

Korie v 27 W. 71st St. LLC

2009 NY Slip Op 32649(U)

November 9, 2009

Supreme Court, New York County

Docket Number: 102567/08

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 31

Index Number : 102567/2008

KORIE, MICHAEL

VS.

27 WEST 71ST STREET

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

FILED

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits 11/5/2009

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby ORDERED that the motion of defendants Tower Building Services, Inc., and Empire Scaffolding Systems, Inc. for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiff Michael Korie, and/or, pursuant to CPLR §3212, granting them summary judgment is granted, and the Complaint against Tower and Empire is dismissed; and it is further

ORDERED that the branch of the cross-motion of defendant Central Park West Hospitality LLC for an order, pursuant to CPLR §3212, granting it summary as to liability is granted, and the Complaint and all cross-claims against Central Park are dismissed; and it is further

ORDERED that the branch of Central Park's cross-motion for an order, pursuant to CPLR §3212, granting it summary judgment on the issue of indemnification from Tower and Empire is denied; and it is further

ORDERED that Tower and Empire serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.
This constitutes the decision and order of the Court.

Dated: 11/9/09

[Signature]
HON. CAROL EDMEAD s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
MICHAEL KORIE,

Plaintiff,

Index No. 102567/08

-against-

DECISION/ORDER

27 WEST 71ST STREET LLC, 71ST STREET STUDIOS,
INC., CENTRAL PARK WEST HOSPITALITY LLC,
TOWER BUILDING SERVICES, INC., and EMPIRE
SCAFFOLDING SYSTEMS, INC.,

Defendants.

FILED
NOV 13 2009
NEW YORK
COUNTY OF NEW YORK

-----x
HON. CAROL ROBINSON EDMOND, J.S.C.

MEMORANDUM DECISION

In this personal injury action, plaintiff Michael Korie (“plaintiff”) seeks to recover for negligence against defendants 27 West 71st Street LLC (“27 West”), 71st Street Studios, Inc., Central Park West Hospitality LLC (“Central Park”), Tower Building Services, Inc. (“Tower”), and Empire Scaffolding Systems, Inc. (“Empire”) (collectively “defendants”).

Tower and Empire (“movants”) now move for an order, pursuant to CPLR §3211(a)(7), dismissing plaintiff’s Complaint for failure to state a claim, and/or, pursuant to CPLR §3212, granting summary judgment in their favor. Central Park cross moves pursuant to CPLR §3212 for summary judgment dismissing plaintiff’s Complaint and all cross-claims.

Background¹

71st Street Studios, Inc. leased the building located at 31 West 71st Street, New York, New York (“the Building”) to Central Park (see “the Central Park Lease”). The Building abuts

¹ Information is taken from plaintiff’s Second Amended Complaint (“Complaint”), Verified Bill of Particulars (“BOP”) and Central Park’s cross-motion.

27 West 71st Street, New York, New York (the "Premises"). On June 5, 2006, Central Park's managing agent Twin Tier Hospitality LLC ("Twin Tier") hired Tower to perform brickwork on the exterior of the Building. Pursuant to the contract between Twin Tier and Tower ("the Contract"), Tower was responsible for erecting a scaffold and obtaining all necessary permits. Tower hired Empire to erect the scaffold.

Plaintiff alleges in his Complaint that on or about March 9, 2007, he tripped and fell on the public sidewalk in front of the Premises. After he lost his balance, his body struck a metal stanchion, piping and/or scaffold on the sidewalk, causing him serious injuries. Plaintiff alleges that the defective/dangerous condition at the Premises included but was not limited to the broken, cracked, raised and uneven sidewalk, and a dangerous scaffold with exposed sharp metal objects, including screws and hardware bolts. Plaintiff further alleges that the incident was caused by defendants' carelessness and negligence in the ownership, operation, maintenance, and control of the Premises, including the sidewalk and the scaffold.

Movants' Verified Answer contains a cross-claim seeking contractual indemnity and/or contribution from the remaining defendants.

Central Park's Amended Verified Answer also contains cross-claims seeking indemnity.

Movants' Motion

Movants argue that the scaffold did not cause or contribute to plaintiff's accident; therefore, all claims and cross-claims against them must be dismissed. Citing plaintiff's testimony at a March 17, 2009 deposition (see "the Koric EBT"), movants argue that "plaintiff has readily conceded . . . that the scaffold in the surrounding area where his alleged accident occurred had absolutely nothing to do with the cause of his accident." The only contributing

factor to plaintiff's accident was the raised portion of the sidewalk at the Premises. In fact, in the photograph marked as Exhibit D at his deposition, plaintiff marked an "X" by the raised portion of the sidewalk that caused his accident, which he judged to be a fair and accurate representation of the accident location. As can be seen from the photograph, the raised portion of the sidewalk is some considerable distance from the first scaffolding pole with which plaintiff's hand eventually came into contact as he attempted to catch his fall after his left foot was caught in the raised portion of the sidewalk. The fact that plaintiff stumbled forward a few feet and reached out to catch himself on a pole of the scaffold is wholly irrelevant as to the cause of his accident. The fact remains that had plaintiff never allegedly tripped over the raised portion of the sidewalk, he would never have been in a position to attempt and brace his fall against the scaffolding pole.

Similarly, the allegedly sharp objects located on the scaffold did not contribute to plaintiff's accident in any manner. When questioned about the portion of plaintiff's BOP that referenced exposed sharp metal objects including screws and hardware bolts on the scaffold, plaintiff testified that his wrist or thumb did not make contact with the sharp objects on the scaffold. In fact, plaintiff only saw those objects after he fell and not before the accident occurred. Therefore, plaintiff has established that the scaffold and/or any sharp objects associated with the scaffold were not the proximate cause of his accident, in that neither contributed to nor was the cause of why he allegedly fell.

Plaintiff's and 27 West's Opposition

First, plaintiff argues that movants' motion is premature, as discovery is incomplete and depositions of all of the defendants have not been conducted. Further, plaintiff has made several requests for documents in the exclusive control of defendants; however, responses to plaintiff's

demands remain outstanding. Plaintiff served 27 West and Central Park with demands for verified bill of particulars as to affirmative defenses (see the “BOP Demands”), and served the movants with combined demands (see “the Combined Demands”). Plaintiff then served all of the defendants with a Notice for Discovery & Inspection (see “the Notice for Discovery”). To date, 27 West and Central Park have not responded to the BOP Demands, movants have not responded to the Combined Demands, and all of the defendants have not responded to the Notice for Discovery. Therefore, documents as well as specific knowledge regarding the circumstances under which the scaffold was erected, the placement of the scaffold, the degree the sidewalk was obstructed, and the fact that the scaffold was erected and obstructed the sidewalk for more than six years prior to the incident are in the exclusive control of movants.

Second, plaintiff argues that movants’ obstruction of the sidewalk was a substantial factor in bringing about the events that produced his injuries. Whether or not the placement of the scaffold on the sidewalk obstructed pedestrian traffic is a question of fact. Plaintiff testified at his deposition that after he tripped on the defective sidewalk, he “crashed” into “one of the poles on the scaffolding,” and as he tried to prevent himself from falling “my hand snapped [fractured] and then I fell on my face.”²

Plaintiff further contends that movants’ placement of the scaffold violated New York City Administrative Code (“Administrative Code”) §27-1021(b)(8), and the Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”) §23-1.18(b)(1). Pursuant to

²The Court notes the Koric EBT on p. 35, lines 11-15 reads as follows:

Q. Did you eventually fall?

A. I did. What happened was that I *reached* one of the poles on the scaffolding to try and steady myself from falling, my hand snapped and then I fell on my face.
(Emphasis added)

Administrative Code §§27-1021(a)(1)(a) and 27-1021 (a)(5), the City of New York issues permits for sidewalks for only one year, and if a scaffold is erected for more than two years (assuming a one-year extension is granted), then the owner is liable for civil penalties. Here, movants “have or should have knowledge as to the exact placement of the scaffold, the width of the passageway and the reason(s) for the extraordinary period of time the scaffold was on the sidewalk,” plaintiff contends. Citing a copy of the “Application Details” for movants’ scaffold printed from the New York City Department of Buildings website, plaintiff contends that movants obtained a permit for the scaffold’s installation on February 8, 2001; thus, the scaffold was installed more than six years prior to plaintiff’s incident on March 9, 2007 (see “the Buildings Dept. records”). Therefore, movants knew or should have known that the scaffold was a dangerous condition. Plaintiff further contends that movants do not deny that the negligent placement and obstruction of the public walkway may be a proximate cause of plaintiff’s injuries. Thus, movants “inadvertently admitted” the existence of a question of fact, plaintiff argues.

In sum, movants breached their duty by failing to properly place the scaffold, failing to provide a safe passageway for plaintiff, and leaving the scaffold in place for more than six years prior to the accident. These acts were a proximate cause of plaintiff’s injuries, plaintiff argues. Thus, movants have not satisfied their burden of demonstrating an entitlement to summary judgment, plaintiff argues.

27 West adopts plaintiff’s arguments in opposition to movants’ motion, and adds that it has complied with plaintiff’s discovery requests (see “the 27 West opp.”). 27 West also points out that plaintiff’s Complaint and BOP contain additional claims of negligence against movants regarding an exposed sharp surface on the scaffold that caused and/or contributed to plaintiff’s

injuries. “While it is conceded that plaintiff’s deposition did not support this claim, if plaintiff, in the future, amends his deposition testimony to support or revisit this claim, it will create an untenable position in that this defendant will be in this case alone and all of the parties responsible for the scaffolding are out of the case.” 27 West contends. Therefore, movants’ motion should be denied in its entirety.

Central Park’s Cross-Motion

Central Park seeks summary judgment on the issues of liability to plaintiff and indemnification from movants.

Central Park argues that it owes no duty to plaintiff, as it is not the owner of the Premises where the accident occurred. Central Park cites the affidavit of Vincent Sano (“Mr. Sano”), Senior Vice President of Operations for Twin Tier, who attests that Central Park only leases the Building adjacent to the Premises (see “the Sano aff.”). Central Park has never owned the Premises, nor made any repairs to or special use of the sidewalk in front of the Premises. Mr. Sano also attests that Central Park did not control or oversee the work movants performed, and he is unaware of any prior accident or injuries regarding the scaffold.

Central Park further argues that it did not proximately cause plaintiff’s accident, and the scaffold was an “open and obvious” condition that did not constitute a hazard. Central Park contends that “Courts have found, as a matter of law, no breach of duty when a plaintiff absentmindedly trips over or is otherwise injured by an ‘open and obvious’ condition.” Plaintiff failed to provide any evidence that the scaffold was defective and proximately caused or contributed to his accident. Plaintiff’s accident occurred when he tripped over a raised sidewalk condition on the sidewalk next to the Building. He tried to reach one of the poles on the scaffold

to steady himself from falling, and his “hand snapped” and he fell. Unlike his BOP, wherein he alleges that there were “exposed sharp metal objects including screws and hardware bolts,” plaintiff’s testimony confirms that he did not touch any bolts or sharp objects on the pole.

Central Park contends that liability does not attach where a condition is “open and obvious,” and there is no duty to warn of an open and obvious, non-hazardous condition. The scaffold was not a hazard to persons reasonably using the walkway. Plaintiff testified that he saw the scaffold on the sidewalk prior to his accident (*id.* at 88). Because plaintiff touched an “open and obvious” pole that he knew about and which posed no risk to others using the walkway, there existed no defective condition of which Central Park was to be on notice, and no defective condition attributable to Central Park. Therefore, plaintiff “was the exclusive proximate cause of his accident,” Central Park argues. Based on the circumstances of the accident as evidenced by plaintiff’s testimony, summary judgment is warranted.

Finally, Central Park argues that movants are under a contractual obligation to indemnify and defend Central Park pursuant to the indemnity provision of the Contract. Accordingly, Central Park seeks reimbursement of its attorneys’ fees and costs incurred to date.

Plaintiff’s and 27 West’s Opposition to Cross-Motion

First, plaintiff argues that Central Park has also failed to satisfy its burden of demonstrating an entitlement to summary judgment, because its motion is premature.

Second, plaintiff further argues that issues of fact exist as to whether Central Park breached its duty to provide a safe walkway, whether the scaffold was a proximate cause of plaintiff’s injuries, and whether the placement of the scaffold violated the Administrative Code.

Plaintiff contends that as Central Park had a duty to maintain the portion of the sidewalk

wherein the scaffold was erected and where plaintiff was caused to slam into the scaffold. Central Park is liable to plaintiff based on its negligent placement of the scaffold on the sidewalk in front of the Building. Plaintiff contends that where abutting lessees and landowners derive a special benefit from public property that is unrelated to public use, the person obtaining a benefit is required to maintain the property in a reasonably safe condition to avoid injury to others. Central Park derived a special use of the sidewalk in front of the Premises because, as lessee of the abutting Building, Central Park utilized the sidewalk to erect the scaffold. Mr. Sano attests that on or before March 9, 2007, Central Park utilized the sidewalk abutting the Building for the “special purpose” of erecting the subject scaffold (Sano Aff., ¶ 13). Additionally, Central Park’s managing agent hired Tower to perform brickwork on the exterior of the Building. In order to perform the brickwork, the scaffold was erected on the public sidewalk. Such use of the sidewalk clearly benefitted Central Park, plaintiff argues. As the scaffold was used in connection with the improvement of the Building, Central Park owed plaintiff a duty to provide a safe walkway. Therefore, an issue of fact exists as to whether Central Park owed plaintiff a duty to provide a safe walkway.

Additionally, the placement of the scaffold violated the Administrative Code. Plaintiff argues that his deposition testimony “establishes that [Central Park] failed to provide adequate space on the sidewalk to allow for Plaintiff to safely pass through the scaffold.” Central Park has failed to allege that the width of the scaffold was in compliance with the Administrative Code. Moreover, Central Park has failed to provide an expert report indicating that the scaffold was in compliance with the statute. At a minimum, a question of fact exists as to whether the inadequate width of the scaffold impeded plaintiff’s ability to safely traverse the sidewalk.

plaintiff contends. Plaintiff further argues that an issue of fact exists as to whether Central Park obstructed the sidewalk for at least six years in violation of the Administrative Code. Based on the Buildings Dept. records, the scaffold obstructed the sidewalk for more than six years prior to the plaintiff's accident on March 9, 2007. As there are questions of fact as to the erection, placement, width, and existence of the scaffold for an unreasonable length of time, Central Park has not satisfied its entitlement to summary judgment, plaintiff argues.

The scaffold's obstruction of the sidewalk was a proximate cause in bringing about the events that produced plaintiff's injuries, plaintiff argues. The placement of the scaffold created a hazardous condition; therefore, the caselaw Central Park cites relating to open and obvious conditions is inapplicable. In addition, the cases Central Park cites involve circumstances where the alleged defect was the sole proximate cause of the incident. Here, the scaffold is a substantial factor, not the sole factor in bringing about the incident. None of the cases cited by Central Park involve a negligently placed scaffold on a sidewalk that was a proximate cause of plaintiff's injuries or a condition that violated the Administrative Code.

Plaintiff further argues that Central Park "misrepresents the facts" by claiming plaintiff "absentmindedly" struck the scaffold.³ Plaintiff testified that, after tripping on a defective and raised sidewalk, he fell forward, and in attempting to regain his balance his hand struck the scaffold and fractured. Central Park breached its duty to plaintiff by failing to properly place the scaffold, by failing to provide a safe passageway for pedestrians, and by leaving the scaffold in

³Plaintiff cites Central Park's memorandum of law ("Central Park's MOL") at paragraph 10. The Court notes that Central Park actually states: "There is a litany of cases where Courts have found, as a matter of law, no breach of duty *when a plaintiff* absentmindedly trips over or is otherwise injured by an 'open and obvious' condition" (emphasis added).

place for more than six years. These acts were a proximate cause of plaintiff's injuries.⁴

Movants' Reply and Opposition to Cross Motion

Movants reiterate their arguments that plaintiff has failed to raise an issue of triable fact regarding whether movants' actions and failure to act were a proximate cause of plaintiff's accident. In response to plaintiff's argument that discovery has not yet been completed, movants contend that "hope and speculation" that evidence may exist does not constitute a valid basis upon which to oppose a summary judgment motion. Here, plaintiff has not set forth an evidentiary basis to suggest that discovery might lead to relevant evidence. In response to plaintiff's argument that movants have not responded to plaintiff's demands nor been produced for a deposition, movants argue that neither documents in movants' possession nor testimony from a representative will change plaintiff's testimony and admissions as to what caused his accident. The "clear and unequivocal cause" of plaintiff's accident was the protruding piece of sidewalk. No amount of discovery will change that plaintiff tripped and fell over a portion of a defective sidewalk of which movants neither exercised control over nor caused or created.

In response to plaintiff's argument that depositions are needed in order to establish under what circumstances the scaffold was erected and the placement of the scaffold, movants contend that plaintiff fails to detail precisely how such facts are relevant to defeating movants' motion. Simply put, the scaffold in question was not a proximate cause of plaintiff's accident. Further, the caselaw plaintiff cites is distinguishable.

The photographs reveal that the scaffold is some distance away from the defective sidewalk that caused plaintiff's accident. The photographs also demonstrate that plaintiff was not

⁴27 West's opposition to Central Park's motion repeats the arguments in its opposition to movants' motion.

directed toward the scaffold in any way. Should plaintiff's argument be given any credence, and taken to its logical limit, plaintiff would be permitted to commence suit against the owner of a parked car located in the street had he tripped on the sidewalk and then stumble into a car. Plaintiff equally would be permitted to commence suit against the City of New York, had he tripped over a defective sidewalk and stumbled into a tree owned by the City of New York. Such arguments cannot withstand even a minimal amount of logical scrutiny. It is more logical to conclude that the scaffold merely furnished the occasion for the occurrence of the accident, but it was not one of the accident's causes, movants argue.

Movants further argue that plaintiff's citations to the Administrative Code are unavailing. These provisions have no bearing on the instant matter, as the placement of the scaffold was not the proximate cause of the accident.

Finally, movants argue that Central Park is not entitled to contractual indemnification from movants. Movants contend that a party is not entitled to contractual indemnification if the indemnification provision limits liability to claims arising out of the work performed by a contractor and the accident was not in any manner caused by the contractor's work. Under indemnification provision, movants would, arguably, have to indemnify Central Park only if a claim arose out of the work performed by movants. Here, to the extent that movants performed any work, the same was not the proximate cause of plaintiff's accident. The scaffold did not cause or contribute to the cause of plaintiff's accident. Therefore, it cannot be said that plaintiff's claim arises from the work performed by movants.

Moreover, a large portion of Central Park's cross-motion is predicated upon the fact that the accident occurred in front of the Premises, not the Building occupied by Central Park. The

scaffold also is located in front of the Building. However, the photographs and plaintiff's testimony reveal that the accident occurred in front of the Premises. Therefore, as plaintiff's accident did not even occur in front of the Building where the scaffold was erected, Central Park is not entitled to indemnification.

Central Park's Reply

Central Park argues that plaintiff's testimony "clearly establishes" that the scaffold was not a proximate cause of the accident. The discovery plaintiff seeks cannot change the evidence that clearly places the accident on a sidewalk condition in front of the Premises. Further, plaintiff's testimony alone is sufficient evidence to extinguish any liability upon Central Park. Thus, plaintiff's arguments that further discovery is required is without merit.

Central Park further contends that plaintiff's testimony dispels any theory that Central Park was liable for any alleged defective condition abutting the Building. Plaintiff's use of the scaffolding pole as a way to regain his balance cannot be used as an attempt to create an issue of fact that it was a proximate cause of his accident. The photographs attached to Central Park's cross-motion indicate that the raised sidewalk condition is several feet away from the scaffold. As movants point out in their reply, plaintiff's flawed argument would make the City of New York liable for injuries caused when someone trips over a raised condition on the sidewalk and stumbles into a tree, or the owner of a parked car is liable for injuries if someone stumbles into their car after tripping on a raised sidewalk condition.

Central Park further contends that plaintiff's argument that the scaffold violated the Administrative Code lacks merit. Central Park's photographs indicate that there is more than 4 feet allocated for pedestrian traffic in that passageway. Additionally, plaintiff's testimony and

his initials on the photograph marked as Exhibit D at plaintiff's deposition indicate that the path in which plaintiff was walking was not obstructed by any scaffold. Further, plaintiff's argument is irrelevant, because, as plaintiff did not trip inside the area of the scaffold, the scaffold was not a proximate cause of plaintiff's injuries.

Further, plaintiff's argument regarding the length of time the scaffold was erected does not support how this condition could have been a proximate cause of plaintiff's accident. Plaintiff saw the scaffold prior to his accident. Additionally, plaintiff confirmed that nothing was obstructing his view of the sidewalk, and that the raised condition caused his accident.

Central Park further argues that plaintiff failed to provide evidence that the scaffold is a hazardous condition. Mr. Sano confirms that there have been no prior accidents or injuries regarding the scaffold prior to March 9, 2007 (Sano Aff., ¶ 20). Plaintiff saw the scaffold prior to his accident. As the photographs clearly indicate, the scaffold was readily observable while plaintiff was walking on the sidewalk. Thus, Central Park had no duty to warn against a pole that was in clear sight.

Central Park argues that it derived no special use of the Premises where plaintiff's accident occurred. As shown in the photographs, the scaffold is several feet away from the raised sidewalk condition that caused plaintiff's accident. Further, even assuming *arguendo* that the Court finds that the portion of the scaffold extending onto the sidewalk abutting the Premises was a special use benefitting Central Park, there is absolutely no evidence that the scaffold proximately caused plaintiff's accident.

Finally, Central Park argues that, assuming *arguendo* that the Court finds that the scaffold was a proximate cause of plaintiff's accident, Central Park is entitled to summary judgment on

their cross-claims for indemnification against movants, because the scaffold relates to the performance of movants' work. The language of the indemnification agreement in the Contract states that "the contractor shall indemnify and hold harmless the owner . . . from and against any claims . . . arising out of or resulting from performance of work" (Contract, p. 17, §3.18). Movants' work relates to erecting and maintaining the scaffold erected at the Building, Central Park contends. In fact, Central Park did not control or oversee any of the work performed by movants. The condition of the scaffold, where it is erected, and how it is maintained can only be the responsibility of movants as they were hired specifically for this purpose. Therefore, movants would be responsible for any claims arising out of or resulting from the performance of work.

Discussion

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2D 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2D 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*; *Zuckerman v City of New York*, 49 NY2D 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2D 230 [1st Dept 2003]; *Thomas v Holzberg*,

300 AD2D 10, 11 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman; Prudential Securities Inc. v Rovello*, 262 AD2D 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (C.P.L.R. §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kemworth Truck Co.*, 68 NY2D 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2D 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRA Technologies, Inc.*, 93 AD2D 772 [1st Dept 1983], *affid.*, 62 NY2D 686 [1984]).

Movants' Motion

Here, movants have made a *prima facie* showing of entitlement to judgment as a matter of law.

Proximate Cause

To establish a negligence cause of action, a plaintiff must demonstrate (1) a duty of care owed to the plaintiff; (2) a breach of that duty; (3) that the breach is a proximate cause of

plaintiff's injury or damages; and (4) that the plaintiff suffered a legally cognizable injury or damages (*see Akins v Gilens Falls City School District*, 53 NY2D 325, 333 [1981]). Although proximate cause is ordinarily a question of fact, it may be decided as a matter of law where the evidence conclusively establishes that there was an intervening act that was so extraordinary and far removed from the defendant's conduct as to be unforeseeable (*Derdiarian v Felix Contracting Corp.*, 51 NY2D 308, 315 [1980] ["There are certain instances, to be sure, where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law. Those cases generally involve independent intervening acts which operate upon but do not flow from the original negligence"]). Here, the evidence in the record establishes that the scaffold was not a proximate cause of plaintiff's injuries.

The First Department makes clear that "the negligence complained of must have caused the occurrence of the accident from which the injuries flow" (*Lee v New York City Hous. Auth.*, 25 AD3d 214, 219 [1st Dept 2005], citing *Rivera v City of New York*, 11 NY2d 856, 857 [1962]). In *Lee*, a child was struck by a car after he ran into a public street after a ball that rolled through a hole in the fence abutting the field. The Court held that the alleged failure of New York City Housing Authority, as landowner, to repair hole in fence at baseball park was not actual cause, or cause in fact, of the child's injuries. The Court explained: "Here, the ball could just as well have traveled over the fence and plaintiff undoubtedly would have chosen the same course of action to retrieve it" (*id.* at 217). In *Ortiz v Jintion Food Corp.* (274 AD2d 508 [2d Dept 2000]), the plaintiff slipped and fell in a store's back lot, and grabbed a tree branch to help him get up. After he let go of the branch, it struck him in the eye. He sued the store and the premises lessor to recover damages for personal injuries. In reversing the Supreme Court's denial of summary

judgment for the defendant store owner, the Second Department held that plaintiff's action "in grabbing the branch to pull himself back up and upon releasing the branch, being struck in the eye, was not a normal or foreseeable consequence of any situation created by the defendants" (*Ortiz* at 508) (citations omitted).

Here, it is clear that movants' placement of the scaffold on the sidewalk in front of the Building did not *cause* plaintiff to trip in front of the Premises. Further, the record does not establish that plaintiff's striking the scaffold pole with his hand was a normal or foreseeable consequence of any situation created by movants.

Plaintiff alleges that he tripped and fell on the sidewalk in front of the Premises, and after he lost his balance, his hand struck the scaffold (Complaint, ¶ 28). Plaintiff further alleges that the dangerous condition at the Premises included but was not limited to the "broken, cracked, raised, uneven sidewalk and a dangerous scaffold with exposed sharp metal objects, including screws and hardware bolts" (BOP, ¶ 4). However, the record establishes that plaintiff tripped on the sidewalk in front of the Premises, not the Building. Further, plaintiff testified that he was caused to trip and fall only by the allegedly dangerous condition of the sidewalk.

At the March 17, 2009 deposition, plaintiff was shown a photograph ("the Photograph") and testified that it represented the "exact area" where his accident took place (Koric EBT, p. 32, lines 4-7). He marked and initialed the Photograph, indicating the area of the sidewalk where his left toe was caught (Koric EBT, p. 73 lines 23-25 through p. 74, line 5). Plaintiff's testimony and the Photograph establish that plaintiff was walking toward the scaffold when he fell.

Q: How did your accident take place?

A: I was walking down the street, and I tripped over a sidewalk that was protruding extending up in the air.

* * *

Q. Did you eventually fall?

A. I did. What happened was that I reached one of the poles on the scaffolding to try and steady myself from falling, my hand snapped⁵ and then I fell on my face.

(Korie EBT, p. 32, lines 11-13 through p. 35, lines 11-15)

Importantly, when asked whether any condition other than the raised sidewalk caused plaintiff to fall, plaintiff answered, “No” (EBT, p. 95, lines 12-14). Plaintiff further testified that his left hand made contact with the pole, but not with any of the screws or hardware bolts on the pole. Plaintiff further contradicting the allegations in his BOP (*id.*, p. 37, lines 2-8; p. 80, lines 10-14).

Therefore, plaintiff’s testimony establishes that only the defective sidewalk in front of the Premises, not the scaffold in front of the Building, was a proximate cause of his injuries. As such, movants have demonstrated a *prima facie* case for summary judgment in their favor, shifting the burden of proof to plaintiff and 27 West.

Plaintiff and 27 West failed to raise an issue of fact as to whether movants’ alleged obstruction of the sidewalk was a substantial factor in bringing about the events that produced plaintiff’s injuries.

The caselaw plaintiff cites is distinguishable. In *McKenzie v Columbus Centre, LLC*, (40 AD3d 312 [1st Dept 2007]), a pedestrian fell in a roadway depression under a sidewalk protective shed erected at a demolition site. The First Department denied a scaffold contractor’s motion for summary judgment on the ground that “there were triable issues of fact as to whether it created an unsafe condition *by directing plaintiff toward the [sidewalk] defect*” (emphasis added). The Court in *McKenzie* cites *Coulton v City of New York* (29 AD3d 301, 302 [1st Dept 2006]), a case in which plaintiff was injured after she slipped and fell on the sidewalk in front of

⁵When asked what plaintiff meant by “snapped,” plaintiff explained that when his left hand made contact with the pole the “wrist broke, the thumb broke, the bone came protruding through the flesh and it also was twisted in an unnatural angle” (*id.*, p.37, lines 18-21).

a house being renovated by a contractor. The contractor had built a plywood cover over the house, which narrowed the width of the sidewalk. The First Department denied the defendant contractor's motion for summary judgment on the ground that the contractor had "a duty not to create an unsafe condition *when it narrowed the sidewalk* by erecting the plywood cover around the building, and to that extent it may have increased the risk that pedestrians might trip on the broken and uneven portion of the sidewalk" (emphasis added).

In *Hunter v City of New York* (23 AD3d 223 [1st Dept 2005]), plaintiff tripped and fell on a sidewalk abutting property that was being renovated. In affirming the motion court's denial of the landlord's summary judgment motion, the First Department noted: "It is undisputed that a plywood construction fence erected at the site by defendant Atlantic encroached on the adjacent sidewalk, limiting the pedestrian passageway to a portion of the sidewalk abutting a subway grating" (*id.* at 224). The Court went on to hold that "there are triable factual issues as to whether . . . the encroachment proximately caused plaintiff's harm *by directing her toward the alleged defect*" (*id.*) (emphasis added).

Here, there is no evidence in the record that the scaffold "directed" plaintiff toward the sidewalk defect, or that the scaffold encroached the sidewalk in front of the Premises (*see e.g. Betances v 700 West 176th St. Realty Corp.*, 250 AD2d 504 [1st Dept 1998] [granting the defendant lessee summary judgment on the ground "that plaintiff failed to adduce any evidence tending to show *that her path was directed toward the hole in the sidewalk* because of the clothing rack allegedly placed on the sidewalk by defendant lessee" (emphasis added)]). Instead, the Photograph and plaintiff's testimony establish that plaintiff was walking *toward* the scaffolded area when he tripped and fell. As he stumbled forward, he extended his hand, and his

hand struck the scaffold (Korie EBT, p. 35, lines 11-15; p. 37, lines 7-21). Further, Mr. Sano attests: “The scaffolding erected extends approximately 15 feet beyond the edge of the property line of [the Building] to [the Premises]. The alleged [sidewalk] defect is located approximately 25 feet beyond the edge of the property line of [the Building] and is in front of [Premises]” (Sano Aff., ¶¶ 18-19). Therefore, the record makes clear that plaintiff tripped and fell before he reached the scaffolded sidewalk in front of the Building.

Further, plaintiff’s arguments regarding movants’ alleged violations of Administrative Code §27-1021(b)(8), and the NYCRR §23-1.18(b)(1) also fail. Administrative Code §27-1021(b)(8), titled “Protection of Sidewalks,” provides in relevant part: “The passageway [of a sidewalk shed] shall be wide enough to accommodate pedestrian traffic normal for that location without causing congestion; but in no case shall the width be less than four feet.” NYCRR §23-1.18(b)(1), titled “Sidewalk Sheds and Barricades” provides in relevant part: “Every sidewalk shed shall have such width as to allow the unimpeded passage of pedestrians at all times but in no case shall any sidewalk shed be less than five feet wide.” However, in the instant case, the record is devoid of any evidence that the scaffold impeded plaintiff’s passage, as plaintiff tripped and fell in front of the Premises *before* he reached the scaffolded area of sidewalk in front of the Building.

Similarly, whether movants violated New York City regulations regarding how long a shed can be in place (Administrative Code §§27-1021[a][1][a] and [a][5]) also is irrelevant. Plaintiff has provided no evidence that the “scaffold obstructed the sidewalk” or was a “dangerous condition” (plaintiff’s opp., ¶ 25). Further, neither plaintiff nor 27 West has demonstrated that movants’ placement and/or maintenance of the scaffold was a proximate cause

of plaintiff's injuries.

As to the claim that outstanding discovery precludes summary relief, it is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3D 426, 427 [2d Dept 2008], quoting *Fleischman v Peacock Water Co., Inc.*, 51 AD3D 1203, 1205 [3d Dept 2008]); *Hayden v City of New York*, 809 NYS2D 75, 76 [1st Dept 2006] ["[P]laintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that additional persons sought for deposition possessed information material and necessary to oppose the motion"]. Further, mere hope or speculation is insufficient to defeat summary judgment (*Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3D 406, 407 [1st Dept 2008] ["Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a 'mere hope,' which is insufficient to defeat summary judgment"]; *Steinberg v Abdul*, 230 AD2D 633, 633 [1st Dept 1996] ["We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants' assumption of a duty to plaintiffs' decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants' motions for summary judgment"].

Here, plaintiff provided no evidence indicating that further discovery will yield material and relevant evidence as to whether movants proximately caused plaintiff's accident. Plaintiff's

claim that movants have documents regarding the circumstances under which the scaffold was erected, the placement of the scaffold, and the degree the sidewalk was obstructed, is unavailing. Neither documents in movants' possession nor deposition testimony from movants will change plaintiff's testimony as to what caused his accident: the defective condition of the sidewalk.

As plaintiff and 27 West failed to raise an issue of material fact as to whether movants' alleged obstruction of the sidewalk was a either a substantial factor in bringing about the events that produced or proximate cause of plaintiff's injuries, movants' motion for summary judgment is granted.

Central Park's Cross-Motion

Central Park also has made a *prima facie* case demonstrating its entitlement to summary judgment on the issue of liability to plaintiff. It is well settled that in "order to hold an abutting owner or lessee liable for a pedestrian's injuries incurred on a public sidewalk, the defendant must be shown to have actually created the dangerous condition or to exercise a special use of the sidewalk" (*Richter v Duane Reade*, 303 AD2D 232, 232-233 [1st Dept 2003], quoting *Morgan v Department of Sanitation of City of New York*, 250 AD2D 525 [1998]). In *Richter*, the plaintiff sought to recover from the defendant, Duane Reade, for injuries she sustained after she tripped and fell on a metal object on the public sidewalk in front of a Duane Reade store. The First Department dismissed the plaintiff's complaint on the ground that she had failed to show that Duane Reade either created the dangerous condition or exercised a special use of the sidewalk.

Here, there is no evidence that Central Park created a dangerous condition or exercised a special use of the sidewalk in front of the Premises, where plaintiff tripped and fell. The record establishes that Central Park leased the Building (see the Lease), and Twin Tier, Central Park's

managing agent, contracted with Tower to perform brickwork to the Building (Sano aff., ¶ 14; the Contract). The record further establishes that Tower hired Empire to build the scaffold in front of the Building, thus making special use of the sidewalk in front of the Building (Sano aff., ¶¶ 13-16). However, there is no evidence that Central Park made any repairs to or special use of the sidewalk in front of *the Premises*. In fact, the Buildings Dept. records provided by plaintiff indicate that the permit for the scaffold was issued for “31 West 71 Street Manhattan,” *i.e.* the address for the Building. Further, as discussed above, the record is devoid of any evidence that the scaffold proximately caused plaintiff’s accident.

Furthermore, plaintiff and 27 West failed to raise a triable issue of fact to defeat Central Park’s entitlement to summary judgment. Specifically, the evidence in the record fails to support plaintiff’s arguments that Central Park breached its duty to plaintiff to provide a safe walkway.

As discussed above, plaintiff does not allege, and there is no evidence, that the scaffold encroached the sidewalk where plaintiff tripped in such a manner that directed plaintiff to walk upon the alleged defective portion of the sidewalk. Further, the “special use” cases plaintiff cites are distinguishable, as they all involve situations in which the plaintiffs tripped on objects from which either the lessee or landowner derived a special use. Here, plaintiff did not trip on the scaffold.

The evidence in the record also contradicts plaintiff’s argument that his deposition testimony “establishes that [Central Park] failed to provide adequate space on the sidewalk to allow for Plaintiff *to safely pass through the scaffold*” (plaintiff’s opposition to cross-motion, ¶ 29) (emphasis added). Plaintiff’s testimony and the Photograph establish that plaintiff tripped and fell before he attempted to “pass through the scaffold.”

The arguments as to whether the scaffold constituted an open and obvious condition are of no moment, as it is clear from the record the scaffold was not a proximate cause of plaintiff's accident. Further, as discussed above, any alleged Administrative Code violations regarding the scaffold are irrelevant.

Finally, plaintiff's arguments regarding insufficient discovery, which mirror the arguments in his opposition to movant's motion, lack merit, as plaintiff has provided no evidence that further discovery will raise an issue of fact as to Central Park's liability for plaintiff's injuries.

Accordingly, Central Park's motion for summary judgment is granted on the issue of liability, and the Complaint and all cross-claims seeking contractual indemnity and/or contribution from Central Park are dismissed.

Indemnification

However, Central Park failed to establish a *prima facie* case for indemnification and reimbursement of litigation costs by movants.

It is well settled that a "party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" [citations omitted]" (*Masciotta v Morse Diesel Intl., Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 521 NYS2d 216 [1987]).

Here, it is clear from a reading of the indemnification provision of the Contract that movants are obligated to indemnify Central Park *only if* a claim arises out of the work performed

by movants. The Indemnity Clause of the Contract provides in relevant part:

[T]he Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. (Contract, p. 17, §3.18) (Emphasis added)

As the record demonstrates that plaintiff's claim does not arise out of any work performed by movants, the indemnification clause does not apply, and movants are not required to defend Central Park (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 2009 WL 3384575, 2 [2d Dept 2009] ["Since [the third-party defendant] is not an insurer, its duty to defend is no broader than its duty to indemnify. Since the third-party plaintiffs are not entitled to indemnification at this juncture, they also are not entitled to a defense" (citations omitted)]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 931 [2d Dept 2009]; *Brasch v Yonkers Const. Co.*, 306 AD2d 508, 511 [2d Dept 2003]). Therefore, movants are not required to reimburse Central Park for its litigation costs.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Tower Building Services, Inc., and Empire Scaffolding Systems, Inc. for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiff Michael Korie, and/or, pursuant to CPLR §3212, granting them summary judgment is granted, and the Complaint against Tower and Empire is dismissed; and it is further

ORDERED that the branch of the cross-motion of defendant Central Park West

Hospitality LLC for an order, pursuant to CPLR §3212, granting it summary as to liability is granted, and the Complaint and all cross-claims against Central Park are dismissed; and it is further

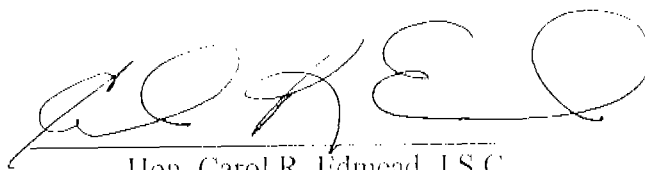
ORDERED that the branch of Central Park's cross-motion for an order, pursuant to CPLR §3212, granting it summary judgment on the issue of indemnification from Tower and Empire is denied; and it is further

ORDERED that Tower and Empire serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: November 9, 2009



Hon. Carol R. Edmead, J.S.C.
HON. CAROL EDMED

FILED

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NEW YORK
COUNTY CLERK