

Yam v Empire City Subway Co. (Ltd.)

2015 NY Slip Op 31742(U)

January 26, 2015

Supreme Court, New York County

Docket Number: 102779/11

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
COUNTY OF NEW YORK

-----X
RICHARD YAM,

Index No: 102779/11

Plaintiff,

-against-

**NOTICE OF ENTRY WITH
ORDER DATED
JANUARY 26, 2015**

EMPIRE CITY SUBWAY COMPANY (LIMITED),
THE CITY OF NEW YORK, NEXT GENERATION
NETWORKS OF NEW YORK INC. and NEXT
GENERATION NYC, LLC,

Defendants.

-----X
EMPIRE CITY SUBWAY COMPANY (LIMITED),

Third Party Plaintiff,

-against-

NICO ASPHALT PAVING, INC.,

Third Party Defendant.

-----X
COUNSELORS:

FILED
FEB 09 2015
COUNTY CLERK'S OFFICE
NEW YORK

PLEASE TAKE NOTICE, that the within is a true copy of the Order of Hon. Kathryn
Freed dated January 26, 2015 and duly entered in the office of the clerk of the within named
Court on February 3, 2015.

Dated: New York, New York
February 6, 2015

Yours, etc.,

NAPOLI BERN RIPKA SHKOLNIK, LLP

By Vincent L. Gonzalez

VINCENT L. GONZALEZ
Attorneys for Plaintiff
350 Fifth Avenue, Suite 7413
New York NY 10118
(212) 267-3700

TO:

THE LAW OFFICES OF EDWARD GARFINKEL
Attorneys for Third Party Defendant
NICO ASPHALT PAVING INC.
12 Metro Tech Center, 28th Floor
Brooklyn, NY 11201-3837
(718) 250-1100

CONWAY FARRELL CURTIN & KELLY, P.C.
Attorneys for Defendant
EMPIRE CITY SUBWAY COMPANY (LIMITED),
40 Wall Street, 20th Floor
New York, NY 10005
(212) 785-2929

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
RICHARD YAM,

Plaintiff,

-against-

EMPIRE CITY SUBWAY COMPANY (LIMITED),
THE CITY OF NEW YORK, NEXT GENERATION
NETWORKS OF NEW YORK INC. and NEXT
GENERATION NYC, LLC,

Defendants.

-----X
EMPIRE SUBWAY COMPANY (LIMITED),

Third-Party Plaintiff,

-against-

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

-----X
HON. KATHRYN E. FREED, J.S.C.:

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

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED.....	1-2 (Exs. A-K)
MEMO OF LAW IN SUPPORT.....	3
NICO'S AFF. IN PARTIAL OPP.....	4
PLAINTIFF'S AFF. IN OPP.....	5 (Exs. A-E)
ECS' REPLY AFF. TO NICO'S OPP.....	6 (Ex. L)
ECS' REPLY AFF. TO PLAINTIFF'S OPP.....	7 (Ex. M)

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

FILED
FEB 03 2015
NEW YORK
COUNTY CLERKS OFFICE
Case No. 590574/13

In this personal injury action, defendant/third-party plaintiff Empire City Subway Company (Limited) (“ECS”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims asserted against it. ECS also seeks summary judgment on its third-party claim for contractual indemnification against third-party defendant Nico Asphalt Paving Corp. (“Nico”). After a review of the aforementioned motion papers, and after a review of the relevant statutes and case law, ECS’ motion for summary judgment dismissing the claims against it is **denied** and its motion for summary judgment against Nico is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on June 28, 2010 in which plaintiff Richard Yam was allegedly injured when the bicycle he was riding struck a hole in the roadway on Broadway near the intersection of Bleecker Street in New York County. Plaintiff commenced the captioned action by filing a summons and complaint on or about March 7, 2011 and subsequently served a supplemental summons and amended verified complaint on or about June 25, 2013. Ex. A.¹ ECS joined issue by service of its verified answer to the amended complaint on or about July 11, 2013. Ex. B. On or about August 12, 2013, ECS commenced a third-party action against Nico seeking, inter alia, a defense and contractual indemnification. Ex. C. Nico joined issue in the third-party action on or about October 22, 2013. Ex. D.²

¹Unless otherwise noted, all references are to the exhibits annexed to ECS’s motion for summary judgment.

