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

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 117170/2003

CRAFTS, KATHY

VS

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 117170/2003

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

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

Dated: 3/14/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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KATHY CRAFTS and TIMOTHY BELAIR,
Plaintiffs,

Index Number 117170/2003
Mot. Seq. Nos. 002, 003

against

THE CITY OF NEW YORK, BOVIS LEND LEASE LMB, INC., and 42/9 RESIDENTIAL, LLC, ATLANTIC-HEYDT CORPORATION, and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendants.

DECISION AND ORDER

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Papers considered in review of these motions for summary judgment:

	Papers[1]	Numbered
Seq. 002	Notice of Motion and Affidavits Annexed, Memo of Law	1,2
	Affirmation in Opposition	3
	Reply Affirmation	4
Seq. 003	Notice of Motion and Affidavits Annexed	1
	Affirmation in Opposition	2

PAUL G. FEINMAN, J.:

The motions bearing sequence numbers 002 and 003 are consolidated for purposes of decision.

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[1]Atlantic-Heydt requests that plaintiff's opposition papers be disregarded by the court, as they were served only on August 22, 2007, one day before the August 23, 2007 return date, rather than seven days as required under the CPLR, citing *Risucci v Zeal Mgmt. Corp.*, 258 AD2d 512 (2d Dept. 1999). However, inasmuch as these motions were repeatedly adjourned throughout September, October and November 2007 and the court would have permitted an opportunity to address any late served papers, the court has considered plaintiffs' opposition papers. Even were the court to disregard plaintiffs' papers, Atlantic-Heydt does not establish its entitlement to summary judgment.

In motion sequence number 002, defendant Atlantic-Heydt Corporation moves for summary judgment and dismissal of the complaint and all cross-claims as against it. In motion sequence number 003, defendants Bovis Lend Lease LMB, Inc., and 42/9 Residential, LLC, move for summary judgment and dismissal of the complaint and all cross-claims with prejudice as against them. For the reasons which follow, the motions by Atlantic-Heydt and by Bovis Lend Lease-42/9 Residential are granted in part and otherwise denied.

Factual Background

Plaintiff Kathy Crafts was injured on October 19, 2002, when she was caused to trip and fall on the sidewalk located on the east side of Ninth Avenue between 42nd and 43rd Street. That area of Ninth Avenue was the site of ongoing construction of an apartment building (Atl.-Heydt Mot. Ex. D, Crafts EBT 50).[2] She described the sidewalk in the general area where she fell as being "broken up" and having "major cracks," one of which tripped her and caused her to fall (Crafts EBT 36, 37-38).

In November 2001, defendant Bovis Lend Lease LMB, Inc., had contracted with defendant 42/9 Residential, the owner of the property, to construct an apartment building on 42nd Street and Ninth Avenue (Bovis Mot. Ex. K, contract). Defendant Atlantic-Heydt, whose business was erecting scaffolds, was hired by Bovis to install a protective walkway over the next to the construction site, as well as an elevator hoist (Atl.-Heydt Mot. Ex. E, Connolly EBT [hereinafter Connolly EBT] 10, 13, 19, 20). This walkway, or bridge, was built along part of Ninth Avenue and along part of 42nd Street (Connolly EBT 50). Atlantic-Heydt began work at

[2]The construction lasted from the latter part of 2001 to the latter part of 2003 or the beginning of 2004 (Atl.-Heydt Mot. Ex. F, Marina EBT 36).

the site about the beginning of the summer in 2002 and was finished sometime in 2003 (Connolly EBT 9-10). The pedestrian walkway was built "close to the curb line and tight to the building line or the new building structure that's going up" (Connolly EBT 28: 4-7). Its legs were made of steel and the "feet" were placed on wood pads or shims directly onto the sidewalk (Connolly EBT 29-30). The legs supported a wood and metal "platform" raised overhead (Connolly EBT 29).

The photograph taken by plaintiff of the area where she fell shows a plywood fence abutting the construction site, and two plywood pieces forming a gate (Pl. Aff. in Opp. to Atlantic-Heydt Mot. Ex. D ["photograph 10"]). This was part of the pedestrian protection built by Atlantic-Heydt; the gate opened so as to enable truck deliveries into the work site (Atl.-Heydt Mot. Ex. F, Marina EBT [hereinafter Marina EBT] 47-48, 67). The gate was attached to a metal pole embedded by Atlantic-Heydt into the sidewalk with cement (Marina EBT 47-48).

The walkway structure was approved by Bovis (Connolly EBT 33). Atlantic-Heydt's director of safety, John Connolly, had regular contact with Bovis's general supervintendent of the job site, Henry Marino (Connolly EBT 33). No one in Atlantic-Heydt had the duty of inspecting the walkways for pedestrian safety (Connolly EBT 27). Any warning signs for pedestrians would have been posted by the contractor (Connolly EBT 7, 39). He also did not know of any complaints made about the pedestrian bridge prior to October 19, 2002 (Connolly EBT 43-44, 50). Connolly was also not aware of any complaints about the sidewalk prior to plaintiff's accident on October 19, 2002 (Connolly EBT 35).

Henry Marina, vice president and Senior Superintendent for Bovis, was the overall coordinator of job site activities, handled "some safety and scheduling," and was in charge of

overseeing the Bovis field staff (Marina EBT 7, 8, 11). He obtained the permits for the sidewalk bridge and the fencing (Marina EBT 57-60; 62-63). He coordinated with Atlantic-Heydt in the building of the sidewalk bridge, but noted that Atlantic-Heydt had its own supervision (Marina EBT 24). However, his duties included ensuring that pedestrians remained safe during and after the sidewalk bridges were erected, "to the best of our ability" (Marina 29). Marina was not aware of any complaints about the Ninth Avenue sidewalk's condition prior to October 19, 2002, nor was he aware of any change made to the sidewalk as a result of erecting the bridge or the fence (Marina EBT 26, 27-28). He did not notice any change in the sidewalk condition after the pole was embedded to support the gate structure, nor did he hear any complaints (Marina EBT 48, 49). Marina noted that it was the routine practice for Atlantic-Heydt to notify Marina if it made any bridge repairs, and Marina would note such in his daily log; he was unaware of any repairs made to the bridge near the time of plaintiff's accident (Marina EBT 32). Marina did not remember ever contacting Atlantic-Heydt regarding a problem with its work or materials prior to October 19, 2002 (Marina EBT 69-70).

Deposition testimony was also taken from the assistant director of the Big Apple Pothole and Sidewalk Protection Committee (Atl.-Heydt Mot. Ex. G, Andrea Kinloch EBT 8, 11-12). Andrea Kinloch testified that maps date-stamped September 20, 2002, October 19, 2001, September 7, 2000, and September 29, 1999, were delivered to the City's Department of Transportation, each representing the area of the east side of Ninth Avenue between 42nd and 43rd Streets, and showing that in the area on Ninth Street closely approximating the area where plaintiff fell, an investigator in each of those four years, had indicated with a symbol that there was "raised or uneven sidewalk" (Kinloch EBT 12-14, 15, 16-17). Kinloch conceded that the

maps give approximate locations of the defects (Kinloch EBT 18). None of the maps, however, indicated that construction was going on at the side (Kinloch EBT 31-32).

Plaintiffs' claims as against both Atlantic-Heydt and Bovis Lend Lease-42/9 Residential are that they negligently created a dangerous condition or had actual or constructive notice of the condition that caused her injuries and failed to rectify it, and that they violated Labor Law sections 200 and 241, New York City Administrative Code sections 16-213, 19-109, 19-138, 19-146, and 19-152, concerning sidewalks and streets, and 34 RCNY § 2-05, concerning construction activity.

Legal Analysis

Summary judgment is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [1992]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). The burden of opposing such a motion is to demonstrate by admissible evidence the existence of a material issue of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 563

[1980]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*See, Thanasoulis v National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1st Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer suspicions, surmises, and accusations (*Zuckerman v City of New York, supra,* at 557).

To establish a prima facie case of negligence, plaintiff must demonstrate (1) that defendant owed him or her a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 (2002). It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy" (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], *aff'd* 72 NY2d 888 [1988], citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 [1983]). The scope of any such duty of care varies with the foreseeability of the possible harm (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]).

An independent contractor does not normally owe a duty of care to a non-contracting third party unless, among the few exceptions, the contractor either created an unreasonable risk of harm, or increased the risk (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept. 2004]).

At the time of plaintiff's accident in 2002, the law in the City of New York was that liability for injuries sustained as a result of negligent maintenance of or the existence of

dangerous and defective conditions to public sidewalks was placed on the municipality and not the abutting landowner. The abutting landowner would be held liable where the sidewalk was constructed in a special manner for the benefit of the abutting owner, where the abutting owner affirmatively caused the defect, where the abutting landowner negligently constructed or repaired the sidewalk, or where a local ordinance or statute specifically charged the abutting landowner with a duty to maintain and repair the sidewalks and imposed liability for injuries resulting from the breach of that duty (*Hausser v Giunta*, 88 NY2d 449, 453 [1996], citations omitted).

Although Atlantic-Heydt argues in its motion for summary judgment that it did not change the surface of the sidewalk along Ninth Avenue between 42nd and 43rd Streets, the testimony by Bovis's witness that the pole on which the plywood gate was hinged was embedded into concrete in the sidewalk by Atlantic-Heydt, raises a question of fact as to whether that embedding caused or exacerbated a previous sidewalk condition, and whether the sidewalk bridge and fencing required further protective measures for passersby on the sidewalk. Accordingly, the branch of Atlantic-Heydt's motion for summary judgment and dismissal of the negligence claim is denied.

Similarly, the motion by Bovis Lend Lease-42/9 for summary judgment is denied. The cracks in the sidewalk seen in the photograph are notably at the area of the gate built by Atlantic-Heydt through which construction trucks entered from the street into the construction site. This portion of the sidewalk was used in a special manner by defendants in order to facilitate the construction of the building, and raises the question of whether the sidewalk should have been repaired or was in fact damaged during the course of the construction work (*see Moschillo v City of New York*, 290 AD2d 260 [1st Dept. 2002] [abutting landowner not liable to pedestrian on

public sidewalk unless it caused the defect to occur because of some special use of the sidewalk]). To the extent that Bovis suggests that the complaint should be dismissed because the sidewalk defect was "trivial," such a determination is best left for a jury (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept. 2000]).

Plaintiffs tacitly concede, by not responding to the defendants' arguments, that neither Labor Law section applies to them, as they are not within the class of persons intended to be protected under the statutes (*see, Laye v Shepard*, 48 Misc 2d 478 [Sup. Ct. NY County 1965], *aff'd* 25 AD2d 498 [1st Dept 1966] [where key fact appears in movant's papers and is not referred to by opposing party, it is deemed admitted]). Accordingly, the branch of the motions seeking summary judgment and dismissal of the Labor Law claims is granted as to both Atlantic-Heydt and Bovis Lend Lease-42/9 Residential.

Section 16-213 of the Administrative Code specifically concerns the duty to remove snow and dirt on sidewalks. As there is no allegation of snow or dirt, summary judgment and dismissal of this cause of action is granted as against both Atlantic-Heydt and Bovis Lend Lease-42/9 Residential.

The remaining regulations at issue are in Chapter 1 of Title 19 of the Administrative Code, which addresses streets and sidewalks, in particular, their construction, maintenance, repair, obstruction, or closure. While the general definition in the Administrative Code of "street" encompasses a sidewalk (NYC Admin. Code § 1-12 [13]), under chapter 1 of Title 19, "sidewalk is defined specifically as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property line, but not including the curb, intended for the use

of pedestrians" (NYC Admin. Code § 19-101 [d]). The definition of "street" under Title 19, chapter 1, remains the same as that set forth in the general provisions (NYC Admin. Code § 19-101 [c]). Thus, under Title 19, when a provision refers to a "street," it may include a sidewalk, but when it refers to a "sidewalk," the term is defined separately.

Section 19-109 concerns protective measures to be taken by anyone who opens or disturbs the pavement or excavates in a public street, or uses part of a street (or sidewalk) in a manner that obstructs travel, and requires protective barriers, warning signs, and other measures. Section 19-138 makes it unlawful to break or injure any street (or sidewalk). As discussed above, there are questions of fact concerning the work such that summary judgment and the branch of the motions seeking summary judgment and dismissal of these two Code provisions must be denied as against these defendants.

Section 19-146 makes it unlawful to cause any street to be raised or any portion removed without permission. There are no allegations that the portion of the sidewalk along Ninth Avenue on which plaintiff was caused to trip, was "raised" or "removed" by any of the moving defendants. Accordingly, the branch of the motions seeking summary judgment and dismissal as to this claim is granted as against both Atlantic-Heydt and Bovis Lend Lease-42/9 Residential.

Section 19-152 sets forth the duties and obligations of property owners with respect to sidewalks. At the time of plaintiff's accident, the Code obligated the landowner to make sidewalk repairs when directed to do so by the New York City Department of Transportation. There have been no allegations that the City directed the property owner, 42/9 Residential, to repair the sidewalk. Neither Atlantic-Heydt nor Bovis are the property owners. Accordingly, the branch of the motions seeking summary judgment and dismissal as to this claim is granted as to

both Atlantic-Heydt and Bovis Lend Lease 42/9 Residential.

24 RCNY 2-05 is a wide-ranging rule, entitled "Construction Activity," which sets forth requirements as concerning obtaining and posting of permits and need for permits as concerns various construction activities. Included are sections addressing the protection and illumination of obstructions on streets; the protection of streets to prevent damage; labeling of containers; storage of construction materials and spaces for storage; the temporary closing of sidewalks or the building of temporary pedestrian walkways in the roadway; placement of shanties or trailers on the streets; permits for crossing of sidewalks for delivery or removal of construction material or equipment. Plaintiffs do not elucidate which sections of Rule 2-05 are at issue, other than to state that "there is evidence and testimony which confirmed various placement of construction material and vehicles interfering with pedestrian traffic on the sidewalk." (Pl. Aff in Opp. to Atl-Heydt p. 11). They offer nothing to suggest that defendants did not obtain the pertinent permits as concerns the placing of construction material and vehicles on the sidewalk, or that the construction material or vehicles contributed to plaintiff's trip and fall. The court cannot parse from the testimony and documentary evidence what portions of Rule 2-05 are at issue and what allegations support their claim. Accordingly, the branch of the motions for summary judgment and dismissal of this cause of action as to Atlantic-Heydt and Bovis Lend Lease-42/9 Residential is granted. It is

ORDERED that motion sequence number 002 for summary judgment and dismissal of the complaint and cross-claims as against Atlantic-Heydt is granted to the extent that the claims alleging violation of Labor Law §§ 240 and 200, New York City Administrative Code §§ 16-213, 19-146, and 19-152, and 24 § RCNY 2-05, are dismissed, and the remainder of the

action as against Atlantic-Heydt Corporation is severed and continues; and it is further

ORDERED that motion sequence number 003 for summary judgment and dismissal of the complaint and cross-claims as against Bovis Lend Lease-42/9 Residential is granted to the extent that the claims alleging violation of Labor Law §§ 240 and 200, New York City Administrative Code §§ 16-213, 19-146, and 19-152, and 24 RCNY § 2-05, are dismissed and the remainder of the action as against Bovis Lend Lease LMB, Inc., and 42/9 Residential, LLC, is severed and continues; and it is further

ORDERED that the Clerk of the Court is to enter partial summary judgment in accordance with the foregoing upon service of a copy of this decision and order with proof of service of notice of its entry upon all parties; and it is further

ORDERED that the parties are to appear as previously scheduled for their Last Clear Chance pre-trial conference before J.H.O. William Leibovitz on May 19, 2008, at 11:00 a.m., at 80 Centre Street, Room 103.

This constitutes the decision and order of the court.

Dated: March 14, 2008
New York, New York

J.S.C.