

<b>Simmons v City of New York</b>
2014 NY Slip Op 30362(U)
February 6, 2014
Supreme Court, New York County
Docket Number: 107399/10
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

PATRICIA SIMMONS,

INDEX NO. 107399/10

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. C002/003

THE CITY OF NEW YORK, et al.,

MOTION CAL NO. \_\_\_\_\_

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1,2

Answering Affidavits- Exhibits \_\_\_\_\_ 3

Replying Affidavits \_\_\_\_\_ 4,5

CROSS-MOTION: \_\_\_\_\_ YES  NO

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

DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION.

Dated:

2/6/14

*DM*

Check one:

\_\_\_\_\_ FINAL DISPOSITION

**FILED**

**DONNA M. MILLS, J.S.C.**  
NON-FINAL DISPOSITION

FEB 11 2014

COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

----- X  
PATRICIA SIMMONS,

Plaintiff,

- against -

Index No. 107399/10

THE CITY OF NEW YORK, TULLY CONSTRUCTION CO.,  
INC. and ANGELIADES GROUP, LLC formerly known as  
Nos. 002  
M.A. ANGELIADES, INC.,

Motion Sequence *02*  
and 003

Defendants.

----- X  
**MILLS, J:**

Motion sequence numbers 002 and 003 are consolidated for disposition.

Patricia Simmons (Plaintiff) brings this personal injury action against the City of New York (City), Tully Construction Co., Inc., (Tully) and Angeliades Group, LLC (Angeliades) to recover for injuries suffered after a trip and fall while crossing a public street. The amended complaint asserts one cause of action for negligence against each of the defendants, based upon their alleged failure to maintain the public street or negligent creation of the defect that caused Plaintiff's fall. All defendants assert cross claims for contribution and common-law indemnification. Tully asserts additional cross claims for contractual indemnification, and breach of contract based upon Angeliades' failure to procure liability insurance.

The City and Angeliades now move (in motion sequence number 002) for summary judgment, seeking dismissal of the amended complaint and all cross claims asserted against them. In motion sequence number 003, Tully also moves for summary judgment dismissing the amended complaint and all cross-claims asserted against it.

- Background

Plaintiff alleges that on December 19, 2009, she was crossing East Houston Street, within the designated crosswalk, at its intersection with Mulberry Street. Amended Complaint, ¶ 10. She states that she was walking from the northwestern corner of the intersection and crossing to the southwestern corner, when she tripped and fell due to a defect located near a circular manhole cover. *Id.*, ¶ 11. Plaintiff alleges that “[t]he street at that area was broken, upraised, depressed and cracked thus creating a nuisance and a trap at which the plaintiff was caused to trip and fall.” *Id.* During her deposition, Plaintiff testified that she fell three or four steps from the curb on the north side of Houston Street. Provenzano affirmation, exhibit C at 41-42. She also circled the area in a photograph, marked as Defendant’s exhibit A, depicting the area that allegedly caused her injury. *Id.* at 55-56, exhibit H. She testified that the photograph accurately portrayed the condition of the area where she fell. *Id.*, exhibit C at 31. Plaintiff alleges that Tully and/or Angeliades had entered into contracts with the City to make alterations or repairs at the location where she was injured and were responsible for the defective condition that caused her fall. Amended Complaint, ¶¶ 6, 12, 21, 22, 39, 40.

According to Tully’s Project Superintendent, Dino Basso (Basso), Tully was hired by the New York City Department of Design and Construction to oversee “the reconstruction of East and West Houston Street from West Street to the Bowery, in New York, New York.” Sullivan affirmation, exhibit G, ¶ 2. In his affidavit, Basso states that in his capacity as Project Superintendent, he oversaw the entire project from its inception in August 2005 to its completion in October 2009. *Id.* According to Basso, he

coordinated subcontractors and conducted daily inspections of work performed. *Id.*; Provenzano affirmation, exhibit D at 6. Basso testified that Tully opened and repaved streets “[n]ear Lafayette or in between Lafayette and Mulberry” and that he oversaw the repaving. Provenzano affirmation, exhibit D at 8, 9. With respect to the rough area identified by Plaintiff, Basso stated that Tully did not create the defect or have a duty to maintain that area. Sullivan affirmation, exhibit G, ¶¶ 4, 5. According to Basso, “[m]ore than one year prior to the alleged accident, Tully did install a water main in the westbound lanes of East Houston Street (the north side of the street); however, that work did not include placement of the asphalt ‘patch’ that appears in the photograph marked by the plaintiff in Defendant’s exhibit ‘A.’” *Id.*, ¶ 5, exhibit 3.

Basso testified that he personally filled out a daily work report that provided the location where work was being done and described the work performed. Provenzano affirmation, exhibit D at 9-10, 13. The reports submitted by Tully in support of its motion cover the period from September 8, 2009 through October 29, 2009 and indicate that Tully was working at West Houston Street and Bedford Street during those months, “installing a cast iron picket fence near Bedford Park, which was several blocks away from the alleged accident location.” Sullivan affirmation, ¶ 5, exhibit G, exhibit 1. The reports also contain Basso’s observations for that period and state: “NYC TA (M.A. Angeliades) working on Lafayette St. bet. Prince & Bleecker St., on Houston St. (E & W. Bnd) bet. Crosby and Mott St.” *Id.*; Provenzano affirmation, exhibit D at 11. According to Basso, from approximately January 2009 until the end of Tully’s project, he observed Angeliades “construction crews every day working in the intersection of Mulberry and Houston, Lafayette and Houston, up and down Lafayette.” Provenzano affirmation,

exhibit D at 15. Basso testified that Angeliades crews were excavating sidewalks and roadways, but that he “didn’t pay too much attention to what they were doing.” *Id.* at 15. He also testified that when Tully’s project ended in October 2009, he saw Angeliades employees doing work at the intersection of Mulberry and Houston. *Id.* at 18. However, he stated that he “didn’t pay exact attention to what they were doing.” *Id.* at 19. Basso testified that he “did not see Angeliades pave around the manhole cover.” *Id.* at 22.

According to Constantine Momioudis (Momioudis), Angeliades’ project engineer in 2009, Angeliades was engaged by the Metropolitan Transit Authority to work on the Bleecker Street Broadway Lafayette complex. Provenzano affirmation, exhibit E at 5, 6. As project engineer, Momioudis oversaw the project, scheduled work, and coordinated with subcontractors. *Id.* at 6. Momioudis testified that he worked on the project from its inception and was present at the construction site full-time throughout the project. *Id.* at 7, 33-34.

Momioudis stated that the work along Houston Street was phased. *Id.* at 19. He testified that in the spring of 2009, Angeliades started work on the south side of Houston Street, then shifted to the north side of the street sometime in 2011, and shifted to the center of the street in early 2012. *Id.* at 19, 20, 32. One renewal application for a permit authorized Angeliades to open roadways on East Houston Street, from Lafayette Street to Mulberry Street, and required roadways to be restored and all work to be completed by November 30, 2009. Feinberg affirmation, exhibit A. Another renewal application for a permit, authorizing Angeliades to open roadways in the same location, required all work to be completed by November 30, 2011. Provenzano affirmation, exhibit G. When asked about particular daily safety and quality records for the work done from October 15, 2009

through December 18, 2009, Momioudis indicated that the work described in each log was not related to the defect that caused Plaintiff's injury and was performed on the south side of Houston Street. *See* Provenzano affirmation, exhibit E at 8-28.

Momioudis testified that prior to December 2009, Angeliades did not perform any roadwork in the area around the manhole cover where Plaintiff fell. *Id.* at 35. When shown the photograph depicting the irregular area circled by Plaintiff, Momioudis stated that it looked like a patch, but that he did not witness its placement or know who placed it there. *Id.* at 35-36. He stated that the patch was not placed by Angeliades or any of its subcontractors. *Id.* 37.

The City conducted a standard Department of Transportation (DOT) roadway search for the two years prior to the accident, searching for permit applications, corrective action requests, notices of violation, inspections, complaints, maintenance and repair records, and contracts for the location where Plaintiff fell. Provenzano affirmation, exhibit G. According to the City, the search did not yield any corrective action requests, contract information, in-house resurfacing records, maintenance and repair records, complaints, gang sheets for roadway defects, or gang sheets for milling and resurfacing records. *Id.*, ¶ 37, exhibit G. Although the search yielded two notices of violations, they did not provide notice of the allegedly defective area. *Id.*, ¶¶ 37-39, exhibit G. The City also submitted the Big Apple Map, which was served on the DOT on October 23, 2003 by the Big Apple Pothole and Sidewalk Protection Corporation. *Id.*, ¶ 40, exhibit G. According to the City, it is the most recent map served upon the City prior to Plaintiff's accident and indicates alleged defects located on sidewalks, curbs, and in crosswalks. *Id.* The map does not depict a defect in the subject crosswalk. *Id.*, exhibit G.

- Discussion

Pursuant to CPLR 3212 (b) “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). A defendant cannot meet this burden “merely by citing gaps in the plaintiff’s case.” *Katz v PRO Form Fitness*, 3 AD3d 474, 475 (2d Dept 2004). Summary judgment is a drastic remedy and “should not be granted where there is any doubt as to the existence of [material and triable issues of fact], or where the issue is arguable.” *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968) (internal quotation marks and citation omitted). In considering a motion for summary judgment, the court must accept the opposing party’s allegations as true and construe the facts in a light most favorable to the opposing party. *Hering v New York Yankees*, 166 AD2d 253, 255 (1st Dept 1990).

- Angeliades and Tully’s Motions

Angeliades and Tully argue that they are entitled to summary judgment because they did not create or contribute to the condition that caused the accident, and that, therefore, there was no causal link between their construction activities and the accident. They also argue that they did not owe Plaintiff a duty of care. Plaintiff counters that the documents submitted by the City demonstrate that, prior to construction, no defects were known concerning the subject crosswalk. She argues that the depositions demonstrate that one or both of the contractors created the defect. In addition, she contends that there exists a discrepancy with respect to when Angeliades worked in the subject area, which

raises an issue of fact precluding summary judgment.

In a negligence case, the plaintiff must demonstrate that the defendants owed her a duty of care, that they breached that duty, and that the breach proximately caused her injury. *J.E. v Beth Israel Hosp.*, 295 AD2d 281, 283 (1st Dept 2002). Generally, “a contractor does not owe a duty of care to a noncontracting third party.” *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 (1st Dept 2004), citing *Church v Callanan Indus.*, 99 NY2d 104 (2002). However, the Court of Appeals has recognized three exceptions that may give rise to a duty of care to noncontracting third parties:

“(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.”

*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 (2002) (internal quotation marks and citations omitted). To launch an instrument of harm is to exacerbate or create a dangerous condition. *Id.* at 143.

Here, Tully admits that it performed work in the subject intersection on the side of the street where Plaintiff fell. Likewise, Angeliades does not deny working in the intersection prior to the accident, but rather, merely contends that its work was limited to the opposite side of the street. Both contractors oversaw large-scale, long-term projects that included the area where Plaintiff was injured, projects that required coordinating with subcontractors and keeping regular records of the work performed. In support of its motion, Tully submits reports from September 8, 2009 through October 29, 2009 (Sullivan affirmation, exhibit G, exhibit 1), but these records are for work done several block away from the subject intersection and do not conclusively demonstrate that Tully

did no work where Plaintiff fell. *Id.*, ¶ 5.

Neither Tully nor Angeliades submits any records for the work performed in the subject intersection that would support the conclusion that they performed no work at the specific location where Plaintiff fell. Although both contractors admit that they performed work on both sides of Houston Street, they fail to submit copies of their construction contracts or work reports showing the work actually completed on the side of the street where Plaintiff fell. Moreover, neither Momioudis nor Basso states that he reviewed such records to ascertain whether or not Tully or Angeliades, or any associated subcontractors, created the defect that allegedly caused Plaintiff's injuries. In short, Tully and Angeliades fail to make a prima facie showing that they did not create or exacerbate a harmful condition that caused Plaintiff's fall. Compare *Amarosa v City of New York*, 51 AD3d 596, 596-597 (1st Dept 2008) (affirming summary judgment dismissal against one contractor where no records existed of work performed by contractor where plaintiff was injured; granting summary judgment dismissal against second contractor where evidence demonstrated that construction work was limited to opposite end of the street "at least 400 feet from the site of the accident"); see also *Robinson v City of New York*, 18 AD3d 255, 256 (1st Dept 2005) (summary judgment dismissal granted where "the record contain[ed] no evidence whatsoever that these defendants ordered or performed any excavation or road work where plaintiff fell"); *Baillargeon v Tuttle Roofing Co., Inc.*, 92 AD3d 908, 908 (2d Dept 2012) (affirming denial of summary judgment where contractor failed to establish conclusively, among other things, "the exact location where the appellant performed its repair work," relative to where the plaintiff fell). As it is undisputed that Tully and Angeliades worked on both sides of Houston Street and there is

no documentary evidence to support Basso and Momioudis' testimony that they did not perform work in the area where Plaintiff fell, this testimony merely raises issues of credibility which are not properly before the court on summary judgment. *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997) (“[i]t is not the court's function on a motion for summary judgment to assess credibility”).

Since Angeliades and Tully have failed to make a prima facie showing, their motions for summary judgment are denied. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (failure to make a prima facie showing “requires denial of the motion, regardless of the sufficiency of the opposing papers”).

- The City's Motion

Although not raised by the parties, the court's independent review of the County Clerk's records reveals that the City failed to serve an answer to the amended complaint. As such, issue was never joined and the City's motion is procedurally defective. CPLR 3212 (a). However, Plaintiff's allegations against the City are identical in the original and amended complaints, as the amended complaint merely adds Tully and Angeliades as defendants. Significantly, Plaintiff does not raise the procedural defect, and the City's summary judgment motion is fully-briefed by all parties. Plaintiff has suffered no prejudice, as the parties have “chart[ered] their own procedural course” (*Riemer v Riemer*, 31 AD2d 482, 488 [2d Dept 1969], *aff'd* 31 NY2d 881 [1972]), and the court, therefore, disregards the procedural defect. CPLR 2001.

The City argues that the defective condition that allegedly caused Plaintiff's

injuries was not the immediate result of an affirmative act of negligence by the City, its agents or contractors, and that the City did not receive prior written notice of the defect, as required by law. In opposition, Plaintiff argues that either Tully or Angeliades, while working for the City, created the defective patch that caused her fall.

The New York City Administrative Code § 7-201 (c) (2) provides, in pertinent part, as follows:

“[n]o civil action shall be maintained against the city for damage to property or injury to person . . . in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing . . . being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice . . . .”

There are two “recognized exceptions to the [prior written notice] rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality.” *Yarborough v City of New York*, 10 NY3d 726, 728 (2008). The affirmative negligence exception is “limited to work by the City that immediately results in the existence of a dangerous condition.” *Bielecki v City of New York*, 14 AD3d 301, 301 (1st Dept 2005).

Here, it is undisputed that the City had no prior written notice. However, having determined “that an issue of fact exists as to whether a contractor hired by the City created the subject defect . . . there is also an issue of fact as to whether the City created the defect through its contractor's actions, and thus whether the affirmative negligence exception to the prior written notice rule applies.” *Tumminia v Cruz Constr. Corp.*, 41 AD3d 585, 586 (2d Dept 2007); see *Gerena v Town of Brookhaven*, 280 AD2d 450, 451-

452 (2d Dept 2001). Consequently, the City's motion for summary judgment is denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants City of New York and Angeliades Group, LLC (motion sequence number 002) is denied; it is further

ORDERED that the motion for summary judgment of defendant Tully Construction Co., Inc. (motion sequence number 003) is denied; it is further

ORDERED that the action shall continue.

Dated: 2 / 6 / 14

ENTER:

  
\_\_\_\_\_  
J.S.C.

RONALD W. MILLS, J.S.C.

**FILED**

**FEB 11 2014**

**COUNTY CLERK'S OFFICE  
NEW YORK**