²By order dated June 7, 2013, this Court (Chan, J.) dismissed all claims against the City of New York. Ex. J. The motion papers reflect that defendants Next Generation Networks of New York Inc. and Next Generation NYC, LLC have failed to appear in this action.

Plaintiff testified at his deposition that his accident occurred as he was riding his bicycle southbound on Broadway on the right side of the road. Ex. E, at 35-36. The accident occurred less than one car length before he reached the intersection of Broadway and Bleecker Street, when his bicycle struck a hole in the roadway. *Id.*, at 36-38, 43-44. The hole was approximately one lane away from the curb on the right side of the road as he traveled downtown. *Id.*, at 55. Plaintiff did not see the hole before the accident but after the incident saw that it was approximately five inches deep. *Id.*, at 45-47. At his deposition, plaintiff identified photographs of the hole, which he said was on Broadway. *Id.*, at 49-50, 54-56.

Denis Donovan appeared for deposition on behalf of ECS. He has been Area Operations Manager of Construction for ECS, a wholly owned subsidiary of Verizon New York Inc., since 1992. Ex. G, at 7-8. In that capacity, he supervised a management team which oversaw contractors and in-house crew for excavating in the City to install conduit between manholes. *Id.*, at 7. ECS had a franchise agreement with the City to provide the aforementioned services in Manhattan and The Bronx. *Id.*, at 8.

A records search conducted by Donovan revealed that ECS performed a job in the area of the intersection of Broadway and Bleecker Street. *Id.*, at 8-10; Ex. H. The work was completed by June 9, 2010. *Id.*, at 20. After the conduit was laid, ECS backfilled the trench and Nico then paved the area and restored any lane markings which had been disturbed by the work. *Id.*, at 36-39.

Donovan testified, after being shown photographs of the accident site marked at plaintiff's deposition, that he could not tell whether ECS performed work in the area depicted. Ex. G, at 57-62.

John Denegall, a superintendent for Nico, testified that the company restored asphalt for ECS and Con Edison in Manhattan and The Bronx. Ex. I, at 8, 14. Denegall performed a search of Nico's

records for work performed in the area of Broadway and Bleecker Street and located a paving order for that location. Ex. I at 9-11.

Nico entered into an agreement (“the contract”) with Verizon Services Corporation (“Verizon”) to perform paving work at the area in question. Ex. I, at 14-15. Verizon entered into the contract on behalf of ECS. *Id.*, at 15. Denegall, who did not visit the job site either during or after Nico’s job at Broadway and Bleecker Street (*Id.*, at 23), did not see any work performed by Nico in the photographs marked at plaintiff’s deposition. *Id.*, at 24-25.

By notice of motion dated August 18, 2014, ECS moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against it.³ It also moves for summary judgment on its claims against Nico seeking defense and indemnification. In support of its motion for summary judgment, ECS submits the pleadings, the deposition transcripts of plaintiff, Denegall and Donovan, an affidavit executed by Donovan, photographs marked at plaintiff’s deposition, the contract between Verizon and Nico, and the order of this Court (Chan, J.) dismissing all claims against the City.

Paragraph 22.1 of the contract between Verizon (ECS) and Nico provides as follows:

Indemnification. Supplier shall defend, indemnify and hold harmless Verizon its parents, subsidiaries and affiliates, and its and their respective directors, officers, partners, employees, agents, successors and assigns (“indemnified parties”) against any claims, demands, lawsuits, damages, liabilities, judgments and settlements of every kind (“claims”) that may be made: (a) by anyone for injuries (including death) to persons or damages to property, including theft, resulting in whole or in part from the acts or omissions of Supplier or those persons furnished by Supplier, including its subcontractors (if any); (b) by persons furnished by Supplier and its subcontractors (if any); under workers’ compensation or similar acts, (c) by anyone in connection

³The motion was originally returnable before Justice Louis York, who passed away prior to deciding the application.

with or based upon products, services, information or work provided by Supplier and its subcontractors (if any) or contemplated by this Agreement, including claims regarding the adequacy of any disclosures, instructions or warnings related to any such products or services; and (d) under any federal securities laws and under any other statute, at common law or otherwise arising out of or in connection with the performance by Supplier contemplated by this Agreement or any information obtained in connection with such performance. The foregoing indemnification shall apply whether Supplier or an indemnified party defends such claim and whether the claim arises or is alleged to arise out of the sole acts or omissions of the Supplier (and/or any subcontractors of Supplier) or out of the concurrent acts or omissions of Supplier (and/or any subcontractor of Supplier) and any indemnified parties. Supplier further agrees to bind its subcontractors (if any) to similarly indemnify, hold harmless and defend the indemnified parties.

Ex. H, at par. 22.1.

POSITIONS OF THE PARTIES:

ECS argues that it is entitled to summary judgment dismissing the complaint and all cross claims against it since plaintiff cannot establish a prima facie case of negligence against it and there are no issues of fact regarding its liability. It maintains that the testimony of Donovan and Denegall, as well as the affidavit of Donovan, establish that ECS did not perform work in the area of the alleged incident. ECS further maintains that it is entitled to contractual indemnification from Nico.

In an affirmation in partial opposition to ECS' motion, Nico asserts that it does not oppose that portion of ECS' motion seeking dismissal of the complaint. However, Nico asserts that it is not obligated to contractually indemnify ECS because paragraph 22.1 of the contract violates General Obligations Law ("GOL") § 5-322.1, which prohibits owners and contractors who enter into construction contracts from being indemnified for their own negligence. Specifically, Nico asserts that paragraph 22.1 is violative of the GOL because it does not provide that ECS will be indemnified

“to the fullest extent permitted by law”, which language would prevent ECS from being indemnified for its own negligence.

In an affirmation in opposition to the motion, plaintiff’s counsel argues that ECS is not entitled to summary judgment dismissing the complaint because it failed to establish its entitlement to such relief as a matter of law. In support of his argument, plaintiff’s counsel maintains that the photographs annexed to ECS’ motion do not contain markings by plaintiff indicating where the alleged incident occurred. Counsel further asserts that Donovan’s testimony establishes that plaintiff’s accident occurred in the area where ECS worked. Further, counsel maintains that, in his affidavit in support of the motion, Donovan improperly relied on photographs he obtained from Google Maps. Plaintiff’s counsel also argues that, since Denegall conceded that he did not see any of the work performed by ECS, his testimony does not entitle ECS to summary judgment.

In an affirmation in reply to plaintiff’s opposition, ECS argues that the deposition testimony and affidavit of Donovan, as well as the testimony of Denegall, establish its prima facie entitlement to summary judgment dismissing the complaint and all cross claims and counterclaims against it because this evidence proves that it did not work in the area where plaintiff was allegedly injured.

In an affirmation in reply to Nico’s opposition, ECS argues that it is entitled to summary judgment on its contractual indemnification claim against Nico, including the reimbursement of attorneys’ fees. In support of its argument, ECS maintains that its indemnification claim against Nico is not barred by GOL § 5-322.1.

LEGAL CONCLUSIONS:

"[T]he 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 eliminate any material issue of fact from the case." *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (*internal quotation marks and citation omitted*). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Kosson v Algaze*, 84 NY2d 1019 (1995). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

ECS' Motion To Dismiss All Claims Against It

"[A] contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street or sidewalk (*citations omitted*)." *Fernandez v 707, Inc.*, 85 AD3d 539 (1st Dept 2011); *see Schwartz v Orange and Rockland Utilities, Inc.*, 93 AD3d 776 (2^d Dept 2012). Where, as here, a contractor seeks to establish that it did not create the defect which injured a plaintiff, it must "establish prima facie that it did not cause or create the [defect] that allegedly caused plaintiff's [accident] (*citations omitted*)." *Corprew v City of New York*, 106 AD3d 524 (1st Dept 2013). ECS has failed to sustain its burden of establishing that it is entitled to summary judgment dismissing all claims against it.

