SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE Justice PART 5

Index Number : 105155/2011
MALDONADO, ALBERTO
VS.
106TH STREET HOUSES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT CALEND

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4, 5, 6

Replying Affidavits _____ | No(s). 7, 8

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
NOV 20 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/16/12
NOV 16 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

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ALBERTO MALDONADO,

Plaintiff,

-against-

106th STREET HOUSES, INC., FIFTH AND 106th STREET ASSOCIATES, ROBERT W. SEAVEY, FIFTH AND 106th STREET HOUSING COMPANY, LLC, DALTON MANAGEMENT CO., LLC, ATLAS CONSTRUCTION OF NEW YORK, INC., EVEREST SCAFFOLDING INC., and THE CITY OF NEW YORK,

Defendants.

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Index No. 105155/11

Argued: 6/5/12
Motion seq. nos.: 002,

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Adam S. Ashe, Esq.
Law Offices of Ami Morgenstern
40-17 Broadway, PO Box 3223
LIC, NY 11103-0223

For City:
Jennifer Herscovici, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007

For Atlas:
Jamie T. Packer, Esq.
Nicoletti Gonson *et al.*
555 Fifth Ave., 8th Fl.
New York, NY 10017
212-730-7750

For Everest:
Cheryl Fuchs, Esq.
Wade Clark Mulcahy
111 Broadway, 9th Fl.
New York, NY 10006
212-267-1900

For Fifth/Seavey/Dalton:
Roy Itzkowitz, Esq.
Gannon, Rosenfarb *et al.*
100 William St., 7th Fl.
New York, NY 10038
212-655-5000

By notice of motion dated December 27, 2011, defendant City moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiff and defendants Fifth and 106th Street Associates (Fifth), Robert W. Seavey, and Dalton Management Co., LLC (Dalton) (collectively, Fifth) oppose.

By notice of cross motion dated March 9, 2012, defendant Atlas Construction of New York, LLC (Atlas) moves pursuant to CPLR 3212 for an order summarily dismissing the

complaint and all cross claims against it. Plaintiff and Fifth oppose.

By notice of motion dated February 8, 2012, defendant Everest Scaffolding, Inc. (Everest) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Fifth opposes.

The motions are consolidated for decision.

I. PERTINENT BACKGROUND

On November 4, 2010, plaintiff was injured when he allegedly tripped and fell in a hole in the sidewalk on Fifth Avenue between East 106th and 107th Streets in Manhattan, in front of an apartment complex located at 1250 Fifth Avenue (the premises). (Affirmation of Jennifer Herscovici, ACC, dated Dec. 27, 2011 [Herscovici Aff.], Exhs. A, G).

In 2008 and 2009, Atlas performed work for Dalton at the premises but did not perform any work on the sidewalk in front of the premises. (Affirmation of Jamie T. Packer, Esq., dated Mar. 9, 2012 [Packer Aff.], Exh. A, Affidavit of Austin Martin, dated Mar. 5, 2012).

On or about July 13, 2009, Everest and Atlas entered into an agreement by which Everest agreed to install a sidewalk bridge in front of the premises. The bridge was installed on August 11, 2009, and consisted of three columns placed upon wooden squares which were then placed on top of the sidewalk; the squares were not drilled, hammered, screwed or annexed in any other way to the sidewalk. Once the bridge was installed, Everest performed no further work at the premises or on the sidewalk. (Affirmation of Cheryl Fuchs, Esq., dated Feb. 8, 2012 [Fuchs Aff.], Exhs. A, B, C; Affidavit of Christopher Downes, dated Feb. 7, 2012).

In October 2011, an investigator hired by Everest inspected the sidewalk where plaintiff fell and measured the hole in which plaintiff fell to be less than a half inch in depth. (*Id.*, Exh. J).

By affirmation dated November 14, 2011, David Atik, a City Department of Finance employee, states that his search of City's Real Property Assessment Division database reflects that City did not own the premises at the time of the accident and that it was classified as Building Class D7 (elevator apartment; semi-fireproof with stores) with 24 stories and 446 apartments. (*Id.*, Exh. I).

A search of City's Department of Transportation's (DOT) records for any permits or permit applications, Corrective Action Requests, notices of violation, inspections, complaints, maintenance or repair records, sidewalk violations, or contracts for the sidewalk where plaintiff fell for the two years prior to the accident yielded no results. (*Id.*, Exh. J).

II. CITY'S MOTION

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. (Admin. Code 7-210[c] [City liable for injury caused by failure to maintain sidewalks abutting "one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes . . ."]). Therefore, after September 14, 2003, the abutting property owner, not City, is generally liable for accidents caused by the failure to maintain a sidewalk. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, as City has established that it is not the abutting landowner and that the premises is not exempt, it has demonstrated, *prima facie*, that it may not be held liable for plaintiff's injuries. (*See Nicoletti v City of New York*, 77 AD3d 715 [2d Dept 2010] [City established *prima facie*

entitlement to dismissal by showing that plaintiff fell on sidewalk abutting property owned by another entity]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [dismissing action against City as plaintiff fell on sidewalk abutting property owned by corporate entity and not exempt]; *see also Forbes v Aaron*, 81 AD3d 876 [2d Dept 2011] [as premises was four-family multiple dwelling, liability for defective sidewalk shifted from City to abutting premises owner]; *Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [City entitled to dismissal of complaint as it did not own property on which plaintiff fell, and as property was vacant lot and thus not exempt pursuant to section 7-210]).

Moreover, City has also established through the absence of any DOT records related to the sidewalk in front of the premises that it did not cause or create the allegedly defective sidewalk condition at issue. In opposition, neither plaintiff nor Fifth submit any evidence showing the existence of any triable issues related to whether City caused or created the defect.

III. ATLAS' MOTION

Atlas denies having performed any work on the sidewalk in front of the premises, and thus denies having caused or created the hole or having had notice of it. It also contends that the hole constitutes a non-actionable trivial defect. (Parker Aff.).

Plaintiff argues that the motion is premature, that Atlas submits no admissible evidence, and that whether the hole was trivial is a jury question and cannot be resolved as a matter of law. (Affirmation of Adam S. Ashe, Esq., dated Mar. 22, 2012).

Fifth asserts that Atlas's motion is premature as its deposition has not yet been held, that its admission that it performed work at the premises raises a triable issue as to whether it created the hole, and that if I find that the hole was trivial, it likewise should be granted summary

judgment. (Affirmation of Roy Itzkowitz, Esq., dated Mar. 14, 2012).

In reply, Atlas denies that its motion is premature, observing that it produced all relevant documents in its possession and that the opposing parties do not identify what discovery they seek which may lead to relevant evidence. (Reply Aff., dated Mar. 29, 2012).

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, Atlas has offered admissible evidence demonstrating that it performed no work on the sidewalk in front of the premises before plaintiff's accident, thus establishing, *prima facie*, that it did not create the defect which caused the accident. (*See Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [contractor met burden by submitting affidavit from manager stating that records showed no work at location, and even if other contractor performed work at location, no evidence that its work was proximate cause of pothole 400 feet away from its work]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006] [contractor demonstrated it did not perform work where plaintiff allegedly fell as its records showed it performed work on different corner of crosswalk than where plaintiff fell]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005] [although contractors performed work on street, no evidence that work was performed at location of plaintiff's fall]).

In opposition, plaintiff and Fifth submit no proof showing that a triable issue of fact exists as to whether Atlas's work at the premises caused the hole in the sidewalk. (*See Crawford v City of New York*, 98 AD3d 935 [2d Dept 2012] [plaintiff's contention that premises owner's landscaper may have broken curb valve on which she tripped when landscaper cut grass around it based on speculation and conjecture]; *Siegel v City of New York*, 86 AD3d 452 [1st Dept 2011]

[rejecting plaintiff's argument that proximity of ECS conduit to alleged defect raised triable issue as to whether ECS' work caused defect]).

Fifth's assertion that further discovery may lead to relevant evidence is speculative and without evidentiary basis. (CPLR 3212[f]; *see Boorstein v 1261 48th St. Condominium*, 96 AD3d 703 [2d Dept 2012] [summary judgment motion not premature as plaintiff failed to establish that discovery may lead to relevant evidence or facts essential to oppose motion exclusively within defendant's knowledge and control]; *Flores v City of New York*, 66 AD3d 599 [1st 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"]; *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]; *Arrucci v City of New York*, 45 AD3d 617 [2d Dept 2007] [plaintiffs failed to establish what additional facts might be disclosed which would demonstrate that issue of fact existed as to whether contractor worked on roadway]).

In light of this conclusion, I need not address Atlas's argument that the hole constituted a trivial defect.

IV. EVEREST'S MOTION

Everest denies creating the hole, and argues that in any event, the hole constitutes a trivial defect as a matter of law and is thus not actionable. (Fuchs Aff.).

Plaintiff contends that Everest's denial that it created the hole bears no weight until a deposition of an Everest employee is held, and that while the hole only measured a half-inch in depth in October 2011, repairs may have been undertaken before then that may have reduced the

depth. (Ashe Aff.).

Fifth opposes on the same grounds set forth in its opposition to Atlas's motion. (Affirmation of Roy Itzkowitz, Esq., dated Mar. 14, 2012).

In reply, Everest argues that Fifth's asserted need for discovery as to the sidewalk bridge is immaterial to whether Everest created the hole, and observes that the sidewalk bridge is still located in front of the premises and Fifth, as the premises owner, can inspect it on its own without any discovery from Everest. It also observes that its president's sworn denial, based on his personal knowledge, is sufficient to support summary dismissal, and that a comparison of the photographs taken of the hole in October 2011 with those taken by plaintiff after his accident show that no repairs were made to the hole. (Reply Mem. of Law, dated Mar. 13, 2012).

Here, Everest has offered admissible evidence demonstrating that its work at the accident location was confined to constructing a sidewalk bridge which neither affected nor altered the sidewalk, thereby establishing, *prima facie*, that it did not create the defect that caused plaintiff's accident. Thus, for the same reasons set forth in granting Atlas's motion, Everest's motion is granted.

Fifth's assertion that further discovery may lead to relevant evidence is speculative and without evidentiary basis, especially in light of the undisputed fact that the bridge is still present in front of its premises and it may examine it at any time.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint and any cross claims against it are dismissed with costs and disbursements to

defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City Part and remove it from the Part 5 inventory. Plaintiff shall serve, within 20 days of the date of this order, a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; it is further

ORDERED, that any compliance conferences currently scheduled are cancelled; it is further

ORDERED, that defendant Atlas Construction of New York, Inc.'s motion for summary judgment is granted and the complaint and any cross claims against it are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that defendant Everest Scaffolding Inc.'s motion for summary judgment is granted and the complaint and any cross claims against it are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 16, 2012
New York, New York