

<b>Kania v City of New York</b>
2019 NY Slip Op 33295(U)
September 13, 2019
Supreme Court, Queens County
Docket Number: 70615-2014
Judge: Carmen R. Velasquez
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ  
Justice

Part 38

ZOFIA KANIA, x  
Plaintiff,  
-against-

Index Number 706915 2014

Motion Date February 25, 2019

THE CITY OF NEW YORK, ET AL.,  
Defendants.

Motion Seq. Nos. 9, 10

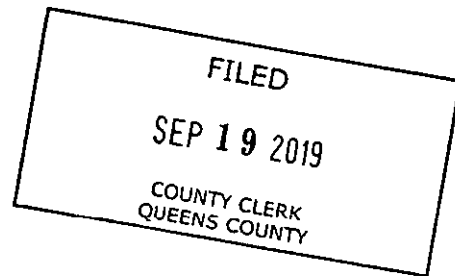
x  
THE CITY OF NEW YORK and THE NEW YORK  
CITY TRANSIT AUTHORITY,

Third-Party Plaintiffs,

=against-

DEBORAH BRADLEY CONSTRUCTION AND  
MANAGEMENT SERVICES, INC.,

Third-Party Defendants.



x

The following papers read on the motion by defendant Deborah Bradley Construction and Management Services, Inc. for summary judgment pursuant to CPLR 3212; and by separate notice of motion by defendants The City of New York and The New York City Transit Authority for leave, pursuant to CPLR 2221 (e), to renew their prior application for summary judgment and upon renewal, grant summary judgment pursuant to CPLR 3212.

Papers  
Numbered

- Notices of Motion – Affidavits – Exhibits ..... EF 192 – 206, 223 – 245
- Answering Affidavits – Exhibits ..... EF 209, 221, 248 – 257, 260 – 263
- Reply Affidavits – Exhibits ..... EF 246 – 247, 258 – 259, 264

Upon the foregoing papers, it is ordered that the motions are consolidated for disposition and are determined as follows:

Plaintiff commenced this action by filing a summons and verified complaint on September 24, 2013, alleging that she sustained personal injuries when she tripped and fell over pipes located in the mezzanine area of the Forest Avenue subway station in Queens, New York. By order dated July 2, 2015, defendants The City of New York and The New York City Transit Authority (hereinafter together The City defendants) filed a motion for summary judgment, which was denied, as premature. A note of issue was filed on June 16, 2016. By so-ordered stipulation dated August 8, 2016, this action was stayed pending the completion of discovery. Said stay was continued, by so-ordered stipulation dated February 27, 2017. By so-ordered stipulation dated June 15, 2017, the stay was lifted and the action was restored to its active status. The parties also stipulated that motions for summary judgment shall be made returnable no later than October 31, 2017. By Order dated April 11, 2018, plaintiff was granted leave to amend her summons and complaint to name defendant Deborah Bradley Construction (DBC) as a direct defendant. By Order dated April 12, 2018, the note of issue, filed on June 6, 2016, was vacated. By order dated September 5, 2018, plaintiff was ordered to file a new note of issue no later than September 14, 2018. A new note of issue was filed on September 13, 2018.

As an initial matter, the motions before the court are timely. “Motions for summary judgment ‘shall be made no later than one hundred twenty days after the filing of the note of issue’ (CPLR 3212 [a]) unless the Supreme Court has set a different deadline.” (*Bargil Assoc., LLC v Crites*, 173 AD3d 958, 958 [2d Dept 2019].) When the note of issue is vacated, the case returns to its pre-note of issue status. (*Montalvo v Episcopal Health Services, Inc.*, 172 AD3d 1357, 1358 [2d Dept 2019].) Here, the court did not set a different deadline after the second note of issue was filed. Therefore, defendants’ respective motions were timely made within 120 days after the filing of the second note of issue. (*See Pevzner v 1397 E. 2nd, LLC*, 96 AD3d 921 [2d Dept 2012].)

The court will first address the motion by DBC. “While the ultimate burden of proof at trial will fall upon the plaintiff, a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form.” (*Calderon v 88-16 N. Blvd, LLC*, 135 AD3d 681, 682 [2d Dept 2016]; quoting *Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015].) “For a defendant to be held liable in tort, it must have owed the injured party a duty of care.” (*Umanskaya v 4050 Nostrand Ave. Condominium*, 173 AD3d 812, 812-13 [2d Dept 2019]; quoting *Suero-Sosa v Cardona*, 112 AD3d 706, 707 [2d Dept 2013].) “Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use.” (*Umanskaya v 4050 Nostrand Ave. Condominium*, 173 AD3d at 813; quoting *Donatien v Long Is. Coll. Hosp.*, 153 AD3d 600, 600-601 [2d Dept 2017].) The existence of one or more of these elements is sufficient to give rise to a duty of care. (*Guzman v Jamaica Hosp. Med. Ctr.*, 163 AD3d 636, 637 [2d Dept 2018].) A defendant making a motion for summary judgment in a trip-and-fall case also has the burden of showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. (*See Jackson v Jamaica First Parking, LLC*, 91 AD3d 602 [2d Dept 2012].)

In support of its motion, DBC submitted, inter alia, copies of the pleadings, a copy of the contract between DBC and nonparty Forte Construction Corp. (hereinafter Forte), DBC business records, drawings depicting the Forest Avenue subway station, deposition testimony and affidavits from Deborah Bradley and Michael Cordani.

Deborah Bradley, president of DBC, stated that she oversees all contracts and construction projects performed by DBC. She affirmed that on January 23, 2013, DBC entered into a subcontractor agreement with Forte, who was the general contractor for the Forest Avenue subway station project. She further affirmed that DBC was hired to perform electrical and communications work for the renewal of five subway stations on the Myrtle Avenue subway line, including the Forest Avenue station. Bradley averred that on the day of the incident, DBC employees were working in the rear mezzanine of the subject station, and not near the staircase leading to the mezzanine area where plaintiff was allegedly injured.

Michael Cordani, an electrical journeyman for DBC, stated that he performed electrical installations at the Forest Avenue station, including running conduits, wiring and installing lighting. He recalled that on the day of the incident and in the four days prior to the incident, none of DBC employees, including himself, were working with conduit or pipes. He further recalled that DBC employees, including himself, did not “leave or cause any pipes or other debris to remain at, on or near the stairwell of the subject Forest Avenue station.” He averred that on the day of the incident, DBC was not installing lights and did not utilize any type of conduit or piping.

Patrick Mangan, DBC’s general foreman for the Forest Avenue subway station project, was deposed on behalf of DBC. Mangan was not on site on the day of the incident but he learned about the incident the following day. He stated that materials were stored in a container on the street and new materials were brought up as they were needed. He also stated that materials, when brought up from the container, were racked to the ceiling and were not stacked or stored at the working level.

While DBC contended that it did not own, manage or control the space in question, DBC failed to argue that it did not occupy the stairs landing space. In fact, Mr. Cordani, stated in his affidavit that the installation work in the space where plaintiff was allegedly injured was completed just days before the incident. Thus, DBC failed to demonstrate that it did not owe plaintiff a duty of care.

Furthermore, while DBC established that it did not create the hazardous condition, it failed to demonstrate that it neither had actual nor constructive notice of the hazardous condition for a sufficient length of time to discover and remedy it. (*See Hanney v White Plains Galleria, LP*, 157 AD3d 660 [2d Dept 2018]; *Lombardo v Kimco Cent. Islip Venture, LLC*, 153 AD3d 1340 [2d Dept 2017].) DBC argued plaintiff cannot establish that the alleged defective condition existed for a sufficient length of time to permit defendant to remedy it. However, it is well settled that a party moving for summary judgment cannot satisfy its initial burden merely by pointing to gaps in plaintiff’s case. (*Fernandez v Festival Fun Parks, LLC*, 122 AD3d 794 [2d Dept 2014]; *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2d Dept 2013].)

Since DBC failed to sustain its burden, it is not necessary to consider the sufficiency of the opposition papers. (*See Baez v Willow Wood Assoc., LP*, 159 AD3d 785, 786 [2d Dept 2018]; *Steed v MVA Enters., LLC*, 136 AD3d 793 [2d Dept 2016]; *Maloney v Farris*, 117 AD3d 916 [2d Dept 2014].)

The court will now turn to the motion by The City defendants. By order dated July 2, 2015, The City defendants' prior motion for summary judgment was denied without prejudice to renew following the completion of discovery. By two orders dated January 24, 2017, this court again denied The City defendants' motions for summary judgment without prejudice to renew when the stay, by so-ordered stipulation August 8, 2016, was lifted. Since the stay has now been lifted, discovery has been completed and a new note of issue has been filed, The City defendants' motion to renew is granted.

In support of their motion, The City defendants submitted copies of pleadings, 50-h hearing and deposition transcripts, a copy of the contract between DBC and Forte, a copy of the lease between The City of New York and New York City Transit Authority, and an affidavit from Christopher Dickerson, Senior Insurance Claims Specialist employed by The City of New York.

Defendant The City of New York alleged that, as an out-of-possession landlord, it cannot be held liable for plaintiff's alleged injuries. "An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct.'" (*Fox v Patriot Saloon*, 166 AD3d 950, 951 [2d Dept 2018]; *Bartels v Eack*, 164 AD3d 1202, 1202-03 [2d Dept 2018]; quoting *Alnashmi v. Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2d Dept 2011]; see *Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011]; *Garcia v Town of Babylon Indus. Dev. Agency*, 120 AD3d 546, 547 [2d Dept 2014].) According to the evidence submitted, The City of New York relinquished possession and control of the subway system when it leased the property to The New York City Transit Authority. Therefore, The City of New York, which retained no right to supervise or control the subway system's operation, cannot be held liable under a negligence theory for plaintiff's injuries. (*See Genco v City of New York*, 211 A.D.2d 615, 616, 621 N.Y.S.2d 627 [2d Dept 1995].)

