

Gordon v Uddin

2022 NY Slip Op 32045(U)

July 1, 2022

Supreme Court, New York County

Docket Number: Index No. 155912/2015

Judge: Lisa S. Headley

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

PRESENT: HON. LISA HEADLEY **PART** **28M**

Justice

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JACK GORDON,

Plaintiff,

- v -

NAZIM UDDIN, NEAL TAXI SERVICE, INC., YORKSHIRE
TOWERS COMPANY, LP, SCHNEIDER AND SCHNEIDER,
INC., DF RESTORATION, INC., SKYLINE SCAFFOLDING,
INC., SKANSKA USA, INC., TRAYLOR BROS., INC.

Defendant.

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INDEX NO. 155912/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 191, 192, 193, 199, 200, 203, 204, 207, 214, 215, 216, 217, 218, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 242, 243, 244, 245, 332, 342

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 333, 334, 335, 336

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

Motion sequences 004 and 005 are decided as follows:

Defendants Skanska USA, Inc. (Skanska) and Traylor Bros., Inc. (Traylor) move for summary judgment dismissing the complaint and all cross claims brought against them (Mot. Seq. No. 004). Defendants Yorkshire Towers Company, LP (Yorkshire) and Schneider and Schneider, Inc. (Schneider) move for summary judgment dismissing the complaint and all cross claims brought against them (Mot. Seq. No. 005).

This is a personal injury action. The complaint alleges that on December 1, 2013, at approximately 7:15 pm, plaintiff Jack Gordon (plaintiff) was struck by a taxi operated by defendant Nazim Uddin (Uddin) and owned by defendant Neal Taxi Service, Inc. (Neal Taxi) while he entered a driveway area from a sidewalk outside of 305-315 East 86th Street, New York, New York (premises). The premises is owned by Yorkshire and managed by Schneider. At the time of the accident, defendant DF Restoration (DF) was performing restoration work on a façade of the premises, and defendant Skyline Scaffolding, Inc. (Skyline) was DF’s subcontractor hired to install a sidewalk shed along the sidewalk abutting the premises. There

was additional but unrelated construction work performed by Skanska and Traylor which involved the Second Avenue subway line.

Skyline moved for summary judgment dismissing the complaint and cross claims (Mot. Seq. No. 003). The court, by order dated November 26, 2021, granted the motion and Skyline has been dismissed from this action. Skanska and Traylor move for summary judgment and dismissal based on similar grounds as Skyline. They argue that the actions of Uddin and Neal Taxi, as Uddin's principal, constitute the proximate cause of the accident and plaintiff's resultant damages; that they provided appropriate safety measures that did not contribute to the accident; and that they owed no legal duty to plaintiff in their capacity as contractors involved in an MTA construction project.

Yorkshire and Schneider move for summary judgment dismissing the complaint and cross claims. They argue that the actions of Uddin and Neal Taxi constitute the proximate cause of the accident and plaintiff's resultant damages; that they did not contribute to the accident and did not create a dangerous or defective condition on the premises.

MOTION SEQUENCE NUMBER 004

Moving defendants Skanska and Traylor were joint venturers contracted to the MTA Capital Construction project at the 86th Street subway station which involved the reconstruction of the Second Avenue subway line. Among the evidence submitted with their motion for summary judgment is plaintiff's verified Bill of Particulars; a police accident report pertaining to the accident; the deposition testimony of plaintiff; of Lynn Schneider, representing Yorkshire and Schneider; of Ibraim Redza, representing Skyline; and of Adam Pramberger, representing Skanska; an affidavit from expert witness C. Bruce Gambardella; a copy of the MTA contract provisions; and photographs of the sidewalk shed and scaffolding at the premises during the construction.

The verified Bill of Particulars alleges that Skanska and Traylor's negligence consisted of permitting and/or causing stop signs and other traffic control signage or devices to be negligently affixed to the premises; and allowing and/or causing netting, mesh and other semi-opaque material to be affixed to the premises which obstructed the view of persons like plaintiff in a dangerous manner.

The Police accident report, dated December 1, 2013, provides that plaintiff was struck by the taxi operated by Uddin in front of the premises owned by Yorkshire located at 315 East 86th Street. The report attributes the causation of the accident to "Driver Inattention/ Distraction" and "Failure to Yield the Right of Way" by Uddin.

Plaintiff testified at his deposition that he was walking home from the supermarket approximately two blocks from his residence when he was struck by the taxi operated by Uddin. This occurred as plaintiff passed a Jersey barrier installed underneath the scaffolding at the driveway entrance of the premises. Plaintiff did not first stop at the Jersey barrier and look beyond the fencing installed on the barrier to see if there were any vehicles entering the driveway before the accident. He could not recall whether there was a yield sign, stop sign or mirrors attached to the scaffolding at the time of the accident which could have obstructed his view. After being shown photographs of the location of the accident taken days after the accident, plaintiff admitted that he did not recall whether there was a yield sign or mirrors at the time of the accident that could have obstructed his view.

Lynn Schneider testified as a partner of Yorkshire and president of Schneider. She identified the location of the premises. She stated that she was not familiar with the day to day

construction process, did not recall the scaffolding installed at the premises or the presence of netting, signs or mats attached to the scaffolding on the day of the accident.

Skyline's deposition testimony was provided by Redza, the principal and president of Skyline. He testified that his duties as principal and president included measuring prospective scaffolding jobs, pricing jobs and inspecting the scaffolding once it was installed. He stated that he is personally familiar with the sidewalk shed installed at the premises and that it was the result of being subcontracted by DF. Redza testified that he personally participated in the erection of the scaffolding, inspected the installation upon completion and confirmed that it conformed with the proposal and schematic drawings drafted and submitted to the New York City Department of Buildings. He testified that Skyline did not install the Jersey barriers, gates, mirrors stop and yield signs, mesh, netting or other items at or near the sidewalk shed.

Andrew Pramberger, field engineer for Skanska testified on behalf of Skanska. He asserted that Skanska installed the Jersey barriers located on the sidewalk bordering the entrance to the driveway. Skanska also installed 6-foot chain link fencing panes on top of the Jersey barriers, and maintained noise blankets attached to the fencing in accordance with contractual obligations related to the Construction Project.

Pramberger testified that Skanska's noise blankets were not attached to the sidewalk shed, but the chain link fence was attached to the shed via a tie wire. Skanska also installed various signage, including a stop sign and a yield sign, convex mirrors and crosswalk stripping at the entrance of the driveway. Skanska inspected and maintained the condition of signage and mirrors on a weekly or bi-weekly basis. Pramberger stated that there were records of the subject installations made by Skanska and Traylor.

Skanska and Traylor submit an affidavit from C. Bruce Gambardella, a consultant engineer. Gambardella asserts that he examined the evidence, documents and photographs pertaining to the events leading up to the accidents. He also used accident reconstruction techniques (3-D modeling) to identify the location of the accident. He concludes that, upon reviewing the relevant information, he finds that the moving defendants are not negligent in this action, that they properly installed the safety items pursuant to their contractual terms, that the installations did not obstruct plaintiff's vision prior to the accident, and that they actually minimized the risks to pedestrians like plaintiff. He also concludes that Uddin's activities as a driver, specifically his failure to notice and respond to the signage on display, was the proximate cause of the accident.

Skanska and Traylor argue that in addition to the evidence, they also had no duty of due care toward plaintiff, with whom they had no contractual relationship. They refer to the ruling in *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002) to affirm their legal position regarding liability, and further claim that they are not liable pursuant to the three exceptions to the *Espinal* rule. The exceptions are when the allegedly negligent party launched a force or instrument of harm against plaintiff; when plaintiff detrimentally relied upon the allegedly negligent party's continued performance of contractual duties; and when the allegedly negligent party entirely displaced the other party to the contract with respect to maintaining the premises. According to Skanska and Traylor, the lack of a duty would obviate a breach of a duty.

Skanska and Traylor contend that since they are not negligent and their conduct was not the proximate cause of the accident, they are not liable for the cross claims brought by the other defendants, which would be based on indemnification or contribution. Thus, all cross claims should be dismissed.

Opposition to this motion comes from Yorkshire and Schneider, Uddin and Neal Taxi and plaintiff. Yorkshire and Schneider offer partial opposition. They agree with the basic arguments made by Skanska and Traylor to justify the granting of their motion. However, in the event that this motion is not granted, Yorkshire and Schneider want to maintain their cross claims against these defendants. They contend that there would remain a possibility that Skanska and Traylor may have contributed to the accident and be liable to plaintiff. Thus, they argue that they could be entitled to their cross claims in indemnification and/or contribution in the event they are held liable.

Uddin and Neal Taxi oppose the motion because Skanska and Traylor failed to prove that they are not liable to plaintiff as a matter of law. They argue that plaintiff has alleged that the installations put up by them obscured his view prior to the accident, and said defendants failed to disprove plaintiff's statements.

Uddin has been precluded from testifying at trial or submitting an affidavit in regard to any motion practice due to his failure to appear at his court-ordered deposition.

Plaintiff opposes this motion on various grounds. First, plaintiff argues that the motion is deficient on its face pursuant to CPLR 2214 (a), lacking in specificity, regarding the relief it is seeking. Second, plaintiff argues that the evidence submitted fails to make out a basis for dismissal from this action. The affidavit from Gambardella is said to be speculative and inadequate, reliant upon an uncertified police accident report and unidentified photographs. Plaintiff submits his own expert affidavit, from a Frank Susino who claims to be knowledgeable in site safety management. Upon examining the premises and reviewing the evidence, he cites the installation of noise blankets by Skanska as proving the obstruction which affected the view of plaintiff prior to the accident. Susino points out that the noise blankets were extended to the edge of the scaffolding, which he deems an improper installation. He also refers to the mirrors installed there as not effective for pedestrians and a lack of a warning sign. His primary point is that the noise blankets were improperly installed and likely to have caused a visual obstruction.

Third, plaintiff contends that the *Espinal* argument raised by the moving parties is inadequate. Plaintiff argues that the MTA contract was not submitted as evidence, so that there is no indication as to whether a third-party like plaintiff was possibly affected by the terms of the agreement. Alternatively, plaintiff argues that Skanska and Traylor could be liable pursuant to an exception to the *Espinal* rule, that is, the force or instrument of harm exception. He avers that the noise blankets installed by the moving defendants constituted a force or instrument of harm launched against him.

In reply, Skanska and Traylor argue that plaintiff, in his deposition testimony, clearly failed to recall the source which obscured his vision. To them, all talk of a distraction is purely speculative and an attempt to create an issue of fact. They argue that their motion is not deficient on its face. They support the findings of Gambardella, who, unlike Susino, is an engineer and accident specialist. They argue that the photographs he examined were identifiable and known to all the parties, and the police report, though uncertified, was valid, in light of Uddin's preclusion from offering his testimony. They submit another affidavit from Gambardella, who responds to Susino's affidavit. In general, Gambardella asserts that Susino's conclusions lack a foundation. Accordingly, Susino failed to identify the convex mirrors at the premises, which was designed for both motorists and pedestrians, allowing viewing from different vantage points. Gambardella also contends that the noise blankets were properly installed. He affirms his conclusions that it was Uddin who ignored the signage that would have prevented the accident,

and that Skanska and Traylor did not contribute to the accident.

Skanska and Traylor argue that they have submitted relevant sections of the MTA contract as part of their evidence to prove they owe no legal duty to plaintiff. They deny that they launched an instrument of harm against plaintiff. According to them, the only instrument of harm was the taxi driven by Uddin.

In reply to the defendants, Skanska and Traylor argue that they have submitted sufficient evidence that they did not contribute to the accident and should be dismissed from this action. They argue that the opposing defendants have failed to raise an issue as to their liability to plaintiff. Therefore, they seek the dismissal of all cross claims in this action.

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues” (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). “The substantive law governing a case dictates what facts are Material, and ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted]’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). “To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]” (*Id.* at 82).

The major evidence submitted by Skanska and Traylor is the deposition testimony of plaintiff and Pramberger, and the expert affidavits from Gambardella and Susino. The Pramberger testimony confirms that Skanska was responsible for the installation of the Jersey barriers, noise blankets, various signage, convex mirrors and crosswalk stripping in accordance with contractual obligations with the MTA project. Provisions of the contract were submitted by these defendants to demonstrate their requirements. It is apparent that while this is a contract between MTA and the defendants, such provisions were made with the intent of providing safety to the public during the construction of a public transportation system. The most pertinent documents are the provisions concerning the maintenance and protection of traffic areas. These indicate an awareness that the public would benefit from safety measures. This is further expressed in the Meeting Minutes documents that demonstrate a regard for community considerations throughout the course of the construction.

Plaintiff testified that he was familiar with the premises when he was walking on the day of the accident. He passed a Jersey barrier installed underneath the scaffolding at the driveway entrance of the premises. He expressly stated that the scaffolding did not obstruct his view. However, he could not recall whether his view was obstructed by any sign or mirror. He did not mention the noise blankets. After being shown photographs of the area to refresh his memory, plaintiff was still unable to remember what obstructed his view before the accident.

Plaintiff failed to stop and check for traffic before entering the crosswalk. He was looking right and away from the signs that were present. Then, Uddin suddenly drove without slowing down and hit plaintiff.

The court finds that plaintiff’s failure to identify the installation which obscured his view undermines his case against Skanska and Traylor. Moreover, the evidence provided by the expert witnesses is based solely on speculation and conjecture as to how an installation could have contributed to the accident. Plaintiff has unsuccessfully attempted to create an issue of fact in an effort to preclude the granting of summary judgment. Skanska and Traylor noted that the

installations were set up weeks before the accident and claim not to have been aware of any complaints or incidents regarding the installations. In the absence of other evidence, plaintiff's claims of liability against these defendants are insufficient. The motion for summary judgment shall be granted.

MOTION SEQUENCE NUMBER 005

Yorkshire and Schneider move for summary judgment for dismissal. They argue that they are not liable to plaintiff because the premises under their control and possession was not in a defective or dangerous condition; that the actions of Uddin were the proximate cause of the accident and they did not contribute to his actions; and that they were not responsible for the installations on or near the premises at the time of the accident. They also argue that they had no notice of any dangerous or defective condition on the premises prior to the accident.

The moving defendants submit the same evidence that was submitted by Skanska and Traynor with their summary judgment motion. The deposition testimony from plaintiff, Pramberger, Schneider and Redza is emphasized as pertinent to their motion. Yorkshire and Schneider contend that plaintiff was unable to recall which installation obstructed his vision prior to the accident and was reduced to making inconsistent statements and speculations. The testimony of Redza and Pramberger confirm the fact that Skyline constructed the sidewalk shed which was along the sidewalk abutting the premises, and that Skanska installed the Jersey barriers, noise blankets, signage, mirrors and crosswalk stripping as part of its work on the Second Avenue subway line. Schneider, testifying on behalf of Yorkshire and Schneider, stated that she was not involved in the regular work performed by Skyline or Skanska, nor was she in regular communication with these parties during the course of their performances.

Yorkshire and Schneider also submit the police accident report, the expert affidavits of Gambardella and Susino, provisions of the MTA contract, and photographs of the premises. They contend that they did not create a condition which would have contributed to the accident. They specifically state that violation of sections 7-120 and 19-152 of the New York City Administrative Code does not apply to them because this is not a slip and fall case caused by a sidewalk defect. They argue that this vehicle accident is not related to a sidewalk defect.

Opposition to the motion comes from Skanska and Traylor and plaintiff. Skanska and Traylor argue that if their motion for summary judgment is denied, they are entitled to maintain their cross claims against the moving defendants. They also cross move to have Yorkshire and Schneider's cross claims against them dismissed as null and void as they are procedurally improper and lacking in merit.

Plaintiff argues that Yorkshire and Schneider have not shown themselves to be free from liability. Plaintiff contends that they had a special use of the driveway area, that they had a duty to examine the area, to keep the premises safe and to prevent improper installations which could have contributed to the accident. Plaintiff contends that based on the evidence, they had reason to have known of a potentially dangerous condition on the premises at the time of the accident.

In reply, Yorkshire and Schneider aver that their activities were not a proximate cause of the accident. While in their capacity as owner and manager of the premises, they acknowledge a duty to plaintiff, but they argue that they did not breach that duty.

The court finds that Yorkshire and Schneider are entitled to summary judgment. They have demonstrated that they did not cause the accident. Although Schneider testified that she did not regularly inspect the premises, Skyline and Skanska did inspect the area where they had installed their materials and were not aware of any safety problems. As noted earlier, plaintiff

testified that he was unable to remember which installation on the premises obstructed his view Plaintiff accuses the moving defendants of doing nothing to protect him from the collision from the driveway. However, even if the moving defendants “furnish[ed] the condition” of the driveway “or [gave] rise to the occasion” where plaintiff was injured, his injury was brought about by a “new independent efficient cause” (*see Gregware v City of New York*, 94 AD3d 470, 470 [1st Dept 2012]). From a review and examination of the evidence, it is clear that the accident was caused by Uddin, as the driver of the vehicle which struck plaintiff, rather than by the conditions in the driveway.

Accordingly, it is

ORDERED that defendants Skanska and Traylor’s motion for summary judgment (Mot. Seq. No. 004) is granted and the complaint and cross claims are dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendants Yorkshire and Schneider’s motion for summary judgment (Mot. Seq. No. 005) is granted and the complaint and cross claims are dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submissions of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further


ORDERED that this action shall continue; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nevertheless been considered; and it is further

ORDERED that within 30 days of entry, movants shall mail a copy of this decision/order upon plaintiff and co-defendants with notice of entry.

This constitutes the decision and order of the Court.

7/1/2022
DATE


LISA HEADLEY, 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"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
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