

<b>Pizzo v Argonaut Holdings, Inc.</b>
2020 NY Slip Op 32578(U)
July 31, 2020
Supreme Court, Kings County
Docket Number: 508972/2017
Judge: Reginald A. Boddie
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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 31st day of July 2020.

**P R E S E N T:**

Honorable Reginald A. Boddie, JSC

-----X

PAMELA PIZZO,

Plaintiff,

Against

ARGONAUT HOLDINGS, INC., RED BALL CONTRACTING CORP., REDCOM DESIGN & CONSTRUCTION, LLC, and AIRSIDE PAVEMENT MARKING, INC.,

Defendants.

-----X

ARGONAUT HOLDINGS LLC,

Third-Party Plaintiff,

Against

BR DESIGN CONCEPTS, INC.,

Third-Party Defendant.

-----X

REDCOM DESIGN & CONSTRUCTION, LLC,

Second Third-Party Plaintiff,

Against

JRM CONSTRUCTION CORP. and A-1 UNDERGROUND PLUMBING CONTRACTORS CORP.,

Second Third-Party Defendants.

-----X

Papers

MS 11 Notice of Motion & Annexed Affirmation/Affidavit in Support  
MS 12 Notice of Motion & Annexed Affirmation/Affidavit in Support  
MS 13 Notice of Motion & Annexed Affirmation/Affidavit in Support

Numbered

Doc. #s 234-291  
Doc. #s 178-289  
Doc. #s 258-262

Upon the foregoing cited papers, the decision and order on the above cited motions is as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained in a February 2, 2017 trip and fall on a defective sidewalk flag adjacent to the premises located at 1575 86<sup>th</sup> Street, Brooklyn, New York. Plaintiff commenced Action No. 1 under Index No. 508972/2017 on May 5, 2017, and Action No. 2 under Index No. 502565/2020 on January 31, 2020. Plaintiff sought to consolidate these actions (MS 13) on the grounds that both cases involve the same accident and allege the same theory of recovery. JRM Construction Corp. (JRM) and A-I Underground Plumbing Contractors Corp. (A-I) also moved for consolidation on the same grounds (MS 12).

JRM and A-I also sought summary judgment and dismissal of the complaint and all cross-claims against them on the grounds that they did not perform work at the site of the accident on or before February 2, 2017, and the work they performed was located two sidewalk flags away from the site of the accident. Red Ball Contracting Corp. (Red Ball) moved for summary judgment (MS 11) on the grounds that Plaintiff discontinued her action against Red Ball by stipulation on March 12, 2020, and only the cross-claims for indemnification, contribution and insurance by Redcom Design & Construction, LLC (Redcom) remain.

On the date of plaintiff's accident, the premises at 1575 86<sup>th</sup> Street was owned by defendant, Argonaut Holdings LLC (Argonaut). Pursuant to a lease, non-party Bay Ridge Chevrolet Inc. (Bay Ridge Chevrolet) took possession of the subject property in October 2014, and was responsible for the maintenance and upkeep of the sidewalk adjacent to the subject property. Bay Ridge Chevrolet also initiated a project to build a new car dealership at the property in October 2014. In connection with this project, Bay Ridge Chevrolet created an entity called BR Design Concepts Inc. (BR). BR hired Redcom as the general contractor for the project. Redcom subcontracted with JRM and Red Ball. Red Ball was hired to erect a

construction fence and demolish the existing structure on the property. JRM was hired to install subsurface plumbing.

On February 25, 2015, the New York City Department of Buildings approved Red Ball's permit for demolition. Red Ball rented two pieces of heavy machinery for demolition and hired a carting company to cart the debris from the site. Demolition was completed in approximately eight to 10 weeks. Red Ball had ceased its presence at the premises approximately 17 months prior to plaintiff's accident. Douglas Palmadessa testified on behalf of Red Ball that no damage to the sidewalk resulted from the performance of any of its work and photographic evidence indicated that the gate for ingress and egress to the site at 86<sup>th</sup> Street was adjacent to, but not at the location of plaintiff's accident.

Plaintiff discontinued her action against Red Ball by stipulation on March 12, 2020. Red Ball moved for summary judgment. JRM and Redcom opposed. JRM argued that Red Ball used heavy machinery and debris containers which repeatedly traversed the sidewalk on 86<sup>th</sup> Street and caused the defective condition on which plaintiff fell. Redcom argued Red Ball's contractual duties to defend, indemnify, insure, and hold harmless Redcom and Argonaut have been triggered regardless of Red Ball's liability for plaintiff's accident. Redcom argued same in opposition to JRM's motion.

On August 11, 2016, Redcom hired JRM to install underground plumbing for the dealership project. On November 16, 2016, A-I, JRM's sister company, obtained the permits and JRM performed the work sometime thereafter. They argued for summary judgment on the grounds that no party has provided any credible, admissible evidence that JRM or A-1 had anything to do with the defective condition alleged by plaintiff, and they did not own the abutting property or perform any work at the job site prior to the date of plaintiff's accident.

Joseph Passalacqua, President of JRM and Vice President of A-I, testified he was present at the construction site and their work took place two sidewalk flags away from the area where plaintiff was injured. He testified that upon completion of the subsurface plumbing work, they backfilled their excavation sites with soil and filled the road and sidewalk with concrete. He also testified that when the street and sidewalk were open during the performance of their work, they would place a roadway plate, one-inch thick, and an asphalt ramp to protect the sidewalk and pedestrians. He testified they refilled the sidewalk flags they excavated by patching them with asphalt. He also testified he reported the subject defective flag to Redcom, who allegedly acknowledged its responsibility to remedy the defective condition.

At his deposition, Mr. Passalacqua was presented photos of the location of plaintiff's accident. He identified the area where A-I performed its work and indicated where it did not perform work, including the area where plaintiff fell. Mr. Passalacqua was unable to conclude from these photos, dated March 8, 2017, whether they showed that the work was completed.

Mr. Passalacqua further testified that whatever work A-I did for the Bay Ridge Chevrolet project occurred between November 16, 2016, and March 31, 2017. He also testified that he did not recall the exact dates A-I performed work at the site, but that they did not work prior to the date of accident. He did not recall how long A-I's work took to complete, but affirmed that it took more than one week and less than six months.

In a subsequent affidavit, Mr. Passalacqua stated that his review of New York City Department of Environmental Protection (DEP) records refreshed his recollection that A-I did not work in the area prior to the date of plaintiff's accident. The DEP records, attached as exhibits to his affidavit, indicated that A-I installed subsurface piping for the subject project on March 17, 2017.

Plaintiff and Redcom opposed the motion on the grounds that there are questions of fact as to whether JRM caused the defective condition at the location of plaintiff's accident. Peter Cybriwsky, Redcom's project manager, testified that he joined the project in late 2016, and as of February 2017, the project was "probably" at the stage of "out of the ground, framing, steel, exterior." He further estimated that JRM performed work at the project site in late 2016, and that they were onsite at the time of plaintiff's accident. He testified that he did not know whether the sidewalk had been removed prior to February 2, 2017, and did not know when JRM opened the sidewalk, but averred that the condition on which plaintiff fell was the result of JRM's excavation and that JRM installed an asphalt patch which caused the condition at issue. He testified he observed JRM perform work at the location of plaintiff's accident and that Redcom's blueprints indicated such. He further averred that Redcom would have contacted JRM to repair its asphalt patch, but he did not initiate such contact and Redcom proffered no documentary evidence to establish such. Mr. Cybriwsky also testified that Redcom was responsible for maintenance of the sidewalks including removal of snow and ice and for redoing the sidewalk around the premises.

As an initial matter, there is no dispute that both actions arise from the same accident and allege the same legal theory. Moreover, no party has submitted written opposition to consolidation. Therefore, Action No. 2 shall be fully consolidated with Action No. 1 and proceed to trial under Index No. 508972/2017.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact

(*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to “. . . produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562 [citations omitted]).

Here, on the basis of personal knowledge, Mr. Passalacqua established that JRM and A-I did not work on the sidewalk flag where plaintiff fell. Therefore, although questions remain as to when the work was commenced and completed, those questions are irrelevant since JRM and A-I established their work did not involve the subject sidewalk flag.

In opposition, plaintiff and Redcom failed to meet their burden raising a triable issue of fact. Mr. Cybriwsky testified he observed JRM and A-I perform work at the location of plaintiff’s accident and attributed the defective condition to them. He also averred blueprints demonstrating such existed and that Redcom would have notified JRM and A-I by email to return to the site to fix the condition. However, no blueprints, emails or other documentary evidence were proffered. Moreover, Mr. Cybriwsky testified that Redcom was responsible for maintenance, including removal of snow and ice, and replacement of the sidewalk, as corroborated by the contract between Redcom and its concrete subcontractor, Condo Brothers, to redo the sidewalks.

In deciding a motion for summary judgment, a court may not weigh the credibility of the pleadings and affidavits (*Heller v Hicks Nurseries, Inc.*, 198 AD2d 330 [2d Dept 1993]). Where affidavits of the parties to a motion for summary judgment are opposed and it is apparent that

one party is not telling the truth, it is generally not within the power of the court to determine the credibility of either affiant, unless there exists some external objective criteria on which the credibility of opposing affidavits can be judged (*see Hogan v Springer*, 24 AD2d 477 [2d Dept 1965]; *see Colucci v AFC Const.*, 54 AD3d 798 [2d Dept 2008]; *see Rosario v Sebco I. Associates, L.P.*, 305 AD2d 307 [1st Dept 2003]). Here, Mr. Passalacqua and Mr. Cybriwsky provided conflicting testimony regarding where JRM and A-I performed work, and therefore, it is not within the Court's purview to determine the credibility of these witnesses. However, here, there exists some external objective criteria on which the credibility of opposing affidavits can be judged. Mr. Cybriwsky testified Redcom maintained blueprints that indicated the location of each subcontractor's work and that Redcom would have sent emails to JRM and A-I to fix the sidewalk defect it alleged they created. Redcom did not proffer such documentary evidence or provide a reason for its omission. Similarly, plaintiff and Redcom failed to raise a triable issue sufficient to defeat Red Ball's motion for summary judgment.

Moreover, plaintiff, citing *Espinal v Melville Snow Contractors*, 98 NY2d 136 (2002), argued against granting JRM summary judgment on the grounds that JRM was the only entity authorized to excavate and backfill same "entirely displaced the owner's duty to maintain the premises safely" and having then created the defective, sunken improperly backfilled, and broken sidewalk flag, it "launched a force or instrument of harm" that resulted in plaintiff's accident. Here, for reasons previously stated, this argument failed to raise a triable issue of fact as to whether JRM performed work on the sidewalk flag where plaintiff fell.

Further, Redcom opposed both motions on the grounds that the movants' subcontracts required them to defend, indemnify, insure, and hold harmless Redcom regardless of their liability. The right to contractual indemnification depends upon the specific language of the

contract and must be strictly construed (*Alfaro v 65 West 13<sup>th</sup> Acquisition, LLC*, 74 AD3d 1255, 1255-1256 [2d Dept 2010] [citations 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 facts and circumstances” (*Id.*).

Here, the subcontractors contracts with Redcom provide, “The Subcontractor’s obligations under this Article shall apply regardless of whether or not any such claim, damage, liability, loss or expense is or may be attributable to the fault or negligence of the Subcontractor.” Redcom argued that this sentence creates an obligation on the part of its subcontractor regardless of the subcontractor’s liability. However, applying the law as stated in *Alfaro*, the Court must look to the indemnity provision in the contract and determine what is clearly implied from the language and purpose of the entire agreement (74 AD3d at 1256). Here, the paragraphs preceding this sentence required JRM to indemnify Redcom for claims, damages, liabilities, losses and expenses arising out of JRM’s work or the work of anyone retained by JRM, in connection with JRM’s work, who may be liable. The remainder of the paragraph following this sentence indicates, in relevant part, that in the event Redcom is found negligent, the Subcontractor’s obligation to indemnify Redcom for any judgment, payment, settlement or award shall only extend to the percentage of negligence of the Subcontractor.

Contrary to Redcom’s contention, this contract does not obligate its subcontractors to indemnify Redcom regardless of its negligence. Rather, the clear inference from the language of the contract preceding and succeeding that sentence is the subcontractors were obligated to indemnify Redcom for the negligence of anyone they hired in connection with their work, and their liability to Redcom would be offset by any percentage of liability attributable to Redcom. As JRM and Red Ball have established its entitlement to summary judgment and no

evidence has been proffered to raise a triable issue as to the negligence of anyone they hired in connection with their work, Redcom's argument is insufficient to defeat their motions for summary judgment.

Accordingly, Red Ball, JRM and A-I are granted summary judgment and the complaint and all cross-claims against them are dismissed. Further, Action No. 2 (Index No. 502565/2020) shall be fully consolidated with Action No. 1 (Index No. 508972/2017) and proceed to trial under Index No. 508972/2017.

ENTER:

*RAB* HON. REGINALD A. BODDIE  
J.S.C.

Honorable Reginald A. Boddie  
Justice, Supreme Court

KINGS COUNTY CLERK  
FILED  
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