

Vasquez v Global Constr. Mgt., LLC

2019 NY Slip Op 30807(U)

March 27, 2019

Supreme Court, New York County

Docket Number: 150272/2018

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

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

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MIREYA VASQUEZ,

Plaintiff,

-against-

GLOBAL CONSTRUCTION MANAGEMENT, LLC
and NEW YORK HE TRADING LLC,

Defendants.

-----x

FRANK P. NERVO, J.S.C.

DECISION AND ORDER

Index Number

150272/2018

Defendant Global Construction Management LLC (“Global”) seeks summary judgment in its favor pursuant to CPLR §3212. Defendant New York He Trading LLC (“NY He”) opposes.

The instant matter stems from an alleged trip-and-fall accident on the sidewalk adjacent to 2240 Amsterdam Avenue or 2238A Amsterdam Avenue. Plaintiff alleges that she was caused to fall due to a defect in the sidewalk. Global argues that it is not the owner of the subject premises and performed only limited excavation work in the rear of the property before ceasing work due to NY He’s non-payment. Global contends that this work was de minimis - tantamount to soil testing and preparation, and did not involve heavy machinery, occurred away from the sidewalk, and ceased 20 months before plaintiff’s alleged injury. NY He denies it is the owner of the subject property and argues that summary judgment is premature, since depositions have not occurred.

On a motion for summary judgment, pursuant to CPLR § 3212, the burden rests with the moving party to make a prima facie showing that it is entitled to judgment as a matter of law, and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “[I]t is proper for the court to ... deny summary judgment if facts are alleged in opposition to the

motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NYD 175 [1982]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

The Court is mindful that the instant litigation is at an early pre-discovery stage. Generally, parties should be “afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment” (*Amico v. Melville Vol. Fire Co., Inc.*, 39 AD3d 784 [2d Dept 2007]; CPLR § 3212[f]). However, where admissible evidence has been submitted on a pre-discovery motion for summary judgment, and such evidence establishes a party’s entitlement to judgment as a matter of law, summary judgment is appropriate (*Griffin v. Pennoyer*, 49 AD3d 341 [1st Dept 2008]). Likewise, speculation or hope that evidence to defeat a summary judgment motion may be revealed by discovery is insufficient to deny the motion, absent an evidentiary basis suggesting discovery may lead to relevant evidence (*DaSilva v. Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480 [1st Dept 2015]; *Rungoo v. Leary*, 110 AD3d 781 [2d Dept 2013]).

Here, in support of its motion, Global provides the contract between it and NY He (Exhibit D). The contract sets forth the scope of the construction work and does not include work to the sidewalk. Likewise, the construction permit issued to Global for the project is entitled “New Building - Earth Work” (Exhibit E). The contract also provides for payments to Global, and Global provides the affidavit of its owner stating work stopped in January 2016, 20 months prior to plaintiff’s alleged injury, due to non-payment (*Id.*; Exhibit F). The affidavit further states Global is not the owner of the subject premises. While a contractual obligation, alone, is generally insufficient to impose tort liability in favor of a third party (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *see also Cioffi v. Klein*, 119 AD3d 886 [2d Dept 2014]), tort liability may, nevertheless, be based on a contractual obligation when: (1) the contracting party

creates a force or instrument of harm or exacerbates a hazardous condition; (2) the plaintiff detrimentally relies on the contracting party's continued performance; or (3) the contracting party subsumes the duty to maintain the premises safely (*Espinal*, 98 NY2d at 140).

However, the evidence establishes Global owed no duty of care to plaintiff as a contracting party, did not create a force of harm or exacerbate a dangerous condition, plaintiff did not detrimentally rely on its continued contractual performance, and NY He retained exclusive control of the premises (*see generally Church v. Callanan Indus.*, 99 NY2d 104 [2002])[contractor granted summary judgment where inspection responsibilities and duty to oversee/maintain remained with Thruway Authority]). Consequently, the *Espinal* exceptions are not present under these facts, and Global has established its prima facie entitlement to a judgment as a matter of law. While NY He denies ownership of the subject property in its opposition, notably, NY He does not deny ownership of the subject premises in its answer, nor does it deny having entered into a contract with Global allowing Global access to the subject property. NY He has failed to provide any documentary evidence supporting its position that it is not the owner of the subject property. Furthermore, NY He has not submitted an affidavit from a person with personal knowledge of the material facts, nor does it contend that depositions of Global will reveal it performed construction work on the sidewalk or caused the alleged defective condition. Consequently, NY He's contention that outstanding depositions preclude summary judgment fails to provide an evidentiary basis suggesting that this further discovery may lead to relevant evidence, and therefore does not raise a triable issue of fact.

Accordingly, it is

ORDERED that Global Construction Management's motion for summary judgment is granted and the complaint is dismissed against them; and it is further

ORDERED that the cross-claims against Global Construction Management LLC are dismissed; and it is further

ORDERED the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Global Construction Management LLC dismissing the claims and cross-claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the status conference scheduled for April 9, 2019 is adjourned to Friday, April 26, 2019 at 10:00am in Part 4. Counsel for plaintiff and New York He Trading LLC are directed to appear on April 26, 2019.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 27, 2019

ENTER:



J.S.C.
HON. FRANK P. NERVO