[*1]

SCANNED ON 9/28/2010

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

PRESENT: [redacted] Salliann Scarpulla PART [redacted] 19

Justice

Index Number : 105880/2007

HARRIS, DEBRA

VS.

HOUSING AUTHORITY

SEQUENCE NUMBER : 005

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

FILED
SEP 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/23/10

Salliann Scarpulla
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

----------X

DEBRA HARRIS,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY and CHELMSFORD CONTRACTING CORP.,

Defendants.

----------X

Index No.: 105880/07
Submission Date: 7/21/10

DECISION AND ORDER

For Plaintiff:
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For Defendant Chelmsford Contracting Corp.:
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For Defendant New York City Housing Authority:
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Papers considered in review of these motions for summary judgment:

Notice of Motion 1
Notice of Motion 2
Affs in Opp 3, 4, 5, 6
Replies 7, 8, 9

HON. SALIANN SCARPULLA, J.:

In this premises liability action, defendant Chelmsford Contracting Corp. ("Chelmsford") moves for summary judgment dismissing the complaint and all cross claims asserted against it and defendant New York City Housing Authority ("NYCHA") moves for summary judgment dismissing the complaint and all cross claims asserted against it.

Plaintiff Debra Harris ("Harris") sustained personal injuries on September 6, 2006, shortly after 8:00 a.m., at Amsterdam Houses, a NYCHA development located at 205 West 61st Street in Manhattan. Pursuant to written contract executed in July 2005, NYCHA hired Chelmsford, a contractor, to perform certain exterior demolition, excavation, and installation work, including the installation of trash compactors and the removal and replacement of pathways and benches in designated areas of the property.

Harris, an Amsterdam Houses tenant, was caused to trip and fall by the damaged concrete base of a wooden bench located on a path leading to the laundry room. As she was walking on the path, looking for an individual who had called her name, her left leg and left pant leg came in contact with twisted metal rods protruding two to three inches from one of the bases into the pathway, causing her to spin and fall to the ground between the two bases. Approximately six weeks prior to the accident, the wood slats of the bench had been removed, and both concrete bench bases holding the wooden slats had been left in place.

Harris commenced this action seeking to recover damages for the injuries she sustained, alleging that NYCHA and/or Chelmsford had removed the wooden portion of the bench, leaving the broken concrete base with protruding metal rods unprotected and unguarded. Harris also alleged that Chelmsford's enclosure of its work area with a temporary chain-link construction fence resulted in the significant narrowing of the path on which the bench was located, and, thus, exacerbated the dangerous condition presented

by the bench base. Harris asserted a negligence claim against NYCHA and Chelmsford, contending that their negligent acts and omissions created, permitted to continue to exist, or exacerbated a dangerous, traplike hazard, and that they negligently failed to warn others about the danger.

In its answer, Chelmsford denied all allegations of wrongdoing, asserted numerous affirmative defenses, a cross claim against NYCHA for common law indemnification and a counterclaim for contributory negligence against Harris. In its answer, NYCHA denied all allegations of wrongdoing, asserted affirmative defenses, and asserted cross claims against Chelmsford for contractual and common-law indemnification, and breach of a contract, based on allegations that Chelmsford improperly failed to procure and maintain liability insurance naming NYCHA as an insured.

Chelmsford now moves for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that the undisputed evidentiary record conclusively demonstrates that it owed no duty to Harris to maintain and/or repair NYCHA property, it did not create or exacerbate the alleged hazard, and the allegedly dangerous condition was open and obvious. In opposition, Harris and NYCHA contend that numerous triable issues exist to preclude summary judgment regarding Chelmsford's alleged failure to timely remove the bench base and exacerbation of the hazard by negligently erecting the fence.

NYCHA also moves for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that the alleged defect was open and obvious and the accident was caused solely by Harris' inattention to her surroundings.

Discussion

The possessor or owner of real property bears a duty at common law to maintain the property in a reasonably safe condition, and may be held liable for injuries caused by a dangerous condition on the property, if the owner or possessor created, or had actual or constructive notice of, the hazard. *Trujillo v. Riverbay Corp.*, 153 A.D.2d 793, 794-795 (1st Dept 1989). "A defendant seeking summary judgment dismissing the complaint based upon lack of notice must make a prima facie showing affirmatively establishing the absence of notice as a matter of law." *Carrillo v. PM Realty Group*, 16 A.D.3d 611, 612 (2nd Dept 2005). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986); *Plantamura v. Penske Truck Leasing*, 246 A.D.2d 347, 347-348 (1st Dept 1998).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends upon the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 (1997) (internal quotation marks and citation omitted); *Alexander v. New York City*

Tr., 34 A.D.3d 312, 313 (1st Dept 2006). Where genuine triable issues of material fact or triable issues requiring credibility determinations exist, summary judgment is not appropriate. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 561 (1980).

