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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 113560/2007

BATTS, INGRAM

VS

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

CAL # 3

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JAN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/12/11

JAN 12 2011

BARBARA JAFFE J.S.C.

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

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 : PART 5

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INGRAM BATTS, an infant, by her mother and natural guardian, CLARA BROOKS, and CLARA BROOKS individually, LEON STUCKEY, an infant, by his Mother and natural guardian, JEANINE STUCKEY, and JEANINE STUCKEY, individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEIGHBORHOOD PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., WEST 132 STREET, LLC, and A. ALEEM CONSTRUCTION, INC.,

Defendants.

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Index No. 113560/07

Motion Date: 11/16/10
Motion Seq. No.: 003

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiffs:
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For A. Aleem:
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By notice of motion dated July 14, 2010, plaintiffs move pursuant to CPLR 3212 for an order granting them partial summary judgment on liability against defendants and setting the matter down for an inquest on damages. Defendants oppose the motion.

By notice of cross-motion dated August 30, 2010, defendants Neighborhood Partnership

Housing Development Fund Co., Inc. (Neighborhood) and West 132 Street, LLC (West) move pursuant to CPLR 3212 for an order summarily dismissing plaintiffs' complaint and all cross-claims against them. Only plaintiffs oppose.

By notice of cross-motion dated August 31, 2010, defendant City moves pursuant to CPLR 3211 and 3212 for an order dismissing the complaint and all cross-claims against it. Plaintiff and the other defendants oppose.

I. BACKGROUND

Defendants Neighborhood and West own the premises at 408-412 Lenox Avenue in Manhattan, including the adjacent sidewalks (the premises). (Affirmation of Scott Star, Esq., dated July 14, 2010 [Star Aff.], Exh. N). In June 2007, they contracted with defendant A. Aleem Construction, Inc. (Aleem) to provide construction services for the premises. (*Id.*, Exh. L). Sometime thereafter, Aleem erected a scaffold-supported sidewalk shed or bridge (shed) in front of 408 Lenox Avenue. (*Id.*, Exhs. E, L). On July 5, 2007, City's Department of Buildings (DOB) issued Aleem a work permit for the shed. (*Id.*, Exh. E).

On August 2, 2007, a caller, later identified as Paulette Gay, reported to City's 311 hotline that ever since it had been erected, the shed was unstable and unlit. (*Id.*, Exhs. E, F). DOB received the complaint and assigned it a complaint number. Sometime thereafter, Gay again called 311 to complain about the shed, and also complained about it to the superintendent of 408 Lenox Avenue. (*Id.*, Exh. F).

Jokhim Balgar, the superintendent at 410 Lenox Avenue, also noticed that the shed appeared to be unsteady and thrice complained about it to Aleem's foreman between June and August 2007. (*Id.*, Exh. G).

Soon thereafter, on August 17, 2007, plaintiffs Leon Stuckey (Stuckey) and Ingram Batts (Batts), both 16 years old, were walking under the shed when it collapsed on them, causing them numerous and severe injuries. (*Id.*, Exh. J).

On August 18, 2007, DOB issued a violation to Neighborhood and West for failing to maintain the sidewalk shed, which it found had structurally failed and collapsed onto the sidewalk. (*Id.*, Exh. E). On or about August 22, 2007, Neighborhood's managing agent submitted to DOB a form on which it admitted that the violation existed and certified that it had been corrected. The violation was deemed corrected on October 11, 2007. (*Id.*).

On or about October 9, 2007, plaintiffs commenced the instant action, on or about November 14, 2007 Neighborhood and West served their answer, on or about December 10, 2007 City answered, and on or about January 16, 2008 Aleem answered. (Affirmation of Lana S. Kaganovsky, Esq., dated Aug. 30, 2010, Exhs. 1-4).

II. APPLICABLE LAW

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and materialissues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate: (1) a duty

owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. (*Solomon v City of New York*, 66 NY2d 1026 [1985]).

III. PLAINTIFFS' MOTION AGAINST ALEEM

A. Contentions

Plaintiffs claim that Aleem unsafely and defectively constructed the shed and had notice that it was unsafe before their accident. (Star Aff.). They rely on a construction safety analysis conducted by Kathleen Hopkins, a certified site safety manager with over 30 years of experience in the construction field, in which she concludes that Aleem, as well as the other defendants, failed to comply with several Rules of the City of New York and the Administrative Code requiring the inspection and safety of scaffolds and the lighting of sidewalk sheds, and that these violations proximately caused plaintiffs' injuries. (Star Aff., Exh. M).