“To succeed on a motion for summary judgment, a movant must establish its claim or defense sufficiently to warrant that the court, as a matter of law, direct judgment in its favor (CPLR 3212[b]), and it must do so by tender of evidentiary proof in admissible form.” *SRM Card Shop, Inc. v 1740 Broadway Assocs., L.P.*, 2 AD3d 136, 139 (1st Dept 2003) citing *Zuckerman v City of New York, supra* at 562.

At his deposition, Donovan testified, after being shown photographs of the accident site marked at plaintiff’s deposition, that he could not tell whether ECS performed work in the area depicted. Ex. G, at 57-62. In an apparent attempt to remedy this deficiency in his testimony, Donovan submitted an affidavit in support of ECS’ motion to for summary judgment dismissing the claims against it. In his affidavit, Donovan stated that:

After [his] deposition, in order to determine if the work done by ECS, about which [he] testified, coincided with the location of plaintiff’s accident, [he] reviewed images from the website “Google Maps.” These images are from June of 2011; one year after both the ECS work was completed and plaintiff’s accident.

Ex. K, at par. 2.

Donovan averred that the work performed by ECS could be seen in the photographs he obtained from Google Earth. Ex. K, at par. 3. He further stated that the location of plaintiff’s accident “was pointed out to him at [his] deposition” (*Id.*, at par. 9) and that ECS did not perform any work in that area. *Id.*, at par. 10. However, since Donovan did not indicate who pointed out the location of the alleged accident to him, or whether it was pointed out in a photograph marked at plaintiff’s deposition or one he obtained from Google Maps, any knowledge he had regarding the location was based on inadmissible hearsay insufficient to establish ECS’s entitlement to summary judgment. *See Zuckerman v City of New York, supra; SRM Card Shop, Inc. v 1740 Broadway*

Assocs., L.P., supra.

Additionally, as noted above, Denegall testified that he did not visit the job site during or after Nico's work at Broadway and Bleecker Street (Ex. I, at 23) and did not see any work performed by Nico in the photographs marked at plaintiff's deposition. *Id.*, at 24-25. Thus, Denegall's testimony was also insufficient to entitle ECS to summary judgment.

Finally, this Court notes that it cannot discern the location of the alleged incident from the photographs annexed to ECS' motion as Ex. F. Nor can it tell from an enlarged photograph of the area, annexed as Ex. M to ECS' reply affirmation, where the incident occurred and whether the location was in the area where ECS had worked.

In light of the foregoing, issues of fact exist regarding whether ECS worked in the area where plaintiff was allegedly injured and thus ECS' motion for summary judgment dismissing all claims against it is denied.

ECS' Motion For Summary Judgment Against Nico

Despite the fact that ECS is not entitled to judgment as a matter of law dismissing all claims against it this Court finds, after reviewing the contract between Verizon and Nico, that ECS is entitled to summary judgment on its claim for contractual indemnification against Nico, including any costs it incurred in defending the instant action. *See Di Perna v American Broadcasting Co.*, 200 AD2d 267 (1st Dept. 1994). The broad language of paragraph 22.1 of the contract, cited above, specifically contemplates indemnification as a defense even if plaintiff's claim is proven to be baseless. *Id.*, at 269-271. Pursuant to the contract, ECS' claim against Nico is viable whether or not the complaint is dismissed as against ECS because the claim arises out of Nico's alleged acts

and/or omissions. *See Diudone v City of New York*, 87 AD3d 608 (2d Dept 2011); *DiPerna, supra*.

This Court further finds that Nico's argument that paragraph 22.1 violates GOL § 5-322.1 is devoid of merit. GOL § 5-322.1 "declares void agreements purporting to indemnify contractors against liability for injuries contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be whole or in part." This section is inapplicable herein because the indemnification clause at issue does not purport to indemnify ECS against its own negligence. Moreover, Nico fails to provide any authority supporting its contention that paragraph 22.1 violates the GOL because it does not contain the phrase "to the fullest extent permitted by law."

Given the above, despite this Court's denial of ECS' motion for summary judgment dismissing all claims against it, ECS is entitled to summary judgment granting it contractual indemnification and reimbursement of attorneys' fees from Nico. *See DiPerna, supra*.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of the motion by defendant/third-party plaintiff Empire Subway Company (Limited) seeking summary judgment dismissing the complaint and all cross claims and counterclaims against it is denied; and it is further,

ORDERED that the branch of the motion by defendant/third-party plaintiff Empire Subway Company (Limited) seeking summary judgment on its claim for contractual indemnification against

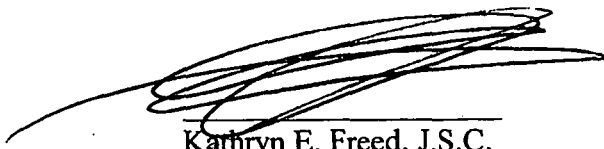
third-party defendant Nico Asphalt Paving, Inc. is granted; and it is further,

ORDERED that Nico is to reimburse defendant Empire Subway Company (Limited) for the cost of its attorneys' fees incurred in defending plaintiff's action; and it is further,

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

Dated: January 26, 2015

ENTER:



Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED
FEB 03 2015
NEW YORK
COUNTY CLERK'S OFFICE

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

CARMEN M. ROJAS, being duly sworn, deposes and says:


That affiant is not a party to this action and is over the age of 18 years.

That on February 6, 2015, affiant served the within NOTICE OF ENTRY WITH ORDER DATED JANUARY 26, 2015 upon the defendant(s) and/or attorney(s) for defendant(s) by depositing a true copy of same securely enclosed in a postpaid wrapper in a post office, official depository under the exclusive care and custody of the United States Postal Service within the state of New York, directed to said individuals or offices as follows:

THE LAW OFFICES OF EDWARD GARFINKEL
12 Metro Tech Center, 28th Floor
Brooklyn, NY 11201-3837

CONWAY FARRELL CURTIN & KELLY, P.C.
40 Wall Street, 20th Floor
New York, NY 10005

those being the respective addresses within the State designated by them for that purpose upon the preceding papers in this action or the respective places where they kept an office between which places there then was and now is a regular communication by mail.



CARMEN M. ROJAS

Sworn to before me this on
February 6, 2015



NOTARY PUBLIC

WANDA Y. RIVERA
Notary Public, State of New York
No. 01RI6074197
Qualified in New York County
Commission Expires May 13, 2018

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

-----X
RICHARD YAM,

Plaintiff,

Index No.: 102779/11

-against-

EMPIRE CITY SUBWAY COMPANY (LIMITED), et
al

Defendants.

-----X

NOTICE OF ENTRY

NAPOLI BERN RIPKA SHKOLNIK, LLP

Attorneys for: Plaintiff
350 5th Ave., Suite 7413
New York, New York 10118
(212) 267-3700

The undersigned attorney hereby certifies, pursuant to 22 NYCRR 130-1.1-a that he/she has read the within papers and that same are not frivolous as that term is defined in 22 NYCRR 130-1.1(c).


VINCENT L. GONZALEZ

Service of a copy of the within is hereby admitted.
Dated, _____

ATTORNEY(S) FOR

PLEASE TAKE NOTICE:

NOTICE OF ENTRY

that the within is a (certified) true copy of an _____ duly entered in the office of the clerk of the within named court on _____ 2014.

NOTICE OF SETTLEMENT

that an order _____ of which the within is a true copy will be presented for settlement to the HON. _____ one of the judges of the within named Court, at _____ on _____ 2014 at _____ O'clock ____M.

Dated, _____

Yours, etc.

NAPOLI BERN RIPKA SHKOLNIK, LLP