

Dowds v City of New York

2022 NY Slip Op 31805(U)

June 6, 2022

Supreme Court, New York County

Docket Number: Index No. 157120/2020

Judge: J. Mabelle Sweeting

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

PAULA DOWDS,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., CONSOLIDATED
EDISON, INC., RESTANI CONSTRUCTION CORP.,
CITYBRIDGE, LLC, JLJ IV ENTERPRISES, INC., FG-PH
CORP., ERIN CONSTRUCTION & DEVELOPMENT CO.,
INC., PCI INDUSTRIES CORP., and TRIUMPH
CONSTRUCTION CORP.,

Defendants.

-----X

RESTANI CONSTRUCTION CORP.

Plaintiff,

-against-

PCI INDUSTRIES CORP.

Defendant.

-----X

CITYBRIDGE, LLC

Plaintiff,

-against-

TRIUMPH CONSTRUCTION CORP.

Defendant.

-----X

INDEX NO. 157120/2020

MOTION DATE 01/24/2022,
04/21/2022

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596016/2021

Second Third-Party
Index No. 596016/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 105, 106, 107, 108, 116, 117, 118, 119, 150, 151, 152, 153

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 148, 149, 154, 155, 156

were read on this motion to/for

DISMISS

In the underlying action, plaintiff Paula Dowds alleges that she sustained personal injuries on June 7, 2019 as a result of an alleged trip and fall in the crosswalk of 7th Avenue at the northern intersection of W. 140th Street, New York, New York.

Plaintiff commenced this action against The City of New York (the “City”), Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. (collectively, “Con Ed”), Restani Construction Corp. (“Restani”), Citybridge LLC (“Citybridge”), JLJ IV Enterprises, Inc. (“JLJ”), Erin Construction & Development Co., Inc. (“Erin”), PCI Industries Corp. (“PCI”), Triumph Construction Corp. (“Triumph”), and FG-PH Corp. (“FG-PH”).

On May 18, 2021, this action was discontinued as against FG-PH pursuant to a stipulation on consent (NYSCEF Document #31).

On or about November 10, 2021, Restani filed a third-party complaint against PCI.

On December 21, 2021, the undersigned issued a Decision and Order on Motion (NYSCEF Document #70) that, *inter alia*, denied a motion made by Citybridge, seeking summary judgment, on the basis that such motion was premature.

On or about March 15, 2022, Citybridge filed a second third-party complaint against Triumph.

Now pending before the court are two motions:

The first is Motion #003, filed by JLJ, seeking an order: (a) pursuant to CPLR 3212(b), granting JLJ summary judgment and dismissing plaintiff’s complaint on the grounds that there are no genuine issues of material fact to be determined at trial with regard to JLJ’s liability for

plaintiff's alleged accident; and (b) 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 JLJ on the grounds that there are no genuine issues of material fact to be determined at trial.

The second is Motion #004, filed by Erin, seeking an order: (a) pursuant to CPLR 3211(a)(1), dismissing plaintiff's complaint as asserted against Erin, in its entirety and with prejudice, on the basis of documentary evidence; and (b) upon dismissal, directing the entry of judgment against plaintiff in favor of Erin and amending the caption to delete Erin as a named party hereto; and (c) for such other and further relief as this court deems just, proper, and equitable, including costs.

JLJ's Motion for Summary Judgment (Motion #003)

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]).

In JLJ’s motion, JLJ argues that: (1) JLJ did not perform any work where plaintiff’s accident allegedly occurred; (2) JLJ did not owe a duty to plaintiff; (3) JLJ neither caused/created the alleged dangerous condition nor derived a special use or benefit from the crosswalk; (4) JLJ did not have notice of the alleged dangerous condition, and (5) JLJ is not under any obligation to defend or indemnify any entity or party in this action.

In support of its arguments, JLJ attaches the sworn Affidavits of James Juliano (NYSCEF Document #89) and Darryl Issac (NYSCEF Document #90). Mr. Juliano is the President of JLJ IV Enterprises and has continuously served in this position since September 2001. According to Mr. Juliano:

10. In connection with the subject project, JLJ IV commenced work in the Summer of 2014 and finished work in the late-Summer /early-Fall of 2015, approximately four years prior to plaintiff's alleged fall on a recent street cut.

11. Despite being issued the DOT permit, *JLJ IV did not perform any type of Construction work at the subject location.*

12. It is JLJ IV's custom and practice to obtain or "pull" permits for adjacent New York City blocks near an active work location in the event work needs to be performed outside such a location. This is done so JLJ IV's work will not be held up or prolonged on the account of pulling of additional permits.

13. At all times relevant herein, including the date of plaintiff's alleged accident - June 7, 2019, JLJ IV (i) never hired and/or retained any entity, company and/or contractor to perform any construction, maintenance, renovation, excavation, installation and/or repair work at the subject location in any capacity (ii) was never retained as a general contractor, engineer, construction manager, consultant or subcontractor for any projects at the subject location, and (iii) never performed any type of work at the subject location at any time prior to, or subsequent to, the date of plaintiff's alleged accident.

14. A complete search of all contracts, agreements, subcontracts, job work orders, internal documents and invoices maintained by our office revealed no documents or records indicating that JLJ IV performed work at the subject location at any time prior to, or subsequent to, the date of plaintiff's alleged accident.

15. JLJ IV has never owned, occupied, maintained, controlled or derived a special use of the subject location.

Mr. Issac is a Supervisor, who has been employed by JLJ IV for the past 15 years. In his affidavit, he averred that:

11. *JLJ IV did not perform any type of construction work at the subject location, specifically on the roadway of 7th Avenue within the crosswalk at the northern intersection of W. 140th Street. Further, I never instructed any JLJ IV personnel to perform work at the subject location.*

13. At all times relevant herein, including the date of plaintiff's alleged accident - June 7, 2019, JLJ IV: (i) never hired and/or retained any entity, company and/or contractor to

perform any construction, maintenance, renovation, excavation, installation and/or repair work at the subject location in any capacity (ii) was never retained as a general contractor, engineer, construction manager, consultant or subcontractor for any projects at the subject location, and (iii) never performed any type of work at the subject location at any time prior to, or subsequent to, the date of plaintiff's alleged accident.

14. I also reviewed the photograph provided by Plaintiffs counsel (marked as Exhibit "A" at plaintiff's Examination Under Oath held on November 15, 2019) depicting the subject location. After reviewing the photograph, I can confirm with absolute certainty that JLJ IV did not perform any work at the subject location.

15. Further, I visited the subject location on Saturday, March 27, 2021. My visit further confirmed my knowledge that JLJ IV did not perform any work at this location.

Plaintiff and Restani both filed papers in opposition, arguing that this motion is premature. Restani argues that the only documents served by JLJ in support of its motion are "self-serving affidavits," and that "the parties are entitled to put each other to their proof through discovery and depositions." Restani also argues that JLJ bases its motion on certain permits and contacts between JLJ and the City, and that the parties are entitled to depose witnesses about those documents. Plaintiff argues that the permit obtained by JLJ "covers the exact area of Plaintiff's fall," and that there has been no opportunity to conduct even one deposition. Plaintiff also notes that the undersigned had previously denied the summary judgment motion made by Citybridge on the basis that it was premature.

Here, plaintiff alleges that her accident occurred in the crosswalk of 7th Avenue at the northern intersection of W. 140th Street, New York New York, and the permit issued to JLJ by the NYC Department of Transportation, (NYSCEF Document #88), is specifically "TO OPEN THE ROADWAY AND/OR SIDEWALK AT: 7 AVENUE FROM WEST 140 STREET TO WEST 141 STREET." On its face, the permit appears to encompass the area where plaintiff had her accident.

Further, there is no dispute that depositions, including that of the plaintiff, have not yet been held in this action. JLJ argues that, “there are no documents to produce as JLJ IV does not have any documents and/or materials in their possession reflecting that JLJ IV ever performed work within the crosswalk where plaintiff’s alleged accident occurred.” However, even if JLJ is not in possession of any further relevant documentary evidence, the parties are still entitled to explore JLJ’s assertion that despite being in possession of the DOT permit, JLJ did not actually perform any type of construction work at the subject location.

Accordingly, JLJ’s motion for summary judgment is denied on the basis that it is premature.

Erin’s Motion to Dismiss (Motion #004)

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

In its motion, Erin argues that it neither owed nor breached a duty to plaintiff, as plaintiff fell within a crosswalk that was neither owned, occupied, maintained, controlled nor utilized by Erin. In support of its argument, Erin submitted the sworn Affidavit of John Murnane, the Chief Executive Officer of Erin, (NYSCEF Document #140), which states, in part:

4. Based upon the allegations set forth in her Verified Complaint, I am aware that Plaintiff alleges she was injured, on or about June 7, 2019, when she was caused to trip and fall by a defective condition, described as a street cut, on the roadway of 7th Avenue within the crosswalk at the northern intersection of W. 14002 Street, New York, NY.

5. This Affidavit is submitted in support of the request for discontinuation of the Complaint, with prejudice, as to Defendant, ERIN CONSTRUCTION & DEVELOPMENT CO., INC., as Erin Construction never performed any work in the

roadway/crosswalk at issue in this litigation, or otherwise had any involvement with any work that was being performed at the alleged location.

6. I hereby attest and affirm that, at all times relevant herein, including June 7, 2019, Erin Construction did not enter into any contract and/or agreement with any other party to perform work of any kind in the roadway/cross walk located at or about the northern intersection of 7th Avenue and W. 140th street, New York, NY.

7. I hereby attest and affirm that, at all times relevant herein, including June 7, 2019, Erin Construction never performed any construction or maintenance work, or otherwise caused any construction or maintenance work to be performed on its behalf, in the roadway/cross walk located at or about the northern intersection of 7th Avenue and W. 140th Street, New York, NY.

Erin also attached a “STIPULATION OF DISCONTINUANCE AS AGAINST DEFENDANT, ERIN CONSTRUCTION & DEVELOPMENT CO., INC.” (NYSCEF Document #141) which provided that this action was “discontinued with prejudice as against Defendant, ERIN CONSTRUCTION & DEVELOPMENT CO., INC., only, without costs to either party as against the other and inclusive of all claims and cross-claims.” This stipulation was executed by plaintiff and by Erin, but was not executed by any of the other parties.

The only parties who filed responses to this motion were plaintiff and Restani.

Plaintiff filed an “Affirmation in Partial Opposition to Defendant Erin Construction & Development Co.’s Motion to Dismiss,” (NYSCEF Document #154), in which plaintiff argued that in the instant motion, Erin seeks “such other and further relief as this Court deems just, proper, and equitable, *including costs* [emphasis added].” Plaintiff argues that per the Stipulation of Discontinuance executed by plaintiff and by Erin, Erin had consented to this action being discontinued without costs. Therefore, plaintiff states, she has no objection to this action being discontinued against Erin, provided it is discontinued without costs.

Restani had previously filed an Answer (NYSCEF Document #149) that included cross-claims as against Erin for indemnification and contribution. With respect to the instant motion,

Restani filed an “AFFIRMATION IN PARTIAL OPPOSITION TO DEFENDANT ERIN CONSTRUCTION & DEVELOPMENT CO., INC.’S MOTION FOR SUMMARY JUDGMENT” (NYSCEF Document #148) in which Restani states that it takes no position with respect to Erin’s application as to the plaintiff’s causes of action against it, but Restani opposes the dismissal of Restani’s cross-claims against Erin, as “it is simply too early in the litigation for RESTANI to agree to a dismissal of such cross-claims at this early juncture.”

In Reply, Erin argues that Restani failed to provide any admissible evidence as to why their cross-claims should not be dismissed. Erin further argues that in Restani’s Response (NYSCEF Document #65) to Erin’s Notice to Admit (NYSCEF Document #63), Restani admitted that it never entered into or performed any work and/or addressed repairs for Erin at the alleged accident location, and hence, there is no merit to Restani’s cross-claims against Erin for contribution, indemnification, or breach of contract.

Here, Erin has asserted that the crosswalk within which plaintiff fell was not owned, occupied, maintained, controlled or utilized by Erin, and no party has disputed these assertions. Similarly, no party has argued that Erin’s motion is premature and that further discovery is required to ascertain Erin’s liability, if any. Further, Restani’s Response to Erin’s Notice to Admit includes the following:

2. You never entered into a contract and/or agreement with ERIN CONSTRUCTION & DEVELOPMENT CO., INC. to perform work and/or addressed repairs on the roadway of 7th Avenue, within the crosswalk at the northern intersection of W. 140th Street, in the County, City, and State of New York.

Response: Admits each and every allegation contained in paragraph “2” of the Notice to Admit to all Defendants.

3. You never performed work and/or addressed repairs for ERIN CONSTRUCTION & DEVELOPMENT CO., INC. on the roadway of 7th Avenue, within the crosswalk at the northern intersection of W. 140th Street, in the County, City, and State of New York.

Response: Admits each and every allegation contained in paragraph “3” of the Notice to Admit to all Defendants.

Given the above, the court GRANTS Erin’s motion to dismiss the complaint and the cross-claims against it.

For the reasons stated, above, it is hereby:

ORDERED that JLJ’s motion seeking summary judgment and dismissal of plaintiff’s complaint and all cross-claims asserted against JLJ is DENIED as premature; and JLJ is granted leave of court to re-file this motion upon completion of relevant discovery; and it is further

ORDERED that Erin’s motion seeking dismissal of plaintiff’s complaint and all cross-claims against Erin is GRANTED; and it is further

ORDERED that Restani is granted leave of court to timely file, at its election, a third-party complaint as against Erin.

6/6/2022
DATE


J. MACHILLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE