Callahan v City of New York
2021 NY Slip Op 30297(U)
February 1, 2021
Supreme Court, New York County
Docket Number: 162923/2015
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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JASON CALLAHAN and NORMA CALLAHAN,

Plaintiffs,

- v -

THE CITY OF NEW YORK, ZHL GROUP, INC.,

Defendants.

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INDEX NO. 162923/2015

MOTION DATE

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

THE CITY OF NEW YORK, ZHL GROUP INC.,

Third-party Plaintiffs,

-against-

UCC CONSTRUCTION INC.,

Third-party Defendant.

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Third-Party
Index No. 595708/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61-87, 101-124, 152, 154, 155

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88-100, 126-151, 153

were read on this motion for summary judgment.

By notice of motion, third-party defendant UCC Construction Inc. moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint. Plaintiffs and defendants/third-party plaintiffs City and ZHL oppose (mot. seq. two).

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint and granting third-party plaintiff ZHL summary judgment on the

third-party complaint. Plaintiffs and third-party defendant UCC oppose (mot. seq. three).

I. PERTINENT BACKGROUND

By contract dated November 5, 2008, ZHL agreed to provide general contracting services to The City of New York Fire Department (FDNY). The contract was amended and renewed on April 11, 2011 and expired on November 4, 2014. (NYSCEF 78).

By letter dated June 12, 2013, FDNY advised the Department of Transportation (DOT) that Ladder 3, located at 108 East 13th Street in Manhattan, was being renovated and that the company was being relocated to Engine Company 5, also located in Manhattan, at 340 East 14th Street. To accommodate the move, FDNY asked that an area be designated on East 14th Street between First and Second Avenues for a cage to be built to house Ladder 3's firetruck for six months. (NYSCEF 79). By letter dated June 24, 2013, ZHL advised DOT of its responsibility for erecting the cage in the designated area and asked that changes be made to the parking regulations in the area to accommodate it. (NYSCEF 80). Thereafter, DOT issued permits to ZHL to erect the cage. (NYSCEF 81).

By contract dated July 10, 2013, ZHL hired UCC to complete work on Ladder 3 in accordance with the November 2008 contract. The work was to take place between July 8 and October 8, 2013. The contract provides that UCC is to defend, indemnify, and hold harmless ZHL and all entities ZHL is required to indemnify and hold harmless for all claims arising or resulting from the work. In addition, the contract reflects that the "[s]cope of work includes installation and removal of temporary cages [...]." (NYSCEF 82).

By amended verified complaint dated June 12, 2018, plaintiffs allege that on June 13, 2015, plaintiff Jason Callahan (plaintiff), in the course of his work as a firefighter, fell and sustained injury due to a defective condition in the roadway in front of the firehouse at 340 East

14th Street, caused by the removal of the cage. Plaintiffs advance causes of action for negligence, violation of General Municipal Law (GML) § 205-a, and loss of consortium. (NYSCEF 40). By order dated October 5, 2018, this action was consolidated with another action commenced by plaintiffs against ZHL only, and in which ZHL commenced a third-party action against UCC for common-law and contractual indemnification and contribution. (NYSCEF 73, 75).

In their bill of particulars, plaintiffs allege that defendants and UCC violated Administrative Code §§ 7-210 and 19-152, 34 RCNY § 2-09, and Labor Law § 27-a (NYSCEF 109-111).

When deposed, plaintiff testified that he was employed as a lieutenant by FDNY. On June 13, 2015, he was working a 24-hour shift at Engine 5 at 340 East 14th Street. When at approximately 9:30pm, after responding to a call, he returned to the firehouse.

Typically, when returning from a call, the firetruck blocks the street, which requires plaintiff to exit the truck and control traffic to obtain sufficient space for the truck to back into the firehouse. On the day of his accident, when stepping off the truck, which was approximately 10 to 15 feet from the curb, plaintiff stepped down with his left foot onto a step below his seat, and then with his right foot, stepped into a hole in the ground, three feet below the step, twisting his ankle, and falling to the ground.

Plaintiff explained that before stepping down with his right foot, he had seen nothing on the ground, whereas after he fell, he saw that his foot was covered with dirt that he assumed was from the hole he had stepped in. He estimated that the hole, which was round, was 12 inches in diameter and three or four inches deep. When shown photographs, which plaintiff claimed were taken by an unidentified fireman days after the accident, he identified the hole in which he had

twisted his ankle. (NYSCEF 83, 84).

At his deposition, ZHL's project manager testified that he was in charge of the renovation at Ladder 3, coordinating all the work, subcontracts, and material deliveries. ZHL subcontracted with UCC for the installation and removal of the cage to UCC and had none of its own laborers working at the site. The manager stated that he had observed the construction and removal of the cage, but he did not recall when, other than it was before 2015. He did not direct UCC's removal of the cage, although he had the authority to stop unsafe work.

The manager explained that although he does not recall how the cage posts were removed, he had seen UCC patching the remaining holes in the ground with asphalt and he confirmed that asphalt was the proper material for doing so. When shown photographs of holes in the street, he denied having seen them and that had he, he would have reported them as the metal in the ground presented a tripping hazard. He also opined that the photos were "likely taken a while after that work was done," and that weather and traffic affected the holes. He does not recall if there were any complaints about the holes before plaintiff's accident. (NYSCEF 86).

At his deposition, UCC's owner testified that UCC installed and removed the cage whereas ZHL directed its placement, supervised and directed its removal, and later checked to ensure that the work was properly done. While he had been to 13th street during construction, he had never gone to 14th Street, where the cage was built.

The owner explained that to remove a cage, UCC cuts the fencing off with a grinder and the posts are cut flush with the ground with the remaining footprint filled with concrete. When shown photographs purportedly showing where the cage poles used to be, he stated that the holes appeared flush with the ground and not hazardous. He received no complaints from his employees about a dangerous condition at the work site, nor did UCC receive complaints from

City concerning the cage removal. (NYSCEF 85).

At his deposition, a DOT representative testified that although he could not identify the specific location of the hole, to the extent that it was in the roadway, it falls under DOT's jurisdiction. (NYSCEF 87).

II. CONTENTIONS

A. UCC (NYSCEF 61-87)

UCC contends that ZHL's third-party claims against it should be summarily dismissed as it did not owe plaintiff a duty of care. Rather, UCC filed, patched, and closed the holes that were left when the cage was removed over a year before plaintiff's accident. In addition, it denies having breached any contractual duty owed to ZHL, as plaintiff's accident did not arise from UCC's negligence or its "work" within the meaning of the subcontract, observing that ZHL had inspected and approved its work, no complaint had been lodged about its work, and plaintiffs advance no claims against it. It also argues that ZHL's project manager had attributed the holes depicted in the photographs to weather and traffic. Consequently, absent evidence that it had created the holes or had notice of them, and given ZHL's denial that it may be held liable for plaintiff's accident and, as a party cannot be indemnified for its own negligence and as plaintiffs' injuries did not arise from its work, ZHL is not entitled to indemnification or contribution.

B. Defendants (NYSCEF 88-100)

Defendants deny having created the condition that caused plaintiff's accident, observing that UCC had installed and removed the cage without any direction from ZHL, and that ZHL had seen that the holes were filled. They argue that ZHL cannot be held liable for defects relating to the means and methods of UCC's work absent a duty of care owed to plaintiffs, and that plaintiffs were not a party to the contract between the FDNY and ZHL. The claims against City

should also be dismissed, they contend, absent prior written notice.

Defendants contend that they are both entitled to contractual indemnity from UCC, regardless of whether it was negligent, because at the time of the accident, the asphalt used by UCC to fill the hole had been worn away, and that plaintiff's accident arose from UCC's work.

C. Plaintiffs (NYSCEF 101-123)

In opposition to UCC's motion for summary judgment, plaintiffs maintain that despite UCC's contention that nothing was wrong with the road, there are photographs reflecting the hole, contending that their "interpretations" of the photographs raise an issue of fact as to whether UCC caused and created a tripping hazard when it removed the cage. In support, plaintiffs submit photographs purporting to show the cage erected in front of the firehouse and the holes that resulted from its removal. (NYSCEF 114-118).

Plaintiffs, moreover, allege violations of 34 RCNY §§ 2-09 and 2-11, including the requirement that openings in the street be filled and flush with adjacent surfaces and that such repairs remain intact for no less than three years. They thus argue that whether defendants had notice of the hole is immaterial, having created it, and that in any event, the photographs of it demonstrate constructive notice. That they were not party to the contract, plaintiffs argue, is immaterial as UCC caused and created the hole.

D. UCC (NYSCEF 126-132)

In opposition to defendants' motion for summary judgment, UCC maintains that it properly filled and patched the holes in the road created by the cage, and observes that ZHL's project manager testified that he had inspected its work, finding that the holes were adequately patched and that the condition reflected in the photographs may have been due to weather and traffic. Moreover, issues of fact exist as to ZHL's negligence, given its the authority to stop

unsafe work, to instruct UCC as to how to complete its work, and to inspect the work upon its completion. While UCC concedes having constructed and deconstructed the cage, it argues that defendants' claim that it created the hole is speculative.

E. Plaintiffs (NYSCEF 133-151)

In opposition to defendants' motion for summary judgment, plaintiffs contend that defendants' failure to address their claim under GML § 205-a requires the denial of their motion. They contend that the statute imposes absolute liability on defendants, as they violated the Administrative Code, 34 RCNY §§ 2-09 and 2-11, and Labor Law § 27-a, and that such liability may be imposed on persons other than owners. They rely on the photographs marked at the depositions as proof of the existence of a tripping hazard, a condition not disputed by defendants, claiming that they raise issues of fact as to whether the condition was inspected and repaired, and whether defendants had constructive notice thereof. That they were not a party to the contract is immaterial, plaintiffs argue, as defendants failed to inspect and remedy the condition. To the extent that defendants deny written notice, plaintiffs contend that they fail to meet their *prima facie* burden of proving a lack of notice, and that there is no need for such notice under GML § 205-a and where City created the defect.

F. ZHL's reply (NYSCEF 154)

In reply, ZHL reiterates its earlier contentions.

G. UCC's reply (NYSCEF 155)

In reply, UCC observes that while plaintiffs argue against its motion for summary judgment, they advance no claims against it, and reiterates that any claim that it caused or created the hole is speculative. It denies that the photographs are probative as some were taken before the cage was removed, and it is unknown when and by whom the photographs were taken.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Negligence

1. City

The duty to maintain public roadways "in a reasonably safe condition and good repair, free from any defect, falls upon the City." (*Cabrera v City of New York*, 45 AD3d 455, 456 [1st Dept 2007]). However, negligence claims against City for injuries sustained due to defects in a street are precluded unless City has prior written notice of the defect. (Administrative Code § 7-201[c][2]). When seeking summary judgment for lack of prior notice, City bears the burden of demonstrating a lack of prior written notice. (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Defendants' contention that City lacked prior written notice is conclusory and unsupported by evidence from one with personal knowledge and is thus is an insufficient basis for dismissing plaintiffs' negligence claim. (*See Bosi v Louzoun*, 134 AD3d 660, 661–62 [2d Dept 2015] [to demonstrate its *prima facie* entitlement to judgment as a matter of law, City

"must submit evidence, such as an affidavit or deposition testimony, that it did not receive any such notice"]).

2. ZHL

It is undisputed that in contrast to City, ZHL owes no direct duty to plaintiff to maintain the roadway. Thus, as a contractor that has entered into a contract to render services, ZHL may only be held to have assumed a duty of care to plaintiffs, nonparties to the contract, where, as pertinent here, "in failing to exercise reasonable care in the performance of [its] duties," it "launches a force or instrument of harm." (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]).

As ZHL did not install or remove the cage, plaintiffs premise its liability solely on its alleged failure to inspect and remedy the hole in the roadway. A negligent inspection or failure to inspect is not equivalent to "launching a force or instrument of harm," as such conduct does not "create or exacerbate an unsafe condition." (*Medinas v MILT Holdings LLC*, 131 AD3d 121, 126 [1st Dept 2015]). As plaintiffs offer no evidence in opposition that ZHL affirmatively created or exacerbated the condition in the roadway, ZHL may not be held liable to plaintiffs for common-law negligence.

B. GML § 205-a

Pursuant to GML § 205-a, firefighters have a private right of action for injuries occurring:

> directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus [...].

In order to demonstrate entitlement to a dismissal, "the defendant bears the initial burden of showing either that it did not negligently violate any relevant government provision, or, if it

did, that the violation did not directly or indirectly cause the plaintiff's injuries." (*Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359 [1st Dept 2006], *lv denied* 7 NY3d 706 [2006]).

Defendants address neither section 205-a nor the statutes and regulations on which plaintiffs rely as predicate violations. Rather, they argue solely that City lacked prior written notice of the hole and that UCC was responsible for creating it. Whether City lacked prior written notice is immaterial to a claim under section 205-a (*see Lustenring v 98-100 Realty, LLC*, 1 AD3d 574, 578 [2d Dept 2003], *lv dismissed and denied* 2 NY3d 791 [2004] [unnecessary for plaintiff to prove notice required under common-law theory]), and in any event, City fails to demonstrate a lack of prior written notice (*see supra* at III.A.1.).

While defendants' evidence reflects that UCC did not directly cause plaintiff's accident, the standard for proving liability under section 205-a is lesser than that required for proving liability for common-law negligence, as it permits a finding of liability even where a plaintiff's injury was the indirect result of a defendant's negligent failure to comply with a governmental provision. (*See Giuffrida v Citibank Corp.*, 100 NY2d 72, 80 [2003] [indirect cause is factor that plays part in producing result]). Thus, having failed to address the alleged violations of the Administrative Code and DOT's rules and regulations and whether those violations were at least an indirect cause of plaintiffs' injuries, defendants fail to meet their *prima facie* burden. As defendants fail to meet their *prima facie* burden, whether plaintiffs established that defendants violated any government provisions need not be addressed. (*See William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [movant's failure to meet *prima facie* burden requires denial of motion, regardless of sufficiency of opposition]).

C. Indemnification and contribution

1. Common law indemnification and contribution

"Common law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnification was free from negligence." (*Martins v Little 40 Worth Assoc., Inc.,* 72 AD3d 483, 484 [1st Dept 2010]). In contrast to common law indemnification, claims of contribution do not require a finding of negligence on the part of the proposed contributor. (*Doundoulakis v Town of Hempstead*, 42 NY2d 440, 451 [1977]). Rather, the "sole requirement is that the parties share responsibility for the same personal injury." (*Rook v 60 Key Ctr., Inc.*, 242 AD2d 872, 873 [4th Dept 1997]).

Here, UCC's evidence reflects that it patched and repaired the holes created by the cage a year before plaintiff's accident, as confirmed by ZHL's project manager who also saw no hazardous condition when inspecting the holes and opined that asphalt was the proper material for filling them and that plaintiff was injured was likely due to traffic and weather. (*See Lubell v Stonegate at Ardsley Home Owner's Assoc., Inc.,* 79 AD3d 1102 [2d Dept 2010] [defendant contractor entitled to summary judgment on claims for common law indemnification where there existed no triable issues of fact as to contractor's negligence]).

In opposition, defendants do not address their common-law claims against UCC, and thus fail to raise an issue of fact. **Plaintiffs' reliance** on the photographs to demonstrate that a hazard existed and that UCC was negligent is misplaced, as the photographs are mostly indecipherable, and to the extent that they are not, they are far from dispositive. Even if they accurately depict a hole, they raise no factual issue as to whether UCC completed its work negligently, given ZHL's admission that the hole was not present when it inspected UCC's work and that the hole likely

arose from weather and traffic conditions, not UCC's work.

2. Contractual indemnification

Pursuant to the contract between ZHL and UCC, UCC is required to indemnify ZHL for claims arising from its work. Although an issue of fact may exist as to whether the installation and removal of the cage is part of UCC's work under the contract, UCC demonstrated that its work was satisfactory, as confirmed by ZHL's project manager, and in opposition, neither ZHL nor plaintiffs raise an issue of fact as to whether plaintiffs' injuries arose from UCC's work. (*See supra* at III.C.1.).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that third-party defendant UCC Construction Inc.'s motion for summary judgment is granted, and the third-party action is severed and dismissed (motion sequence two); it is further

ORDERED, that defendants' motion for summary judgment is granted to the extent that plaintiffs' common-law negligence claim against defendant ZHL Group, Inc. is severed and dismissed, and otherwise denied (motion sequence three); and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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2/1/2021
DATE

BARBARA JAFFE, J.S.C.

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