

Smith v Ambrosio

2020 NY Slip Op 30235(U)

January 27, 2020

Supreme Court, Kings County

Docket Number: 509692/2016

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of January, 2020.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

----- X

IRIS SMITH,

Plaintiff,

- against -

GIANNINO AMBROSIO, CYNTHIA AMBROSIO, LITTLE J'S TRUCKING, LTD, LITTLE J'S ENTERPRISES, INC., APARO'S LITTLE JOHN, INC. THE HART GRP CON LLC, ZUCARO HOUSE LIFTERS INC. and JOHN MCADAM,

Defendants.

----- X

THE HART GRP CON LLC,

Third-Party Plaintiff

- against -

JOHN MCADAM,

Third-Party Defendant.

----- X

The following papers number 1 to 36 read herein:

Papers Numbered

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

1-3, 4-6, 7-9, 10-12, 13-14, 15-17

Opposing Affidavits (Affirmations) _____

18, 19, 20, 21, 22, 23, 24, 25, 26, 27

Reply Affidavits (Affirmations) _____

28, 29, 30, 31, 32, 33, 34, 35, 36

Upon the foregoing papers, defendant/third-party defendant John McAdam (McAdam) moves, in motion (mot.) sequence (seq.) 11, for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint of plaintiff Iris Smith, the third-party complaint of defendant/third-party plaintiff The Hart Grp Con LLC (Hart), and all cross claims asserted against him. Defendant Zucaro House Lifters Inc. (Zucaro) moves, in mot. seq. 12, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims asserted against it. Hart moves, in mot. seq. 13, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims asserted against it. Defendant Aparo's Little John, Inc. (Aparo's) moves, in mot. seq. 14, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims asserted against it. Defendants Little J's Trucking, Ltd. and Little J's Enterprises, Inc. (collectively, Little J) move, in mot. seq. 15, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint and all cross claims asserted against them. Lastly, defendants Giannino Ambrosio and Cynthia Ambrosio (collectively, Ambrosios) cross-move, in mot. seq. 16, for an order, pursuant to CPLR 3124 and Uniform Rules for Trial Cts [22 NYCRR] § 202.21 (e), directing all of the other defendants to appear for court-ordered depositions and vacating the note of issue and certificate of readiness.

Background

Plaintiff commenced the instant action on June 8, 2016 by electronically filing a summons and verified complaint in this court against the Ambrosios, Hart, Zucaro, Little J

and Aparo's. The various defendants then interposed answers and also asserted several cross claims. There were a few amendments to correct the names of the defendants. On January 20, 2017, Hart impleaded McAdam.¹ By an order of this court dated August 20, 2017, McAdam was added as a direct defendant.

The pleadings allege that, on April 25, 2016, plaintiff was caused to trip and fall by a damaged and uneven sidewalk in front of the premises known as 2522 Sycamore Avenue in Wantagh, Nassau County. Plaintiff classifies the damaged sidewalk as a hazard, and alleges, as relevant to the instant motions, that the various defendants created or exacerbated² the hazardous condition. Specifically, the house at that address, as the record bears out, was damaged in 2012 by Hurricane Sandy, which necessitated it to be lifted from its foundation to be repaired. The Ambrosios own the subject premises and hired Hart to function as a construction manager for the project. Zucaro was hired to lift the subject house and perform the foundation work. Aparo's was responsible for providing portable toilets at the site, and Little J was responsible for providing receptacles for the debris. Lastly, McAdam was employed as a carpenter and handyman.

Plaintiff alleges that defendants' construction work, and their heavy equipment, created the dangerous sidewalk condition. Plaintiff states that she suffered injuries as a result

¹ Hart's third-party claims are based on a written agreement between it and McAdam.

² The court notes that plaintiff's claims against defendants are necessarily limited to the allegations that defendants caused or created the sidewalk hazard, since the local laws in Wantagh, New York restrict notice-based hazardous sidewalk claims against the town to those where the municipality has received prior written notice.

of her fall, and claims that defendants proximately caused her injuries and thus she is entitled to damages.

Discovery and motion practice ensued, and, on August 17, 2018, plaintiff filed a note of issue with a demand for a trial by jury, certifying that discovery is either waived or complete and that this matter is ready for trial. The instant summary judgment motions and the cross motion to vacate the note of issue followed.

McAdam's Arguments Supporting His Summary Judgment Motion (mot. seq. 11)

McAdam, in support of his summary judgment motion dismissing all claims³ asserted against him, first argues that he did not owe plaintiff a duty of care. Specifically, McAdam views the record as establishing that his carpentry or handyman work was limited to work performed inside the Ambrosio property. He asserts that the record does not indicate that he was ever responsible for transporting heavy equipment on the subject sidewalk. Nor, continues McAdam, did he ever actually perform construction work on the subject sidewalk. McAdam, in other words, regards the record as showing that he was not responsible for any heavy construction work or work near the sidewalk.

McAdam also argues that no evidence demonstrates that he breached a duty or that he created or exacerbated any damage on the sidewalk. Additionally, he points out that plaintiff equivocated at her deposition as to what sidewalk damage caused her to trip and fall. Instead, he maintains that any appreciable sidewalk damage occurred weeks after plaintiff

³ Although McAdam seeks summary judgment dismissing all claims, including the third-party claims, his arguments are solely addressed to the claims advanced by plaintiff.

allegedly fell. In any event, claims McAdam, the record reveals that he was not responsible for any of the kind of heavy equipment that reasonably could have caused the sidewalk damage that plaintiff now claims caused her accident. He additionally argues that the record lacks any facts suggesting he had either actual or constructive notice of any sidewalk hazard.

Lastly, McAdam asserts that none of his contractual obligations created a duty of care to plaintiff. McAdam acknowledges that there are exceptions to this rule, but asserts that any applicable exception here would require his assumption of responsibility for (or taking actions related to) maintenance of the sidewalk. McAdam sees no such indication in the record and, therefore, advocates granting his summary judgment motion.

Zucaro's Arguments Supporting Its Summary Judgment Motion (mot. seq. 12)

Zucaro, in support of its summary judgment motion dismissing all claims asserted against it, first claims that Giannino and Cynthia Ambrosio's deposition testimony establishes that the subject sidewalk was in good condition on the date of plaintiff's alleged accident, and that the photographs in the record corroborate this fact. Zucaro also asserts that its work - lifting the subject house from its foundation - caused no strain on the integrity of the abutting sidewalk. The testimony given by the Ambrosios, continues Zucaro, confirms this statement. Zucaro adds that the same testimony indicates that the sidewalk damage plaintiff identified was not in fact caused until a cement mixer, for which it bears no responsibility, damaged the sidewalk on May 10, 2016 - weeks after plaintiff's alleged trip and fall. Hence, Zucaro concludes that the record shows it simply could not have caused the alleged sidewalk damage before plaintiff's accident.

Zucaro also asserts that it owed plaintiff no duty. It reasons that, assuming that the Ambrosios are nominally responsible for the condition of the sidewalk abutting their property, none of the actions its agents took displaced the landowner's responsibility for the sidewalk. Zucaro concludes that, according to the record, no factual issue exists as to whether it owed plaintiff a duty of care.

Lastly, Zucaro notes that the plaintiff's verified bill of particulars references statutes, regulations and codes which are applicable only within the City of New York, and that the plaintiff's alleged accident occurred outside the City of New York and in Nassau County. Therefore, Zucaro argues that any claim based upon alleged violations of these provisions must be dismissed, and, for all the reasons above, its summary judgment motion should be granted.

Hart's Arguments Supporting Its Summary Judgment Motion (mot. seq. 13)

Hart, in support of its motion for summary judgment dismissing all claims asserted against it, first submits that any reasonable interpretation of the record—including any reasonably ascertained factual question—has nothing to do with its claimed unmistakable lack of liability in this action. Hart points out that plaintiff's testimony identifies the alleged defective sidewalk as causing her to fall on April 25, 2016. Hart further notes that the Ambrosios insist that no hazardous condition on the subject sidewalk occurred until a cement mixer damaged it on May 10, 2016. Hart reasons that, regardless whether a factual issue existed between plaintiff and the Ambrosios, the record nevertheless contains no indication that Hart's agents caused any defective sidewalk condition.

Hart acknowledges plaintiff's theory that the various contractors and abutting property owners damaged the subject sidewalk. More specifically, Hart recognizes that, as to the contractors, plaintiff claims that construction companies caused the defective condition by placing dumpsters and portable toilets, among other items, in the area. Hart adds that the record indisputably indicates that it did not deliver or place such items in the area and establishes that it did not operate any heavy equipment (such as cement mixers) in the area. Therefore, any reasonable understanding of plaintiff's theory of this action, continues Hart, necessarily suggests it is not liable.

Hart also points out that its contractual relationship with the Ambrosios does not create a duty to plaintiff and that the record shows in this regard that its agents neither created nor exacerbated a dangerous condition on the subject premises. Hart thus regards any allegations against it as purely speculative and concludes that its summary judgment motion should be granted.

Aparo's Arguments Supporting Its Summary Judgment Motion (mot. seq. 14)

Aparo's, in support of its summary judgment motion dismissing all claims asserted against it, first argues that it owed no duty to plaintiff. Aparo's notes that it is undisputed that it never owned or possessed any property abutting the subject sidewalk. Aparo's also notes that it delivered a portable toilet to the subject area several times before plaintiff's accident and that surveillance footage in the record indicates that Aparo's trucks never drove on or across the relevant area of the subject sidewalk. Aparo's further recounts that its involvement in the construction project was limited to delivering portable toilets.

Accordingly, Aparo's views the record as establishing that it never assumed any responsibility for the condition of the sidewalk.

Next, Aparo's claims that it neither created nor had notice about the alleged hazardous condition. Aparo's reiterates that the surveillance footage shows that its trucks never drove on or across the relevant area of the subject sidewalk, thereby supporting its position that its vehicles could not have caused the alleged damage. Aparo's also cites plaintiff's deposition testimony as indicating that she does not know how the subject sidewalk was damaged and states that nothing else in the record links it to the alleged hazard. Additionally, Aparo's affirms that it had no notice of any defect in the sidewalk, and, in this regard, alleges that its agents never received any complaints about either the condition of the sidewalk or the quality of their delivery service. Aparo's adds that there was no appreciable damage to the subject sidewalk before plaintiff's accident and concludes that it thus breached no duty to plaintiff. These factors, Aparo's submits, further bolster its position.

Lastly, Aparo's claims that any cross claims asserted against it must likewise be dismissed. Aparo's states that it cannot be held liable pursuant to the law of common-law indemnification or contribution because only an actually negligent party can properly be ordered to indemnify another party or to contribute to a judgment. Here, Aparo's continues, the record establishes that it is not negligent at all because it was not responsible for either the subject sidewalk or the alleged hazard. Additionally, Aparo's states that the record lacks any evidence of a contract between it and any other defendant. Hence, Aparo's posits that

any cross claim for contractual indemnification lacks merit, and urges the court to grant it summary judgment dismissing all claims and cross claims against it.

Little J's Arguments Supporting Its Summary Judgment Motion (mot. seq. 15)

Little J, in support of its summary judgment motion dismissing the complaint, first asserts that plaintiff has not made any allegations that specifically describe how its agents engaged in negligent acts or omissions that contributed to the alleged hazardous sidewalk condition that purportedly caused plaintiff's injuries. Little J contends that, to the extent that the hazardous condition occurred on a sidewalk abutting the Ambrosio's property, it did not, at relevant times, own, operate, control, maintain, repair, or otherwise have any responsibility for conditions on that sidewalk. Moreover, Little J points out that, to the extent the record indicates that a Little J trash container or portable toilet was present on the sidewalk after the accident occurred, plaintiff's own deposition testimony indicates that there was no container or toilet present on the sidewalk when she fell. Little J further points out that plaintiff also testified that she has no other knowledge of a Little J entity connected with the property.

Little J concludes that the record contains no evidence linking the acts and omissions of its agents to the alleged hazardous condition. Instead, Little J argues that plaintiff noticed its equipment on the subject sidewalk—after the accident occurred—and thus decided to commence this action against it. Nevertheless, continues Little J, the record indicates that

any claim asserted against it is unsupported by facts, and, therefore, its summary judgment motion dismissing all claims asserted against it should be granted.⁴

The Ambrosios' Arguments Supporting Their Cross Motion to Vacate the Note of Issue and Direct Discovery (mot. seq. 16)

The Ambrosios, in support of their cross motion for discovery-related relief, first highlight that several items of court-ordered discovery remain outstanding. Specifically, they mention that they are the only defendants that have been deposed to date, even though the court ordered depositions of all defendants. The Ambrosios acknowledge that plaintiff has purported to waive the depositions of the remaining defendants but note the numerous cross claims in this action and submit that the depositions of all defendants remain pertinent. The Ambrosios assert their right to depose their co-defendants irrespective of plaintiff's actions. Also, the Ambrosios reiterate that the court has ordered these depositions and question whether any party has the right to unilaterally waive them. Lastly, the Ambrosios argue that, in the face of the multiple summary judgment motions and in view of the numerous cross claims against them, they cannot adequately defend themselves without taking depositions of co-defendants. The Ambrosios cite these circumstances as entitling them to an order both vacating the note of issue and directing the parties not yet deposed to appear for depositions.

Hart's Opposition Arguments

Hart, in partial opposition to McAdam's motion, first observes that McAdam purports to seek summary judgment dismissing its third-party claims but advances no arguments

⁴ Little J also states that it incorporates by reference all other arguments advanced by the other defendants moving for summary judgment.

against them. Hart states that it is entitled to contractual indemnification against McAdam to the fullest extent permitted by law insofar as Hart remains subject to liability for plaintiff's injuries. Hart adds that the subject written agreement also required McAdam to purchase and maintain general commercial liability insurance in its favor. Hart then notes that McAdam has not advanced any arguments with respect to *these* claims, and has thus failed to make a prima facie showing of entitlement to dismiss the third-party claims, regardless whether McAdam's notice of motion seeks that relief. Lastly, Hart asserts that McAdam should not be permitted to remedy the absence of these arguments by stating them in his reply papers. Hart thus concludes that McAdam's motion should be denied insofar as it seeks summary judgment dismissing the third-party claims.

McAdam's Opposition Arguments

McAdam, in opposition to the cross motion, first asserts that the Ambrosios misstate the circumstances involving the outstanding depositions. Specifically, McAdam claims that he was ready to timely appear for a deposition conducted by the Ambrosios' counsel when the instant summary judgment motions were filed. McAdam views the Ambrosios' arguments as suggesting that McAdam, and the other moving defendants, have flaunted court orders, but claims, in reality, depositions of the remaining defendants have not occurred because plaintiff waived them and because the summary judgment motions have stayed discovery.

McAdam then reiterates his argument that the record, as already developed, establishes that he neither owed plaintiff a duty nor breached a duty to plaintiff. He notes that plaintiff's testimony unequivocally indicates that a sidewalk condition caused her to trip

and fall. He further notes that the Ambrosios' testimony confirms that he only performed carpentry and related work inside the house and that he was not responsible for any heavy equipment placed on or transported across the subject sidewalk. Thus, reasons McAdam, the present record establishes that he is not liable for plaintiff's accident and is entitled to summary judgment dismissing all claims asserted against him.

The Ambrosios' Opposition Arguments

The Ambrosios, in opposition to the summary judgment motions, first reiterate that no other defendants have been deposed and add that defendants have thus violated numerous court orders. The Ambrosios state that they cannot adequately oppose the instant motions without the sworn testimony of their co-defendants. Moreover, they characterize the evidence supporting the instant summary judgment motions—namely, affidavits of the parties moving for that relief—as self-serving. Absent complete depositions, urge the Ambrosios, the instant summary judgment motions are premature and should be denied on this independent ground.

Additionally, the Ambrosios allege that summary judgment, on the merit, is inappropriate, given the record. They note that all the moving defendants were involved in a heavy construction project—specifically, lifting and reconstructing their house. The Ambrosios suggest that, given the project's nature, a proper inference is that the various defendants damaged the subject sidewalk by transporting heavy equipment to and from the premises. They also observe that the record must be viewed in the light most favorable to those parties opposing summary judgment and thus urge denying the summary judgment

motions on their merits, or, alternatively, denying them with leave to renew when discovery is complete.

Aparo's Opposition Arguments

Aparo's, in opposition to the cross motion for discovery-related relief, first contends that the cross motion is procedurally defective because the purported good faith affirmation does not specify counsel's attempt to resolve the discovery dispute before moving for discovery relief. Moreover, Aparo's asserts that the Ambrosios are attempting to mislead the court regarding the outstanding depositions. Aparo's claims that the current pending summary judgment motions have stayed discovery and that the parties are thus not violating any court orders. Lastly, Aparo's reiterates that its summary judgment motion should be granted on the merits. Aparo's again references its principal's affidavit, which states that only a portable toilet, and no other materials, were delivered by Aparo's to the site. Aparo's also claims that the relevant surveillance footage confirms that its vehicles did not drive across the sidewalk where the alleged trip and fall occurred. Aparo's maintains that it did not perform "construction work" as that phrase is commonly understood, and, therefore, the inference that Aparo's interaction with the work site somehow damaged the sidewalk is speculative. Hence, Aparo's concludes that additional discovery is unnecessary, its summary judgment motion should be granted and the Ambrosios' cross motion should be denied.

Little J's Opposition Arguments

Little J also opposes the cross motion for discovery relief, and, in doing so, adopts the

arguments of the other defendants opposing the cross motion.

Plaintiff's Opposition Arguments

Plaintiff, in opposition to the summary judgment motions, first claims that factual issues remain as to each defendant's role at the subject premises. Plaintiff asserts that the record does not establish without contradiction which defendant either caused or could have caused the subject sidewalk hazard. Additionally, plaintiff points out that the record must be viewed in the light most favorable to her, as the opponent of the summary judgment motions. Plaintiff also notes that, generally, claims of negligent inspection and/or maintenance are properly resolved by the trier of fact. She contends that those issues presently remain outstanding, making summary judgment inappropriate and the basis to deny the summary judgment motions here.

Discussion

Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ.*

Med. Ctr., 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to the opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]).

Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, “[a] motion for summary judgment ‘should not be granted

where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

However, a summary judgment motion will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of a party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman*, 49 NY2d at 562) and the party opposing the summary judgment motion fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324 citing *Zuckerman*, 49 NY2d at 562). If a movant meets this initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, “averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly,

if there is no genuine factual issue, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

Generally, a summary judgment motion should be denied where, as here, there is outstanding discovery (*see e.g. Campbell v City of New York*, 220 AD2d 476 [2d Dept 1995]; *see also McGovern v St. Cyril & Methodius R.C. Church* 52 AD3d 787, 788 [2d Dept 2008]; *see also CPLR 3212 [f]; Rengifo v City of New York*, 7 AD3d 773 [2d Dept 2004] [summary judgment motion would have been premature since discovery was outstanding at time motion was made]; *Lantigua v Mallick*, 263 AD2d 467, 468 [2d Dept 1999]). However, a summary judgment motion is not automatically premature if discovery is outstanding; an opponent must demonstrate that additional discovery might lead to relevant evidence (*see e.g. Lambert v Bracco*, 18 AD3d 619 [2d Dept 2005]).

Mot. Seq. # 11 - McAdam

Given these principles, McAdam is entitled to summary judgment dismissing plaintiff's claims⁵ insofar as asserted against him. Plaintiff's deposition testimony does not reflect any knowledge of McAdam or his work pertaining to the project. The Ambrosios' testimony indicates that McAdam was a carpenter and handyman who performed work on stairs and a chimney. The record contains no indication that McAdam operated vehicles or heavy equipment on the subject premises. None of these statements are contradicted by any

⁵ As Hart correctly points out, McAdam does not address the third-party claims in his motion papers. Accordingly, McAdam has failed to demonstrate prima facie entitlement to judgment as a matter of law regarding the third-party action. Moreover, the court notes that the record (exhibit B to the third-party pleadings) contains a copy of a written agreement between Hart and McAdam requiring McAdam to indemnify Hart in certain circumstances.

other sworn testimony. Therefore, the record establishes that McAdam could not have damaged⁶ the subject sidewalk, and, for this reason, McAdam's summary judgment motion dismissing the first-party claims is granted.

Mot. Seq. # 12-15

However, the remaining summary judgment motions are denied in their entirety. They are denied on the ground that none of the movants have been deposed, and facts about their respective roles at the construction site are exclusively within their knowledge (*see e.g. Gaughan v Chase Manhattan Bank*, 204 AD2d 67 [1st Dept 1994]). Indeed, each of the movants rely solely on self-serving affidavits, and for this reason, summary judgment absent their depositions would be premature.

Alternatively, and equally persuasively without depositions, the record demonstrates the existence of factual issues as to whether each defendant (other than McAdam) damaged the subject sidewalk. Contrary to some of the movants' arguments, the applicable surveillance footage shows several pieces of heavy equipment (including dumpsters, portable toilets and forklifts) traversing the sidewalk before the plaintiff's accident. A trier of fact could reasonably conclude that one or more of these movants were responsible for the operation of heavy equipment and, therefore, could reasonably infer that it (or they) were responsible for the damaged sidewalk. In any event, to the extent that it is argued that

⁶ To the extent plaintiff asserts that claims of "negligent inspection and maintenance" of the subject sidewalk are actionable, she is mistaken. The accident occurred in a jurisdiction that does not allow sidewalk hazard claims regarding inspection or maintenance, which can only be asserted against the town, absent prior written notice. Hence, plaintiff's claims against defendants are limited to those alleging they caused or created a hazardous sidewalk condition.

someone must consider photographs and surveillance video, the trier of fact must do so. Therefore, the remaining summary judgment motions are denied⁷ for the reasons stated above and as a consequence of the requirement that the court resolve all inferences in favor of the opponent of summary judgment, here, the plaintiff (*Brandes v Incorporated Vil. of Lindenhurst*, 8 AD3d 315 [2004]; *Genova v Regal Mar. Indus.*, 309 AD2d 733, 734 [2d Dept 2003]).

Outstanding Discovery - mot. seq. # 16

The Ambrosios' cross motion is granted to the extent that the note of issue is vacated and the parties are directed to complete all previously ordered discovery within 60 days.⁸ "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (*Rinaldi v Evenflo Co., Inc.*, 62 AD3d 856, 856 [2d Dept 2009]), citing *Matter of U.S. Pioneer Elec. Corp. [Nikko Elec. Corp.]*, 47 NY2d 914, 916 [1979]; *Mattocks v White Motor Corp.*, 258 AD2d 628, 629 [2d Dept 1999]; *Kaplan v Herbstein*, 175 AD2d 200 [2d Dept 1991]). This court thus exercises its "broad discretion in supervising discovery" to determine the cross motion (*Ferro v Lee*, 48 AD3d 412, 412 [2d Dept 2008], citing *Vasile v Chisena*, 272 AD2d 610 [2d Dept 2000]).

⁷ However, any allegations in the bill of particulars related to codes or regulations of the City of New York are patently irrelevant, and those claims are stricken.

⁸ The cross motion may be procedurally flawed, but the court, in exercising its inherent power to supervise discovery, nevertheless issues this ruling given the outstanding party depositions.

The Ambrosios have demonstrated that substantial discovery is outstanding, which provides sufficient reason for granting their motion to vacate the note of issue. Here, none of the defendants have been deposed other than the Ambrosios. Thus, the cross motion is granted to the extent that the note of issue is vacated (*see e.g. Slovney v Nasso*, 153 AD3d 962 [2d Dept 2017]).

Moreover, the parties shall complete all previously ordered discovery, including the remaining defendants' depositions, within 60 days. The parties are advised that depositions are not waived, unless 1) *all* parties agree to waive depositions; or 2) the court deems depositions to have been waived. The Ambrosios, who are subject to cross claims asserted by the remaining defendants, correctly note that they are entitled to the remaining defendants' depositions. Consequently, the cross motion is granted for this additional reason.⁹ Accordingly, it is

ORDERED that McAdam's motion, mot. seq. 11, is granted to the extent that he is awarded summary judgment dismissing the claims of plaintiff Iris Smith asserted against him, and is otherwise denied; and it is further

ORDERED that Zucaro's motion, mot. seq. 12, is denied; and it is further

ORDERED that Hart's motion, mot. seq. 13, is denied; and it is further

ORDERED that Aparo's motion, mot. seq. 14, is denied; and it is further

ORDERED that Little J's motion, mot. seq. 15, is denied; and it is further

⁹ This order is without prejudice to further motion practice regarding outstanding discovery.

ORDERED that the Ambrosios' cross motion is granted to the extent that 1) the parties are directed to complete all previously ordered discovery, including the depositions, within 60 days; and 2) the note of issue is vacated; and it is further

ORDERED that plaintiff is directed to file a note of issue on or before June 26, 2020.

The foregoing constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court