Dowds v City of New York
2021 NY Slip Op 32734(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 157120/2020
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** — ***Justice***

PART **62**

--X

PAULA DOWDS,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,CONSOLIDATED EDISON, INC.,RESTANI CONSTRUCTION CORP., Citybridge, JLJ IV ENTERPRISES, INC.,FG-PH CORP., ERIN CONSTRUCTION & DEVELOPMENT CO., INC.,

Defendants.

--X

INDEX NO. 157120/2020

MOTION DATE 07/21/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

RESTANI CONSTRUCTION CORP.

Plaintiff,

-against-

PCI INDUSTRIES CORP.

Defendant.

--X

Third-Party
Index No. 596016/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 57, 58, 59, 60, 61, 62, 67

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

This is an action for personal injuries allegedly sustained by plaintiff Paula Dowds on June 7, 2019, as a result of an alleged trip and fall in the crosswalk of 7th Avenue at the northern intersection of West 140th Street, New York, New York.

Pending before the court is a motion filed by defendant Citybridge ("Citybridge") seeking an order: (1) pursuant to CPLR 3212(b) granting Citybridge summary judgment, dismissing plaintiff's Complaint on the grounds that there are no genuine issues of material fact to be

determined at trial with regard to Citybridge's liability for plaintiff's alleged accident; and (2) pursuant to CPLR 3212(b) granting summary judgment and dismissal of all cross-claims for contribution, contractual indemnification, common law indemnification, and/or breach of contract asserted against Citybridge on the grounds that there are no genuine issues of material fact to be determined at trial. Upon the foregoing documents, this motion is DENIED as premature.

Standard for Summary Judgment

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 [Sup. Ct. App. Div. 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 [Sup. Ct. App. Div. 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]).

The proponent of a summary judgment motion 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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must 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 v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Procedural Objections

Citybridge objects to the opposition filings (discussed further below) made by plaintiff and by defendant/third-party plaintiff RESTANI CONSTRUCTION CORP. ("Restani"), on procedural grounds. Citybridge argues, correctly, that Uniform Rule Section 202.8-g was recently enacted and sets forth new requirements for motions for summary judgment and papers submitted in opposition thereto. Specifically, Uniform Rule Section 202.8-g requires movants to set forth a short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary

judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. The Rule also provides that, "each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party."

Citybridge argues, correctly, that absent from plaintiff's and from Restani's opposition papers is any counter-statement of facts disputing any of the facts set forth by Citybridge in its motion for summary judgment. Citybridge argues that due to these failures, all of the facts proffered by Citybridge in its Uniform Rule Section 202.8-g Statement are now deemed undisputed.

This court recognizes that the opposition filings each fail to include the proper Counter-Statement of Facts as required by Uniform Rule Section 202.8-g. However, the Appellate Division, First Department has repeatedly held:

> [t]hat it is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible and for that purpose a liberal policy is adopted with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues . . ..

38 Holding Corp. v. New York, 179 A.D.2d 486 (App. Div. 1st Dept. 1992); *See also* Gluck v. McDonough, 139 A.D.3d 628 (2016) (referencing that "strong public policy favors resolving cases on the merits") and Acosta v. Riverdale Dev., LLC, 72 A.D.3d 525 (2010) ("Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits").

In addition, CPLR 2001 (Mistakes, omissions, defects and irregularities) provides:

> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced [...]

Further, the N.Y. Ct. Rules, § 202.1 (Application of Part; Waiver; Additional Rules; Application of CPLR; Definitions) provides:

> (b) Waiver. For good cause shown, and in the interests of justice, the court in an action or proceeding may waive compliance with any of these rules other than sections 202.2 and 202.3 unless prohibited from doing so by statute or by a rule of the Chief Judge.

As noted above, CPLR 2001 and Part 202.1(b) of the Uniform Rules gives the court discretion to overlook procedural defects. Further, 22 NYCRR 202.8-g(a) does not require that the motion be denied or marked off. *See also* Abreu v Barkin and Assoc. Realty, Inc., 69 AD3d 420 (Sup. Ct. App. Div. 1st Dept 2010) ("We reject defendants' argument that plaintiff's failure to provide a fully supported counterstatement of disputed facts in opposition to defendants' motion for summary judgment, in accordance with Rule 19–a of the Commercial Division of the Supreme Court (22 NYCRR 202.70), required the court to deem defendants' statement of material facts admitted. While the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so. There was sufficient evidence in the record to raise triable issues of fact and the court was not compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19–a"). This court, in the exercise of its discretion, declines to deem Citybridge's statement of facts as admitted. Instead, the court now decides the motion on the merits.

Instant Filings

In its motion, Citybridge argues that: (1) Citybridge did not perform any work in the crosswalk of 7th Avenue at the northern intersection of West 140th Street, New York, New York, where the accident is alleged to have occurred; (2) Citybridge did not owe a duty to plaintiff to maintain the streets or crosswalks, including the crosswalk involved in the alleged incident, as it did not own, occupy, control or maintain such walkway; (3) Citybridge did not cause or create the alleged dangerous condition, and it did not make a special use of or derive a special benefit from the pedestrian walkway; (4) Citybridge did not have notice of the alleged dangerous condition; and (5) Citybridge did not undertake any duty to defend or indemnify any other entity or party in this action.

Citybridge also argues that a company called "Triumph," which is not a party in this action, was employed by Citybridge as an "independent contractor." Citybridge argues that to the extent that Triumph performed at or near the accident site, Citybridge would not be liable because of Triumph's status as an independent contractor. Specifically, Citybridge argues:

> Here, even if Triumph did in fact cause or create the alleged defective condition, which it did not, Citybridge would not, and could not be held liable for Triumph's purported negligent acts. Nevertheless, any argument that Triumph caused or created the alleged condition would be based on nothing more than sheer speculation as no evidence has been proffered showing any nexus between the worked performed on behalf of Citybridge and the condition plaintiff claims caused her accident.

Finally, Citybridge argues that even though depositions have not yet been held, this motion is not premature because no further discovery would uncover facts which would impute liability upon Citybridge.

In support of their arguments, Citybridge submits the Affidavit of Michael Zigrossi (NYSCEF Document #69), which states, in relevant part:

> 5. Citybridge entered into a public communications structures Franchise Agreement with THE CITY OF NEW YORK for installation, operation and maintenance of LinkNYC kiosks. Annexed hereto as Exhibit "A" is a true and accurate copy of the aforementioned Franchise Agreement, which is kept by Citybridge in the regular course of business.
>
> 6. Citybridge entered into a subcontract with TRIUMPH CONSTRUCTION, CORP., (hereinafter "TRIUMPH") on December 11, 2015, whereby TRIUMPH agreed to furnish all labor materials, tools, equipment and all other things necessary to install LinkNYC kiosks. On April 15, 2018, the aforementioned subcontract was renewed. Annexed hereto as Exhibit "B" is a true and accurate copy of the aforementioned subcontract along with the renewal agreement, both of which are kept by Citybridge in the regular course of business.
>
> […]
>
> 9. On July 10, 2017, TRIUMPH began the work associated with the removal of telephone booth (PPT-137385_137415) on the public sidewalk abutting 2401 Adam Clayton Powell Jr., Boulevard, New York, New York, which is located on the northeast corner of 7th Avenue and W. 140th Street.
>
> 10. After telephone booth (PPT-137385_137415) was removed, the public sidewalk was excavated by TRIUMPH to prepare for the installation of LinkNYC kiosk mn-10-137385. TRIUMPH then restored the sidewalk to grade.
>
> 11. In order to power LinkNYC kiosk mn-10-137385, TRIUMPH performed trenching work in the roadway to a manhole located at the intersection of 7th Avenue and W. 140th Street. Once the conduit was installed, the roadway was restored back to grade by TRIUMPH.
>
> […]
>
> 13. On July 19, 2017, TRIUMPH installed LinkNYC kiosk mn-10-137385 on the public sidewalk in the exact location where telephone booth (PPT-137385_137415) had been removed.
>
> […]
>
> 15. On September 12, 2017, LinkNYC kiosk mn-10-137385 was fully activated.
>
> 16. Citybridge did not own, occupy, control, manage, inspect, repair, construct, make a special use of, or derive a special benefit from the crosswalk of 7th Avenue at the northern intersection of W. 140th Street, New York, New York.

> 17. Citybridge did not perform any work whatsoever relative to the removal of telephone booth (PPT-137385_137415) and the installation and connection of LinkNYC kiosk mn-10-137385 on the public sidewalk abutting 2401 Adam Clayton Powell Jr., Boulevard, New York, New York.
>
> 18. All of the work associated with the removal of telephone booth (PPT137385_137415) and the installation and connection of LinkNYC kiosk mn-10-137385 on the public sidewalk abutting 2401 Adam Clayton Powell Jr., Boulevard, New York, New York, was performed by TRIUMPH. No physical work was performed by Citybridge at any point in time.

In opposition, plaintiff argues, first, that with respect to the affidavit, Mr. Zigrossi is not a Citybridge employee, but he is an employee of a parent company of Citybridge. Plaintiff argues that Mr. Zigrossi appears to have derived all of his knowledge from a review of documents and records, but he does not state that he has personal knowledge of the work performed in relation to the LinkNYC kiosk mn-10-137385. His affidavit is not based on his personal observation and knowledge of the same.

Plaintiff also argues that this motion is premature, as no depositions have been held. Plaintiff argues that per the Affidavit, Citybridge admitted that "In order to power LinkNYC kiosk mn-10-137385, TRIUMPH performed trenching work in the roadway to a manhole located at the intersection of 7th Avenue and West 140th Street." Plaintiff argues that this is "almost the exact location of plaintiff's fall," and hence Citybridge has not met its burden for summary judgment. Plaintiff further argues that to the extent that the trenching work was performed by non-party Triumph, plaintiff should be entitled to conduct depositions into the nature of the relationship between Triumph and Citybridge, and the issue of whether Citybridge exercised control over Triumph's work.

Restani also filed papers in partial opposition, with respect to Citybridge's request to dismiss all cross-claims against Citybridge. Restani argues that its Answer, dated September 21, 2020, included cross-claims against Citybridge for indemnification and contribution. Restani

argues that Restani recently commenced a third-party action against PCI INDUSTRIES CORP, who has not yet answered. Restani argues that even if the court were to grant Citybridge summary judgment with respect to plaintiff's claims, the court should nevertheless preserve the cross-claims against Citybridge, as "it is simply too early in the litigation for RESTANI to agree to a dismissal of such cross-claims at this early juncture."

Analysis and Conclusions

Here, the complaint describes the accident location as being, "on the roadway of 7th Avenue within the crosswalk at the northern intersection of West 140th Street, County, City and State of New York. More specifically, approximately 2 feet 7 inches in the northern direction from the northern curb of West 140th Street" (the "accident location"). The Affidavit of Mr. Zigrossi states that Triumph conducted work associated with the removal of a telephone booth "on the public sidewalk abutting 2401 Adam Clayton Powell Jr., Boulevard, New York, New York, which is located on the northeast corner of 7th Avenue and West 140th Street," and that "Triumph performed trenching work in the roadway to a manhole located at the intersection of 7th Avenue and W. 140th Street" (the "work locations"). On the surface, it appears that the accident location and work location are in the same place, or are close enough to each other so that work at the work location may have impacted the accident location.

With respect to Citybridge's argument that Triumph was an independent contractor and therefore Citybridge should not be held liable for Triumph's work, the New York Court of Appeals had stated, in Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (N.Y. Ct. of Appeals 2002):

> […] in Palka [Palka v. Servicemaster Mgmt. Servs. Corp., 83 N.Y.2d 579 (1994)], we considered whether a maintenance company under contract to provide preventive maintenance services to a hospital assumed a duty of care to the plaintiff, a nurse who was injured when a wall-mounted fan fell on her as she was tending to a patient. The contract between the parties was "comprehensive and exclusive" […] and required the maintenance company to inspect, repair and maintain the facilities, and to train and supervise all support service personnel. The company's obligation to the hospital was so broad that it entirely displaced the hospital in carrying out maintenance duties and became "the sole privatized provider for a safe and clean hospital premises" […]. Because the company's contractual obligation was comprehensive, we found this to be another instance in which a contracting provider owed a duty to "noncontracting individuals reasonably within the zone and contemplation of the intended safety services," including the plaintiff (id.).
>
> [In contrast, in the current case here,] by the express terms of the contract, Melville was obligated to plow only when the snow accumulation had ended and exceeded three inches. This contractual undertaking is not the type of "comprehensive and exclusive" property maintenance obligation contemplated by Palka. Melville did not entirely absorb Miltope's duty as a landowner to maintain the premises safely […]. Indeed, the contract stated that "[i]t is the responsibility of the property manager or owner to decide whether an icy condition warrants application(s) of salt-sand by Melville. Owner must inspect property within 12 hours of work. Any defect in performance must be communicated immediately." Although Melville undertook to provide snow removal services under specific circumstances, Miltope at all times retained its landowner's duty to inspect and safely maintain the premises. Melville was under no obligation to monitor the weather to see if melting and refreezing would create an icy condition.

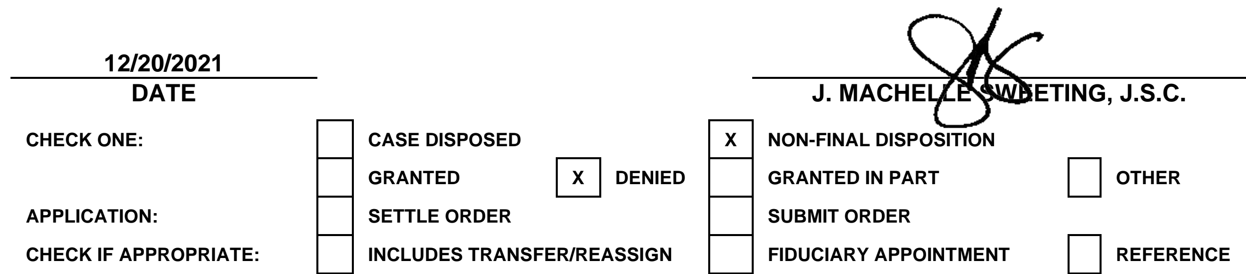
The Affidavit of Mr. Zigrossi states that Triumph was a subcontractor, but does not provide further details as to the relationship between Citybridge and Triumph. Further, although Citybridge provided a copy of the subcontract between Triumph and Citybridge, it is unclear on this record whether Triumph's scope of work was comprehensive and exclusive enough to absolve Citybridge of any responsibility. Plaintiff should have the opportunity to explore these issues through depositions, including whether Triumph performed work at the accident site, and the nature of the relationship that existed between Citybridge and Triumph.

Accordingly, it is hereby:

ORDERED that this motion is DENIED as premature; and it is further

ORDERED that Citybridge is given leave of court to re-file for summary judgment, at their election, after relevant discovery has been conducted.

This is the Decision and Order of this court.



12/20/2021
DATE

J. MACHELLE SWEETING, J.S.C.

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