

Thadani v Between the Bread 40th Inc.
2019 NY Slip Op 32356(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 154329/2016
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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RUMONA THADANI,

Index No. 154329/2016

Plaintiff

- against -

BETWEEN THE BREAD 40TH INC., DOM BEN
REALTY CORPORATION, and P. VERARDI
CONSTRUCTION CORP.,

Defendants

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P. VERARDI CONSTRUCTION CORP.,

Third Party Plaintiff

- against -

AMERICAN CONSTRUCTION and GABRIEL
UZIEL,

Third Party Defendants

-----X

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BETWEEN THE BREAD 40TH INC. and DOM
BEN REALTY CORPORATION,

Second Third Party Plaintiffs

- against -

AMERICAN CONSTRUCTION and GABRIEL
UZIEL,

Second Third Party Defendants

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained September 19, 2015, when she was struck by construction material in front of 20A East 40th Street, New York County, owned by defendant Dom Ben Realty Corporation, where defendant Between the Bread 40th Inc. was a tenant. Either defendant P. Verardi Construction Corp. or third party defendant Uziel, who did business as American Construction, was renovating the premises for the tenant. P. Verardi Construction commenced a first third party action and the owner and tenant (owner defendants) commenced a second third party action against American Construction and Uziel, claiming contribution, implied and contractual indemnification, and breach of a contract to procure insurance.

The owner defendants move for summary judgment dismissing the complaint and P. Verardi Construction's cross-claims, C.P.L.R. § 3212(b), and awarding the owner defendants indemnification based on their cross-claims against P. Verardi

Construction. Third party defendants cross-move for summary judgment dismissing the third party actions, id., maintaining that Uziel and American Construction performed no work at the premises. For the reasons explained below, the court grants the owner defendants' motion in part and third party defendants' cross-motion in part and denies the remainder of the motion and cross-motion.

II. THE EVIDENCE

A. Plaintiff's Injury

Plaintiff testified at her deposition that, as she walked on the sidewalk abutting the owner defendants' premises, workers inside the premises threw wood to the sidewalk outside that struck her leg. Plaintiff testified that "Gabby," a man whom she believed was involved in the construction on the premises, assisted her after her injury. Aff. of Gary Marshall Ex. N, at 33. Uziel, who happened to be at the work site when plaintiff was injured, attests in his affidavit, however, that plaintiff informed him she was injured when "her shoe got caught in the metal subway grate on the sidewalk." Aff. of Gabriel Uziel ¶ 7. This alleged admission contradicts plaintiff's testimony, raising a factual issue whether her injury is attributable to renovation work on the owner defendants' premises, carried out by defendants

or third party defendants, or to another cause. Santos v. Condo 124 LLC, 161 A.D.3d 650, 654-55 (1st Dep't 2018); Medrano v. Port Auth. of N.Y. & N.J., 154 A.D.3d 521, 521-22 (1st Dep't 2017); Albino v. 221-223 W. 82 Owners Corp., 142 A.D.3d 799, 800-801 (1st Dep't 2016); Barba v. Stewart, 137 A.D.3d 704, 705 (1st Dep't 2016).

Uziel also attests that, since September 19, 2015, was a Saturday, no renovation work was being performed at the site, which also contradicts plaintiff's account. Finally, Uziel attests that plaintiff was alone when he assisted her, contradicting her testimony that her client Sanjeev Thakrar accompanied her when she was injured. Thakrar's affidavit, on the other hand, largely confirms plaintiff's account.

B. Relevant Provisions of the Renovation Agreement

At oral argument April 2, 2019, the parties stipulated that the court consider Between the Bread's agreement for renovation of its premises, executed July 22, 2015, authentic and admissible for the purposes of the motion and cross-motion for summary judgment. The parties further stipulated that whichever party contracted with Between the Bread to perform renovation of the 20A East 40th Street premises also was responsible for cleaning up the renovation debris, the negligent performance of which may

have entailed workers inside the premises throwing wood to the sidewalk outside.

Section 9.15.1 of the renovation agreement between Between the Bread (referred to as the "Owner") and the Contractor provides:

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9.15.1.

Aff. of Anthony Caronna Ex. E, at 11. Thus the agreement requires indemnification only to the extent that plaintiff's claimed injury resulted from the negligence of the contractor or the contractor's employee or agent. Section 17.1 of the renovation agreement also requires the contractor to procure insurance:

The Contractor shall purchase from, and maintain in a company or companies lawfully authorized to do business in

the jurisdiction in which the Project is located, insurance for protection from claims under workers' compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations and completed operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them.

Id. at 16.

III. THIRD PARTY DEFENDANTS' CROSS-MOTION

The undisputed evidence establishes that American Construction was a sole proprietorship owned by Uziel, which is not a suable entity. Therefore the court grants his cross-motion for summary judgment dismissing the third party actions against American Construction.

Uziel contends that he is not liable for plaintiff's injuries either, because he was not a party to the renovation agreement. Jonathan Eisen, Between the Bread's chief strategy officer, signed the agreement on its behalf. Uziel maintains that he signed the agreement on behalf of P. Verardi Construction, whose name appears on the agreement. Paul Verardi, P. Verardi Construction's president and owner, testified at his deposition that P. Verardi Construction never gave Uziel authority to sign contracts for P. Verardi Construction and

denied that Uziel was ever its employee. The contradictory accounts by Uziel and Verardi raise factual issues involving credibility determinations regarding Uziel's actual authority to execute the agreement on P. Verardi Construction's behalf.

Citibank, N.A. v. Uri Schwartz & Sons Diamonds Ltd., 97 A.D.3d 444, 446 (1st Dep't 2012); 1100 Inc. v. 4441 Broadway Realty Corp., 5 A.D.3d 284, 285 (1st Dep't 2004).

No evidence, however, indicates Uziel's apparent authority, which arises from the conduct of the principal only and not the agent. Indosuez Intl. Fin. v. National Reserve Bank, 98 N.Y.2d 238, 245 (2002); Standard Funding Corp. v. Lewitt, 89 N.Y.2d 546, 551 (1997); Hallock v. State of New York, 64 N.Y.2d 224, 231 (1984); DLJ Mtge. Capital, Inc. v. Kontogiannis, 102 A.D.3d 489, 489 (1st Dep't 2013), aff'd, 22 N.Y.3d 960 (2013). Neither Ricky Eisen, the president of Between the Bread, nor Jonathan Eisen communicated with Verardi or P. Verardi Construction. Verardi in turn denied any knowledge of Between the Bread, Dom Ben Realty, or the Eisens. Although Verardi testified that P. Verardi Construction allowed Uziel to use its insurance and its name for Between the Bread's architect to obtain the permit for the renovation and to help Uziel secure the job, no evidence establishes that the use of P. Verardi Construction's insurance

or name in connection with the permit was communicated to Ricky or Jonathan Eisen. Contrary to the owner defendants' characterization of Verardi's testimony, no evidence establishes that P. Verardi Construction allowed Uziel to use its contractor's license or obtained the permit itself. Nor does the evidence disclose any other words or conduct by P. Verardi Construction indicating to Between the Bread that Uziel possessed authority to act on P. Verardi Construction's behalf. Site Five Hous. Dev. Fund Corp. v. Estate of Bullock, 112 A.D.3d 479, 480 (1st Dep't 2013); 1230 Park Assoc., LLC v. Northern Source, LLC, 48 A.D.3d 355, 356 (1st Dep't 2008); 56 E. 87th Units Corp. v. Kingsland Group, Inc., 30 A.D.3d 653, 653 (1st Dep't 2011); Wood v. Carter Co., 273 A.D.2d 7, 7 (1st Dep't 2000). See Evans v. Norecaj, 172 A.D.3d 576, 578 (1st Dep't 2019).

While from the owner defendants' perspective nothing cast doubt on Uziel's authority to act for P. Verardi Construction, National Black Theatre Workshop Inc. v. Nubian Props. LLC, 89 A.D.3d 518, 520 (1st Dep't 2011), none of the representations of his authority emanated from P. Verardi Construction. See Cologne Life Reins. Co. v. Zurich Reins. (N. Am.), 286 A.D.2d 118, 125 (1st Dep't 2001). The law did not permit Uziel to vest himself with apparent authority to act as P. Verardi Construction's

agent. Hallock v. State of New York, 64 N.Y.2d at 231;
Children's Day Treatment Ctr. & School, Inc. v. Dorn, 83 A.D.3d
425, 425 (1st Dep't 2011); Imburgio v. Toby, 82 A.D.3d 653, 653
(1st Dep't 2011); M Entertainment, Inc. v. Leydier, 71 A.D.3d
517, 520 (1st Dep't 2010).

Surprisingly, no evidence confirms whom Between the Bread
paid for the renovation work under the agreement. Both Verardi
and Uziel deny that Between the Bread paid them or their
businesses. No testimony from Between the Bread's witnesses nor
any documentary evidence indicates whom Between the Bread paid.

The factual and credibility issues regarding the cause of
plaintiff's injury and whether P. Verardi Construction or Uziel
executed the renovation agreement with Between the Bread preclude
summary judgment dismissing P. Verardi Construction's third party
claims for contribution and implied indemnification and the owner
defendants' third party claims for contractual indemnification
and breach of a contract to procure insurance against Uziel.

Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't
2018); Buscemi-Sanz v. Hudson Meridian Constr. Group, LLC, 159
A.D.3d 402, 403 (1st Dep't 2018); Wunderlich v. Turner Constr.
Co., 147 A.D.3d 598, 598-99 (1st Dep't 2017); McCullough v. One
Bryant Park, 132 A.D.3d 491, 493 (1st Dep't 2015). Identifying

the contractor is critical because § 9.2.2 of the agreement provides that:

The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

Caronna Aff. Ex. E, at 9.

The record discloses no contract, however, on which P. Verardi Construction's third party claims for contractual indemnification and breach of a contract to procure insurance against Uziel are based. Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549-50 (1st Dep't 2018); Echevarria v. 158th Riverside Dr. Hous. Co., Inc., 113 A.D.3d 500, 502 (1st Dep't 2014); Regno v. City of New York, 88 A.D.3d 610, 610 (1st Dep't 2011); Hughey v. RHM-88, LLC, 77 A.D.3d 520, 523 (1st Dep't 2010). Therefore Uziel is entitled to summary judgment dismissing these third party claims by P. Verardi Construction.

III. THE OWNER DEFENDANTS' MOTION

The owner defendants' motion seeks summary judgment dismissing (1) plaintiff's claims; (2) P. Verardi Construction's cross-claims for contribution and implied indemnification; and (3) Uziel's counterclaims in the second third party action for contribution, implied and contractual indemnification, and breach

of a contract to procure insurance. The owner defendants contend that they are not liable for plaintiff's injury regardless whether P. Verardi Construction or Uziel executed the agreement, because they provided no labor or materials for the renovation project.

In New York City, however, the owner of real 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 615, 616 (1st Dep't 2017). Since Between the Bread did not own the premises abutting the sidewalk, Between the Bread owed no duty to maintain the sidewalk. As a nonowner, Between the Bread's liability for an unsafe sidewalk condition depends on whether Between the Bread created the condition or made special use of the sidewalk. Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d at 617; 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).

Based on either account of plaintiff's injury, neither Dom

Ben Realty nor Between the Bread is liable. Plaintiff's testimony does not indicate that any condition of the sidewalk contributed to her injury, but instead points the actions of the workers on the premises, whom the owner defendants did not supervise or control. Even if material being thrown from inside the premises out to the sidewalk amounted to an unsafe sidewalk condition, Dom Ben Realty's liability under Administrative Code § 7-210(a) for failing to maintain the sidewalk in a safe condition requires its negligence. E.g., Storper v. Kobe Club, 76 A.D.3d 426, 427 (1st Dep't 2010); Cook v. Consolidated Edison Co. of NY, Inc., 51 A.D.3d 447, 448 (1st Dep't 2008); Flynn v. City of New York, 84 A.D.3d 1018, 1019 (2d Dep't 2011). One of its officers familiar with its business practices as the landlord of the premises occupied by Between the Bread attests that no employee or agent of Dom Ben Realty ever supervised, inspected, visited, or provided personnel or materials for Between the Bread's renovation. No other evidence indicates that Dom Ben Realty negligently allowed workers on its premises to throw wood out to the sidewalk or that, if such an act caused plaintiff's injury, that act was more than a single occurrence as opposed to recurring conduct. Other pieces of wood lay on the sidewalk, but no evidence indicates they were thrown there from inside the

premises.

Uziel's account, pointing to the grating in the sidewalk as the cause of plaintiff's injury, does not render Dom Ben Realty liable either, because "the owners of . . . gratings in a street are responsible for monitoring the condition of the . . . gratings." 34 R.C.N.Y. § 2-07(b)(1); Storper v. Kobe Club, 76 A.D.3d at 427; Hurley v. Related Mgt. Co., 74 A.D.3d 648, 649 (1st Dep't 2010). 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. § 2-07(b)(2); 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 at 1019.

In opposition to the motion and cross-motion for summary judgment, plaintiff complains about her lack of opportunity to depose either a witness from Dom Ben Realty or Uziel. C.P.L.R. § 3212(f). Plaintiff fails to explain, however, why she never sought either witness' deposition before filing a note of issue. Therefore the absence of this disclosure is not a basis to deny summary judgment. Abe v. New York Univ., 169 A.D.3d 445, 448 (1st Dep't 2019); Rodriguez v. City of New York, 105 A.D.3d 623, 625 (1st Dep't 2013); Mayer v. New York City Tr. Auth., 39 A.D.3d 349, 349 (1st Dep't 2007).

Similarly lacking is any evidence that Between the Bread created any hazard or made special use of the sidewalk. Ricky Eisen testified that Between the Bread did not commence operation until March 2016, after plaintiff's injury. She further testified, corroborated by and Jonathan Eisen's affidavit, that Between the Bread did not supervise or control the workers performing the renovation. In fact, § 9.2.1 of the agreement provides that: "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention." Caronna Aff. Ex. E, at 9. Therefore the owner defendants are entitled to summary judgment dismissing plaintiff's claims and dismissing P. Verardi Construction's cross-claims and Uziel's counterclaims for contribution and implied indemnification. Canty v. 133 E. 79th St., LLC, 167 A.D.3d at 549; 87 Chambers, LLC v. 77 Reade, LLC, 122 A.D.3d 540, 542 (1st Dep't 2014).

Regarding Uziel's breach of contract counterclaim, although § 17.2 of the renovation agreement obligated Between the Bread to purchase and maintain liability insurance, that provision did not require Between the Bread to name Uziel as an insured as Uziel alleges in his claim for breach of a contract to procure insurance. Uziel identifies no other contract requiring the owner defendants to procure insurance, nor any contract requiring

them to indemnify him. Therefore the owner defendants also are entitled to summary judgment dismissing his contractual counterclaims. Canty v. 133 E. 79th St., LLC, 167 A.D.3d at 549-50; Echevarria v. 158th Riverside Dr. Hous. Co., Inc., 113 A.D.3d at 502; Regno v. City of New York, 88 A.D.3d at 610; Hughey v. RHM-88, LLC, 77 A.D.3d at 523.

The owner defendants thus have established their entitlement to summary judgment dismissing all the claims against them. Insofar as they still seek indemnification of their defense expenses from P. Verardi Construction or Uziel, however, the factual issues whether P. Verardi Construction or Uziel executed the renovation agreement with Between the Bread and how plaintiff was injured preclude summary judgment on the owner defendants' indemnification claims against either P. Verardi Construction or Uziel. King v. City Bay Plaza, LLC, 118 A.D.3d 476, 477 (1st Dep't 2014); Fernandez v. Stockbridge Homes, LLC, 99 A.D.3d 550, 551 (1st Dep't 2012); Mohammed v. Silverstein Props., Inc., 74 A.D.3d 453, 454 (1st Dep't 2004); Donnelly v. Treeline Cos., 13 A.D.3d 143, 144 (1st Dep't 2004). See Chapel v. Mitchell, 84 N.Y.2d 345, 347 (1994); Hernandez v. Ten Ten Co., 102 A.D.3d 431, 433 (1st Dep't 2013). Although the owner defendants have established that they were not at fault, they have not

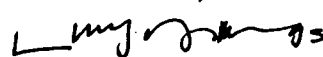
established conclusively that the negligence of either P. Verardi Construction or Uziel caused plaintiff's injuries. Gell-Tejada v. Macy's Retail Holding, Inc., 116 A.D.3d 594, 595 (1st Dep't 2014); Espinoza v. Federated Dept. Stores, Inc., 73 A.D.3d 599, 600 (1st Dep't 2010).

IV. CONCLUSION

In sum, the court grants the motion for summary judgment by defendants-second third party plaintiffs Dom Ben Realty Corporation and Between the Bread 40th Inc. to the extent of dismissing all claims against them, but denies them summary judgment on their indemnification claims against co-defendant P. Verardi Construction Corp. C.P.L.R. § 3212(b). The court also grants the cross-motion for summary judgment by third party defendants and second third party defendants to the extent of dismissing the third party complaint and second third party complaint against American Construction and third party plaintiff P. Verardi Construction Corp.'s claims for contractual indemnification and breach of contract against Uziel. C.P.L.R. § 3212(b) and (e). The court otherwise denies the cross-motion. This decision constitutes the court's order and judgment dismissing all claims against Dom Ben Realty Corporation, Between the Bread 40th Inc., and American Construction and P. Verardi

Construction Corp's third party contractual claims against Uziel.
The Clerk shall enter a judgment in accordance with this
decision.

DATED: July 31, 2019



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.