affidavits of Marie Brandao, a Construction Project Manager with the City's Department of Design and Construction and Engineer in Charge of the reconstruction of Flushing Avenue. Demicco offers the Affidavits of Frank Demicco, its President.

Although there does not appear to be an abundance of caselaw addressing property owners' claims for damages allegedly resulting from disruption during public construction projects, it has long been held, in the absence of negligence, that there will be no liability for interference with access to property unless the interference is both total and permanent. (*See* Matter of O'Brien v City of Syracuse, 54 AD2d 186, 189, 388 N.Y.S.2d 866 [4th Dept 1976]; Beck v State of New York, 21 AD2d 939, 940, 251 N.Y.S.2d 288 [3d Dept 1964]; Welbilt Corp. v State of New York, 80 Misc 2d 439, 441-43, 363 N.Y.S.2d 766 [Ct Claims 1975]; **[***5]** *see also* Coffey v State of New York, 291 NY 494, 496-97, 53 N.E.2d 362 [1944].) "[W]hile it may well be that [Plaintiffs] suffered disproportionately because of their location or the nature of their businesses, the law is clear that without permanent lack of access there is no appropriation, *de facto* or otherwise." (*See* Beck v State of New York, 21 AD2d at 940.) Neither Mishgy nor Fump alleges a permanent loss of access, and neither cites any authority that anything less will suffice.

Although "an adjoining property owner . . . has the right to use the street and highway in front of his premises, subject at all times to . . . work in the street necessary for its repair and maintenance, or for the construction of other public utilities," "[t]he law . . . does afford him relief, if the city or a contractor interferes with the highway without authority; or, if acting legally, prolongs the work unnecessarily or unreasonably." (Farrell v Rose, 253 NY 73, 76, 170 N.E. 498 [1930].) "The obstruction of streets and highways or the work carried on in them of a public nature must be reasonable and necessary for the public improvement which is being made." (*Id.; see also* Quaglia v Incorporated Vil. of Munsey Park, 54 AD2d 434, 438-39, 389 N.Y.S.2d 616 [2d Dept 1976], **[***6]** *aff'd* 44 NY2d 772, 377 N.E.2d 473, 406 N.Y.S.2d 30 [1978]; Seril v Bureau of Highway Operations of the Dept. of Transp. of City of NY, 245 AD2d 233, 236, 667 N.Y.S.2d 42 [1st Dept 1997]; J.J. Johnson Restaurant, Inc. v City of New York Dep't. of Env. Prot., 216 A.D.2d 359, 359, 628 N.Y.S.2d 533 [2d Dept 1995]; Welbilt Corp. v State of New York, 80 Misc 2d at 443.)

On these motions, therefore, the City and Demicco must each establish *prima facie* that the work carried on in the reconstruction of Flushing Avenue was reasonable and necessary, that is, that it had been not performed negligently. (*See Trocchia v Yonkers Construction Co., Inc., 250 AD2d 599, 599, 672 N.Y.S.2d 247 [2d Dept 1998].*) If such a showing is made, Mishgy and Fump must create a triable issue "by the testimony of men familiar with this class of work and with the situation" that the work was "unreasonable and unnecessary." (*See* Farrell v Rose, 253 NY at 80; *see also* ***[****3]*** J.J. Johnson Restaurant, Inc., 216 AD2d at 359 ["evidence from an expert in road construction"].) In making these assessments, the Court notes that it is not aware of any case in which a property owner has succeeded in obtaining damages as a result of the obstruction of a public roadway or interference with access to the property, where there **[***7]** has not been a

compensable "taking" of at least a part of the property.

The City contends in the first instance, based upon the Affidavits of Suzanne Elstein, that "[i]t is nothing less than frivolous" for Mishgy and Fump "to contend that the work on Flushing Avenue cut off vehicular access" to their respective properties. (Memorandum of Law in Support of Motion for Summary Judgment, at 6-7.) And so, their respective claims for damages are "patently meritless on the factual level." (*Id.,* at 7.) Ms. Elstein asserts, based upon her April 2007 inspections and illustrated by the photos she took, that as to Mishgy the property "has street frontage on three sides . . . [and] is accessible via Flushing Avenue, Varick Avenue and Thames Street" (Affidavit of Suzanne Elstein, P 6), and that as to Fump the property "has street frontage on three sides . . . [and] is accessible via Flushing Avenue, George Avenue, and Knickerbocker Avenue" (Affidavit of Suzanne Elstein, P 6.)

