# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

***Justice***

----------X

**INDEX NO.** 156081/2018

DONALD PARDEW,

**MOTION DATE** N/A, N/A

Plaintiff,

**MOTION SEQ. NO.** 002 003

- v -

MAYFLOWER DEVELOPMENT CORPORATION, RCR MANAGEMENT, LLC,ROCK GROUP NY CORP, PEGASUS CONSTRUCTION NY CORP, THE ROSENBLAT TRUSTS LLC,

**DECISION + ORDER ON MOTION**

Defendant.

----------X

ROCK GROUP NY CORP

Third-Party
Index No. 595794/2020

Plaintiff,

-against-

PEGASUS CONSTRUCTION NY CORP.

Defendant.

----------X

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, 76, 80, 81, 83, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 117, 118

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 78, 79, 82, 84, 87, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119

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

Motion Sequence Numbers 002 and 003 are consolidated for disposition.

The motion (MS002) by defendants Mayflower Development Corporation ("Mayflower"), RCR Management LLC ("RCR") and The Rosenblat Trusts LLC (Rosenblat) for summary judgment in favor of Rosenblat dismissing plaintiff's complaint, granting Mayflower and RCR summary judgment on their contractual indemnification claims against defendant Rock

Group NY Corp. ("Rock Group) and for common law indemnification against Rock Group is granted in part and denied in part. The motion (MS003) by Rock Group for summary judgment dismissing plaintiff's claims is denied.

**Background**

This action arises out of plaintiff's alleged trip and fall on the sidewalk. Plaintiff contends that he was hurt after trying to free his foot from a bolt attached to a scaffolding pole. Mayflower owned the building next to the scaffolding and Rock Group was hired to build the scaffolding although the scaffold was ultimately built by third-party defendant Pegasus.

Rosenblat moves for summary judgment on the ground that it has no relationship to the accident. It claims it did not own the property (Mayflower did and RCR managed the premises) and had no duty to plaintiff. Rosenblat argues that it was merely the owner of Mayflower.

Mayflower and RCR move for contractual indemnification on the ground that the contract between the parties required Rock Group to hold these defendants harmless for any claims that might arise out of the work performed by Rock Group. They insist that Rock Group was hired to install the sidewalk bridge and that is what caused plaintiff's accident.

With respect to common law indemnification, Mayflower, Rosenblat and RCR claim that they did not do any work on the sidewalk bridge and, therefore, Rock Group must indemnify them.

In opposition, Rock Group claims that its indemnification obligations have not been triggered because they are not liable for a trivial defect that allegedly caused plaintiff's injuries. Rock Group also claims that it did not have a duty to plaintiff. It insists that there was nothing wrong with the placement of the scaffolding and plaintiff caused his own injuries by deciding to thrust himself backwards after his foot got caught underneath a bolt.

Plaintiff also offers opposition. He claims that the motion should not be granted as to defendant Rosenblat because he did not have a chance to depose a witness from this entity. Although plaintiff acknowledges that he filed a note of issue, he asks (although does not move for such relief) that the note of issue be withdrawn.

**Rosenblat**

The Court grants the branch of the motion (MS002) with respect to the dismissal of the claims against Rosenblat. While plaintiff claims that he did not have a chance to depose a witness for Rosenblat, the fact is that he filed a note of issue in June 2020 (NYSCEF Doc. No. 37). Of course, the filing of the note of issue signifies that all discovery is completed and the case is ready for trial (although it appears plaintiff stated in the note of issue that discovery was not completed).

Instead of making a motion for an extension of time to file the note of issue, plaintiff waited until January 29, 2021 to make a request that the note of issue be stricken (although plaintiff did not cross-move for such relief). The Court recognizes that the case was previously assigned to another judge who imposes note of issue deadlines (this part does not). But if plaintiff actually wanted to take the deposition of Rosenblat, he would not have filed the note of issue and then waited until after Rosenblat moved for summary judgment to demand that a deposition was required. Plaintiff could have utilized numerous remedies in the CPLR, but he chose not to. He did not even bother to cross-move for relief in this motion.

**Plaintiff's Claims Against Rock Group**

Rock Group seeks summary judgment dismissing plaintiff's complaint. It argues that the metal bolt on which plaintiff's foot got stuck was 3/8 of an inch thick and projected 4 inches from the base of a pillar. Rock Group argues that plaintiff had walked by this scaffolding 2-3

times per week and did not trip over the scaffolding on any prior occasion. It concludes it was a trivial defect and that the bolt was not the proximate cause of the accident.

Plaintiff explains that that the time of the incident, the scaffolding was being disassembled. He testified that "One pedestrian crossed on my right, if I recall, and then another pedestrian, so I moved over to my right because it was dark, and I was trying to be a polite pedestrian, and the scaffolding had been, it seemed moved a little bit away from the building in the, in the process of being disassembled, so it was not straight ahead, it was more at a slight angle" (NYSCEF Doc. No. 58 at 26). Plaintiff continued that "So as I moved over and continued my—on the base, there are bolts that, that come out, which are not—which are about two or three inches from the ground. My foot went under one, uh, and I couldn't move my foot forward. I mean, this all happened very quickly. So I, so I tried to pull my – I tried to pull my—I tried to—I didn't know what was happening, so I tried to pull the foot up, uh, which really, uh caused me to sort of thrust the body back because the foot could not move, and at that point, the force of me trying to pull the foot up to get it loose from the thing caused me to, to fall back, and, uh, and I went down on my right side" (*id*. at 26-27).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). "Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*id.*). A court must examine "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 978).

"There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises . . . and even a trivial defect may constitute a snare or trap" (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166, 716 NYS2d 657 [1st Dept 2000] [internal citations omitted]). "While a gradual, shallow depression is generally regarded as trivial the presence of an edge which poses a tripping hazard renders the defect nontrivial" (*id.* [internal citations omitted]).

"A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). "The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*id.* at 80).

The Court denies the branch of Rock Group's motion for summary judgment on the ground that the alleged defect was trivial or that it was not the proximate cause of plaintiff's accident. It is undisputed that Rock Group was hired to erect scaffolding and that plaintiff claims his foot got caught in a bolt on the scaffolding. There is nothing on this record, such an expert's affidavit, to show that the alleged defect was so trivial as to merit dismissal of plaintiff's complaint. A jury must decide whether defendants were negligent and, specifically, whether the placement of the bolt was a significant enough defect upon which plaintiff can recover. Plaintiff's account raised an issue of fact by asserting that the defect was large enough for him to get his foot lodged in a bolt.

The Court also rejects Rock Group's claims to the extent it claims the bolt was not a proximate cause of plaintiff's injuries. It argues that the injury was caused by plaintiff's decision

to thrust himself out of the bolt and fall. This argument is meritless and plaintiff raised an issue of fact in opposition. What was plaintiff supposed to do—wait for the bolt to suddenly become loose? It is a natural reaction for someone who has his foot stuck to try and pry that body part free; that is what plaintiff testified he did. The resulting injuries suffered were caused by the bolt—the defect that trapped plaintiff's foot. It was not plaintiff's decision to purportedly throw himself on the ground for fun.

**Indemnification Claims**

The Court grants the branch of the motion (MS002) by Mayflower and RCR for contractual indemnification against RCR. "In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

The indemnification provision of the parties' contract clearly provides that Rock Group was to hold both parties harmless for any incidents arising out of their work. Rock Group's work involved the scaffolding, which (according to plaintiff) is what caused the accident. There is no basis under the facts presented on this motion to find that Mayflower or RCR had anything to do with the scaffolding—there is no evidence, for instance, that Mayflower or RCR employees did any work or maintenance on the scaffolding. In fact, emails between the parties show that Rock Group was supposed to remove the sidewalk shed a few days after the plaintiff's accident (NYSCEF Doc. No. 60).

As stated above, Rock Group's claim that the scaffolding was not a proximate cause of the accident is without merit. And while Rock Group focuses on the proposal for work (NYSCEF Doc. No. 50 at 2)-- that it claims required Mayflower and RCR to maintain the

scaffolding-- the fact is that the parties signed a separate hold harmless agreement (NYSCEF Doc. No. 50 at 10). That agreement evidences a specific intent for Rock Group to provide indemnification for an accident just like the one that allegedly occurred here. A vague assertion in the work proposal does not defeat a stand-alone "hold harmless" agreement where Rock Group was supposed to purchase insurance naming the landlord as an additional insured.

However, the Court declines to grant the branch of the motion (MS002) that seeks common law indemnification.

"Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). "[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia*, 259 AD2d at 65).

There has been no finding of negligence by Rock Group. It may be that the jury finds that plaintiff's injury was caused by a trivial defect and, therefore, that no defendant is liable.

Accordingly, it is hereby

ORDERED that the motion (MS002) by defendant Mayflower, Rosenblat and RCR for summary judgment is granted only to the extent that (1) the complaint and all cross-claims are dismissed against defendant Rosenblat Trusts, LLC, and (2) defendants Mayflower Development Corporation and RCR Management, LLC are entitled to contractual indemnification against

defendant Rock Group NY Corp. and (3) denied as to the remaining relief requested; and it is further

ORDERED that the motion (MS003) by defendant Rock Group NY Corp. for summary judgment is denied.

3/2/2021
DATE

ARLENE P. BLUTH, 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 |