

Diggs v 125th St. Holdings LLC
2016 NY Slip Op 30052(U)
January 8, 2016
Supreme Court, New York County
Docket Number: 152398/12
Judge: Joan A. Madden
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
COUNTY OF NEW YORK, IAS PART 11

----- X
MARIE DIGGS,

Index No. 152398/12

Plaintiff,

-against-

125th STREET HOLDINGS LLC, ALBA GROUP, INC.,
and JLJ IV ENTERPRISES INC.,

Defendants.

----- X
JOAN A. MADDEN, J.:

In this personal injury action, defendant JLJ IV Enterprises, Inc. ("JLJ") moves an order granting summary judgment dismissing the complaint against it. Plaintiff opposes the motion, which is granted for the reasons below.

Background

Plaintiff alleges that she sustained personal injuries on September 16, 2011, when she tripped and fell on plywood while walking on the sidewalk on the sidewalk adjacent to 51 East 125th Street, New York, NY ("the Building") which is at the corner of 125 Street and Madison Avenue. Defendant 125th Street Holding Company, LLC ("125th Holding") owned the Building, and, in June 2011, entered into a contract with defendant Alba Group, LLC ("Alba") to perform interior and exterior construction work at the Building. During his deposition, however, Alba's owner, Martin Shkreli, testified that Alba did not begin to work until October 4, 2011, which is after the accident.

Plaintiff testified that on the day of the accident, at approximately between 1:00 and 1:30 p.m., she was walking home from the subway station at 125th Street to her apartment on 137th

Street (Plaintiff's deposition at 13-14). As she turned on the intersection 125th St. and Madison Ave., plaintiff stepped on a sheet of plywood, and her right foot got caught in the plywood causing her to fall to the ground (Id. at 24). The plywood covered the majority of the sidewalk (Id. at 23). As she fell to her right side, her left hand, right elbow, and knees contacted the plywood (Id. at 25). Two men that were working on the site came over to help her up, and she heard one of the men working on the site mention the name Alba (Id. at 24-26). She later observed the men putting the plywood up on the Building (Id. at 94).

Phillip Basso ("Basso"), the field supervisor of JLJ, testified that in this position he is responsible for coordinating with all utilities as well as City inspectors and is physically located at the job he supervises. According to Basso, JLJ entered into a contract with New York City Department of Design and Construction on approximately January 2010, for the purpose of installing sidewalk handicap ramps at specific corners, including 125th and Madison (Basso deposition at 12-13). He testified that plywood is not needed to install the ramps, and that the first time work JLJ performed work at the intersection of 125th and Madison was in June of 2014, which was well after the date of the accident (Id. at 17).

JLJ moves for summary judgment, arguing that the evidence establishes that it did not cause or create the condition on which plaintiff fell, pointing to Basso's testimony that JLJ did not use plywood or perform work in the area where plaintiff fell until approximately two and a half years after her accident.

Plaintiff opposes the motion, arguing that there is "unequivocal evidence that work was taking place at the time and location" of plaintiff's accident. In support of her opposition, plaintiff attaches a stop work order and an ECB violation both issued on September 21, 2011, by

the New York City Department of Buildings. The stop work order, identifies the location as “Premises 51 East 125th St” and refers to “Demolition Exterior and Interior.” According to plaintiff the stop work order was placed on the construction fence that was put around the construction being done on the Building. The violation refers to the same location and refers to failure to provide a sidewalk shed and states that the structure is “undergoing interior demolition, facade modifications, horizontal enlargement and structural changes.”

Plaintiff also points to several construction permits produced by JLJ during discovery allowing JLJ to perform work at the time and location of plaintiff’s accident, i.e. permits for East 125th Street, including from 5th Avenue to Madison Avenue for the period for July 7, 2011 to October 1, 2011. Plaintiff argues that in light of these permits, JLJ cannot rely on Basso’s self-serving testimony to obtain summary judgment, citing Bral v. City of New York, 221 AD2d 283 (1st Dept 1995)(summary judgment properly denied where defendant construction company’s claim that it did not perform work in the area of the accident was supported solely by defendant’s principal and conflicted with documentary evidence, including permits, issued to defendant for the worksite).

In reply, JLJ argues that the stop work order and the violation relate to the construction work being performed at the Building by Alba and points out that the violation was issued to 125th Holding, as the Building’s owner. It further argues that the violation have nothing to do with the permits taken out by JLJ, for the work eventually performed by JLJ, and that JLJ did not use plywood for its work.

In her supplemental affirmation submitted with permission of the court, plaintiff argues that the permits constitute direct evidence that construction is taking place and precludes a grant

of summary judgment in JLJ's favor, particularly as its motion is supported solely by Basso's self-serving testimony.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

To sustain an action for negligence, a plaintiff must show "1) the existence of a duty on defendant's part as to plaintiff, 2) breach of this duty, and 3) injury to plaintiff as a result thereof." Akins v. Glens Falls School Dist., 53 NY2d 325, 333 (1981)(internal citations omitted). A duty relationship is required in a negligence action since otherwise a defendant would be subjected "to limitless liability to an indeterminate class of persons conceivably injured by any negligence in [the defendant's] act" (Id., quoting Eiseman v. State, 70 NY2d 175, 188 (1987)). "Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises... The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property." Balsam v. Delma Engineering Corp., 139 AD2d 292, 296- 297 (1st Dept 1998) (internal citations omitted).

Here, JLJ has made a prima facie showing entitling it to summary judgment based on Bass's testimony that JLJ did not perform work in the area where plaintiff fell and, in any event, did not use plywood for its work which involved the installation of handicap ramps at street corners. His testimony is further supported by evidence that renovation work being performed on the Building involved the use of plywood. See See Amini v. Arena Const. Co., Inc., 110 AD3d 414, 414-415 (1st Dept 2013)(in personal injury action arising from plaintiff's trip and fall over a pothole in a crosswalk "defendant contractors made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidence that they did not perform work connected to the defect at issue"). Moreover, plaintiff has not controverted this showing. The stop work order and violation involve the construction work on the Building and not any work performed by JLJ. Furthermore, while the permits show that JLJ had permission to do work in the area of the accident during the relevant time period, they are insufficient to controvert JLJ's showing that it did not perform work where plaintiff fell and/or was not responsible for the plywood which caused her to fall.

Furthermore, Bral v. the City of New York, on which plaintiff primarily relies is not ~~is~~ dispositive here. In Bral, the First Department affirmed the finding below that triable issues of fact existed as to whether defendant performed the work at issue, where the defendant's principal's claim to the contrary was controverted by documentary evidence, including a building permit and a certificate of insurance. However, contrary to plaintiff's position, Bral does not hold that a permit to do work is sufficient to raise a factual issue when, as here, there is evidence that notwithstanding the permit, the defendant contractor was not involved in the work resulting in plaintiff's injuries, nor does it establish that deposition testimony from a defendant's principal

is not probative evidence. See Amini v. Arena Const. Co., Inc., 110 AD3d at 415 (holding that contractor, which had a permit to do work in crosswalk where plaintiff fell, was entitled to summary judgment where record showed that its work was performed at least 500 feet away from crosswalk); Bermudez v. the City of New York, 21 AD3d 258 (1st Dept 2005)(finding that “[c]ontrary to the motion court's finding, the street opening permit for catch basin installation work at the intersection where plaintiff stepped into a pothole and broke her ankle, and the City's contract with [the defendant contractor] for such work, are insufficient to raise a question of fact as to whether such work was actually performed”); Gorham v. Reliable Fence & Supply, 92 AD3d 834, 837 (2d Dept 2012)(defendant construction company made prima facie showing entitling it summary judgment based on affidavit of its project manager, who stated, in effect, that it did not have control over the work site where accident happened).

The other cases relied on by plaintiff are also not controlling here. For example, in Harris v. Nicko Dev Corp., 10 AD3d 410 (2d Dept 2004), the court found, without explanation, that the defendant did not submit sufficient evidence to support its claim that it did not commence construction work or have equipment in the area where plaintiff fell, which, as indicated above, is not the case here. In Whitfield v. City of New York, 16 Misc3d 1115(A)(Sup Ct Kings Co. 2007), the court simply held that prior to discovery, summary judgment is not appropriately granted to a contractor where there is evidence that the contractor had a permit to perform work in the area at issue.

Finally, while Alba denies that its work had commenced at the time of plaintiff's fall, such evidence is insufficient to raise an issue of fact as to JLJ's responsibility for the condition causing plaintiff's injuries.

Conclusion

In view of the above, it is

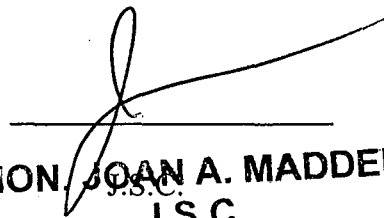
ORDERED that the motion for summary judgment by defendant JLJ IV Enterprises, Inc. is granted; and it is further

ORDERED that the caption is amended to reflect the dismissal of the complaint against defendant JLJ IV Enterprises, Inc.; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that counsel for defendant JLJ IV Enterprises, Inc shall provide, in accordance with the rules of efilng, a copy of this order with notice of entry to the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein.

Dated: January 8, 2016



HON. JOAN A. MADDEN
J.S.C.