

<b>Schwartz v City of New York</b>
2021 NY Slip Op 30042(U)
January 6, 2021
Supreme Court, New York County
Docket Number: 156297/2016
Judge: J. Mabelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62

Justice

-----X

SUSAN SCHWARTZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, EMPIRE CITY SUBWAY COMPANY (LIMITED),

Defendant.

-----X

EMPIRE CITY SUBWAY COMPANY (LIMITED)

Plaintiff,

-against-

NICO ASPHALT PAVING, INC.

Defendant.

-----X

INDEX NO. 156297/2016
MOTION DATE 10/28/2020, 12/15/2020
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

Third-Party Index No. 595008/2017

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 62, 63, 64, 65, 66, 67, 70, 71

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 68, 69

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

This is an action wherein plaintiff alleges that on May 14, 2015, while attempting to cross the street in the middle of the block in front of a Fairway Market located at 240 East 86th Street, New York, New York, not within a cross-walk, she tripped and fell due to a pothole in the roadway inches from the sidewalk curb. Plaintiff filed this action against defendants City of New York

(the “City”) and Empire City Subway Company (Limited) (“ECS”). ECS, in turn, filed a third-party action against third-party defendant Nico Asphalt Paving, Inc. (“Nico”).

Pending before the court are two motions: Motion #001, filed by Nico, seeks an order, pursuant to C.P.L.R. §3212, dismissing plaintiff’s Complaint and third-party Complaint against Nico, and any and all cross claims against Nico. Motion #002, filed by defendant ECS, seeks an order pursuant to CPLR §3212: (1) granting ECS summary judgment and dismissing plaintiff’s Verified Complaint and all cross-claims and counterclaims asserted against ECS; or alternatively, (2) granting summary judgment to ECS as to its cross-claims against Nico. Pursuant to the forgoing documents, both motions are hereby GRANTED.

Here, it is undisputed that ECS hires Nico to perform “final asphalt restoration work,” meaning that after ECS completes the backfill of a trench, they leave approximately four inches below the roadway surface for Nico to fill with asphalt.

With respect to Motion #002, ECS argues that it is clear, based on plaintiff’s Bill of Particulars and photographs submitted by plaintiff, that the alleged defect was within a few inches of the sidewalk curb. Importantly, ECS argues that the alleged defect is located in the parking lane on East 86<sup>th</sup> Street and not the driving lane on the street. ECS argues that their records show that in the two-year period leading up to and including the date of plaintiff’s incident, the only work performed by ECS or Nico in that area was performed by Nico in the driving lane only, not in the parking lane where the subject pothole was located. ECS further argues that even assuming arguendo that the alleged defect was created in connection with any ECS permits (which ECS “vehemently denies”), the pothole in question would be the result of a paving issue, which would fall under the work performed by Nico.

With respect to Motion #001, Nico argues that it did not perform any work at or within ten (10) feet of the subject incident location, and that any work performed by Nico would have been in the driving lane and not the parking lane.

Nico opposed ECS's cross motion only to the extent that ECS seeks summary judgment in its favor against Nico. Nico did not oppose that part of ECS's motion seeking the dismissal of plaintiff's Complaint against ECS. In partial opposition to Nico's motion, ECS agreed that the plaintiff had not submitted any evidence that ECS is liable for the alleged incident, but argued that if the court were to deny ECS's motion for summary judgment, then Nico's motion for summary judgment should be denied as well on the basis that Nico would be required to indemnify ECS.

Neither plaintiff nor defendant City filed any papers in opposition to either motion.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

Here, plaintiff alleges in the Bill of Particulars, and the photographs submitted by plaintiff show, that the alleged defect was within a few inches of the sidewalk curb, which is within the parking lane on East 86th Street. Employees from Nico and from ECS averred in their EBTs, that they did not perform any work in the subject parking lane and neither plaintiff nor the City oppose the facts as asserted above.

Accordingly, both motions are GRANTED. ECS is granted summary judgment in its favor and plaintiff's Verified Complaint and all cross-claims and counterclaims asserted against ECS are hereby DISMISSED WITH PREJUDICE. The third-party complaint against Nico and any and all cross claims against Nico are also DISMISSED WITH PREJUDICE.

This is the order of the court.

1/6/2021  
DATE

  
J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE