

Joseph v New York City Hous. Auth.

2019 NY Slip Op 33455(U)

November 8, 2019

Supreme Court, Kings County

Docket Number: 515112/16

Judge: Edgar G. Walker

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At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of November 2019.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

-----X

ALISHA JOSEPH,
Plaintiff,

- against -

Index No. 515112/16

NEW YORK CITY HOUSING AUTHORITY, MUNOZ
ENGINEERING & LAND SURVEYING, D.P.C., F/K/A
MUNOZ ENGINEERING P.C. AND MUNOZ ENGINEERING
& LAND SURVEYING, P.C., R.S.N. CONSTRUCTION,
INC., and SKYWORX CONTRACTING, INC.,

Defendants.

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The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

223, 225, 271-272

Opposing Affidavits (Affirmations) _____

290, 295, 307, 320

Reply Affidavits (Affirmations) _____

334, 342, 347, 351

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, defendant R.S.N. Construction, Inc., (RSN) moves for an order: (1) pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and cross-claims as against it; and in the alternative (2) pursuant to CPLR 3212 (g), limiting the issues of fact for trial regarding RSN's liability while requiring plaintiff to present her

prima facie burden (motion sequence number 12). Defendant New York City Housing Authority (NYCHA) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and cross-claims as against it.

NYCHA's motion is denied. RSN's motion is granted to the extent that the complaint is dismissed as against it with respect to any theory of liability other than that RSN launched a force or instrument of harm by creating the dangerous condition. In addition, in view of this court's order, dated May 3, 2019, dismissing the action as against defendant Munoz Engineering & Land Surveying, D.P.C., the caption is amended to read as follows:

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ALISHA JOSEPH,
Plaintiff,

- against -

Index No. 515112/16

NEW YORK CITY HOUSING AUTHORITY, R.S.N.
CONSTRUCTION, INC., and SKYWORX
CONTRACTING, INC.,
Defendants.

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Plaintiff Alisha Joseph alleges that at approximately 9:00 a.m. on December 1, 2015, she slipped and fell on garbage and debris that were strewn across a public sidewalk located in front of a building that is part of NYCHA's Taylor-Wythe housing complex. RSN is a contractor that was hired by NYCHA to replace the roof of the building at issue and was working on the building in November and December of 2015. Defendant Skyworx

Contracting, Inc., (Skyworx) is a subcontractor that was hired by RSN to install a sidewalk shed over the sidewalk in the area of the accident.¹

According to plaintiff's deposition testimony, as she was walking along the sidewalk she encountered open bags of garbage and debris consisting of paint, wood chips, gravel, stucco, wood and household trash that covered the width of the sidewalk. Plaintiff slipped and fell as she attempted to navigate through this material on the sidewalk. Plaintiff could not state for sure which substance caused her to slip and fall, but noted that it could have been the wood, stucco, gravel or paint that covered the sidewalk in the area where she fell. Pictures of a boot, which plaintiff identified at her deposition as one of the boots she was wearing at the time she fell, show that sole of the boot is covered with a white paint-like substance. Plaintiff also stated that adjacent to the accident location, or very near it, was a location where Taylor-Wythe residents placed their garbage for pick-up by NYCHA workers. While plaintiff was not sure if construction workers she had observed working on the building placed material in that area, she did see them traversing the area with wheelbarrows containing construction material such as cement, gravel, wood, and paint.²

Turning first to NYCHA's motion, Administrative Code of the City of New York § 7-210 imposes a duty on property owners to maintain the sidewalk adjacent to their property

¹ Plaintiff's motion for a default judgment against Skyworx based on Skyworx's failure to appear in this action was granted by way of an order dated June 9, 2017.

² Plaintiff testified that she could distinguish the construction workers from NYCHA workers based on the distinctive uniform worn by the NYCHA workers. Plaintiff, however, could not identify the name of the company performing the construction work.

in a reasonably safe condition, and this duty to maintain includes the duty to remove dirt or other material from the sidewalk (*see Weinberg v 2345 Ocean Assoc., LLC*, 108 AD3d 524, 524-525 [2d Dept 2013]; *Melnikov v 249 Brighton Corp.*, 72 AD3d 760, 761 [2d Dept 2010]; *see also Xiang Fu He v Troon Mgt., Inc.*, ___ NY3d ___, 2019 NY Slip Op 07643, *2 [2019]; *Torres v New York City Hous. Auth.*, 118 AD3d 540, 540 [1st Dept 2014]; Administrative Code of City NY § 7-210 [b]). Despite the duty imposed by Administrative Code of the City of New York § 7-210, an injured party must still prove the elements of negligence to in order demonstrate that a property owner is liable (*see Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d 693, 693 [2d Dept 2018]). In order for a property owner to be liable in tort to a plaintiff who was injured as a result of an allegedly defective property condition, a plaintiff must demonstrate that a defective condition existed and that the property owner affirmatively created the condition or had actual or constructive notice of its existence (*see Pilgrim v Avenue D Realty Co.*, 173 AD3d 788, 789 [2d Dept 2019]; *Steed v MVA Enters., LLC*, 136 AD3d 793, 794 [2016]; *see also Gordon v Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

When a defendant property owner moves for summary judgment, however, it bears the initial burden of demonstrating, *prima facie*, 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 Muhammad*, 163 AD3d at 693; *Melnikov*, 72 AD3d at 760; *see also Pilgrim*, 173 AD3d at 789). “To meet its burden on the issue of lack of constructive

notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the accident” (*Butts v SJF, LLC*, 171 AD3d 688, 689 [2d Dept 2019]; see *Rodriguez v New York City Hous. Auth.*, 169 AD3d 947, 948 [2d Dept 2019]; *Sartori v JP Morgan Chase Bank, N.A.*, 127 AD3d 1157, 1157 [2d Dept 2015]). “Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice” (*Butts*, 171 AD3d at 689 [internal quotation marks omitted]; see *Rodriguez*, 169 AD3d at 948; *Herman v Lifplex, LLC*, 106 AD3d 1050, 1051 [2d Dept 2013]).

Here, NYCHA primarily relies on the deposition testimony of David Irizarry, a NYCHA supervisor who supervised the grounds at Taylor-Wythe a few days a week. Irizarry stated that he did not know if anyone made complaints to him or NYCHA regarding the condition of the sidewalk at issue. Irizarry, however, was not asked, and made no assertion that he was the NYCHA employee who would be notified if someone had made a complaint about conditions on the sidewalk at issue. Irizarry did not perform any cleaning/inspection work himself, and only was able to testify to the general cleaning/inspection schedule for NYCHA’s caretakers at Taylor-Wythe. Irizarry’s testimony provides no specific evidence, whether based on his personal knowledge or a review of NYCHA records, as to when the area of the accident in question was actually cleaned or inspected. While Irizarry asserted that he was not aware of NYCHA vendors performing painting work at or around the time of plaintiff’s accident, he was not asked if NYCHA’s

own maintenance or grounds crews utilized any of the other materials on which plaintiff alleges was strewn on the sidewalk, and made no assertion that NYCHA's own workers would not have used such materials. As a result, Irizarry's testimony fails to demonstrate, prima facie, that NYCHA did not create the dangerous condition, or that it did not have actual or constructive notice of the trash conditions on the sidewalk at issue (*see Butts*, 171 AD3d at 689-690; *Rodriguez*, 169 AD3d at 948; *Weinberg*, 108 AD3d at 525).

NYCHA argues that it may not be held liable because the evidence demonstrates that the material on which plaintiff slipped was construction material that must have been left there by one of the contractors. As noted above, however, Irizarry's testimony does not, as a matter of law, exclude NYCHA as the source of the material. Additionally, Amandeep Singh, RSN's project manager, generally testified that RSN would not have left material at that location, but rather would have disposed of material in a dumpster that was placed in a fenced-off location. Singh, relying on work records relating to the work performed on the days leading up to the accident, also testified that RSN would not have used some of the material plaintiff identified as blocking her path in the days leading up to the accident. While, as discussed below, Singh's testimony is not sufficient, as a matter of law, to exclude RSN as the source of the material, Singh's testimony is sufficient to demonstrate the existence of factual issues with respect to the source of those materials. In any event, even if the materials were left at that location by a contractor working at the site, NYCHA could still be held liable for plaintiff's accident based on its obligation to maintain the sidewalk if

it is found to have had actual or constructive notice that the material was blocking the sidewalk (see *Melnikov*, 72 AD3d at 761; see also *Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145, 152 [1943]; *Gamer v Ross*, 49 AD3d 598, 600 [2d Dept 2008]).

NYCHA's other grounds for summary judgment in its favor similarly fail. Contrary to NYCHA's assertion, plaintiff, who unequivocally identified garbage and debris strewn across the sidewalk as the cause of her fall, was not required to identify the exact item that caused her to fall (see *Fundaro v City of New York*, 272 AD2d 516, 517 [2d Dept 2000]; see also *Melnikov*, 72 AD3d at 761; *Tomaino v 209 East 84th St. Corp.*, 72 AD3d 460, 461 [1st Dept 2010]).³ In addition, NYCHA may be correct that a garbage bag lying on a portion of a sidewalk may constitute an open and obvious condition that is not inherently dangerous (see *Ruiz v 221-223 E. 28th St., LLC*, 143 AD3d 553, 553 [1st Dept 2016]; *Cotto v New York City Hous. Auth.*, 17 AD3d 621, 621 [2d Dept 2005]). However, the fact that garbage and debris were strewn across a sidewalk such that they obstruct a pedestrian's path does not negate a defendant's liability as such material cannot be deemed not inherently dangerous as a matter of law. Rather, the extent that the material was readily observable presents an issue relating to a plaintiff's comparative fault (see *Gonzalez v G. Fazio Constr. Co., Inc.*,

³ Plaintiff's inability to identify the specific item might be grounds for summary judgment if the only basis for liability against NYCHA that it caused or created the condition, but the condition caused or created was limited to a particular item (cf. *Montas v JJC Constr. Corp.*, 20 NY3d 1016, 1018 [2013]). No such showing is made here, however, and the identity of the exact item of debris is not necessary with respect to a claim based on NYCHA's duty to maintain the sidewalk free and clear of debris (*Carrera v Westchester Triangle Hous. Dev. Fund*, 116 AD3d 585, 587 [1st Dept 2014]).

___ AD3d ___, 2019 NY Slip Op 07728, *1 [1st Dept 2019]; *Lawson v Riverbay Corp.*, 64 AD3d 445, 446 [1st Dept 2008]; *Gamer*, 49 AD3d at 600; *Mizell v Bright Services, Inc.*, 38 AD3d 267, 267 [1st Dept 2007]; *Roussos v Ciccotto*, 15 AD3d 641, 643 [2d Dept 2005]; see also *Rivera v Queens Ballpark Co., LLC*, 134 AD3d 796, 798 [2d Dept 2015]).

NYCHA has thus failed to demonstrate its prima facie entitlement to summary judgment, and its motion must be denied regardless of the sufficiency of plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). As such, the court need not address whether plaintiff can demonstrate an evidentiary basis for finding that NYCHA had actual or constructive notice of the condition at issue.

In moving for summary judgment dismissing the complaint, RSN asserts that it may not be held liable to plaintiff because it was only a contractor and was not an owner, and thus did not owe plaintiff a duty to maintain the area of the sidewalk in question. A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, the Court of Appeals has recognized three exceptions to the general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]). "As part of its prima facie showing, a contracting defendant is only

required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" (*Burger v Brickman Group, Ltd., LLC*, 174 AD3d 568, 569 [2d Dept 2019] [internal quotation marks omitted]; see *Barone v Nickerson*, 140 AD3d 1100, 1101 [2d Dept 2016]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). In the absence of any allegations regarding the *Espinal* exceptions, a contractor defendant can establish its prima facie entitlement to summary judgment simply by submitting evidence that the plaintiff was not a party to the contract at issue, and thus, that the contractor owed the plaintiff no duty of care (*Turner v Birchwood on the Green Owners Corp.*, 171 AD3d 1119, 1121 [2d Dept 2019]; *Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 956 [2d Dept 2016]; *Foster*, 76 AD3d at 214).

Here, plaintiff's complaint and bill of particulars fail to clearly allege that any of the *Espinal* exceptions were applicable. Neither document contains allegations that address the second and third *Espinal* exceptions, and plaintiff's conclusory and unsubstantiated allegations contained in the bill of particulars that RSN was negligent in "creating a trap," in "creating a nuisance," or that the "conditions complained of were created" by RSN are insufficient to require RSN to demonstrate the inapplicability of the first *Espinal* exception (see *Baker v Buckpitt*, 99 AD3d 1097, 1099 n2 [3d Dept 2012]). As such, RSN has demonstrated its prima facie entitlement to dismissal of the complaint by demonstrating that plaintiff was not a party to its contract with NYCHA, and the burden has thus shifted to

plaintiff to come forward with evidence sufficient to raise a triable issue of fact as to the applicability of one or more of the three *Espinal* exceptions (*Foster*, 76 AD3d at 214).

In opposing the motion, plaintiff points to testimony from Singh, RSN's project manager, who conceded that RSN used a liquid epoxy-like substance in installing flashing on November 30, 2015. Since Singh could not remember the color of this material, his testimony does not exclude this material used with respect to the flashing as the material on plaintiff's boots. Singh's testimony that the material came in five gallon plastic buckets similarly does not, since this court is not convinced that plaintiff's reference to can of paint in her testimony can be seen as excluding the plastic buckets used by RSN.⁴ Although Singh, relying on work logs that identify the work performed by RSN in the few days leading up to the accident, stated that such work did not involve the use of gravel, Singh also stated that RSN's work included the removal of old gravel from the roof and its replacement with new gravel. Singh, while he stated that RSN, as a matter of practice, only placed debris and trash in a dumpster located within a designated area, did not provide any specific testimony regarding what RSN's workers did with trash and debris in the few days before the accident. Singh also testified that RSN's workers would have transported material across the accident location.

⁴ Singh did testify that the paint, trash and other debris shown in the photographs of the area of the accident did not come from RSN. The photographs, however, are not conclusive proof of what items were present at the time of the accident as plaintiff could not identify any of the photographs as having been taken on the day of the accident.

Given that testimony from Singh and NYCHA's witnesses suggests that RSN was one of the few entities performing work near the accident location, given plaintiff's description of the material that caused her to fall, and given Singh's inability to exclude RSN as the source of that material, plaintiff has demonstrated the existence of a factual issue with respect to the *Espinal* exception for launching a force or instrument of harm. Plaintiff, however, in view of deposition testimony from Singh and NYCHA's witnesses demonstrating that RSN had no duty to clean or maintain the sidewalk in the area of the accident, has failed to demonstrate the existence of a factual issue as to whether RSN displaced NYCHA's duty to maintain the premises. In the absence of proof addressing the issue, plaintiff has also failed to demonstrate a factual issue as to whether she detrimentally relied upon RSN's performance of its contractual duties. As such, while RSN is not entitled to dismissal of the complaint, RSN is entitled to partial summary judgment dismissing plaintiff's action against it to the extent that she relies on *Espinal* exceptions other than the launched an instrument of harm exception.

These factual issues relating to RSN's negligence also preclude summary judgment dismissing NYCHA's contribution and common-law indemnification as against RSN (*see Greenidge v United Parcel Serv., Inc.*, 153 AD3d 905, 907 [2d Dept 2017]; *McCullough v One Bryant Park*, 132 AD3d 491, 493 [1st Dept 2015]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 845 [2d Dept 2014]). RSN is also not entitled to dismissal of NYCHA's contractual indemnification claim against it, since, in view of the factual issues relating to

whether RSN caused or created the condition at issue, there are likewise factual issues as to whether the accident is one “resulting directly or indirectly from the work” of RSN or one of its contractors under the broad terms of the indemnification provision submitted by NYCHA in its opposition papers (*see Adagio v New York State Urban Dev. Corp.*, 168 AD3d 602, 603 [1st Dept 2019]; *Muhjaj v 77 Water St., Inc.*, 148 AD3d 1165, 1168 [2d Dept 2017]). Finally, in view of these factual issues as to whether the accident may have resulted from RSN’s work under its contract with NYCHA (*cf. Youndt v Boulevard Mall Co.*, 306 AD2d 882, 883 [4th Dept 2003]; *Ceron v Rector, Church Wardens & Vestry Members of Trinity Church*, 224 AD2d 475, 476 [2d Dept 1996]), and in view of RSN’s failure to provide any evidentiary proof that it complied with the terms of the insurance procurement clause of its contract with NYCHA, RSN is not entitled to summary judgment dismissing NYCHA’s contractual claims for breach of the insurance procurement provisions of the contract (*see Ginter*, 121 AD3d at 844; *Simon v Granite Bldg.2, LLC*, 114 AD3d 749, 755-756 [2d Dept 2014]).

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. EDGAR G. WALKER

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