

Nazaire v City of New York

2020 NY Slip Op 31137(U)

April 29, 2020

Supreme Court, New York County

Docket Number: 150828/2016

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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PATRICK NAZAIRE,

Plaintiff,

- v -

THE CITY OF NEW YORK, 140 BW LLC, NEW HINES INTEREST LIMITED PARTNERSHIP AND CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

-----X

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and corresponding values: 150828/2016, N/A, 002, 003, 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 74-96; (Motion 003) 97-117, 127-139; (Motion 004) 118-120, 148-162

were read on these motions for SUMMARY JUDGMENT

Plaintiff Patrick Nazaire, an employee of third-party defendant ABM Janitorial Northeast Inc., commenced this action after he tripped and fell on a hole in the sidewalk/curb adjacent to the Cedar Street side of the premises known as 140 Broadway in Manhattan. In motion 002, defendants 140 BW LLC, the owner of the building, and defendant New Hines Interest Limited Partnership, its management company, move pursuant to CPLR 3212 for summary judgment seeking dismissal of the complaint. In motion 003, third-party defendant ABM Janitorial moves pursuant to CPLR 3212 for summary judgment seeking dismissal of the third-party complaint. In motion 004, defendant the City of New York moves pursuant to CPLR 3212 seeking dismissal of the complaint and any cross-claims asserted against it. The motions are consolidated for purposes of this decision.

On the day of the accident, January 22, 2015 at approximately 6:45 am, plaintiff was performing his janitorial duties outside the premises of 140 Broadway, which included sweeping

and cleaning up debris. Affirmation of Elizabeth A. Griffin dated July 25, 2019, Exh E, Nazaire Dep. Tr. 61-65. Approximately five minutes before the accident, plaintiff was picking up debris off the roadway near the curb and was standing on the curb area in order to do this. Griffin Aff., Exh. E, Nazaire Dep. Tr. 71-74. Plaintiff was midway through this process when someone called out his name and he looked up, causing his right foot to go into the hole on the curb of the sidewalk. Griffin Aff., Exh. E, Nazaire Dep. Tr. 74-76; see also Exhs. G, H (photo of accident site).

Turning to the motions, defendants 140 BW, the owner of the premises, and defendant New Hines, the property manager, argue primarily that they are not responsible for maintaining the area of the sidewalk and/or curb where plaintiff's accident occurred. In support, defendants 140 BW and New Hines submit the testimony of several witnesses, including the plaintiff, which shows that the sidewalk grate adjacent to the hole where plaintiff fell was owned by defendant ConEd. Griffin Aff., Exh. E, Nazaire Dep. Tr. 73; Exh. K, McCahill Dep. Tr. 21-22, 24-25, 28-31; Exh. M, Grimm Dep. Tr. 30-31; Exh. O, Mejia Dep. Tr. 45-47. Under New York City Highway Rule 2-07(b)(1), the owner of a sidewalk grate is responsible for maintaining the area extending 12 inches outward from the perimeter of the grate. 34 RCNY Sec. 2-07(b)(1). Here, the area where plaintiff fell was on the sidewalk and/or curb directly adjacent to ConEd's sidewalk grate, and thus this area is not part of the sidewalk that defendants 140 BW and New Hines are responsible for maintaining under Admin. Code of the City of New York Sec. 7-210. *Storper v. Kobe Club*, 76 A.D.3d 426 (1st Dep't 2010). Accordingly, defendants 140 BW and New Hines have met their prima facie burden of showing that they are not responsible for maintaining the area where plaintiff fell and since no other party filed opposition to their motion, they are entitled to dismissal of the complaint as asserted against them.

Similarly, defendant the City of New York seeks dismissal of the complaint under the same grounds, arguing that under 34 RCNY Sec. 2-07(b)(1), defendant ConEd was responsible for maintaining the area of the sidewalk and/or curb where plaintiff's accident occurred since it was directly adjacent to ConEd's sidewalk grate. However, while the rule requires ConEd to repair any sidewalk defects located within 12 inches of its sidewalk grates, curbs are not included in the area that ConEd is required to repair under this rule. *Rojas v. Empire City Subway Co.*, 173 A.D.3d 626 (1st Dep't 2019). Further, curbs are not part of the "sidewalk" that adjacent landowners are required to repair under Admin. Code of the City of New York Sec. 7-210, which remain the City's responsibility. *Ascencio v. New York City Hous. Auth.*, 77 A.D.3d 591 (1st Dep't 2010). Accordingly, defendant the City of New York is not entitled to dismissal of the complaint.

Finally, third-party defendant ABM Janitorial, plaintiff's employer, moves for summary judgment seeking dismissal of the third-party complaint filed against it by defendants/third-party plaintiffs 140 BW and New Hines. First, third-party defendant ABM Janitorial argues that the common law contribution and indemnification claims asserted against it must be dismissed because plaintiff was performing work in the course of his employment at the time of the accident and did not suffer a grave injury. As such, these claims are barred under Workers' Compensation Law Sec. 11. *Clavin v. CAP Equipment Leasing Corp.*, 156 A.D.3d 404, 404 (1st Dep't 2017). Since defendants/third-party plaintiffs 140 BW and New Hines have not opposed this aspect of the motion, they have conceded this argument and these claims will be dismissed. Likewise, 140 BW and New Hines do not dispute third-party defendant ABM Janitorial's showing that it procured the requisite insurance coverage required under the parties' contract and

thus the breach of contract claim must also be dismissed. Affirmation of Jill L. Zibkow dated August 21, 2019, Exh. N, para. 7 and Exh. P (endorsement 155).

With respect to the remaining claim for contractual indemnification, third-party defendant ABM Janitorial argues that the indemnification provision in the parties' contract is not triggered because the accident did not occur as a result of any "act or omission" of ABM Janitorial. The indemnification provision in the parties' contract provides, in relevant part that ABM Janitorial shall be liable for and shall hold 140 BW and New Hines harmless for any claims which arise out of or result from "any act or omission of contractor or contractor's employees, agents, licenses, or subcontractors" Zibkow Aff., Exh. N, para. 9. In support of their motion, third-party defendant ABM Janitorial has submitted evidence showing that its services were janitorial in nature and that it was in no way responsible for maintaining or repairing defects in the sidewalk which caused plaintiff's fall. Zibkow Aff., Exh. N, para. 1 and Exh. A (specifications).

Defendants/third-party plaintiffs 140 BW and New Hines do not dispute that ABM Janitorial was not responsible for repairing sidewalk defects but nevertheless argue that this action triggers the indemnification provision because the accident occurred while plaintiff was performing work for ABM Janitorial and thus was due to an "act or omission" of ABM Janitorial. However, contrary to defendants' contention, "routine performance of plaintiff's duties on the job, or his mere presence on the site, cannot be considered an 'act' sufficient to invoke indemnification" under the parties' contract. *Gentile v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 9 Misc.3d 111, 112 (App. Term 1st Dep't 2005) (analyzing similar "acts or omissions" indemnification provision). Had the parties intended for ABM Janitorial to indemnify 140 BW and New Hines for all claims arising from any work-related activity, irrespective of

negligence, they would have included such language in the contract. *Id.* at 113. Thus, this cause of action must also be dismissed. Accordingly, it is

ORDERED that the motion for summary judgment by defendants 140 BW LLC and New Hines Interest Limited Partnership seeking dismissal of the complaint (motion #002) is granted, and the complaint is dismissed with respect to these defendants; and it is further

ORDERED that the motion for summary judgment by defendant the City of New York (#004) is denied; and it is further

ORDERED that the motion for summary judgment by third-party defendant ABM Janitorial Northeast Inc. (#003) is granted, and the third-party complaint is dismissed, with costs and disbursements awarded to the moving party, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the caption shall be amended to reflect dismissal of the complaint as against 140 BW LLC and New Hines Interest Limited Partnership and dismissal of the third-party action and third-party defendant shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records accordingly.

4/29/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION: _____

CHECK IF APPROPRIATE: _____