

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33931
Y/prt

_____AD3d_____

Argued - January 20, 2012

WILLIAM F. MASTRO, A.P.J.
DANIEL D. ANGIOLILLO
RANDALL T. ENG
JEFFREY A. COHEN, JJ.

2011-01352

DECISION & ORDER

Nekesha Moore, et al., respondents, v City of Yonkers, et al., defendants, New York Ladder & Scaffold Corp., defendant third-party plaintiff-appellant; Consolidated Edison Company of New York, third-party defendant.

(Index No. 10530/06)

Gruvman, Giordano & Glaws, LLP, New York, N.Y. (Paul S. Gruvman of counsel),
for defendant third-party plaintiff-appellant.

Hershman & Leicher, P.C., New York, N.Y. (Marvin H. Leicher of counsel), for
respondents.

In an action to recover damages for personal injuries, etc., the defendant third-party plaintiff New York Ladder & Scaffold Corporation appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Loehr, J.), entered January 4, 2011, as denied its motion for summary judgment dismissing the complaint and all cross claims and counterclaims insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs and the motion of the defendant third-party plaintiff New York Ladder & Scaffold Corp. for summary judgment dismissing complaint and all cross claims and counterclaims insofar as asserted against it is granted.

The plaintiff Nekesha Moore allegedly was injured when she tripped and fell in a sidewalk depression in front of property owned by the defendant 1225 Yonkers Ave. Realty Corp.

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and leased by the defendant 1225 Lauderie Corp.

The tenant of the property previously had contracted with the defendant-third-party plaintiff New York Ladder & Scaffold Corp. (hereinafter NY Ladder) for the rental and installation of a sidewalk shed to shield the public sidewalk abutting the subject premises from any debris which might fall from a building on the property that had been damaged in a fire. Thereafter, a crew of workers from the third-party defendant Consolidated Edison Company of New York, Inc. (hereinafter Con Ed) had removed a section of the sidewalk in order to cap the gas service to the building. The plaintiffs do not dispute that the Con Ed workers left the subject depression in the sidewalk as a result of the manner in which they back-filled the excavated portion of the sidewalk.

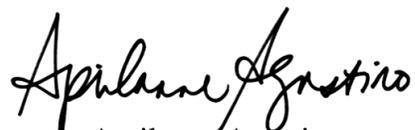
Contrary to the determination of the Supreme Court, NY Ladder demonstrated its prima facie entitlement to summary judgment dismissing the complaint and all cross claims and counterclaims insofar as asserted against it by establishing that it owed the injured plaintiff no duty of care with regard to the sidewalk by reason of its contract with the tenant of the subject premises (*see Church v Callanan Indus.*, 99 NY2d 104, 111; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139-141; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 213-214). In opposition to the motion, the plaintiffs failed to raise a triable issue of fact. NY Ladder's limited contractual undertaking was not a comprehensive and exclusive property maintenance obligation intended to displace the owner's or tenant's duty to safely maintain the area (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588; *Spitzer v Tranese*, 72 AD3d 674, 675), nor could NY Ladder be held liable pursuant to a special use theory with regard to the sidewalk (*see Kaufman v Silver*, 90 NY2d 204, 207-208; *Strauss v Thomas Paul Homes, Inc.*, 88 AD3d 688, 689; *Delgardio v Davis*, 86 AD3d 589, 590).

Moreover, the plaintiffs did not allege that the sidewalk shed erected by NY Ladder created a dangerous or defective sidewalk condition so as to launch an instrumentality of harm (*cf. Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809; *Phillips v Seril*, 209 AD2d 496), nor is there any suggestion that the sidewalk shed directed the injured plaintiff toward the sidewalk depression (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426).

Furthermore, even if the plaintiffs had succeeded in establishing that NY Ladder owed them a duty of care under the circumstances, NY Ladder demonstrated that it had no actual or constructive notice of the sidewalk condition, and the plaintiff failed to raise a triable issue of fact in opposition to that showing.

MASTRO, A.P.J., ANGIOLILLO, ENG and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court