On the other hand, The New York City Transit Authority failed to demonstrate its prima facie entitlement to judgment as a matter of law. The New York City Transit Authority failed to eliminate all triable issues of fact as to whether it had constructive notice of the allegedly dangerous condition. Whether DBC left pipes in the area where the incident occurred and whether the alleged pipes were securely stored are questions that must be resolved by the fact-finder. (*See Flaccavento v John's Farms*, 173 AD3d 1141 [2d Dept 2019]; *Kerzhner v New York City Tr. Auth.*, 170 AD3d 982, 983 [2d Dept 2019].)

Since The New York City Transit Authority failed to sustain its burden, it is not necessary to consider the sufficiency of plaintiff's opposition papers. (*See Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Agbosasa v City of New York*, 168 AD3d 794, 797 [2d Dept 2019].)

Next, the court will address the branch of The City defendants' motion for common-law and contractual indemnification. The basis of common-law indemnification is vicarious liability without actual fault on the part of the proposed indemnitee, and therefore, a party who has participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. (*Desena v North Shore Hebrew Academy*, 119 AD3d 631, 635 [2d Dept 2014]; quoting *Henderson v Waldbaums*, 149 AD2d 461, 462 [2d Dept 1989] [internal quotation marks omitted]; see *Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 658 [2d Dept 2014].) To establish their claim for common-law indemnification, The City Defendants are required to not only prove that they were not negligent, but also that DBC was responsible for negligence that contributed to the accident. (See *Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756 [2d Dept 2018]; *Morris v Home Depot USA*, 152 AD3d 669, 673 [2d Dept 2017].) Since it has not been determined whether plaintiff's injuries were caused in whole or in part by DBC or The New York City Transit Authority, it is premature for the court to decide this issue. (See *Shaughnessy v Huntington Hosp. Ass'n*, 147 AD3d 994, 999 [2d Dept 2017]; *Konsky v Escada Hair Salon, Inc.*, 113 AD3d at 658.

As to contractual indemnification, a party's right to contractual indemnification depends on the specific language of the relevant contract. (*O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]; citing *George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009] [internal quotation marks omitted].) "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances." (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d at 659.)

The indemnification provision found in the contract between DBC and Forte provides:

"To the fullest extent permitted by law, [DBC] agrees to indemnify, defend and hold harmless the General Contractor, Owner, Architect, Consultants, their officers, directors, agents, employees and partners (hereafter collectively "indemnitees") from any and all claims, suits, damages, liabilities . . . related to death, personal injuries or property damage . . . brought or assumed against any of the indemnitees by any person or firm, arising out of or in connection with or as a consequence of the performance of the Work of [DBC] under this agreement, as well as any additional work, extra work, or add-on work, whether caused in whole or part by [DBC] including any second tier subcontractors therefore and their employees. The parties expressly agree that this indemnification agreement contemplates: 1) full indemnity in the event liability is imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and 2) partial indemnity in the event of any actual negligence on the part of the indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any liability imposed over and above the percentage attributable to actual fault whether by statute by operational of law, or otherwise."

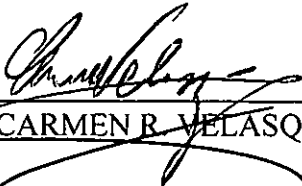
Although the contract is sufficiently specific to compel indemnify as stated herein, there are triable issues of fact concerning the degree of fault attributable to the indemnified parties. Therefore, summary judgment on this claim for contractual indemnification against DBC is not appropriate at this juncture. (*See Shaughnessy v Huntington Hosp. Ass'n*, 147 AD3d at 1000; *Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007 [2d Dept 2011].)

Turning to the branch of The City defendants' motion for summary judgment on their breach of contract claim against DBC, "a party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (*Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570 [2d Dept 2014], quoting *DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011].) Here, The City defendants failed to demonstrate that DBC failed to procure insurance in accordance with Article 10 of the contract.

Since The City defendants failed to meet their prima facie burden demonstrating their entitlement to summary judgment on their third-party claims, it is not necessary to examine whether triable issues of fact were raised in opposition. (*See Gatto v Coinmach Corp.*, 172 AD3d 1176 [2d Dept 2019].)

Accordingly, the motion by DBC is denied. The branch of the motion by The City defendants seeking summary judgment dismissing the complaint as alleged against The City of New York is granted. The branch of the motion by The City defendants seeking summary judgement dismissing the complaint as alleged against The New York City Transit Authority is denied. The branches of the motion by The City defendants for summary judgment on their indemnification claims against DBC are denied as premature. The branch of the motion by The City defendants with respect to the breach of contract claim against DBC in the third-party action is denied.

Date: September 13, 2019

  
CARMEN R. VELASQUEZ, J.S.C.