Aleem denies that the shed was improperly constructed, submitting employee affidavits describing the shed's construction and an expert affidavit from a licensed engineer who concludes that the shed was properly constructed in compliance with all applicable rules and regulations. (Affirmation of Loretta A. Redmond, Esq., dated Sept. 13, 2010, Exhs. B-F). It also denies receiving any complaints from Gay or Balgar or observing that the shed was unstable, and asserts that plaintiffs have failed to establish, *prima facie*, that it caused the shed to collapse, alleging that there is evidence that third parties tampered with it before the collapse. Finally, Aleem maintains that the motion is premature as discovery is ongoing and that depositions of defendants, Gay, and Balgar remain outstanding, relying on the affidavit of an investigator who states that Gay told him in a telephone interview that the shed "appeared to be in fine condition" and "sturdy" before the collapse and an affidavit from the superintendent of 408 Lenox Avenue

who denies that Gay complained to him about the shed. (*Id.*, Exhs. K, L, M).

In reply, plaintiffs dispute the credibility of Aleem's employees and the conclusions drawn by Aleem's expert. (Reply Affirmation, dated Sept. 23, 2010).

B. Analysis

The credibility of Aleem's witnesses and an assessment of the relative probative value of the conflicting expert opinions cannot be addressed on these motions. (58A NY Jur 2d, Evidence and Witnesses § 672 [2010]; *see Powell v HIS Contrs., Inc.*, 75 AD3d 463 [1st Dept 2010] [credibility issues should not be resolved on summary judgment motion]; *Ocampo v Boiler*, 33 AD3d 332 [1st Dept 2006] [experts' conflicting opinions raised issues of fact and credibility that may not be resolved on motion for summary judgment]).

Consequently, there exist disputed issues of fact as to whether the shed was constructed safely, how the accident was caused, and whether Aleem had notice before the accident that the shed was unsafe. Moreover, as discovery is ongoing and neither defendants nor the non-party witnesses have yet been deposed, the motion is premature. (CPLR 3213[f]).

IV. PLAINTIFFS' MOTION AGAINST NEIGHBORHOOD AND WEST AND NEIGHBORHOOD AND WEST'S CROSS-MOTION

A. Contentions

Plaintiffs argue that having admitted that the shed was unsafe in their DOB correction certificate, Neighborhood and West are vicariously liable for Aleem's actions as Aleem constructed the shed for their benefit and pursuant to the contract between them, and that they are independently liable given their duty to maintain the shed in safe condition and because their construction of the shed on the public sidewalk constituted a "special use." Plaintiffs also assert that Gay's complaint provided Neighborhood and West with notice of the shed's unsafe

condition. (Star Aff.).

In opposition to plaintiffs' motion and in support of their cross- motion, Neighborhood and West assert that plaintiffs' motion is premature as defendants' depositions have not yet been held, and they deny vicarious liability for the conduct of Aleem, an independent contractor. (Kaganovsky Aug. Aff.; Affirmation of Lana S. Kaganovsky, Esq., dated Sept. 13, 2010 [Kaganovsky Sept. Aff.]). Neighborhood's officer and West's president allege that they delegated to Aleem all aspects of the construction at 408 Lenox Avenue, that they had no control over Aleem's work, and that they received no complaints about the shed before plaintiffs' accident. (*Id.*, Exhs. 1, 2). Absent proof that they created or had actual or constructive notice of an unsafe or dangerous condition, Neighborhood and West argue that they may not be held liable for plaintiffs' injuries. They deny having made special use of the sidewalk or that they may even be alleged to have made special use of the sidewalk as they neither installed nor inserted anything into it. They also label plaintiffs' expert's conclusions conclusory and speculative, and contend that plaintiffs submit no evidence demonstrating the proximate cause of the accident. (Kaganovsky Aug. Aff.; Kaganovsky Sept. Aff.).

In opposition to Neighborhood and West's cross-motion, plaintiffs argue that Neighborhood and West owed a nondelegable duty to pedestrians traveling under the shed, as construction of the shed constitutes an inherently dangerous activity, and that it is thus irrelevant whether they received notice that the shed was not safe. (Affirmation of Scott Star, Esq., dated Sept. 20, 2010).

In reply, Neighborhood and West deny having had a nondelegable duty absent notice or proof that it created a dangerous condition, that Aleem improperly constructed the shed, or that it

received any complaints or violations before the accident. (Reply Affirmation, dated Sept. 23, 2010).

B. Analysis

While a premises owner is responsible for maintaining its property in a reasonably safe condition and has a nondelegable duty to not "cause harm to members of the public traveling on the nearby public sidewalk" (*Emmons v City of New York*, 283 AD2d 244 [1st Dept 2001]), it may not be held liable for any negligent actions undertaken by an independent contractor which it hired to perform a particular task on the premises "absent a showing of a specifically imposed duty or knowledge by the [owner] of an inherent danger" (*Laecca v New York Univ.*, 7 AD3d 415 [1st Dept 2004], *lv denied* 3 NY3d 608). Thus, an owner may be held liable for an independenet contractor's actions if "it has assigned work to [it] which the [owner] knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated" by the owner. (*Rosenberg v Equit. Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]; *see also Hernandez v Racanelli Constr. Co., Inc.*, 33 AD3d 536 [1st Dept 2006], *lv denied* 8 NY3d 816 [2007] [inherently dangerous work may implicate developer's nondelegable duty of supervision]).

In *Tytell v Battery Beer Distrib., Inc.*, 202 AD2d 226 (1st Dept 1994), the issue before the court was whether the owner and manager of a building may be held vicariously liable for an independent contractor's alleged negligence in constructing a sidewalk bridge, in front of and attached to the building, which had collapsed. While the court observed that the owner and manager would not generally be held liable for the independent contractor's actions, it held that:

> the construction of a sidewalk bridge extending over an area frequented by pedestrians is clearly a project which must be carefully done in order to avoid the creation of such a dangerous condition. Thus, [the building owner and manager] may not argue that they are

not vicariously liable for any lack of due care in constructing the bridge.

(*Id.* at 227).

Here, Neighborhood and West constructed a shed, or sidewalk bridge, over an area frequented by pedestrians. Thus, as in *Tytell*, they may be held liable for Aleem's alleged negligence and consequently, have failed to establish, *prima facie*, that they may not be held liable. (*See also Little v Cohen*, 259 AD2d 261 [1st Dept 1999] [complaint improperly dismissed against building owners as they had nondelegable duty to exercise due care to assure that scaffolding erected over public walkway in front of building provided requisite level of protection from risks presented by ongoing work at premises and could thus be held liable for contractor's negligence]).

However, as factual issues remain as to whether Aleem was negligent in constructing the shed, plaintiffs are not entitled to summary judgment on the issue of liability as against Neighborhood and West.

V. PLAINTIFFS' MOTION AGAINST CITY AND CITY'S CROSS-MOTION

A. Contentions

Plaintiffs maintain that City was given notice of the unsafe condition of the shed before the accident via Gay's 311 call, and that its failure to respond to the call and inspect the shed renders City jointly liable for their injuries. (Star Aff.). And, having issued a permit for Aleem to construct the shed, they maintain that City had an absolute, nondelegable duty to inspect the shed. Plaintiffs' expert concludes that City's failure to inspect the shed after it was built and after it received a complaint about its unsafe condition contributed to causing the accident. (Star Aff., Exh. M).

In moving for summary dismissal of the complaint, City denies that it owed any duty of

care to plaintiffs as it did not own, operate, or control the premises or construct the shed, or that it may be held liable for any failure to inspect or negligent inspection of the shed in the absence of a special relationship between it and plaintiffs, or that it received prior written notice of the shed's allegedly dangerous condition. (Affirmation of Lynn M. Leopold, ACC, dated Aug. 31, 2010 [Leopold Aff.]).

Neighborhood and West argue that City had a duty to keep the shed and the sidewalk below it reasonably safe after it issued the permit, that it received actual notice of the defect via Gay's 311 call, that it had constructive notice of the defect as the condition had allegedly existed for a sufficient length of time, and that it had a duty to inspect and/or maintain the shed. (Affirmation of Lana S. Kaganovsky, Esq., dated Sept. 14, 2010).

Plaintiffs contend that City had a duty to inspect the shed as the construction of a sidewalk bridge is inherently dangerous, and that it is thus irrelevant whether or not City received notice or had a special relationship with them. (Affirmation of Scott Star, Esq., dated Sept. 16, 2010). Aleem joins in plaintiffs' opposition and observes that City cites no decisions addressing its duty relating to sidewalk sheds or bridges. (Affirmation of Richard Bakalor, Esq., dated Sept. 21, 2010).

In reply, City maintains that Administrative Code § 7-210 shifts liability from City to the premises owner for sidewalk maintenance, and that pursuant to Administrative Code § 7-201, no claim may be made against it for personal injuries caused by a defective encumbrance or attachment to a sidewalk absent written notice. It also argues that without a special relationship it may not be held liable for negligent inspection or failure to inspect the shed and observes that plaintiffs do not allege in their opposition that a special relationship existed, and that even if it had inspected the shed, plaintiffs have not established that such an inspection would have

prevented their injuries. (Reply Affirmation, dated Oct. 8, 2010).

B. Analysis

Several early decisions address City's liability for the actions of a contractor to whom City has issued a permit for the construction of a sidewalk shed or bridge. In *Parks v City of New York*, the plaintiff was injured after a temporary sidewalk bridge collapsed, which bridge had been constructed pursuant to a City permit. The court held that even if City had received no notice that the bridge was defective, it could nevertheless be held liable because "by issuing the permit, [City] became a joint actor with the owner of the land in the erection of the bridge and by reason thereof became responsible for any neglect or fault of the owner in properly erecting the bridge." (111 AD 836 [1st Dept 1906], *affd* 187 NY 555 [1907]). Similarly, in *Metzroth v City of New York*, City was held liable to a plaintiff who had been killed after a sidewalk bridge had collapsed on him due to its having granted a permit for the construction of the bridge. (241 NY 470 [1926]; *see also City of New York v Corn*, 133 AD 1 [1st Dept 1909] [as City issued permit for contractor to erect sidewalk bridge, it had duty to public to ensure that bridge was constructed and maintained in safe condition]). Accordingly, when City issues a permit for the construction of a sidewalk shed or bridge, it has a duty to inspect the shed or bridge and may be held liable for failing to do so.

The Court of Appeals subsequently narrowed City's duty to inspect the activities of third parties to whom it had issued a permit to situations where the permit authorizes "dangerous or imminently dangerous activities in the [C]ity's thoroughfares." (*De Witt Props, Inc. v City of New York*, 44 NY2d 417 [1978]). The Court cited *Parks* and *Metzroth* and noted that the erection of sidewalk bridges constitutes a dangerous activity for which City could be held liable. (*See also Gillette Shoe Co., Inc. v City of New York*, 58 NY2d 853 [1983] [City had duty to

inspect third-party's activity only if activity was dangerous]; *cf Colon v City of New York*, 29 AD3d 724 [2d Dept 2006] [City had no duty to inspect repaving work as it was not imminently dangerous activity]). Thus, *De Witt* reaffirmed that City may be held liable for the collapse of a sidewalk shed for which it had issued a permit.

While City argues that Administrative Code § 7-210 supersedes *Parks*, *DeWitt*, and *Metzroth*, those decisions do not depend on City's duty to maintain the sidewalks, but rather on the nature of the work at issue in the permit and whether it was dangerous. Moreover, as the Administrative Code pertains only to the failure of a property owner to "maintain [a] sidewalk in a reasonably safe condition [including but not limited to] the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk" (Admin. Code 7-210[b]), there is doubt as to whether it applies to an owner's failure to maintain a shed above a sidewalk.

And, as City had a duty to inspect the shed, it is irrelevant whether it received notice. (*Parks*, 111 AD at 839-840). City has thus failed to demonstrate, *prima facie*, that it may not be held liable for plaintiff's injuries.

However, as triable issues remain as to the cause of the accident and whether City's failure to inspect the shed proximately caused the accident or contributed to its cause, plaintiffs have also failed to demonstrate that they are entitled to an order granting them summary judgment on liability against City.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment on liability only against all defendants is denied; it is further

ORDERED, that defendants Neighborhood Partnership Housing Development Fund Co., Inc. and West 132 Street, LLC's cross-motion for summary judgment is denied; and it is further

ORDERED, that defendant City of New York's cross-motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: January 12, 2011
New York, New York

JAN 12 2011

FILED

JAN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE