

**Ocean v Strivers Gardens Condominium Assn.**

2019 NY Slip Op 31482(U)

May 28, 2019

Supreme Court, New York County

Docket Number: 154702/2016

Judge: Kathryn E. Freed

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

**PRESENT:** HON. KATHRYN E. FREED PART IAS MOTION 2EFM

*Justice*

-----X INDEX NO. 154702/2016

AMIRA OCEAN, MOTION SEQ. NO. 006

Plaintiff,

- v -

STRIVERS GARDENS CONDOMINIUM ASSOCIATION, NEW  
BEDFORD MANAGEMENT CORP., ROCK GROUP NY CORP.,  
ROCK SCAFFOLDING CORP., YATES RESTORATION GROUP  
LTD, SUPERSTRUCTURES ENGINEERS AND ARCHITECTS,  
and RB NY ENTERPRISES INC.,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 143, 144, 145, 146, 147, 148, 150, 154, 155, 156, 157, 158

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action commenced by plaintiff Amira Ocean (“Ocean”), defendant Superstructures Engineers and Architects PLLC (“Superstructures”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. Plaintiff and co-defendants Strivers Gardens Condominium Association (“Strivers Gardens”) and New Bedford Management Corp. (“New Bedford”) oppose the motion. After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On February 24, 2016, plaintiff was allegedly struck by an unsecured piece of wood that fell from either a scaffold or a “sidewalk bridge” while she was walking on a sidewalk in front of

300 West 135th Street (“the premises”) in Manhattan. (Doc. 144 at 2.) Plaintiff thereafter commenced this suit against defendants Strivers Gardens, New Bedford, Rock Group NY Corp. (“Rock Group”), Rock Scaffolding Corp.,<sup>1</sup> Yates Restoration Group Ltd. (“Yates”), Superstructures, and RB NY Enterprises Inc. (“RB NY”), alleging that her injuries resulted from defendants’ negligence in their maintenance and supervision of the sidewalk. (See Doc. 145 at 106–23.)

In their answers, defendants Strivers Gardens (*id.* at 38–45), New Bedford (*id.*), Rock Group (*id.* at 20–37), Yates (*id.* at 46–57),<sup>2</sup> and RB NY (*id.* at 126–38) asserted cross claims against each other and Superstructures for contribution and indemnification.

Superstructures now moves, pursuant to CPLR 3212, for summary judgment in its favor dismissing the complaint and all cross claims. (Doc. 143.) In support of the motion, Superstructures submits an affidavit by David May (“May”), a licensed professional architect and a principal of the entity, who states that Superstructures submitted a work proposal to Strivers Gardens in 2014. (Doc. 146 at 2.) Strivers Gardens accepted this proposal. (*Id.*) However, the agreement provided that the scope of Superstructures’ work would not include anything related to the construction or maintenance of the sidewalk on which plaintiff sustained her injury. (*Id.*) May further states in his affidavit that Superstructures had nothing to do with the sidewalk shed. (*Id.* at 4.) Superstructure also submits the work agreement between it and co-defendant Strivers Gardens. (*Id.* at 6–27.) Thus, because construction and maintenance of the sidewalk shed were outside the scope of its work, Superstructures argues that it cannot be held liable for plaintiff’s injuries. (Doc. 147 at 11–13.)

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<sup>1</sup> By order dated January 29, 2018, this Court (Freed, J.) granted plaintiff a default judgment against defendant Rock Scaffolding Corp. (Doc. 95.)

<sup>2</sup> By order dated November 7, 2018, this Court (Freed, J.) granted Yates’ motion to dismiss the complaint and all cross claims against it. (Doc. 149.)

In opposition, plaintiff, Strivers Gardens and New Bedford argue that Superstructures' summary judgment motion is premature: "In [this] case there has been zero discovery as to any defendant that is necessary before allowing the within motion seeking summary judgment." (Doc. 154 at 3; *see also* Doc. 148 at 2.) Moreover, Strivers Gardens and New Bedford maintain that there is a factual issue precluding summary judgment, specifically that "it is still unclear as to who installed the shed and who was responsible for monitoring, maintaining and inspecting it." (Doc. 148 at 2.) In addition, plaintiff submits an application for a work permit that Superstructures purportedly submitted to the New York City Department of Buildings ("the DOB"). (Doc. 155). Because this permit was related to repairs of the exterior façade "for which a sidewalk bridge/scaffold would be required" (Doc. 154 at 2), plaintiff contends that the motion must be denied.

In reply, Superstructures argues that plaintiff, Strivers Gardens, and New Bedford did not raise an issue of fact because they did not dispute the validity of Superstructures' work agreement for the project. (Doc. 157 at 2–4.) Because the scope of its work did not encompass the sidewalk shed, it reiterates its argument that it did not owe a duty of care to plaintiff. (*See id.*) May also submits an affidavit in reply, stating that Superstructures neither applied for nor obtained a permit to erect a scaffold on the sidewalk. (*Id.* at 4; Doc. 158 at 4.) Contrary to plaintiff's contention that the work permit creates issues of fact as to whether Superstructures is liable for the accident, May asserts that, although the permit was for restoration of the exterior façade, it was not a permit to do work on the sidewalk. (Doc. 158 at 3–4.)

**LEGAL CONCLUSIONS:**

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

This Court finds that Superstructures has established its prima facie entitlement to judgment as a matter of law. It is well established that, in tort cases based on premises liability, a “defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition.” (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012].) The contract between Superstructures and Strivers Gardens defines Superstructures as “SSX” on the very first page. (Doc. 146 at 7.) The contract provides as follows:

SSX is not a guarantor or insurer of the contractor’s work. SSX shall not be responsible for the contractor’s means, methods, sequences, or procedures of construction, the safety precautions and programs incident to the work of the contractor, or compliance with OSHA and other applicable regulations. . . . *SSX shall not be responsible for the design, erection, or maintenance of sidewalk sheds associated with the project, or for the maintenance of sidewalks or pedestrian walkways beneath the sheds.*

(*Id.* at 15 (emphasis added).) The contention by Strivers Gardens and New Bedford that May's affidavit fails to offer any personal knowledge of Superstructures' work on the site, and that his "affidavit . . . only focuses on the agreement" (Doc. 148 at 4), is insufficient to raise a triable issue of fact regarding Superstructures' contractual duties regarding the project. Moreover, their contention, as well as plaintiff's contention, that discovery is still outstanding does not bar summary judgment in this situation. (*See Chem. Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983].) Rather, they must show "a likelihood of discovery leading to such evidence" which would raise issues of fact. (*See Frierson v. Concourse Plaza Assocs.*, 189 AD2d 609, 610 [1st Dept 1993] ("The 'mere hope' . . . that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough.")) They failed to do so.

Nor does Superstructures' application to DOB for a work permit raise an issue of fact. The exhibit establishes that May submitted the application, that it was approved on April 8, 2015, and that it was for work on 135th Street. (Doc. 155 at 2.) However, in his reply affidavit, May states that this permit did not authorize Superstructures to perform any sidewalk work or to construct a sidewalk shed. (Doc. 158 at 3-4.) Thus, the complaint must be dismissed as against Superstructures. (*See Robinson v City of New York*, 18 AD3d 255, 256 [1st Dept 2005] (dismissing complaint where the record contained "no evidence whatsoever" that the defendant performed work where the plaintiff was injured).)

Based on the foregoing, this Court determines that Superstructures is not liable for plaintiff's accident. Therefore, summary judgment dismissing the cross claims of the co-defendants in this action for contribution and indemnification is also granted. (*See Barto v NS Partners, LLC*, 74 AD3d 1717, 1720 [4th Dept 2010] (dismissing cross-claims for indemnification where defendant established its nonliability to plaintiff).)

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

**ORDERED** that defendant Superstructures Engineers and Architects PLLC's motion to dismiss the complaint and all cross-claims is granted; and it is further

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

**ORDERED** that the caption be amended to reflect the dismissal of defendant Superstructures Engineers and Architects PLLC and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

**ORDERED** that this constitutes the decision and order of this Court.

5/28/2019  
DATE

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KATHRYN E. FREED, J.S.C.~~

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	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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