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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Index Number : 116698/2008
ALLEN, NORMA MILLER
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
Cal. # 13

INDEX NO. 116698/08
MOTION DATE 11/15/11
MOTION SEQ. NO. 002

Motion to/for summary judgment
No(s). 1
No(s). 2,3
No(s). 4,5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
FEB 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/10/12
FEB 10 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

NORMA MILLER ALLEN,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, CONSOLIDATED EDISON CO. OF NEW YORK INC., PROCIDA CONSTRUCTION CORP., and TRIUMPH CONSTRUCTION CORP.,

Defendants.

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Index No. 116698/08

Argued: 11/15/11
Motion Seq. No.: 002
Motion Cal. No.: 105

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:	**For Triumph:**	**For City:**
Paul J. Sagiv, Esq.	Tod S. Fichtelberg, Esq.	Andrew Lucas, ACC
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By notice of motion dated July 12, 2011, defendant Triumph Construction Corporation (Triumph) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against it. Plaintiff and defendants City and the New York City Housing Authority (NYCHA) oppose.

I. BACKGROUND

On February 1, 2006, Triumph submitted a bid to City for an award of a contract to install "sidewalks, adjacent curbs, and pedestrian ramps as necessary in various locations." (Affirmation Andrew Lucas, ACC, in Opposition, dated Aug. 10, 2011 [Lucas Opp. Aff.], Exh. 1). In March of 2006, Triumph and City executed a contract whereby Triumph agreed to perform the work. (*Id.*). Article 7 of the contract provides, in pertinent part, that:

> [i]f any person . . . sustains any . . . injury arising out of the operations of [Triumph] . . . in the performance of this Contract or from [Triumph's] . . . failure to comply with any provisions of this Contract or of the Law, [Triumph] shall indemnify, defend, and hold the City, its employees, and agents harmless against any and all claims, liens, demands, judgments, penalties, fines, liabilities, settlements, damages, costs and expenses of whatever kind or nature . . . arising from or in any way related to such operations, or failure to comply with any of the provisions of this Contract or of the Law. . . .
>
> [Triumph] shall defend at its own expense, indemnify and hold the City harmless from any and all claims . . . or judgments for damages . . . and from costs and expenses to which the City may be subjected or which it may suffer or incur allegedly arising out of or in connection with any operations of [Triumph] . . . or [its] failure to comply with the provisions of this Contract or of the Laws.

(*Id.*).

Sometime thereafter, City issued Triumph a work permit, which specifies that Triumph may open the "roadway and/or sidewalk at East 110th Street [from] Madison Avenue [to] Park Avenue" "for a maximum length of 700 feet" "for the purpose of . . . major reconstruction." (Affirmation of Paul J. Sagiv, Esq., in Opposition, dated Sept. 22, 2011 [Sagiv Opp. Aff.], Exh. B).

On September 16, 2007, plaintiff tripped and fell on a sidewalk expansion joint on the south side of East 110th Street between Park and Madison Avenues, adjacent to the Lehman House, a NYCHA-owned housing development, in Manhattan. (Affirmation of Tod S. Fichtelberg, Esq., dated July 12, 2011 [Fichtelberg Aff.], Exh. C).

On or about December 15, 2008, plaintiff commenced the instant action with the filing of a summons and verified complaint, asserting negligence claims against defendants arising from their ownership and maintenance of the sidewalk. (*Id.*, Exh. A). On or about May 18, 2009, Triumph joined issue with service of its answer. (*Id.*, Exh. B).

At an examination before trial (EBT) held on March 4, 2011, plaintiff testified that she

first noticed the defect after she fell, explaining:

> I couldn't understand . . . what happened, so . . . I went to that area and I saw that separation because I felt the front of my right shoe hit something, like I felt a dip, and that's when I fell forward. I felt like a dip as I was walking. . . . I felt this separation between . . . two cement slabs.

(*Id.*, Exh. E). Although she could not remember how wide the separation was when her accident occurred, she returned to the site to measure it in October or November of 2007, determining that it was approximately one-and-a-half to two inches wide and one-and-a-half inches deep. (*Id.*).

At an EBT held on March 10, 2011, Robert Charles, superintendent for Triumph, testified that, pursuant to the 2006 contract with City, Triumph completely replaced the sidewalk on which plaintiff tripped and fell, ensuring that "everything [was] level [and] secure, [ ] [that] there [were] no tripping hazards, [that] there [was] adequate spacing for expansion and contraction of the sidewalk[,] [a]nd generally that it me[t] all City specifications." (*Id.*, Exh. G). With respect to the spacing between cement slabs, he testified that Triumph installed them according to City specifications, pouring the cement around pre-measured expansion material. (*Id.*). According to him, the job was performed sometime between June and October of 2006, and a City consultant, who, along with him, was on site every day, never expressed dissatisfaction with Triumph's work. (*Id.*). When asked to explain the approval process for work performed pursuant to a City contract, he testified as follows:

> Quality control reports . . . are produced on each property that is done under this particular type of contract. The only way we would have it is if there were deficiencies found. . . . The document is produced for us to go out and correct defects in the final product. . . . If there is no quality control report, that means the final product was accepted.

(*Id.*). He testified that Triumph never received a quality control report. (*Id.*).

By so-ordered stipulation dated March 29, 2011, Triumph was directed to produce records in its possession relating to its reconstruction of the sidewalk "to the extent not already provided." (Sagiv Opp. Aff., Exh. C).

At an EBT held on May 19, 2011, Omar Codling, record searcher for the New York City Department of Transportation (DOT), testified that a fruitless search of DOT records for the subject block from September 16, 2005 to and including September 16, 2007 was performed. (Lucas Aff., Exh. G).

II. CONTENTIONS

Triumph denies possessing or breaching any duty to plaintiff, as it is undisputed that it did not own the property abutting the subject sidewalk and that plaintiff was not a party to its contract with City, and there is no evidence that it failed to exercise care in installing the sidewalk, that plaintiff detrimentally relied on the continued performance of its duties, or that it was obligated to maintain the sidewalk. (*Id.*). In any event, Triumph maintains that the defect is trivial and that it had no notice of it. (*Id.*).

City and NYCHA agree that the defect is trivial but nonetheless oppose Triumph's motion on the ground that it is premature, arguing that discovery is necessary to determine whether Triumph owes a duty to plaintiff or City by virtue of the indemnification provisions in its 2006 contract with City and, as City and NYCHA have maintenance agreements with each other, whether Triumph has a common law or contractual duty to indemnify NYCHA. (Lucas Opp. Aff.).

Plaintiff agrees that Triumph's motion is premature, as the March 29 order directed it to provide documentation of its work, and the only document it has produced is the City work

permit. (Sagiv Opp. Aff.). She also claims that triable issues of fact exist as to whether Triumph caused or created the defect, as other documentation of its work may reveal that it failed to use reasonable care in installing the expansion joint and whether the defect was trivial. (*Id.*). She also asserts that the motion is premature insofar as she plans to hire an expert on expansion joint defects. (*Id.*).

In reply, Triumph denies owing a duty to either plaintiff or City notwithstanding the 2006 indemnification provisions, as City offers no evidence demonstrating an absence of care in performing its contractual obligations or that it otherwise caused or created the defect. (Affirmation of Tod S. Fichtelberg, Esq., in Reply to City's Opposition, dated Aug. 17, 2011). It also denies possessing any duty to indemnify NYCHA, absent the maintenance contracts between City and NYCHA or any evidence that it was negligent. (*Id.*). It argues that its motion is not premature, as plaintiff and City only speculate as to the existence of other records of its work at the site, and observes that plaintiff has had three years to retain an expert on expansion joints, and that neither party has offered evidence contradicting Charles' testimony as to City's approval of its work. (*Id.*; Affirmation of Tod S. Fichtelberg, Esq., in Reply to Plaintiff's Opposition, dated Sept. 28, 2011).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*,

49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. Summary judgment motion as premature

A summary judgment motion may be denied as premature if it "appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." (CPLR 3212[f]). "This is especially so when the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." (*Gardner v Cason, Inc.*, 82 AD3d 930 [2d Dept 2011]). However, "[t]he mere hope that evidence sufficient to defeat [the] motion . . . may be uncovered during the discovery process is insufficient to deny [it]." (*Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]).

Here, as the instant action was commenced more than three years ago, both City and plaintiff have had an adequate opportunity to obtain disclosure, and City only speculates as to the existence of additional evidence pertaining to the 2006 contract. And, as the March 29 so-ordered stipulation only directs Triumph to provide records of its work to the extent it has not already done so, and absent any evidence as to when Triumph provided the City permit, there is no evidence that it possesses additional records, and plaintiff's speculation as to same is insufficient to justify denial of the motion. (*See Goldes v City of New York*, 19 AD3d 448 [2d Dept 2005] [hope that evidence of defendant's affirmative negligence may be uncovered as discovery continues insufficient to justify denial of defendant's summary judgment motion]).

B. Existence of duty to plaintiff

Pursuant to New York City Administrative Code § 7-210, and subject to certain

exceptions not pertinent here, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition and may be held liable for injury caused by its failure to do so. Nonetheless, an independent contractor that performs work on a sidewalk may owe a duty to a non-contracting third party if, as relevant here, it fails to exercise reasonable care in the performance of its duties and thereby "launch[es] a force or instrument of harm." (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]). Consequently, in determining whether the contractor owed a duty to the third party, whether the contractor negligently created or exacerbated a dangerous condition must be determined. (*Id.* at 142).

Here, as is undisputed that Triumph does not own Lehman House, it may not be held liable for plaintiff's injuries pursuant to section 7-210. Moreover, as Charles testified that Triumph was contractually obligated to install the sidewalk's expansion joints in accordance with City's specifications, that it did so, that the City consultant never expressed dissatisfaction with its work, and that it never received a quality control report, and as Codling testified that there exist no DOT records pertaining to the sidewalk for the two years before and including the accident, Triumph has established that it exercised due care in performing its contractual obligations, and there is no evidence that Triumph was obligated to return to the sidewalk after completing its work to ensure that the expansion joints remained in the same condition. Thus, even if the expansion joint on which plaintiff tripped constituted a dangerous condition, Triumph owed her no duty of care and has established, *prima facie*, entitlement to summary judgment. (*See Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011] [where abutting property owner hired contractor to build sidewalk and tree well, and plaintiff tripped over tree well, contractor entitled to summary judgment, as its representative testified tree well was level with sidewalk when work

was complete, property owner had no problem with work, and no evidence offered demonstrating that contractor breached its contractual obligations]; *Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702 [4th Dept 2011] [where contractor obligated to repair water main and fill hole to be flush with pavement, and plaintiff slipped in depression created by shifting of stones that filled hole, contractor had no duty to her, as it was not obligated to ensure that the hole remained flush after completion of its work]).

As plaintiff and City speculate as to the existence of additional records of Triumph's work (*see supra*, III.A.) and offer no evidence reflecting that Triumph failed to exercise reasonable care in performing same, they have failed to raise triable factual issues as to whether Triumph owed plaintiff a duty.

In light of the above determination, whether the expansion joint constituted a trivial defect and whether Triumph obtained notice of the defect need not be determined.

D. Cross-claims for indemnification

1. Contractual indemnification

"The right to contractual indemnification depends on the specific language of the contract." (*Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). Where a party is required to indemnify another for damages "arising out of" its work, there must be a showing that "a particular act or omission in the performance of such work was causally related to the accident." (*Urbina v 26 Ct. St. Assocs., LLC*, 46 AD3d 268, 273 [1st Dept 2007]).

Here, as plaintiff tripped and fell on an expansion joint installed by Triumph, and as Triumph offers no evidence demonstrating that this installation, regardless of whether it was performed with due care, was not causally related to plaintiff's accident, it is not entitled to

summary judgment on City's cross-claim for contractual indemnification.

Absent any evidence of a contract between Triumph and NYCHA, or any evidence as to the existence and content of the maintenance contracts between City and NYCHA, Triumph is entitled to summary judgment on NYCHA's contractual indemnification claim.

2. Common law indemnification

"Common law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnification was free from negligence." (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

Here, Triumph has established that there exists no evidence reflecting that it failed to exercise care in performing its contractual obligations. As NYCHA, by virtue of being the abutting landowner, may be held liable for plaintiff's injuries pursuant to Administrative Code § 7-210 and fails to offer any evidence demonstrating that it was not negligent in maintaining the sidewalk, or that there exist triable factual issues as to its freedom from negligence, Triumph is entitled to summary judgment on this cross-claim. (*See Jaikran v Shoppers Jamaica, LLC*, 85 AD3d 864 [2d Dept 2011] [where contractor demonstrated that it did not owe duty to plaintiff pursuant to *Espinal*, and thus, that the accident was not due solely to its own negligence, contractor entitled to summary judgment on property owner's cross-claim for common law indemnification]; *Lubell v Stonegate at Ardsley Home Owner's Assoc., Inc.*, 79 AD3d 1102 [2d Dept 2010] [defendant contractor entitled to summary judgment on defendants property owner's and property manager's cross-claims for common law indemnification where there existed no triable issues of fact as to contractor's negligence]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Triumph Construction Corporation's motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant Triumph Construction Corporation with costs and disbursements to Triumph Construction Corporation, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Triumph Construction Corporation; and it is further

ORDERED, that defendant Triumph Construction Corporation's motion for summary judgment is granted as to defendant New York City Housing Authority's cross-claim for common law indemnification; and it is further

ORDERED, that defendant Triumph Construction Corporation's motion for summary judgment is granted as to defendant New York City Housing Authority's cross-claim for contractual indemnification; and it is further

ORDERED, that defendant Triumph Construction Corporation's motion for summary judgment is denied as to defendant City's cross-claim for contractual indemnification; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

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

DATED: February 10, 2012
New York, New York