Karten v 500-512 Seventh Ave. LP

2019 NY Slip Op 31848(U)

June 21, 2019

Supreme Court, New York County

Docket Number: 151650/2014

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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SHELLEY KARTEN and MARK KARTEN,

Index No. 151650/2014

Plaintiffs

- against -

500-512 SEVENTH AVENUE LP, LLC, NEWMARK GRUBB KNIGHT FRANK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., GIBRALTAR CONTRACTING, INC., and G&E REAL ESTATE MANAGEMENT SERVICES, INC.,

Defendants

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third Party Plaintiff

- against -

NAMOW, INC.,

Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for personal injuries and lost services sustained September 3, 2013, when plaintiff Shelley Karten fell in front of a building at 210 West 38th Street, between 7th and 8th Avenues, in New York County, owned by defendant 500-512 Seventh Avenue LP, LLC, and managed by its agent defendant Newmark Grubb Knight Frank (owner defendants).

Defendant Consolidated Edison Company of New York, Inc., had excavated the sidewalk in front of the building and had contracted with third party defendant Namow, Inc., to perform sidewalk restoration work.

In a stipulation dated June 3, 2015, plaintiffs discontinued plaintiff Mark Karten's lost services claim. In a stipulation dated April 25, 2017, plaintiffs discontinued their action against defendant G&E Real Estate Management Services, Inc. At oral argument December 11, 2018, the parties stipulated on the record to discontinue all claims against defendant Gibraltar Contracting, Inc.

Consolidated Edison commenced a third party action against third party defendant Namow, Inc., for indemnification, breach of contract, and negligence. Namow moves for summary judgment dismissing the third party action on the ground that Namow did not perform work that caused plaintiff's injury. C.P.L.R. § 3212(b). The owner defendants separately move for summary judgment dismissing the complaint and cross-claims by Consolidated Edison and Namow against the owner defendants on the ground that they were not responsible for the sidewalk where plaintiff fell. Id. See C.P.L.R. § 1008.

II. NAMOW'S MOTION

While Namow acknowledges that it entered a blanket purchase agreement with Consolidated Edison to repair sidewalks at various locations throughout New York County, including where plaintiff was injured, Namow insists it had yet not commenced work in that

area before plaintiff's injury. Since Namow did not own the premises abutting the sidewalk, Namow owed no duty to maintain the sidewalk. As a nonowner, Namow's liability for sidewalk hazards depends on whether Namow created the hazard or made special use of the sidewalk. Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d 615, 617 (1st Dep't 2017); O'Brien v. Prestige Bay Plaza Dev. Corp., 103 A.D.3d 428, 429 (1st Dep't 2013); Abramson v. Eden Farm, Inc., 70 A.D.3d 514, 514 (1st Dep't 2010). Evidence that Namow, a contractor, had not performed work in an area where plaintiff sustained injury demonstrates the contractor's nonliability. O'Jon v. Consolidated Edison Co. of N.Y., Inc., 147 A.D.3d 570, 570 (1st Dep't 2017); Camacho v. City of New York, 135 A.D.3d 482, 482-83 (1st Dep't 2016); Andino v. NSPD Assoc., LLC, 89 A.D.3d 414, 414 (1st Dep't 2011).

Joseph Hassoune, a Namow project manager from 2011 to 2016, attests that, after an unidentified Namow representative inspected the site where plaintiff was injured and discovered scaffolding that prevented sidewalk work, Namow reported this finding to Consolidated Edison, which never notified Namow when work could proceed. Hassoune's account of both the inspection and the report to Consolidated Edison, however, are inadmissible hearsay. Ying Choy Chong v. 457 W. 22nd St. Tenants Corp., 144 A.D.3d 591, 592 (1st Dep't 2016); Acevedo v. Williams Scotsman, Inc., 116 A.D.3d 416, 417 (1st Dep't 2014). Even were Hassoune's account admissible, it fails to specify the critical detail of when the inspection occurred in relation to plaintiff's injury.

Plaintiff's deposition testimony does confirm scaffolding near where she was injured, but does not indicate how long it was there before her injury or whether the scaffolding was the same structure that Namov's representative found.

Namow presents an email dated February 18, 2015, from Arthur Blind of Consolidated Edison inquiring why Namow had not performed work on West 38th Street between 7th and 8th Avenues, to which Namow responded that its records indicated scaffolding on the site. Although Hassoune attests that he reviewed Namow's records on which this response was based, it, too, is inadmissible hearsay, absent Namow's presentation of those records and a foundation for their admissibility as business records or another exception to the rule against hearsay. E.g., C.P.L.R. § 4518(a). No witness offers any explanation for the failure to present these records. Schozer v. William Penn Life Ins. Co. of N.Y., 84 N.Y.2d 639, 643-44 (1994); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014). Recitation of their contents by Hassoune or in an email is not an acceptable substitute for the records themselves. People v. Joseph, 86 N.Y.2d 565, 570 (1995); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d at 438. Again, however, even were Namow's response to Blind admissible, a communication over 18 months after plaintiff's injury does not show when Namow reported that it could not perform the contract work: whether before or after September 3, 2013, the date of plaintiff's injury.

Since Namow has not demonstrated that it performed no work

where plaintiff fell before she fell, Namov fails to establish that it did not create the condition that caused her to fall. DelGuidice v. City of New York, 103 A.D.3d 443, 444 (1st Dep't 2013). Namow's failure to demonstrate that Namow performed no work at the site of plaintiff's injury also precludes dismissal of the remaining third party claims. According to Article 36 of the standard terms and conditions incorporated into the blanket purchase agreement, an injury arising from Namow's work, regardless of its negligence, triggers its obligation to indemnify Consolidated Edison. Since Namow failed to demonstrate that it performed no work at plaintiff's injury site, her injury may have arisen from its work, negating any conclusive basis for summary judgment dismissing Consolidated Edison's indemnification claims. Berihuete v. 565 W. 139th St., L.P., ___ A.D.3d ___, 99 N.Y.S.3d 274, 275 (1st Dep't 2019); McCullough v. One Bryant Park, 132 A.D.3d 491, 493 (1st Dep't 2015); Arner v. RREEF Am., L.L.C., 121 A.D.3d 450, 450-51 (1st Dep't 2014). See Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017).

Consolidated Edison also claims that Namow breached the blanket purchase agreement by not performing work at the site of plaintiff's injury. Although the purchase agreement did not set a deadline for performing that work, Hassoune attests that Consolidated Edison identified locations to be given priority and never denies that the site of plaintiff's injury was one of them. Absent such a denial, and absent admissible evidence that Namow ever reported its inability to perform the work under the

contract, Consolidated Edison's claim that Namow breached its contractual obligation to perform the work also survives dismissal.

Finally, Namow's unsupported claim that it performed no work is irrelevant to its further contractual obligation under the purchase agreement to procure insurance. Absent any evidence that Namow purchased the required insurance, Namow also fails to demonstrate entitlement to dismissal of Consolidated Edison's claim that Namow breached its contractual obligation to procure insurance. Prevost v. One City Block LLC, 155 A.D.3d 531, 536 (1st Dep't 2017). See Aramburu v. Midtown W. B, LLC, 126 A.D.3d 498, 501 (1st Dep't 2015); Arner v. RREEF Am., L.L.C., 121 A.D.3d at 451; Mathews v. Bank of Am., 107 A.D.3d 495, 496 (1st Dep't 2013).

III. THE OWNER DEFENDANTS' MOTION

The owner defendants seek summary judgment dismissing plaintiff's claims and the cross-claims by Consolidated Edison and Namow for implied indemnification against the owner defendants. They maintain that they are not liable because they neither created the hazard on which plaintiff fell nor made special use of the area. Plaintiff contends that they are precluded from presenting evidence regarding liability.

A. The Owner Defendants Are Not Precluded from Presenting Evidence Supporting Summary Judgment.

In an order dated November 1, 2017, the court (Mendez, J.) precluded only 500-512 Seventh Avenue LP from introducing evidence regarding liability at trial, but, since Newmark Grubb

Knight Frank had produced a witness for a deposition, did not preclude this defendant from introducing such evidence. An order (Mendez, J.) dated July 19, 2017, had required both defendants to produce witnesses for depositions before September 22, 2017, and precluded each defendant from introducing evidence on liability at trial if they failed to comply. While the orders refer to defendants' presentation of evidence at trial, the bar may be interpreted to include evidence to support summary judgment. Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D.3d 1, 9 (1st Dep't 2011). Nevertheless, the preclusion of evidence on liability does not bar the owner defendants from moving for summary judgment altogether, because they may rely on the deposition testimony by plaintiff, Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D.3d at 7; Wellington v. Manmall, LLC, 70 A.D.3d 401, 401 (1st Dep't 2010); Murphy v. Herbert Constr. Co., 297 A.D.3d 503, 504-505 (1st Dep't 2002), and by Newmark Grubb Knight Frank, which was not precluded from presenting evidence on liability.

B. The Merits of the Owner Defendants' Motion

In New York City the owner of property abutting a sidewalk owes a duty "to maintain such sidewalk in a reasonably safe condition." N.Y.C. Admin. Code § 7-210(a); Sangaray v. West Riv. Assoc., LLC, 26 N.Y.3d 793, 796 (2016); Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 520 (2008). See Bronfman v. East Midtown Plaza Hous. Co., Inc., 151 A.D.3d 639, 640 (1st Dep't 2017); Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d at 616. The owner defendants contend, however, that a sidewalk grate for

which they were not responsible caused plaintiff's injury. Yet the evidence that they present does not support their claim that Consolidated Edison was responsible to maintain, inspect, and repair the grate. Yesenia Campoverde of Consolidated Edison testified at her deposition that she was unsure whether Consolidated Edison owned the transformer vault covered by the grate. Campoverde explained that the New York City Department of Transportation issued a corrective action request to Consolidated Edison to repair the concrete around the transformer vault because the repair related to work for which a permit had been issued to Consolidated Edison. Joseph Cirotti, a Consolidated Edison mechanic, testified at his deposition about a document describing a sidewalk opening on 38th Street, which the owner defendants also never present. In any event, this hearsay testimony establishes only that Consolidated Edison applied backfill, dirt, and temporary blacktop to a hole to fill it temporarily until repaving was performed, not that Consolidated Edison owned the grate or the vault underneath.

Albert Voci, senior portfolio manager for Newmark Grubb Knight Frank, testified at his deposition that he reported a problem with the grate to Consolidated Edison because the grate was Consolidated Edison's property, but offers no basis for this conclusion. While Voci also testified regarding emails dated September 27, 2012, from Mark Sullivan of Consolidated Edison to Voci in which Sullivan stated that Consolidated Edison would repair particular sidewalk grates, Voci acknowledged that he did

not know the locations of those grates to which Sullivan referred. Nor do Sullivan's emails admit ownership or sole responsibility for the grates. In any event, the owner defendants do not establish Sullivan's authority to make admissions on Consolidated Edison's behalf. Tyrrell v. Wal-Mart Stores, 97 N.Y.2d 650, 652 (2001); Clarke v. Verizon N.Y., Inc., 138 A.D.3d 505, 506 (1st Dep't 2016); Rodriguez v. New York City Tr. Auth., 118 A.D.3d 618, 619 (1st Dep't 2014); Gordzica v. New York City Tr. Auth., 103 A.D.3d 598, 598 (1st Dep't 2013).

For all these reasons, the evidence fails to demonstrate Consolidated Edison's ownership of the grating, see Sanders v. Aqua Chlor Enters., Inc., 90 A.D.3d 521, 522 (1st Dep't 2011); Kleckner v. Meushar 34th St., LLC, 80 A.D.3d 478, 479 (1st Dep't 2011), or its special use or creation of the claimed hazard. Arzeno v. City of New York, 128 A.D.3d 527, 528 (1st Dep't 2015); Kleckner v. Meushar 34th St., LLC, 80 A.D.3d at 479. Moreoever, even if Consolidated Edison did own the grate, its ownership would not entirely displace the owner defendants' duty to maintain the sidewalk around it. Bronfman v. East Midtown Plaza Hous. Co., Inc., 151 A.D.3d at 640. Plaintiff did not attribute her fall to the grate, but testified instead that her foot contacted uneven concrete and twisted, causing her fall. See Baghban v. City of New York, 140 A.D.3d 586, 586 (1st Dep't 2016).

The duty owed by the owner of a sidewalk grate to maintain the sidewalk around the grate is limited. The "owners of covers

or gratings in a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware." 34 R.C.N.Y. § 2-07(b)(1); Storper v. Kobe Club, 76 A.D.3d 426, 427 (1st Dep't 2010); Hurley v. Related Mgt. Co., 74 A.D.3d 648, 649 (1st Dep't 2010). The "owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the hardware." 34 R.C.N.Y. § 2-07(b)(2); Storper v. Kobe Club, 76 A.D.3d at 427; Hurley v. Related Mgt. Co., 74 A.D.3d at 649. See Lewis v. City of New York, 89 A.D.3d 410, 411 (1st Dep't 2011). The definition of a "street" as used in the regulation includes a sidewalk. 34 R.C.N.Y. § 2-01; Cruz v. New York City Tr. Auth., 19 A.D.3d 130, 131 (1st Dep't 2005); Flynn v. City of New York, 84 A.D.3d 1018, 1019 (2d Dep't 2011).

Even if the owner defendants established Consolidated Edison's ownership of the grate, they still failed to demonstrate that the condition causing plaintiff's fall was within the 12 inches of the grate's perimeter according to the regulations. While the owner defendants rely on photographs of the area where plaintiff sustained injury, including a photograph on which she marked the location of the defective condition, the owner defendants offer no basis to measure the distance of the defective condition from the grate using the photograph alone. Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66, 82 (2015);

Jones v. 3417 Broadway LLC, ___ A.D.3d ___, 98 N.Y.S.3d 743, 744 (1st Dep't May 21, 2019); Pitt v. New York City Tr. Auth., 146 A.D.3d 826, 828 (1st Dep't 2017); Forrester v. Riverbay Corp., 135 A.D.3d 448, 449 (1st Dep't 2016). Plaintiff herself could not testify as to the distance of the defective condition from the grate. Therefore the owner defendants further fail to demonstrate that the defective condition causing plaintiff's fall was within the 12 inches of the grate required by the regulations for the owner defendants to avoid liability. See Jones v. 3417 Broadway LLC, 98 N.Y.S.3d at 744; Lewis v. City of New York, 89 A.D.3d at 411; Storper v. Kobe Club, 76 A.D.3d at 427; Hurley v. Related Mgt. Co., 74 A.D.3d at 649.

IV. CONCLUSION

For all the reasons explained above, the court denies the separate motions for summary judgment by third party defendant Namow, Inc., and by defendants 500-512 Seventh Avenue LP, LLC, and Newmark Grubb Knight Frank. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: June 21, 2019

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.