Assuming, however, that it may fairly be inferred that the physical configuration of the properties as to street access was the same during the period of Defendants' work on Flushing Avenue, the City cites no authority that a **[***8]** denial of access caused by negligence must be either total or permanent to be actionable. As a factual matter, moreover, there is not even an assertion that suitable access to the Mishgy and Fumps properties would have been maintained through these other streets even when, as alleged, Flushing Avenue was obstructed. On the records presented on these motions, the most that can be said is that any additional street access to and from the properties would certainly be important to the fact and amount of loss that would result from denial of access to and from Flushing Avenue.

The City's showing, which Demicco explicitly relies upon (*see* Affirmation in Support, P 7), depends primarily upon the Affidavits of Marie Brandao, the Engineer in Charge of the Flushing Avenue reconstruction project. Ms. Brandao describes the scope of the project and the City's attempts to mitigate the disruption resulting from the work, including a requirement that "at least one lane of traffic be kept open while the Contract work is under way." (Affidavit of Marie Brandao, P 7.) As to the stretch of Flushing Avenue on which Mishgy's and Fump's properties abut, Demicco was required to "make the street . . . one-way **[***9]** eastbound, maintaining one twelve-foot traffic lane for through traffic, during the course of the water and sewer construction and the final concrete roadway restoration." (*Id.,* P 8.) The Flushing Avenue reconstruction project, "scheduled to take approximately three years [was] on schedule." (*Id.,* P 5.)

Ms. Brandao asserts that the nature and extent of the work required "opening and working in the street for a significant period of time," and that "interference with normal traffic flow [was] unavoidable." (*Id.,* P 10.) Based upon the records available to her, including the reports and other documents prepared by the City's field inspectors, Ms. Brandao suggests that Flushing **[****4]** Avenue was not "completely blocked at any time during the course of the Contract work." (*Id.,* P 11.) Because the City "is well aware of the significance of Flushing Avenue in the overall traffic pattern in Brooklyn, . . . if Flushing Avenue had been completely blocked, that fact would have been noted." (*Id.,* P 11 n.3) As to access to the Mishgy and Fump properties from Flushing Avenue, since the project "included curbside work such as replacing the fire hydrants, the curbs and sidewalks," "temporary loss of vehicular **[***10]** access [was] unavoidable, if the reconstruction work was to be accompanied." (*Id.,* PP 12-13.)

Ms. Brandao also suggests, based upon the records available to her, that neither Mishgy nor Fump complained about the work (*id.,* P 12), or sought "an exemption from any of the Contract's mandated curbside work . . . so as to ensure that the Contract work would not obstruct street access to the Premises" (*id.,* P 14.) Her Affidavit, however, does not supply a sufficient evidentiary foundation to permit an inference that no complaint was made or request for exemption submitted. (*See* *Whitfield v City of New York, 16 Misc 3d 1115[A], 847 NYS2d 899, 2007 NY Slip Op 51433[U], *5-7 [Sup Ct, Kings County]*.)

The Affidavits of Frank Demicco likewise suffer from evidentiary deficiencies. Mr Demicco asserts that defendant Demicco did not receive "any complaints or requests" from Mishgy or Fump "regarding access or a loss of access to its premises"; and that "the work performed by Demicco Bros. pursuant to the Contract never caused a complete closure of Flushing Avenue in the vicinity" of Mishgy's or Fump's property "or obstructed the required traffic lane on the roadway in question." (Affidavit of Frank Demicco, **[***11]** PP 14-17.) Absent from the Affidavits, however, is any evidentiary foundation for these statements. (*See* *Barraillier v City of New York, 12 AD3d 168, 169, 784 N.Y.S.2d 55 [1st Dept 2004]*; *Dempsey v Intercontinental Hotel Corp., 126 AD2d 477, 479, 511 N.Y.S.2d 10 [1st Dept 1987]*.)

The Court concludes, nonetheless, that the City and

Demicco have made a sufficient showing that the Flushing Avenue reconstruction and the manner in which it was done, insofar as it affected Mishgy and Fump, were "reasonable and necessary for the public improvement . . . being made." (*See* Farrell v Rose, 253 NY at 76.) The Court recognizes that the Brandao Affidavits are not explicitly cast in these terms, particularly as to "reasonableness," but the Affidavits as a whole, and the specific assertions of a competent witness that interference with traffic flow and access were "unavoidable," must be so understood.

The Court also recognizes that the Brandao Affidavits do not address specified acts or omissions that might have affected traffic flow or access to the Mishgy and Fump properties -- the consequence perhaps of the City's seeking dismissal of the Verified Complaints before disclosure has been had on either side. But the Verified Bills **[***12]** of Particulars indicate that such specifics would not readily be obtained, and, in the context of the applicable caselaw and the facts of these actions, such specifics are appropriately left to Mishgy and Fump and their respective responses to these motions.

In opposition, Mishgy proffers the Affidavit of Manny Shurka, one of its members, and **[****5]** Fump proffers the Affidavit of Esther Zernitsky, a managing member. Each affidavit is accompanied by identical copies of 34 photographs, many of which are indecipherable. Neither Affidavit provides any identification or description of the photographs, nor any authentication or other foundation for their use as evidence. We are not told when the photographs were taken, or how they relate to the allegations of the Verified Complaints. In short, the photos lack any evidentiary value. (*See* Wasserman v Genovese Drug Stores, Inc., 282 AD2d 447, 448, 723 N.Y.S.2d 191 [2d Dept 2001]; Morales v City of New York, 278 AD2d 293, 293, 717 N.Y.S.2d 344 [2d Dept 2000].)

The Affidavit of Manny Shurka on behalf of Mishgy fails to state that its assertions are made on personal knowledge, and does not otherwise provide a foundation for admissibility. The Affidavit does not, in any event, address the **[***13]** allegations of lack of access to and from Flushing Avenue. The only assertions in any way relevant to any of the allegations of the Verified Complaint are that "there was only one lane open for moving traffic," which "was extremely narrow and . . . did not allow for trucks and other commercial vehicles to travel on Flushing Avenue." (Affidavit of Manny Shurka, P 4.) There is no support, expert or otherwise, for any inference that the reduction to one lane of traffic was not necessary and reasonable, or that a 12-foot lane was not necessary or reasonable, nor is there a statement as to the width of the lane or that it was less than 12 feet. The Affidavit of Manny Shurka fails to raise a triable issue.

The Affidavit of Esther Zernitsky on behalf of Fump fails to state that its assertions are made on personal knowledge, and does not otherwise provide a foundation for admissibility. Ms. Zernitsky asserts that "there was only one narrow lane for moving traffic creating unreasonable ingress and egress to the property" (Affidavit of Ester Zernitsky, P 4), but there is no support, expert or otherwise, for the conclusory allegation of unreasonableness. Ms. Zernitsky also asserts that "a number **[***14]** of days during this period of the construction work, the front of the premises was completely closed by the construction crew and numerous complaints to the construction crew was given by us" (*id.*) In addition to the lack of specificity and the absence of any statement as to the effect of closure at "the front of the premises" on access to the premises, there is no support, expert or otherwise, for an inference that the closure was not necessary and reasonable. The Affidavit of Esther Zernitsky fails to raise a triable issue.

Neither the Affidavit of Manny Shurka nor the affidavit of Esther Zernitsky provides any support for the allegations in the Verified Complaints that Demicco breached its contract with the City, in the face of the clear implication of Ms. Brandao's Affidavits that there was no breach. Even if there were a breach, however, the remedy would belong to the City and not to Plaintiffs. (*See* Farrell v Rose, 253 NY at 79-80.)

The Court has not ignored the lack of disclosure to date, but Plaintiffs do not state that they have served disclosure demands that have not been complied with, and they do not describe the disclosure they could fairly seek given the lack of specificity **[***15]** of their allegations. "[D]epositions to see if this contract [between the City and Demicco] was in fact followed" (Affirmation in Opposition, P 12) would, at best, be of limited relevance. Disclosure is not required to allow Plaintiffs to provide evidentiary support for specifics as to closure of Flushing **[****6]** Avenue or denial of access to and from it, or as to any objectionable act or omission of the contractor, so as to allow for even an inference of negligence. With such evidence, the lack of disclosure to date might well have warranted denial of the pending motions; without it, the motions must be granted.

The motion of the City of New York and the cross-motion of Demicco Bros., Inc. for dismissal of the Verified Complaint of Mishgy, LLC are granted.

The motion of the City of New York and the cross-motion of Demicco Bros., Inc. for dismissal of the Verified Complaint of Fump LLC are granted.

November 27, 2007

Jack M. Battaglia

Justice, Supreme Court

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