Zglejc v City of New York
2020 NY Slip Op 33562(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 161640/2018
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 161640/2018

ALDONA ZGLEJC,

Plaintiff,

MOTION SEQ. NO. 001, 003

- v -

THE CITY OF NEW YORK, MONTY TWO EAST 86TH STREET ASSOCIATES LLC, MONTY THREE EAST 86TH STREET ASSOCIATES LLC, THE LILLIAN GOLDMAN FAMILY L.L.C., JANE GOLDMAN, ALLAN GOLDMAN, AMY GOLDMAN FOWLER, DIANE GOLDMAN KEMPER AS CO-EXECS. OF EST. OF LILLIAN GOLDMAN, BOARD OF MANAGERS OF 155 EAST 86TH CONDOMINIUM, GILBANE RESIDENTIAL CONSTRUCTION LLC, CERUZZI PROPERTIES LLC, KUAFU PROPERTIES LLC, PHILIP HABIB & ASSOCIATES, MILROSE CONSULTANTS, INC., RA CONSULTANTS LLC, and RNC INDUSTRIES LLC,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 35, 36, 39

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequence numbers 001 and 003 are hereby consolidated for resolution.

In motion sequence number 001, defendant Philip Habib & Associates (PHA) moves, pursuant to CPLR 3211(a) (1) and (a) (7), to dismiss the complaint, e-filed December 13, 2018 (complaint [NYSCEF Doc No. 1]), as asserted against it by plaintiff Aldona Zglejc. In motion sequence number 003, defendant Milrose Consultants, Inc. (Milrose), moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims asserted against it.

Factual and Procedural Background

Plaintiff, a resident of the State of New York, alleges that, on January 31, 2018, while traversing a pathway abutting the building located at 147-151 East 86th Street in Manhattan (the property), she was injured when she tripped and fell due to the hazardous and defective state of the sidewalk at that location. (complaint ¶¶ 1, 26-28). Plaintiff alleges a cause of action in negligence as against the City of New York, the owners of the property, the property's Board of Managers, and several contractors involved in a construction project at the property, including PHA and Milrose.

PHA is a consulting engineering firm which maintains offices in Manhattan (*see* affidavit of Sue E. McCoy, P.E., sworn to January 22, 2019 [McCoy aff] [NYSCEF Doc No. 27], ¶ 1; *see also* https://phaeng.com/index.php?s=about). PHA asserts that it was retained for the sole purpose of providing civil engineering services relating to the preparation of a pavement plan for the property (*see* affirmation of Jonathan P. Pirog, Esq, Milrose, which also maintains offices in Manhattan, engages in building code consulting and permit expediting (*see* affidavit of Gustavo Mazza, sworn to February 12, 2020 [Mazza aff], ¶¶ 5-6; *see also* https://www.milrose.com/).

PHA asserts that the complaint must be dismissed against it under CPLR 3211 (a) (1) and (a) (7) because it was only responsible for preparing the pavement plan and had no responsibility for the supervision, direction or control over the demolition, removal and installation of the sidewalk, and that it was not responsible for the maintenance of the sidewalk (McCoy aff ¶ 9).

Similarly, Milrose asserts that it is entitled to summary judgment in its favor on the issue of liability, dismissing all claims and counterclaims asserted against it, because it only provided code consulting and permit/filing expediting services and had no control over, or responsibility for, the construction work at the Property (Mazza aff ¶ 6).

When a court rules on a motion to dismiss under CPLR 3211, it "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation marks and citations omitted]). "However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence" (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 627 [1st Dept 2017] [citation omitted]). A motion to dismiss under CPLR 3211 (a) (1) "may be granted if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. One example of such proof is an unambiguous contract that indisputably undermines the asserted causes of action" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63 [internal quotation marks, alteration and citations omitted]).

On a motion to dismiss under CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Again, the court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [internal quotation marks and citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

"[A]ffidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless [] the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

To prevail on a summary judgment motion, the movant must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor (*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965, 967 [1985]; *see also Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016], quoting *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986] [proponent of summary judgment "'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'"]). If the moving party fails to make a prima facie showing of its entitlement to summary judgment, the motion must be denied, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). Once this showing is made, the burden shifts to the opposing party to submit proof in admissible form sufficient to raise a question of fact requiring a trial (*Kosson v Algaze,* 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant (*Branham v Loews Orpheum Cinemas*, 8 NY3d 931, 932 [2007]). Party affidavits and other proof must be examined closely "because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*id.)*.

"It is well settled that in order to set forth a prima facie case of negligence, the plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) an injury suffered by the plaintiff which was proximately caused by the breach" (*Murray v New York City Hous. Auth.*, 269 AD2d 288, 289 [1st Dept 2000] [citations omitted]).

Both movants are contractors seeking to avoid liability for personal injuries. Under *Espinal v Melville Snow Contractors,* "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (98 NY2d 136, 138 [2002] [citation omitted]). There are, however, three situations in which contractors

> "may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting parties duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(*id.* 98 NY2d at 140 [citations omitted]).

Motion Sequence Number 001

In its motion to dismiss, PHA admits it was responsible for preparing a "Paving Plan" (McCoy aff ¶ 8) and that it prepared both the Paving Plan and an amended Paving Plan (annexed together as exhibit 3 to McCoy aff [NYSCEF Doc No. 27]). PHA asserts it cannot be held liable for plaintiff's alleged injuries because it was not in any way responsible for the demolition, installation or supervision of work relating to the removal of the sidewalk or responsible for controlling, directing or supervising the work of others in connection with the demolition, removal and installation of the sidewalk (McCoy aff ¶¶ 11-12). It also denies, among other things, having an ownership interest in the property, or being responsible for its maintenance,

operation, repair or control, or being in any way involved in construction at the Property, or involved in the design or installation of temporary barricades and scaffolds at the Property (*id.* ¶¶ 13-17).

To support its argument, PHA submits its original proposal for engineering services, dated December 5, 2014 and accepted by Kenneth Cartelli on behalf of Courtney One Manager LLC on December 11, 2014 (Letter Agreement [McCoy aff exhibit 1]). This Letter Agreement listed 5 tasks for PHA to complete, written on a "not-to-exceed" basis, for a total cost of $69,500, $48,500 of which was directly attributable to the "Builders Pavement Plan and Sidewalk Widening" (McCoy aff exhibit 3). This Letter Agreement was assigned to defendants Monty Two East 86th Street Associates LLC (Monty Two) and Monty Three East 86th Street Associates LLC (Monty Three), as of November 30. 2017 (Assignment [McCoy Aff exhibit 2]).

Annexed to the Assignment, however, is a "Supplemental Provisions Rider" (Rider). Provision R.1.2 of this Rider, captioned "Additional Services," which states that PHA, as Consultant, "shall perform services other than as required and/or necessary under" the Letter Agreement, "as requested by Monty Two and Monty Three, as "Owner" (McCoy aff exhibit 2), The beginning of Provision R.1.2 appears on the bottom of the Rider's first page. The second page of the Rider is missing from the exhibit and so the scope of PHA's "Additional Services" cannot be determined by this submission. This undermines PHA's averment that its role was limited to preparing the Paving Plan and amended Paving Plan under the Letter Agreement.

Furthermore, plaintiff's allegations also encompass conduct of "one or more of the defendants [who] planned construction. . . at the Property and, more particularly, removal of the sidewalk abutting the Property" (complaint ¶ 19). Giving plaintiff "the benefit of every possible favorable inference" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at

63), this allegation of fact fits a claim against PHA for negligent design of the Paving Plan and amended Paving Plan. In light of these factors, PHA does not carry its burden for dismissal and so its motion to must be denied.

Motion Sequence Number 003

Milrose moves for summary judgment on the issue of liability pursuant to CPLR 3212. It argues that it is entitled summary judgment dismissing all claims and counterclaims asserted against it because it had nothing to do with the allegedly defective sidewalk at the property since it was hired by non-party BVS Kuafu, LLC [1] (*see* Mazza aff exhibit F [Milrose contract with BVS Kuafu, LLC [NYSCEF Doc No. 89]) to provide code consulting and expediting services for the construction project. Milrose asserts that, in this role, it did not own, manage or control the property, or have any responsibility for the construction which allegedly created the hazardous condition which caused plaintiff's injury. It also denies that it had any role in implementing any safety precautions over the construction work (Mazza aff ¶¶ 4-6). Milrose also notes that, prior to the alleged incident, the scope of its work was never altered in any way (*id.* ¶ 7). Milrose asserts that there is no evidence that any of the *Espinal* exceptions apply to it and so it owed no duty of care to plaintiff.

To establish its prima facie showing for summary judgment, "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 and citation omitted]).

Construing plaintiff's complaint and verified bill of particulars (Mazza exhibits A and F [NYSCEF Doc Nos. 84 and 88]), in a light most favorable to plaintiff, Milrose has established its prima facie entitlement to judgment as a matter of law by showing that, because of its limited involvement, it did nothing to create the hazardous condition that allegedly caused plaintiff's injury and had no responsibility for safety at the property.

In opposition, plaintiff does not address these assertions but instead complains that the motion is premature because Milrose has yet to provide discovery. CPLR 3212 (a) allows a party to move for summary judgment "after issue has been joined." Milrose e-filed its answer on April 18, 2019 (NYSCEF Doc No. 40), and so its motion is not premature, as plaintiff contends.

Plaintiff also argues that it should be permitted to keep Milrose in this action pending further discovery, by virtue of CPLR 3212 (f) and plaintiff's speculations about Milrose's unknown "input into the project work" (affirmation of Gregory LaSpina, Esq, executed March 9, 2020, ¶ 10 [NYSCEF Doc No. 90]), based upon provisions to Milrose's contract (Mazza aff exhibit F [NYSCEF Doc No. 89]). Subsection (f), however, requires the party opposing summary judgment to submit affidavits showing that "facts essential to justify opposition may exist but cannot be stated," to justify denial of the motion. Plaintiff has not made such a showing. In any event, speculation is insufficient to defeat summary judgment (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d at 448).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), by defendant Philip Habib & Associates is denied; and it is further

ORDERED that defendant Milrose Consultants, Inc.'s motion for summary judgment, pursuant to CPLR 3212 is granted in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

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10/28/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**