

<b>Rubinstein v City of New York</b>
2010 NY Slip Op 31878(U)
July 14, 2010
Supreme Court, New York County
Docket Number: 115057/07
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JAFFE

PART 5

DECENT.

Index Number : 115057/2007

RUBINSTEIN, ADAM

vs  
CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO.

115057/07

MOTION DATE

6/20/10

MOTION SEQ. NO.

004

MOTION CAL. NO.

101

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

PAPERS NUMBERED

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

12

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

34

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

5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

JUL 21 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_

BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 5

-----X  
ADAM RUBINSTEIN,

Plaintiff,

-against-

THE CITY OF NEW YORK, NYC DEPARTMENT  
OF ENVIRONMENTAL PROTECTION, 1271  
LEXINGTON AVENUE LLC, LAKHI GENERAL  
CONTRACTOR INC., BOVIS LEND LEASE LMB,  
INC., BREND RENOVATION CORPORATION,  
BREEZE NATIONAL INC., CONSOLIDATED  
EDISON COMPANY OF NEW YORK, EMPIRE  
CITY SUBWAY LTD., AARON PLUMBING &  
MECHANICAL SYSTEMS, INC., NEW YORK  
PAVING, INC., EXTELL 85<sup>th</sup> STREET LLC,  
TIME WARNER CABLE, INC.,

Defendants.

-----X  
EMPIRE CITY SUBWAY COMPANY (LIMITED),  
s/h/a EMPIRE CITY SUBWAY, LTD.,

Third-Party Plaintiff,

-against-

NICO ASPHALT PAVING, LTD.,

Third-Party Defendant.

-----X  
BARBARA JAFFE, JSC:

**For defendant Brend:**  
Barbara Henderson, Esq.  
Rubin, Fiorella & Friedman, LLP  
292 Madison Ave., 11<sup>th</sup> Fl.  
New York, NY 10017  
212-953-2381

Index No. 115057/07

Motion Dates: 5/20/10, 6/18/10  
Motion Seq. Nos.: 004, 005  
Motion Cal. Nos.: 101, 108  
Motion Argued: 6/8/10, 6/29/10

**DECISION AND ORDER**

**FILED**  
JUL 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**For defendant 1271 and Bovis:**  
Patrick M. Caruana, Esq.  
Newman Myers Kreines Gross Harris, P.C.  
14 Wall Street  
New York, NY 10005-2101  
212-619-4350

**For defendant Time Warner Cable:**

Christopher W. Rust, Esq.  
Gottlieb Siegel & Schwartz, LLP  
180 E. 162<sup>nd</sup> St., Ste. 1D  
Bronx, NY 10451  
718-665-1700

**For defendant Lakhi:**

Michael W. Butler, Esq.  
White, Quinlan & Staley  
377 Oak St., PO Box 9304  
Garden City, NY 11530  
516-222-2434

By notice of motion dated March 8, 2010, defendant Brend Renovation Corporation (Brend) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against it. Co-defendants 1271 Lexington Avenue LLC (1271), Bovis Lend Lease LMB (Bovis), and Time Warner Cable, Inc. (Time Warner) oppose the motion. By notice of motion dated May 19, 2010, defendant Lakhi General Contractor (Lakhi) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against it. Only Time Warner opposes the motion. The motions are consolidated for decision.

#### I. BACKGROUND

On August 19, 2006, plaintiff was allegedly injured when he stepped into a hole in the street opposite 150 East 85<sup>th</sup> Street in Manhattan, near the intersection of Lexington Avenue. (Affirmation of Barbara Henderson, Esq., dated Mar. 8, 2010 [Henderson Aff.], Exh. A). On or about October 30, 2007, plaintiff commenced the instant action by filing his summons and complaint, in which he alleged, as pertinent here, that defendants 1271, Bovis, Lakhi, and Brend negligently performed and/or caused to be performed work at the location. (*Id.*).

On or about January 18, 2008, 1271 and Bovis served their answers, and on or about February 7, 2008 Brend served its answer. (*Id.*, Exhs. C, D).

On January 14, 2009, plaintiff testified at a deposition that he was injured on East 85<sup>th</sup> Street between Lexington and Third Avenues, near the northeast corner of the intersection. (*Id.*, Exh. N).

On or about January 19, 2009, plaintiff served an amended complaint, naming defendant Empire City Subway, Ltd. as an additional defendant. (*Id.*, Exh. G).

At a deposition held on July 23, 2009, Fatima Brantley, an employee of the New York City Department of Transportation, testified that a City employee conducted a search for records pertaining to the block of East 85<sup>th</sup> Street between Lexington and Third Avenues for two years prior to and including the date of plaintiff's accident. (*Id.*, Exh. O). Brantley identified all of the work permits issued by City to contractors for the location; none were issued to Brend or Lakhi. (*Id.*).

On or about August 5, 2009, plaintiff commenced an action against defendants Aaron Plumbing & Mechanical Systems, Inc., New York Paving, Inc., Extell 85<sup>th</sup> Street LLC, and Time Warner, alleging, as pertinent here, that Time Warner had opened the roadway at the location of his accident. (*Id.*, Exh. K).

On or about December 29, 2009, ECS commenced a third-party action against Nico Asphalt Paving, Ltd. (*Id.*, Exh. I).

By decision and order dated January 14, 2010, plaintiff's two actions were consolidated for all purposes. (*Id.*, Exh. L).

## II. BREND'S MOTION

### A. Contentions

Brend denies that it created the hole at the location of plaintiff's accident, relying on Brantley's deposition testimony that no permits were issued to it to perform work there, and the affidavit of Matthew Jaworski, its executive vice-president, who states that between June 2005 and May 2007, Brend performed work at the building located at 111 East 85<sup>th</sup> Street in

Manhattan, which is between Lexington and Park Avenues, that it performed no work on East 85<sup>th</sup> Street between Lexington and Third Avenues, and that he has no knowledge of how the hole was created. (*Id.*, Exh. P).

Time Warner argues that the motion is premature as it has yet to depose any party in the action, and as plaintiff and City were deposed when Time Warner was not yet a party. (Affirmation of Christopher W. Rust, Esq., dated Mar. 26, 2010). It thus contends that it is unable to defend the motion without having had a chance to conduct discovery. Bovis and 1271 join Time Warner, and also contend that City has not yet produced all documents reflecting work done at the location. (Affirmation of Patrick M. Caruana, Esq., dated Apr. 9, 2010).

In reply, Brend submits a stipulation of discontinuance of the action against it signed by plaintiff, Lakhi, and Con Edison, and observes that only 1271, Bovis, and Time Warner oppose the motion. It argues that absent any factual basis for defendants' allegations that it performed work at the location, there is no need to depose it. (Reply Affirmation of Barbara Henderson, Esq., dated May 14, 2010).

#### B. Analysis

As all parties have not signed the stipulation of discontinuance, and as Brend had already filed its motion for summary judgment, the action is not discontinued against Brend by plaintiff or by Lakhi and Con Edison. (CPLR 3217[a][2] [party may discontinue action by filing stipulation signed by attorneys for all parties]; *see eg Scholtz v Catholic Health System of Long Island, Inc.*, 21 Misc 3d 1126[A], 2008 NY Slip Op 52236[U] [Sup Ct, Suffolk County 2008] [denying motion for discontinuance as all parties did not sign stipulation of discontinuance and motion for summary judgment had been submitted]). Nevertheless, as plaintiff and all of the

other defendants except 1271, Bovis, and Time Warner did not oppose the motion, the complaint and any cross-claims asserted by the other defendants against Brend are dismissed on default.

A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk. (*Cino v City of New York*, 49 AD3d 796 [2d Dept 2008]). Here, Brend has offered admissible evidence demonstrating that it performed no work at the location of plaintiff's accident, thus establishing, *prima facie*, that it did not create a dangerous condition at the location. (*Amarosa v City of New York*, 51 AD3d 596 [1<sup>st</sup> Dept 2008] [contractor met burden by submitting affidavit from manager stating that records showed no work at location]; *Arucci v City of New York*, 45 AD3d 617 [2d Dept 2007] [contractor submitted affidavit from officer attesting that it performed no work at location]; *Flores v City of New York*, 29 AD3d 356 [1<sup>st</sup> Dept 2006] [contractor showed it did not perform work where plaintiff allegedly fell]; *Robinson v City of New York*, 18 AD3d 255 [1<sup>st</sup> Dept 2005] [no evidence that defendants performed any work where plaintiff fell]).

In opposition, 1271, Bovis, and Time Warner did not submit any proof showing that a triable issue of fact exists as to whether Brend performed work at the location of plaintiff's accident. Moreover, their assertion that further discovery may lead to relevant evidence is speculative and without evidentiary basis. (CPLR 3212[f]; *see Flores v City of New York*, 66 AD3d 599 [1<sup>st</sup> Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]; *Arucci*, 45 AD3d at 618 [plaintiffs failed to establish what additional facts might be disclosed which would demonstrate that issue of fact existed as to whether contractor did work on roadway]; *Rubina v City of New York*, 51 AD3d 761 [2d Dept 2008] [no evidentiary basis

shown that further discovery may lead to relevant evidence concerning whether contractor created defect]; *cf. Astudillo v City of New York*, 71 AD3d 709 [2d Dept 2010] [plaintiffs offered evidentiary basis to suggest discovery may lead to evidence regarding whether contractor performed work at location and created defective condition]).

### III. LAKHI'S MOTION

#### A. Contentions

Lakhi also denies having performed any work on the street or sidewalk at East 85<sup>th</sup> Street between Lexington and Third Avenues, relying too on Brantley's deposition testimony that City issued it no permits to perform work at the location, and on the affidavit of Gurcharan Singh, its president, who also denies that Lakhi performed any work there. (Affirmation of Michael W. Butler, Esq., dated May 19, 2010 [Butler Aff.], Exh. 1). While Lakhi was notified by co-defendant City that plaintiff had filed a claim against City and that City believed that its contract with Lakhi may be involved, Lakhi maintains that the contract does not require it to perform work at the location, and submits, in support thereof, a copy of the contract and a letter from the manager of the program that awarded the contract, each confirming that Lakhi was not contractually obligated to perform work on East 85<sup>th</sup> Street. (*Id.*, Exhs. 2, 3). Lakhi thus denies having created the allegedly defective condition on the street where plaintiff fell.

Time Warner opposes the motion on the grounds that City did not produce at Brantley's deposition all of the records showing work at the location and that Brantley did not personally perform the search. It also argues that Lakhi had not responded to any discovery demands and that the contract it submitted does not correspond to that identified by City in alerting Lakhi that plaintiff had filed a claim against City. Time Warner thus contends that the motion is premature.

(Affirmation of Christopher W. Rust, Esq., dated May 26, 2010).

In reply, Lakhi observes that the contract numbers correspond and that the contract it submitted is the same contract referred to in City's letter, and that Brantley testified as to all of the records pertaining to the location, which were also produced at her deposition. (Reply Affirmation, dated June 10, 2010). Lakhi also submits a proposed stipulation of discontinuance against it signed by plaintiff. (*Id.*, Exh. 1).

#### B. Analysis

Lakhi's affidavit and documents establish, *prima facie*, that it did not perform any work at the location of plaintiff's accident, and thus did not create any defective condition therein. Time Warner has failed to set forth any triable issues as to whether Lakhi may be held liable for plaintiff's accident, and has not set forth an evidentiary basis for its asserted need for further discovery. (*See supra*, II.B).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Brend Renovation Corporation's motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant Brend Renovation Corporation with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that defendant Lakhi General Contractor, Inc.'s motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant Lakhi General Contractor, Inc. with costs and disbursements to defendant as taxed by the clerk of

the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue and the remaining parties shall appear for a compliance conference on October 12, 2010 at 2 pm at 80 Centre Street, New York, New York, room 103 as originally scheduled.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: July 14, 2010  
New York, New York

**FILED**  
JUL 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE