

Buck v 15 Broad St., LLC
2013 NY Slip Op 33392(U)
December 4, 2013
Supreme Court, New York County
Docket Number: 106606/2008
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 106606/2008
BUCK, DENNIS
vs.
15 BROAD STREET, LLC
SEQUENCE NUMBER : 012
SUMMARY JUDGMENT CAL-#7

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). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

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

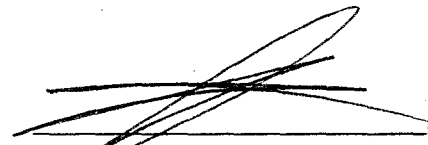
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

DEC - 9 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 12-4-13
DEC 04 2013



HON. KATHRYN FREED
JUSTICE OF SUPREME COURT 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

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
DENNIS BUCK,

Plaintiff,

-against-

DECISION/ORDER

Index No. 106606/2008

Seq. No. 012

15 BROAD STREET, LLC and DOWNTOWN
CONDOMINIUM,

Defendants.

-----X
15 BROAD STREET, LLC,

Third-Party Plaintiff,

-against-

JUDLAU CONTRACTING, INC., FELIX ASSOCIATES,
LLC, ALISA CONSTRUCTION CO., INC.,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., THE CITY OF NEW YORK, ALLIANCE FOR
DOWNTOWN NEW YORK, INC. and BOVIS LEND
LEASE CONSTRUCTION, INC.,

Third-Party Defendants.

-----X
KATHRYN E. FREED, JSC:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2 (Ex A-M)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	
ANSWERING AFFIRMATIONS.....	..3 (Ex A,B)...
REPLY AFFIRMATIONS.....	..4. (Ex A).....
OTHER.....	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this personal injury action, third-party defendant, Lend Lease (US) Construction LMB, Inc., f/k/a Bovis Lend Lease LMB Inc., and i/s/h/a Bovis Lend Lease Construction Inc. (Lend Lease) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, as against it. Defendants/third-party plaintiff, 15 Broad Street, LLC (“15 Broad”) and Downtown Condominium (“Downtown”), oppose.

Factual and procedural background:

Plaintiff alleges that, on January 25, 2008, he was injured when he tripped on an uneven sidewalk in front of 15 Broad Street in Manhattan (Shapiro affirmation, exhibit C).

In September 2011, defendant/third-party plaintiff 15 Broad Street, LLC (15 Broad), the owner of the property where the accident allegedly occurred, served a third amended third-party complaint impleading Lend Lease. Lend Lease was the construction manager for various New York City Economic Development Corporation (EDC) projects, including the New York Stock Exchange sidewalk program which called for the restoration of all the sidewalks and curbs within the Stock Exchange district, including the eastern sidewalk on Broad Street between Wall Street and Exchange Place, where plaintiff’s accident is alleged to have occurred (Shapiro affirmation, exhibit L [Ulsses¹ deposition] at 7, 9-14). That third-party complaint alleges that prior to January 25, 2008, Lend Lease performed work on the sidewalk adjacent to 15 Broad Street (Shapiro affirmation, exhibit D, ¶ 16) and, if plaintiff was injured, it was due to Lend Lease’s negligence.

It is Lend Lease’s position that: (1) in August 2008, it developed plans for the restoration of

¹ Holly Ulsses, is a senior project manager for Lend Lease, who, along with John Skiadis, co-managed the EDC New York Stock Exchange sidewalk restoration project for Lend Lease.

the subject sidewalk and that the restoration of the subject sidewalk did not begin until September 3, 2008 (Shapiro affirmation, exhibit L at 42-43, 48-49; exhibit M), more than eight months after plaintiff's accident; (2) it is not the owner of the property; and (3) there is no admissible evidence that Lend Lease, or its agents, created the condition that caused the accident.

15 Broad opposes Lend Lease's summary judgment motion arguing that the motion is premature because discovery is not complete and that there are questions of fact regarding: whether Lend Lease was negligent by failing to replace the sidewalk "as rapidly as possible" as it was required to do pursuant to its contract with EDC, whether Lend Lease had plans in place to replace the sidewalk in September 2006, and whether 15 Broad did not repair the sidewalk because it detrimentally relied on Lend Lease's plans.²

Conclusions of law:

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562; *see also Ellen v Lauer*,

² The third amended third-party complaint contains one cause of action for contribution and/or indemnification against all of the third-party defendants based on their alleged negligence. Although 15 Broad alludes to a cause of action against Lend Lease for detrimental reliance, the third amended third-party complaint neither alleges nor pleads such a cause of action.

210 AD2d 87, 90 [1st Dept 1994] [it “is not enough that the party opposing summary judgment insinuates that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . . [citations omitted]”).

In this case, Lend Lease has made a *prima facie* showing that it is entitled to judgment as a matter of law by submitting: the deposition of Angel Carregal, 15 Broad’s residential manager who testified that he started working for 15 Broad in February 2006 and that the condition on the sidewalk existed at that time and that it was corrected by Lend Lease in either late 2008 or 2009 (Shapiro affirmation, exhibit K at 12, 25-27, 47-48); the testimony of Holly Ulsses, Lend Lease’s project co-manager who testified that Lend Lease performed no work at the subject premises before September 3, 2008 (*id.* at 42); which testimony is corroborated by a copy of the site logistic plan for sidewalk and curb replacement in and around the accident site which identifies the date of the plan as September 3, 2008 (Shapiro affirmation, exhibit M).³

In opposition, plaintiff has failed to raise a triable issue of fact sufficient to overcome Lend Lease’s *prima facie* case. As to its allegations that it is unable to properly oppose the motion because discovery is incomplete, on June 28, 2013, plaintiff filed the note of issue in this matter, certifying that discovery was complete.⁴ 15 Broad has neither moved to strike the note of issue on

³ Ms. Ulsses initially testified that Lend Lease developed a logistic plan for the sidewalk replacement in September 2006 (Shapiro affirmation, exhibit L at 21). However, because the date on the electronic copy of the plan could not be easily deciphered (*id.* at 21-22), she checked with her co-manager, John Skiadis, and corrected her testimony and averred that the actual date on the plan, was September 3, 2008, not 2006 and that Lend Lease performed no work at the accident site before September 3, 2008.

⁴ 15 Broad belatedly served its discovery demand on June 20, 2013 – eight days before the note of issue was filed. Lend Lease responded to that demand on August 22, 2013.

the ground that discovery is still outstanding nor has it moved, pursuant to CPLR 3124, to compel Lend Lease to comply with its disclosure demand. Moreover, discovery to prove that Lend Lease had a contractual obligation to make the repair is unnecessary because Lend Lease concedes that it had a contractual obligation to replace the sidewalk where the accident occurred. Accordingly, the evidence that 15 Broad seeks is unnecessary and redundant and 15 Broad's mere hope and speculation that additional discovery may uncover other evidence that would raise a triable issue of fact is insufficient to defeat the motion.

In *Amini v Arena Constr. Co., Inc.* (110 AD3d 414, 415 [1st Dept 2013]), the court found that plaintiff did not demonstrate that additional discovery was necessary to oppose summary judgment because the record showed that defendant performed no work at the accident site; the work logs confirmed that no structural work had been performed before plaintiff's accident; and the schematics were irrelevant as to timing. Similarly, in the case at bar, the logistic plan and the Ulsses and Carregal depositions (Shapiro affirmation, exhibits K, L, and M) establish that Lend Lease did not perform sidewalk replacement work at the site before September 3, 2008, eight months after plaintiff's accident. Here, the additional discovery that 15 Broad seeks is irrelevant to establish when the work was performed (*see also Ordonez v Levy*, 19 AD3d 385, 386 [2d Dept 2005]).

In addition, 15 Broad's vague allegations that Lend Lease breached its contractual obligations to the EDC is not at issue in this case because 15 Broad does not allege that it was a party or third-party beneficiary under the EDC contract with the power to enforce that contract. Moreover, even, assuming arguendo, that the contract was relevant to this dispute, 15 Broad has not attached a copy of the contract or specifically identified the terms of the contract that it relies on and that are related to the dispute before the court (*see Gordon v Dino DeLaurentiis Corp.*, 141 AD2d 435, 436 [1st Dept

1988] [vague, conclusory allegations of breach of contract are not sufficient]).

Finally, as to 15 Broad's allegations of detrimental reliance, the papers before the court are devoid of any evidence of such reliance (*see e.g. Thalenberg v Rosenfield*, 226 AD2d 446, 447 [2d Dept 1996]).

Therefore, in accordance with the foregoing; it is

ORDERED that third-party defendant Lend Lease (US) Construction LMB, Inc., f/k/a Bovis Lend Lease LMB Inc., and i/s/h/a Bovis Lend Lease Construction Inc.'s motion for summary judgment dismissing the third amended third-party complaint as against it is granted; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to third-party defendant Lend Lease (US) Construction LMB, Inc., f/k/a Bovis Lend Lease LMB Inc., and i/s/h/a Bovis Lend Lease Construction Inc., 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 third-party action shall continue as to the remaining third-party defendants; and it is further

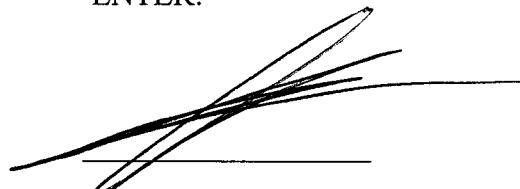
ORDERED that this constitutes the decision and order of the Court.

DATED: December 4, 2013

DEC 04 2013

DEC - 9 2013
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT