

<b>Linder v United Metro Energy Servs. Corp</b>
2020 NY Slip Op 30984(U)
April 21, 2020
Supreme Court, New York County
Docket Number: 153947/2016
Judge: David Benjamin Cohen
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SUPREME COURT OF NEW YORK  
COUNTY OF NEW YORK

SECTION 58

-----X  
JILL LINDER and JANE BRODY,

Plaintiffs,

-against-

Index No. 153947/2016

UNITED METRO ENERGY SERVICES CORP.,  
MERRICK THOMPSON, and CHARLES K.  
GOLDNER, LLC,

Defendants.

-----X  
DAVID B. COHEN, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, defendant Charles K. Goldner, LLC (Goldner, LLC) moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint and any cross claims as to it, or in the alternative, summary judgment in its favor on its cross claims against defendants United Metro Energy Corp. (UMEC) and Merrick Thompson (Thompson) (collectively, the UMEC defendants). In motion sequence number 004, the UMEC defendants move, pursuant to CPLR 3212, for an order granting them summary judgment and dismissing the complaint as to them.

In this personal injury case, plaintiff Jill Linder (Linder) alleges that on or about November 10, 2015, at approximately 5:25 a.m. she left her apartment at 225 Central Park West with her spouse, plaintiff Jane Brody (Brody)<sup>1</sup> to go to the gym, which is

<sup>1</sup> Brody, Linder's spouse, sues for loss of services, consortium and companionship of her spouse, as well as for money

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 located at Amsterdam Avenue and 77<sup>th</sup> Street. According to

Linder, when she was walking south on the sidewalk on the west side of Amsterdam Avenue, she stumbled on a hose that was on the sidewalk, landed on the manhole cover that was in the street on 77<sup>th</sup> Street, and was injured, suffering a broken hip necessitating surgery. According to Linder, the sun had not risen, it was still dark outside, she did not see the hose before she stumbled on it, and there was no sign over the hose and no safety cones adjacent to the area where she fell.

The hose on which Linder stumbled was a black 75-foot hose that belonged to and was being used by UMEC to deliver oil to the apartment building located at 201 West 77<sup>th</sup> Street (a/k/a 360 Amsterdam Ave.) (the Building), owned by defendant Goldner, LLC. The hose was connected to the UMEC oil delivery truck that was double-parked on Amsterdam Ave. The hose was stretched across the portion of the sidewalk that ran parallel to Amsterdam Avenue and then along the West 77<sup>th</sup> Street portion of the sidewalk to the oil fill panel located near the front entrance to the Building.

According to the resident Building superintendent at the time of Linder's accident, Calin Tare (Tare), UMEC is an independent contractor hired by Goldner, LLC to deliver heating

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she was obliged to expend for Linder's medical and hospital care.

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oil to the Building. In his deposition, Tare testified that the general Building procedure was for him to monitor the level of heating oil in the Building's storage tank. When the oil reached a level indicating a delivery was needed, he would call UMEC and request a delivery.

Building staff, consisting of a resident superintendent, a handyman and three doormen, are only on duty between the hours of 8 a.m. and 12 a.m. As a matter of policy, deliveries of oil were requested to be made after 8 a.m., as indicated on the delivery ticket. The delivery ticket stated "DEL AFT 8A" AND "AFT 8A/SEE SUPER/SUP CAL," and included Tare's cell phone number, the cell phone numbers of the handyman, Brian, and of "mgt Miriam." See UMEC delivery ticket, NYSCEF Doc. No. 87.

According to Tare, the oil fill panel is located in the sidewalk near the front entrance to the Building and UMEC did not require access to the building in order to make a delivery. Tare testified that if a delivery was made before any member of the building staff was on duty, the driver for UMEC was to call one of the cell phone numbers on the delivery ticket to inform the building staff that a delivery was being made. According to Tare, he did not receive any phone call notifying him of the delivery on the day of Linder's accident.

According to the deposition of defendant Thompson, an employee of UMEC and the driver of the oil truck, when he arrived

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 at the Building at 4:10 a.m. no building employees.

were present, so he called the Building superintendent and received his permission to use the vent alarm to fill the oil tank. Thompson stated that he double parked his truck on the north west corner of Amsterdam Avenue and West 77<sup>th</sup> Street, located the oil fill panel, and took out the hose and connected it. The oil truck was parked on Amsterdam Ave., rather than directly in front of the Building on West 77<sup>th</sup> Street, because the truck was too large to get through the street because of a cage for a fire truck located in front of the Building. Thompson used a 75-foot black hose that was 2 inches in diameter, rather than the 35-foot orange and black hose that was 3 inches in diameter.

In his deposition, Thompson testified that he put out safety cones and a warning sign next to them, at the location where the hose crossed the portion of the sidewalk parallel to Amsterdam Avenue, and began to pump the oil. A trainee, whose name Thompson could not remember, and who is no longer employed by UMEC, was located at the other end of the hose near the oil fill panel.

Thompson contends that he placed the cones and the sign before Linder arrived, that Linder fell despite the presence of the cones and the sign, and that he took a photo of the area where the cone and signs were located approximately three minutes

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after Linder fell. According to Thompson, he gave Linder and

Brody verbal warnings about the hose when they were approximately three or four feet away from the hose, but that Linder was talking to Brody who was walking behind her, and apparently did not hear his warnings. According to Thompson, he gave similar warnings to approximately 8-10 pedestrians that walked by while he was pumping the oil.

In her deposition, plaintiff Brody stated that Linder was a couple of steps in front of her when she stumbled and fell. Brody indicated that she did not see the hose before Linder fell, but that after Linder's fall, she saw the oil delivery truck. She further indicated that she did not see any cones before Linder fell, but that, almost immediately after Linder fell, she saw somebody move a caution sign to where Linder had fallen. Both Brody and Linder testified that, while they were at the scene of the accident, they did not see anyone take photographs of the accident site. They left the scene of the accident when an ambulance arrived and took Linder to the hospital emergency room.

In affidavits submitted in opposition to defendants' motions, both Brody and Linder stated that during their depositions they had not been asked whether anyone verbally warned them about the presence of the hose, but that no such warning had been given to them.

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 MOTION FOR SUMMARY JUDGMENT OF GOLDNER, LLC

Goldner, LLC moves for an order granting summary judgment in its favor and dismissing the complaint against it. Goldner, LLC contends that the mere happening of an accident does not constitute negligence by the defendant, citing *Candelier v City of New York* (129 AD2d 145 [1<sup>st</sup> Dept 1987]). Citing *Febesh v Elcejay Inn Corp.* (157 AD2d 102 [1<sup>st</sup> Dept 1990]), Goldner, LLC further argues that in order to establish a prima facie case of negligence the plaintiff must show that Goldner, LLC had a duty of care to plaintiff which it breached, and that there was a reasonably close connection between the contact and the resulting injury.

Citing *Schiros v Tawil* (2003 NY Slip Op 50953[U][App Term, 2d and 11<sup>th</sup> Jud Dists 2003]) Goldner, LLC argues that an employer who hires an independent contractor is generally not liable for the negligent acts of the independent contractor. According to Goldner LLC, UMEC is an independent contractor that controlled the oil delivery and the hose on which Linder stumbled and fell, that Goldner LLC did not assist, direct, control, oversee or supervise the oil delivery or the manner, methods or timing of the delivery, and, therefore, had no duty of care to Lindner. Goldner LLC further argues that it had no control over the timing of the oil delivery and could not prevent the delivery because the oil fill panel is located outside of the building. There, the

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resident sup... did not speak with the

driver on the day of the delivery, that the Building requested that deliveries be made after 8 a.m., when building staff were on duty, and that he was not aware that the delivery was being made at 5:30 a.m. when it was dark outside and no Building staff were present. See *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) (Where there is no evidence that defendant had actual notice that a defective condition existed, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.")

For these reasons, Goldner LLC contends that it had no duty of care to Linder and the complaint should be dismissed.

As Goldner, LLC argues, "[i]t is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability." *Pulka v Edelman*, 40 NY2d 781, 782 (1976) (citations omitted). Furthermore,

"[i]t is well settled that a property owner is not liable for injuries resulting from a dangerous condition upon property unless the owner created the dangerous condition or had actual or constructive notice of the same. While plaintiff need not prove that defendant had actual knowledge of the presence of the particular substance or object plaintiff must demonstrate that defendant either created the condition

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...ongoing and recurring unsafe condition which regularly went unaddressed."

*Kivlan v Dake Bros.*, 255 AD2d 782, 782 (3d Dept 1998) (internal quotation marks and citations omitted).

However, while a landowner may not generally be liable for the work of an independent contractor, it may be liable "where, from the nature of the work, danger is readily foreseeable."

*Wright v Tudor City Twelfth Unit*, 276 NY 303, 307 (1938).

It is a fundamental principle that "summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." *Rotubs Extruders v Ceppos*, 46 NY2d 223, 231 (1978) (internal quotation marks and citation omitted). Although there is no evidence that Goldner, LLC created the condition which resulted in Linder's fall, there is conflicting testimony which raises a triable question of fact as to whether the resident Building superintendent received a phone call from Thompson, putting him on notice that the oil delivery was being made at 5:30 a.m. when it was still dark outside, and which could result in the potential for harm to passing pedestrians, and whether Goldner LLC, therefore, had a duty to insure that the oil was delivered safely and no condition was created by its contractor that could injure passing pedestrians. This conflicting testimony raises the possibility of an exception to the principle that an employer is generally

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not liable contractor and

precludes summary judgment. See, *Wright v Tudor City Twelfth Unit*, 276 NY 303; *Schiros v Tawil*, 2003 NY Slip Op 50953[0]. It is, therefore, not necessary for the court to reach UMEC's additional contention that Goldner, LLC provided insufficient lighting for the Building, potentially contributing to Lindner's failure to see UMEC's hose.

MOTION FOR SUMMARY JUDGMENT OF UMEC AND THOMPSON

The UMEC defendants move for an order granting summary judgment in their favor and dismissing the complaint as to them. They contend that the duty they owed to plaintiffs was one of reasonable care under the circumstances (*Basso v Miller*, 40 NY2d 233, 239 [1976]), and that Thompson's testimony and the photographs of the hose showing the cones and warning sign establishes that they met that standard. According to Thompson's deposition testimony, when he arrived at the Building he telephoned the resident superintendent to notify him that an oil delivery was being made. He then placed the cones beside and the warning sign over the hose, as depicted in the photographs that he states he took within three minutes after Linder stumbled and fell. He also testified that he had verbally warned all pedestrians, including Linder and Brody, of the presence of the hose, however he contends that Linder apparently did not hear him because she was talking with Brody who was behind her. The UMEC

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 defendants' negligence constituted reasonable

care and that, therefore, the complaint should be dismissed as to them.

"[A] defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 141-42, (2002). Here again, there is a sharp conflict of facts as to whether Thompson in fact took the actions that the UMEC defendants contend established reasonable care. According to Linder and Brody there were no cones or warning sign alerting them to the presence of the hose, and according to Brody, almost immediately after Linder stumbled and fell, she noticed someone moving the warning sign to where Linder had stumbled. Linder and Brody also contend that no photograph was taken of the hose while they were still at the location, and, finally, they both state that no one verbally warned them about the presence of the hose before Linder stumbled on it and fell. This conflicting testimony raises material issues of fact concerning whether Thompson in fact exercised reasonable care by placing cones and a warning sign where they would have alerted pedestrians to the presence of the black hose stretched across the sidewalk and whether he verbally warned plaintiffs of the presence of the hose. Those questions of fact preclude a grant of summary judgment to the UMEC defendants.

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ORDERED that the motion of defendant Charles K. Goldner, LLC for summary judgment dismissing the complaint and any cross claims against it, or in the alternative, summary judgment on the cross claims of said defendant against defendants United Metro Energy Corp. and Merrick Thompson is denied; and it is further

ORDERED that the motion of defendants United Metro Energy Corp. and Merrick Thompson for summary judgment dismissing the complaint as against them is denied.

Dated: 4-21-2020

ENTER:

  
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J.S.C.

DAVID B COHEN