Chelmsford correctly argues that it owed no duty to Harris, a third party to Chelmsford's construction contract with NYCHA, to warn, or to maintain, inspect, or repair the bench, because it did not own the premises, nor did it contractually assume NYCHA's duty to maintain the premises in a safe condition. Generally, a contractual obligation, without more, does not operate to impose a duty of care in tort in favor of a third party to the contract. *Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257 (2007); *Espinal v. Melville Snow Contrs., Inc.*, 98 N.Y.2d 136, 138 (2002)). However, where a contracting party has entirely displaced an owner's duty to maintain the premises in a safe condition, the party may be found liable. *Church v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 112 (2002); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 589 (1994). There is no dispute that Chelmsford did not own Amsterdam Houses. In addition, nothing in its contract with NYCHA indicates that it assumed NYCHA's obligation to maintain the premises. Therefore, whether Chelmsford had notice of the alleged hazard is irrelevant to its liability.

Chelmsford may be held liable only if Harris proves that it created or exacerbated the hazard that caused her injury. *See Espinal v. Melville Snow Contrs., Inc.*, 98 N.Y.2d at 141-142; *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168 (1928). Here,

issues of fact exist as to whether Chelmsford created or exacerbated the hazard that caused Harris' injury. The record includes eyewitness testimony from non-party witness Olga Rodriguez that a NYCHA employee removed splintered wooden slats from the bench bases. In addition, Chelmsford vice president Antonio Firmino testified at a deposition that, in accordance with the contract, NYCHA regulations, and instructions from NYCHA inspectors, Chelmsford erected a chain-link fence enclosing its work area, and left about 10 feet from the building line for people to access the laundry room.

Significantly, however, the record also includes evidence that Chelmsford's work included bench removal and the erection of a fence down the center of the subject path. The contract's scope of work provides that Chelmsford's "work shall consist of but not be limited to the following: 1. Removals of various pavements, various fences, curbs and footings, tree and rootballs, benches, yardlights and soil." Clarence Gordon ("Gordon"), the Amsterdam Houses housing manager, testified at a deposition that Chelmsford's scope of work specifically included the removal and replacement of benches on the path where the accident happened. The record also includes evidence that Chelmsford was required to remove and replace the subject bench in July or August 2006, prior to the date of the accident.

In addition, the project blueprints appear to demonstrate that Chelmsford's designated work areas, as marked by shaded areas, included the path where the accident occurred. While the blueprints apparently do not reference a bench at the accident

location, a video and photographs produced by Harris evidence that the bench, in fact, was located within the area that is shaded on the blueprints.

The photographs also constitute some evidence that Chelmsford may have exacerbated the alleged hazard by erecting a chain-link fence bisecting the path on which the bench was located, narrowing and obstructing the path. Gordon testified that, prior to the accident, Chelmsford erected a chain-link fence six-to-seven-feet high on the path where the accident occurred that extended four to five feet into the path on the side opposite the bench. Harris similarly testified at her deposition that, about one month prior to the accident, a temporary fence, approximately six-feet high, was erected down the center of the path, narrowing it to approximately six feet in width.

Next, Chelmsford and NYCHA contend that neither can be held liable for Harris' accident on the ground that the record demonstrates that the alleged hazard was open and obvious, and, therefore, they owed no duty to warn Harris. In opposition, Harris contends that the remaining bench base with broken concrete and protruding metal rods is not, as a matter of law, an open and obvious hazard, in the circumstances presented here.

Generally, "negligence will not attach when the allegedly dangerous condition complained of was open and obvious, particularly where the injured plaintiff was aware of it." *Nardi v. Crowley Mar. Assoc., Inc.*, 292 A.D.2d 577, 577 (2nd Dept 2002). However, whether a dangerous condition is open and obvious and negates a duty to warn presents a fact issue for the jury, unless the clear and undisputed evidence compels the

conclusion that the hazard was patent, as a matter of law. *Tagle v. Jakob*, 97 N.Y.2d 165, 169 (2001); *see Bloom v. Lula Realty Corp.*, 43 A.D.3d 662, 663 (1st Dept 2007). The surrounding circumstances must be considered, and "[a] condition that is ordinarily apparent to a person making reasonable use of [his] senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted." *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, 1009 (2d Dept 2008). Therefore, summary judgment will be denied where the claim is based on an alleged failure to maintain the premises in a safe condition, even if the hazard is open and obvious, because such evidence goes only to the issue of comparative negligence. *Garcia v. Mack-Cali Realty Corp.*, 52 A.D.3d 420, 421 (1st Dept 2008); *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 72-73 (1st Dept 2004).

Here, Harris testified that, during the six-week period immediately preceding the accident, she observed the condition of the bench while walking by the area twice a week, on her way to the laundry room. She also testified that, while she had observed that the wood bench slats had been removed, she did not notice the broken concrete base and twisted metal rods protruding from the base, prior to the accident. She testified that, just before the accident occurred, she had been sitting on a bench on the path, and could not see the metal rods or the base because her view was blocked by an acquaintance, who weighed more than 200 lbs., and by a fence erected by NYCHA. She heard her name being called, stood up, and began walking toward the voice, stepped around the

acquaintance, and collided with the broken bench base. The fact that a dangerous condition may be visible does not necessarily mean that it is open and obvious, especially where, as here, where the plaintiff's view of the defect is obstructed by other pedestrians *Cook v. Consolidated Edison Co. of N. Inc.*, 51 A.D.3d 447, 448 (1st Dept 2008).

As such, Chelmsford and NYCHA's respective motions for summary judgment dismissing the complaint are denied.

Summary judgment is also denied on those branches of Chelmsford's motion for summary judgment dismissing NYCHA's cross claims for contractual indemnification and for breach of contract by failing to protect the public from injury and by failing to procure liability insurance naming NYCHA as an insured.

With regard to indemnification, the contract provides, in relevant part, that:

> [i]f any person sustains injury or death, or loss or damage to property occurs, resulting directly or indirectly from the Work of [Chelmsford], or his subcontractors, in their performance of this Contract, or from [Chelmsford's] failure to comply with any of the provision of this Contract or of law, or for any other reason whatsoever, [Chelmsford] shall indemnify and hold [NYCHA] harmless from any and all claims and judgments for damages and from costs and expenses to which [NYCHA] may be subjected or which it may suffer or incur by reason thereby.

Pursuant to the clear and unambiguous terms of this provision. *See generally American Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dept 1990), *lv denied* 77 N.Y.2d 807 (1991), Chelmsford's obligation to indemnify NYCHA is triggered only if Chelmsford is found liable for Harris' accident. As discussed above, there exist genuine triable issues of material fact including, but not limited to, whether Chelmsford's acts or omissions in allegedly failing to timely remove and/or barricade the subject bench, and in erecting the chain-link fence were proximate causes of Harris' accident.

These triable issues also preclude summary judgment on the claim for breach of the site protection contract provision. The provision provides, in relevant part, that Chelmsford "shall maintain all work areas . . . in a neat and workmanlike manner [and] shall take all measures required by law and NYC Building Code for the protection of the public. The work included in this contract shall be executed in such a manner that no damage or injury will occur to . . . the public."

With regard to insurance coverage, the contract obligates Chelmsford to procure insurance protecting NYCHA "against liability claims for personal injury and bodily injury . . . arising from or alleged to have arisen from operations of [Chelmsford] and its Subcontractors." The court is unable to determine from the record whether Chelmsford procured the appropriate insurance, or failed to do so. Therefore, summary judgment in favor of either party on this claim is denied.

In addition, Chelmsford is not entitled to summary judgment dismissing NYCHA's cross claim for common law indemnification against it and NYCHA is not entitled to summary judgment dismissing Chelmsford's cross claim for common law indemnification against it, as such a finding would be premature at this time. *See Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 A.D.3d 635 (1st Dept. 2010).

In accordance with the foregoing, it is hereby

ORDERED that defendant Chelmsford Contracting Corp.'s motion for summary judgment dismissing the complaint and all cross claims asserted against it is denied; and it is further

ORDERED that defendant New York City Housing Authority's motion for summary judgment dismissing the complaint and all cross claims asserted against it is denied.

This constitutes the decision and order of the court.

FILED
SEP 28 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: New York, New York
September 23, 2010

ENTER:

J.S.C.