Purcell v Fifty Broad St. Inc.
2016 NY Slip Op 31907(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 153979/12
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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RALPH PURCELL and HUAI PING LIN PURCELL,

Plaintiffs, **Index No.: 153979/12**

-against-

FIFTY BROAD STREET INC.; FIFTY NEW STREET INC.; BROAD CONSTRUCTION LLC., NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, ZAMIR EQITIES, LLC.; RESTANI CONSTRUCTION CORP., PERIMETER BRIDGE & SCAFFOLD CO. INC., S&E BRIDGE & SCAFFOLD CO., INC., ABC CORP. (name being fictitious and unknown) and JOHN DOE (name being fictitious and unknown), **DECISION/ORDER**

Defendants.

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FIFTY BROAD STREET INC. AND FIFTY NEW STREET INC.,

Third-Party Plaintiffs, **Index. No. : 595447/14**

-against-

SOLOTOFF EXTERIOR RESTORATION CORP., SOLOTOFF EXTERIOR RESTORATION, INC., and SOLOTOFF CONSTRUCTION CORP.,

Third-Party Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Motion sequence numbers 006, 007, and 008 are consolidated for disposition.

In this personal injury action, defendants Perimeter Bridge & Scaffold Co., Inc. ("Perimeter") (motion sequence 006), Fifty Broad Street, Inc. and Fifty New Street, Inc.

(collectively "Fifty Broad") (motion sequence 007), and Restani Construction Corp. ("Restani") (motion sequence 008) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them.[1]

BACKGROUND

According to the "Amended Verified Bill of Particulars" dated October 28, 2014, plaintiff Ralph Purcell ("Purcell" or "plaintiff"), a security officer working for the New York Stock Exchange, was allegedly injured on June 29, 2009, at approximately 10:20 a.m., when he tripped on the sidewalk in front of the entrance to 40 Broad Street in Manhattan (Comiskey Affirmation, Exhibit "I," ¶¶ 1,2). 40 Broad Street is owned by defendant Zamir Equities, LLC ("Zamir").

Plaintiff claims that he tripped on the sidewalk and fell in the street because loose gravel, cobblestones and/or construction debris on the adjacent street caused a tripping hazard (*id.*, ¶ 3). Plaintiff claims that Fifty Broad had scaffolding[2] erected in front of 40 Broad Street and that defendants were negligent, *inter alia*, in failing to maintain proper lighting on the scaffolding (*id.*, ¶ 4)

It is undisputed that, at the time of the accident, the area extending from 30 to 60 Broad Street, including the street itself, was under active construction. In connection with this construction: 1) pursuant to contracts with Zamir and nonparty Newmark Construction Services, LLC, Perimeter had erected scaffolding in front of 40 Broad (Saracino Affirmation, Exhibits "F"

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[1] The action has been discontinued against defendants S&E Bridge & Scaffold LLC and New York City Economic Development Corp. Defendants Broad Construction LLC and Zamir Equities, LLC are in default (Comiskey Affirmation, Exhibits "G" and "H").

[2] Thoughout the papers, the words "scaffolding", "sidewalk bridge" and "sidewalk shed" are used interchangeably by the parties. For the sake of consistency, this Court will use the term "scaffolding."

and "G"); 2) Fifty Broad contracted with the third-party defendants (the "Solotoff Entities") for exterior restoration work on its building and the Solotoff Entities hired the company that erected the scaffolding in front of Fifty Broad. According to Mark Bassin, Fifty Broad's building manager, nonparty Skyline was in charge of Fifty Broad's scaffolding in 2009 (Vasile Affirmation., Exhibit "L" at 48); and 3) pursuant to two separate contracts, Restani was performing work on certain portions of Broad Street, which work involved replacement of sidewalks and roadway improvements, including the laying of eurocobble pavers on certain streets and the installation of new curbs.

At his deposition, Purcell testified that, on the day of accident, there was scaffolding extending from about 30 Broad Street to about 60 Broad Street because of various ongoing construction projects (*id.*, Exhibit "J" at 94). He claims that he was walking underneath some scaffolding; it was very dark; he stepped on some soft asphalt, then out onto the curb. According to Plaintiff, when he stepped onto the street he encountered some loose cobblestone that caused him to trip and fall (*id.* at 99). Purcell described the patch of asphalt on the sidewalk as being three feet wide and five feet long (*id.* at 110) and that it appeared to be near 50 Broad Street[3] (*id.* at 114). He also stated that, after he fell, he saw the cobblestone that caused him to trip, and that it looked like there was a crack in the side of the cement that was supposed to be holding it in place (*id.* at 134).

[3] However, in the Amended Verified Bill of Particulars, Purcell avers that he fell in front of 40 Broad (Comiskey Affirmation, Exhibit "I," ¶ 2 & 3).

Following the first session of his deposition, Purcell corrected his testimony to clarify that he tripped over the curb which caused him to fall and injure himself (*id.*, errata sheet).[4] At his continued deposition, Purcell testified that he tripped on the curb (*id.* at 226) and lost his balance; and that the curb was an inch or two higher than the asphalt (*id.* at 237-238).

Cordy Hart ("Hart"), a nonparty who witnessed the accident, testified that he saw Purcell, who was walking in front of him fall and hit the ground. Hart testified that Purcell claimed that he tripped over equipment (Comiskey Affirmation, Exhibit "Q" at 25). Moreover, after viewing the videotape of the location of the accident, it was Hart's opinion that Purcell fell in front of 40 Broad Street (*id.* at 30).

SUMMARY JUDGMENT

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]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). 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).

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[4] This Court notes that, throughout his deposition, Purcell was shown photographs, which were marked into evidence, to help him fix the location where the accident occurred. The photographs identifying the location with Purcell's notations were not provided for the Court's review. In addition, the photographs that were attached as exhibits to the motions are either irrelevant because they do not identify where the accident occurred or fail to provide any meaningful details.

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).

THE MOTIONS

A. Perimeter (motion sequence 006)

In motion sequence 006, Perimeter argues that it has established its prima facie case that it is entitled to judgment dismissing the complaint by submitting the deposition of Ed Kirsch ("Kirsch"), Perimeter's president (Saracino Affirmation, Exhibit "E"), who testified that, pursuant to Perimeter's contract with Zamir, it was not Perimeter's responsibility to maintain the scaffolding it erected (*id.* at 38). Indeed, according to Kirsch, it was Zamir's responsibility to maintain the lighting (*id.* at 37). Moreover, Kirsch testified that installing the scaffolding did not require any work to be done to the sidewalk and that Perimeter did not install asphalt on the sidewalk (*id.* at 32). According to Perimeter, it owed no duty to Purcell because it did not displace the owner or general contractor's duty to maintain the premises, including the sidewalk

In opposition to Perimeter's motion for summary judgment, Purcell argues that his testimony that the area was dark creates a triable issue of fact about whether Perimeter was negligent and that, pursuant to the New York City Building Code (Administrative Code of the City of New York tit. 28, ch. 33) § 3307.6.5[5], Perimeter had a duty to make sure that the

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[5] Section 3307.6.5 entitled "Use and maintenance of sidewalk sheds," states in pertinent part:

> "2. The underside of sidewalk sheds shall be lighted at all times either by natural or artificial light. The level of illumination shall be the equivalent of that produced by 200 watt, 3400 lumen minimum standard incandescent lamps . . . . Artificial lighting units shall be inspected nightly; burned out or inoperative units shall be replaced or repaired immediately.

underside of the scaffolding was properly lighted.

In this case, Perimeter is entitled to summary judgment dismissing the complaint, as against it, because it owed no duty to Purcell. In *Espinal v Melville Snow Contrs* (98 NY2d 136, 140 [2002]), the Court of Appeals identified three situations where an entity which enters into a contract to render services,

> "may be said to have assumed a duty of care–and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launches 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"

(interior quotation marks and citations omitted).

In this case, as in *Blech v West Park Presbyt. Church* (102 AD3d 596, 597 [1st Dept 2013]) and *Drakes v Crescent Green LLC* (2015 WL 1943125 at *5 [Sup Ct, Bronx County 2015]), the undisputed contracts with Zamir and Newmark specifically excluded all maintenance of the scaffolding following its installation, and the contract with Zamir also specifically excluded florescent lighting (Saracino Affirmation, Exhibits "F" and "G"). Moreover, Edmund Kirsch, Perimeter's former president, testified that Zamir and/or Newmark maintained the lighting and that, if a lightbulb went out, it was the customer's duty to replace it (*id.* at 37). In addition, Kirsch testified that Perimeter did not do any sidewalk work and that it did not put any asphalt on the sidewalk (*id.* at 32).

Plaintiff failed to rebut this prima facie showing by presenting evidence that Perimeter created a condition that launched an instrumentality of harm, or that plaintiff detrimentally relied

on Perimeter's performance, or that Perimeter completely displaced the owner and general contractor's duty to maintain the scaffold (*see Blech*, 102 AD3d 597). Indeed, as discussed above, the evidence demonstrates that Perimeter had no duty to maintain the scaffolding.

In addition, at his deposition and in the Verified Amended Bill of Particulars, Plaintiff does not claim that he tripped and fell because he was unable to see (*see e.g. Yannetti v Hammerstein Ballroom*, 130 AD3d 410, 410 [1st Dept 2015]). Indeed, his testimony reveals that, while under the scaffolding, he was able to see and describe the area of asphalt on the sidewalk, he was able to see and describe the height differential between the sidewalk and the curb, and he was able to see that the asphalt was covering a portion of the curb. Moreover, Plaintiff's accident occurred on a sunny day at approximately 10:20 a.m. (Saracino Affirmation, Exhibit "C" at 99, 109,110, 111, 225, 237; *see Funk v United Parcel Serv., Inc.*, 73 AD3d 851, 852-853 [2d Dept 2010] [the plaintiff's claim of inadequate lighting rejected where plaintiff's own testimony established that he saw the area where the accident occurred with the aid of only natural lighting]).

Accordingly, lighting was not a substantial factor or a proximate cause of the accident.

However, even assuming *arguendo*, that the lighting was inadequate, according to the contract and Kirsch's testimony, it was the owner's obligation to maintain the scaffolding, including the lighting.

Accordingly, Perimeter's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

B. Fifty Broad (motion sequence 007)

In support of its motion for summary judgment, dismissing the complaint, Fifty Broad argues that it has established its prima facie case that it is entitled to summary judgment because plaintiff's deposition testimony and the Amended Verified Bill of Particulars demonstrate that plaintiff did not fall in front of Fifty Broad and that Mark Bassin ("Bassin"), Fifty Broad's property manager, testified that it did not put asphalt on the sidewalk and that it did not create an allegedly dangerous condition in front of 40 Broad.

In opposition to summary judgment[6], Plaintiff argues that there is a question of fact about whether Fifty Broad maintained the sidewalk in front of its building in a reasonably safe condition. Moreover, plaintiff contends that the issue of whether there was adequate lighting under the scaffolding raises a question of fact for the jury because Bassin testified that the scaffolding that Fifty Broad erected may have covered part of the sidewalk in front of 40 Broad and he also testified that he complained about the lack of lighting under the scaffold[7] to his management company.

Administrative Code of the City of New York § 7-210 imposes a non-delegable duty on the owner of abutting premises to maintain and repair the sidewalk. Where a defendant establishes that it did not own the property where the accident occurred, it will not be held liable

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[6] Plaintiff has not opposed this summary judgment motion that he fell in front of 50 Broad. Therefore, plaintiff has abandoned the position that the accident occurred at 50 Broad, and it is now uncontested that he fell in front of 40 Broad as alleged in his Amended Verified Bill of Particulars.

[7] It is undisputed that the scaffolding was first erected in front of Fifty Broad in 2007. Mr. Bassin does not identify when he complained about the inadequate lighting (Vasile Affirmation, Exhibit "L" at 66-68)

unless it is shown, under a special use theory, that "he put[] part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298 [1st Dept 1988]). In *Balsam*, the First Department explained, that a "special use" usually "involve[s] the installation of some object in the sidewalk or the street" that creates a dangerous condition (*id.*).

Here, both plaintiff's deposition testimony and the Amended Verified Bill of Particulars demonstrate conclusively that Fifty Broad did not own the property that abutted the sidewalk on which plaintiff tripped and fell. Rather, plaintiff has abandoned its argument that he fell in front of 50 Broad Street, and it is now plaintiff's position that he fell in front of the building located at 40 Broad Street, which is consistent with the Amended Verified Bill of Particulars.

Indeed, as discussed *supra*, there is no evidence that the lighting under the scaffolding was inadequate on the date and at the time of the accident because the accident occurred mid-morning on a sunny day and plaintiff was able to provide a detailed description of the conditions of the sidewalk, curb and street (Saracino Affirmation, Exhibit "C" at 99, 109, 110, 111, 225 and 237; *see Funk v United Parcel Serv., Inc.*, 73 AD3d at 852-853 [the plaintiff's claim of inadequate lighting rejected where plaintiff's own testimony established that he saw the area where the accident occurred with the aid of only natural lighting]).

C. Restani (motion sequence 008)

In support of its motion for summary judgment, Restani argues that, although it replaced the curb where plaintiff allegedly tripped, it did not perform the asphalt patching on the sidewalk area where plaintiff fell and, therefore, it did not create the dangerous condition that caused

plaintiff's injuries. Moreover, it claims that it was not actively working on the eurocobble pavers, on the date, and in the area, where plaintiff fell.[8]

It is also Restani's position that the curb height differential was open and obvious and not inherently dangerous. Restani contends that when plaintiff's foot hit the curb, he lost his balance and that this was the proximate cause of his accident.

In opposition to summary judgment, plaintiff argues that there are questions of fact about whether Restani installed the eurocobble pavers in the area where plaintiff fell prior to the date of plaintiff's accident. Plaintiff points to the affidavit of Antonio Miranda ("Miranda"), Restani's foreman who was assigned to supervise the renovation work in the Financial District, wherein he states that "[a]t the time the accident is alleged to have occurred, Restani had installed eurocobble pavers on Broad Street in the area where plaintiff alleges to have fallen and had installed new curbs, specifically in the area where plaintiff claims he had been walking (Miranda Aff., ¶ 3). Moreover, plaintiff argues that there are questions of fact about whether Restani negligently created a dangerous condition in the roadway because the photographs (Carroll Affirmation, Exhibit "A" [marked J & K at Plaintiff's deposition]) demonstrate that, on the date of plaintiff's accident, Restani was involved in ongoing and active installation of new cobblestones on Broad Street.

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[8] The replacement of the sidewalks in front of 40 and 50 Broad Street, while originally part of Restani's scope of work under the No/Go Sidewalk Agreement, was taken out of Restani's scope of work because of the presence of scaffolding in front of 40 and 50 Broad Street (Miranda Aff., ¶ 1 & 4).

In addition, plaintiff contends that Restani launched a force or instrument of harm by negligently installing an elevated curbstone – one or two inches higher than the existing sidewalk.

As to Restani, there is a question of fact regarding whether Restani "launched a force or instrument of harm" by negligently installing the new curb in front of 40 Broad Street and/or whether it properly installed the eurocobble pavers in the same area. In *Espinal v Melville Snow Contrs.* (98 NY2d at 140), the Court of Appeals held that a party who enters into a contract may be liable in tort to a third person, inter alia, "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm" (internal quotation marks and citation omitted)(see also *Karydas v Ferrara-Ruurds*, ____ AD3d ____, 37 NYS3d 16, 17 [1st Dept 2016] ["issues of fact exist whether, in its attempts to repair a minor leak, [defendant] negligently exacerbated the problem, and 'launched a force or instrument of harm,' i.e., what plaintiff called a 'cascad[e]' of water into his unit"]; *Jenkins v Related Cos, L.P.* , 114 AD3d 435, 436 [1st Dept 2014]["issue if fact as to whether Waldorf [defendant] owed plaintiff a duty of care by having 'launched a force or instrument of harm' in failing to exercise reasonable care in the performance of its snow and ice removal duties"]).

Here, Restani admits that, before plaintiff's accident and pursuant to its contracts, it replaced the curb in the area where plaintiff allegedly tripped. However, it relies on plaintiff's deposition testimony to support its argument that the height differential between the sidewalk and the curb constituted an open and obvious condition that was not inherently dangerous as a matter of law (Comiskey Affirmation, Exhibit "N" at 225, 237).

To be considered open and obvious, a hazard "must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open, making a posted warning of the presence of the hazard superfluous" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]; see also *Trincere v County of Suffolk*, 90 NY2d 976 [1997]). However, a hazard that is open and obvious "may be rendered a trap for the unwary where the condition is obscured . . . or the plaintiff's attention is otherwise distracted" (*Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [1st Dept 2004]). "[W]hether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d at 72) and where the basis is clear and undisputed evidence (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]).

Here, there is a question of fact as to whether the one to two-inch differential in height between the curb and the sidewalk was an open and obvious condition that was not inherently dangerous. Indeed, Restani has failed to establish its prima facie case that it is entitled to judgment because it has not submitted admissible evidence, including photographs or expert testimony, demonstrating that, at the time of the accident, the differential in height between the sidewalk and curb was not inherently dangerous (*see e.g. Philips v Paco Lafayette LLC*, 106 AD3d 631, 632 [1st Dept 2013] [photographs show that the curb was open and obvious]).

Moreover, there are questions of fact regarding the whether a loose eurocobble paver caused or contributed to plaintiff's fall. While the videotape of plaintiff's accident (Comiskey Affirmation, Exhibit "R") is inconclusive as to whether plaintiff examined the eurocobble pavers immediately after he fell, plaintiff testified that he looked at the cobblestones at some point after

he fell, and he saw a gouge around one of the pavers where the grout was missing (*id.*, Exhibit "N" at 247-248). Given Plaintiff's testimony, it cannot be said as a matter of law that Restani was not negligent (*see Negri v Stop & Shop,* 65 NY2d 625, 626 [1985]*; Adams v Bruno*, 124 AD3d 566, 567 [2d Dept 2015] ["[i]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party"]). Moreover, although Restani's videotape evidence does not show plaintiff inspecting the pavers immediately after he fell, the videotape does not conclusively establish that the pavers were secure; that none of the grout was missing; and that the roadway was safe.

However, the branch of Restani's motion that seeks to dismiss the cross claims asserted by Fifty Broad and Perimeter is granted because this Court has determined that those entities are entitled to summary judgment dismissing the complaint as to them.

CONCLUSION

Accordingly, it is hereby

ORDERED that Perimeter Bridge & Scaffold Co. Inc.'s motion for summary judgment (motion sequence 006) dismissing the complaint and all cross claims against it is granted and the complaint and cross claims are severed and dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the court; and it is further

ORDERED that Fifty Broad Street Inc and Fifty New Street Inc.'s motion for summary judgment (motion sequence 007) dismissing the complaint and all cross claims against it is granted and the complaint and cross claims are severed and dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the court; and it is further

ORDERED that the branch of Restani Construction Corp.'s motion seeking summary judgment (motion sequence 008) dismissing the complaint as against it is denied; and it is further

ORDERED that the branch of Restani Construction Corp.'s motion (motion sequence 008) that seeks to dismiss the cross claims asserted by Fifty Broad Street Inc., Fifty New Street Inc. and Perimeter Bridge & Scaffold Co., Inc. is granted; and it is further

ORDERED that the action shall continue as to the remaining defendants.

Dated: September 30, 2016

ENTER:

J.S.C.

Shlomo Hagler
J.S.C.