SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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STEVEN ANDERSON,

Plaintiff,

- v -

EW HOWELL CONSTRUCTION GROUP a/k/a EW HOWELL CO. INC.,

Defendant.

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INDEX NO. 152012/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21-42 were read on this motion for summary judgment.

Defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

In March 2016, defendant and non-party The Brearley School (School) entered into a contract, pursuant to which defendant was to serve as construction manager for the construction of a new School facility located at 590 East 83rd Street in Manhattan. Pursuant to the contract, defendant agreed to provide all "work, labor, services, materials, supplies, and equipment necessary to construct" the new facility and to supervise all subcontractors. The only obligation defendant undertook concerning the sidewalks adjoining the School was to produce a "site safety plan" indicating the location of sidewalk bridges. (NYSCEF 31).

On September 1, 2017 at 9:30 pm, plaintiff was walking along East 83rd Street approaching East End Avenue when he rolled his ankle on an uneven surface. The following

day, plaintiff returned to the location and took photographs. On September 5 he took more photographs at the site and spoke with a site supervisor. (NYSCEF 34).

At his deposition, plaintiff added that at the time of his accident, he was walking with his wife on the southern side of 83rd Street between York Avenue and East End Avenue, the location of the School, when his "ankle rolled" on a "jagged edge" of a tree pit in the sidewalk and he fell, sustaining injury. At the time, there was no active ongoing construction and he did not recall whether there had ever been trees or plants, or construction activity, in the tree pit. He also testified that he had observed construction at the School "over the past year or so" and that "every couple of months or so it seems they change the sidewalk," including the placement of Porta-Potties and the closure of one lane of 83rd Street. He stated that he gave defendant notice of the accident on September 5, 2017, when he returned to the site to file his report, and after speaking with defendant's employee, they both took pictures of the accident location. (NYSCEF 26). Plaintiff identified the location of his accident and marked photographs taken by both himself and defendant's employee. (NYSCEF 29).

By stipulation filed January 7, 2019, plaintiff waived the deposition of defendant. (NYSCEF 27).

By affidavit dated March 25, 2019, defendant's vice president states that he was at the School regularly and that no work was performed by defendant at or in the tree pit or sidewalk on East 83rd Street. In addition, defendant's contract did not provide for work at that location, and no contractors or subcontractors working on the project worked at the location before plaintiff's accident. (NYSCEF 30).

By affidavit dated March 22, 2019, defendant's project superintendent states that he was present at the School on a regular basis and that no construction work was being performed at the

time of plaintiff's accident. At the site, he spoke with plaintiff who told him that he had "tripped" and fallen on the sidewalk near the tree pit. He took photographs of the location of plaintiff's accident, which were later used at plaintiff's deposition and marked by plaintiff to show the exact location of his accident, and he prepared an accident report. In addition, he denies that any defendant employees or any contractors or subcontractors worked at or in the tree pit or the sidewalk next to it on East 83rd Street, and that the contract did not call for any work in the area of plaintiff's accident. (NYSCEF 31).

By affidavit dated April 10, 2019, plaintiff states on September 1, 2017, describes having "rolled [his] left ankle and [fallen] down in pain," because his "ankle had buckled on an unlevel surface." He denies having told the superintendent that he "tripped," and does not recall seeing trees in the alleged "tree pit." He observes that defendant's contract provides for it to supervised of architects, contractors, and subcontractors, who are required to operate "under good practices." He has observed the construction at the School for years and refers to his deposition at which he stated that "every couple of months or so it seems they change the sidewalk." (NYSCEF 36). According to plaintiff, having seen construction workers walking on the sidewalk, defendant's evidence that no work was performed in the area is not credible. (NYSCEF 32).

II. CONTENTIONS

A. Defendant (NYSCEF 21-31)

EW contends that it is entitled to summary judgment because it performed no work at the location of plaintiff's accident, and thus, did not create the alleged hazardous condition.

B. Plaintiff (NYSCEF 32-37)

In opposition, plaintiff contends that there remain issues of fact as to whether defendant

caused the dangerous condition, as it is undisputed that defendant worked "in the area" of plaintiff's accident. He maintains that defendant's evidence demonstrates that it managed the work in the area of the hazardous condition, and argues that defendant's counsel's affirmation and its vice president's affidavit are not supported by personal knowledge. Moreover, even if none of defendant's employees worked at the site of plaintiff's accident, defendant was also responsible for supervising the work of the contractors and subcontractors at the site, and one of them could have created the dangerous condition. The affidavit of defendant's superintendent, he claims, should be disregarded for the additional reason that he falsely stated that plaintiff had told him that he had "tripped."

C. Reply (NYSCEF 38-41)

Defendant asserts that plaintiff fails to raise an issue of fact, as his beliefs that construction workers were performing work in the area and that defendant's affidavits are made without personal knowledge are conclusory. He also contends that even if it performed work in the area of the accident, it is insufficient to raise an issue of fact, as it demonstrates that it did not cause the hazardous condition, and that it had no obligation to supervise the work of contractors and subcontractors.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25–26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB*

AG, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A contractor may be held liable for negligence where it creates a dangerous condition on a public street. (*McGee v City of New York*, 161 AD3d 1062, 1062 [2d Dept 2018]; *Garcia v City of New York*, 99 AD3d 491, 492 [1st Dept 2012] [contractor not entitled to summary judgment where issues of fact exist as to whether it created allegedly dangerous condition]). On a motion for summary judgment, a contractor bears the *prima facie* burden of "demonstrating that it did not perform any work where the accident occurred or create the allegedly dangerous condition that caused the plaintiff's accident." (*Morris v City of New York*, 143 AD3d 681, 682 [2d Dept 2016], citing *Finegold v Brooklyn Union Gas Co.*, 202 AD2d 469, 470 [2d Dept 1994]).

Defendant's evidence that neither it nor its contractors or subcontractors conducted work on the sidewalk or tree pit on East 83rd Street, along with the superintendent's affidavit reflecting the same, and defendant's contract which does not provide for work to be done on the sidewalk or tree pit on East 83rd Street, demonstrate *prima facie* that defendant did not create the allegedly hazardous condition. (*See e.g.*, *Loughlin v City of New York*, 74 AD3d 757, 758 [2d Dept 2010] ["Through the depositions of party witnesses, work permits, and a photograph depicting the accident location, [defendant] established that, prior to the date of the injured plaintiff's accident, it had not performed construction or repair at or on the portion of the sidewalk where the plaintiff fell"]). While issues of fact as to whether defendant performed work "in the area" of plaintiff's accident may defeat summary judgment (*Finegold*, 202 AD2d at 470), defendant also offers evidence that it "did not perform work connected to the defect at issue"

(*Amini v Arena Const. Co.*, 110 AD3d 414, 415 [1st Dept 2013]), the jagged edge of the tree pit on the sidewalk.

As they were regularly at the construction site and reviewed the pertinent contract, the statements made by defendant's vice president and superintendent are supported by their personal knowledge. (*See Piccinich v New York Stock Exch., Inc.*, 257 AD2d 438, 439 [1st Dept 1999] [summary judgment properly granted where contractor "submitted an affidavit from a vice president that its records indicated it did not perform any work at the accident site prior to or at the time of the accident"]; *cf Barraillier v City of New York*, 12 AD3d 168, 169 [1st Dept 2004] [summary judgment properly denied where "supporting affidavit of its executive vice president did not indicate the sources (e.g., documents he may have searched or reviewed, or persons he consulted) of his familiarity with the construction project at issue, or the company's purported lack of involvement with same"]).

Plaintiff's speculation that defendant or its subcontractors performed work in the area, absent additional evidence, raises no issue of fact, and his observation that construction workers walked along the sidewalk and that fencing was constructed adjacent to the School does not contradict defendant's evidence that no work was performed on the exact location of plaintiff's accident. Moreover, plaintiff voluntarily waived his right to depose defendant and he filed his note of issue, thereby indicating that he had no further questions about defendant's work and supervision at the School. (*See Cruz v Otis Elevator Co.*, 238 AD2d 540, 540 [2d Dept 1997], citing CPLR 3212[f] ["A party who claims ignorance of critical facts to defeat a motion for summary judgment [...] must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue"]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted, and the complaint is dismissed, and the clerk is directed to enter judgment accordingly.

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9/5/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE