

Berg v City of New York
2022 NY Slip Op 32077(U)
July 5, 2022
Supreme Court, New York County
Docket Number: Index No. 153839/2018
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART

Justice

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MAURICE BERG,

Plaintiff,

- v -

CITY OF NEW YORK, CARLO LIZZA & SONS PAVING,
INC., TRIUMPH CONSTRUCTION CORP., JOHN P.
PICONE, INC., EMPIRE CITY SUBWAY COMPANY LTD.,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,

Defendants.

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INDEX NO. 153839/2018

MOTION DATE 02/08/2022

MOTION SEQ. NO. 007 & 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 237, 238

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 146, 147, 148, 149, 150, 151, 152, 153, 154, 200, 201, 202, 203, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 232, 233, 234, 235, 236

were read on this motion for SUMMARY JUDGMENT.

Plaintiff commenced this action to recover for injuries allegedly sustained on November 14, 2017, when he tripped and fell on raised, dark material on the pedestrian island in the northwest corner of East 23rd Street and First Avenue (NYSCEF Doc. Nos. 1 [Compl. at ¶¶5-6] and 116 [Bill of Particulars at ¶2]). Plaintiff’s complaint asserts negligence claims against, inter alia, the City of New York (the “City”) and John P. Picone, Inc. (“Picone”) (NYSCEF Doc. No. 1 [Compl. at ¶11]).

As pertinent here, the City interposed an Answer asserting cross-claims against, inter alia, Picone alleging that “[a]ny damages sustained by the plaintiff(s) were caused in whole or in part

by the acts or omissions of ... John P. Picone, Inc., who ... may be liable to [the City] for contribution on the basis of their equitable shares of responsibility, or for indemnity on the basis of a contract between them, actual or implied” (NYSCEF Doc. No. 35 [City Answer at ¶10]).

In motion sequence 007, the City moves for an order, pursuant to CPLR §3212, granting it summary judgment as to its cross-claims against Picone. In motion sequence 008, Picone moves, pursuant to CPLR §3212, for an order granting it summary judgment dismissing plaintiff’s complaint and all crossclaims as against it. These motions are consolidated for disposition.

The Court first addresses Picone’s motion for summary judgment dismissing this action. Picone argues that it is entitled to summary judgment because it did not perform any work at the pedestrian plaza where plaintiff tripped. In support of this contention, Picone submits the testimony of James Pellizzi, a supervisor for Picone, at his examination before trial (“EBT”). Pellizzi testified, in relevant part, as follows:

Q. Where specifically was the excavation, the entirety of the square or somewhere surrounding the square?

A. No. It was 19 feet off the curb heading north, nine by 13 was the trench.

Q. That would have been going from the corner of 23rd Street going north towards 24th?

A. Yes

Q. Would that have put us in the area of where that pedestrian plaza was?

A. No.

Q. Where was the pedestrian plaza if you had to put it on this specific sketch?

A. The pedestrian plaza was 20 feet or so south of our excavation.

...

Q. How close to this pedestrian plaza was the nearest work done by John P. Picone?

A. At least 20 to 25 feet north of that walkway.

(NYSCEF Doc. No. 123 [Pellizzi EBT at pp. 37-38, 79]). Pellizzi also denied that Picone put down the asphalt that plaintiff allegedly tripped on (Id. at pp. 81-83).

In opposition to Picone's motion, plaintiff and the City submit permits issued to Picone by the New York City Department of Transportation ("DOT") related to Picone's installation of water mains at the intersection of First Avenue and East 23rd Street as well as along First Avenue between East 23rd Street and East 24th Street (NYSCEF Doc. No. 225). These permits include maps of the subject intersection with overlaid diagrams outlining the location of the permitted work, which outlined areas include the subject pedestrian plaza where plaintiff allegedly fell (Id. at pp. 69-72]). The City also submits a Corrective Action Request ("CAR") issued to Picone by DOT in connection with one of these permits, M01-2017004-A06. This CAR notes that "temp cuts sunken 5 inches in driving lane and in pedestrian plaza at 1st Ave & East 23 Street" and that the asphalt at that location was "broken/cracked" (NYSCEF Doc. No. 202 [emphasis added]).

In reply, Picone argues that the existence of these permits, in and of itself, is not sufficient to establish an issue of fact as to whether Picone actually performed work at the subject pedestrian plaza. Picone also argues that the CAR does not create a question of fact because the issues outlined in the CAR were noted as corrected in an inspection on January 20, 2017 (NYSCEF Doc. No. 225 [DOT Records at pp. 98-102]), well before plaintiff's fall on November 14, 2017.

The Court concludes that an issue of fact exists as to whether Picone performed work at the subject pedestrian plaza, precluding summary judgment on Picone's motion. While Picone correctly notes that where a defendant establishes its prima facie entitlement to summary judgment through affidavits attesting that it did not perform work at the accident site, the existence of permits allowing defendant to perform work at that precise location do not raise a triable issue of fact (See e.g., Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016]). Here, however, plaintiff "has produced more evidence than a street opening permit, specifically the

corrective action report and the notice of corrective action, to raise an issue of fact” (Sabino v The City of New York, 2018 NY Slip Op 32359[U], 10 [Sup Ct, NY County 2018]).

Specifically, the CAR creates an issue of fact as to whether Picone performed work in the subject pedestrian plaza at some point, belying Pellizzi’s assertion that Picone did not do so. The fact that the issues outlined in the CAR may have been resolved ten months prior to the date of plaintiff’s accident is irrelevant to this analysis—the CAR is not being submitted to show that the defect at issue therein was what led to plaintiff’s injury but to raise issue of fact as to whether Picone did in fact perform work at the subject location (Id.). In light of the foregoing, Picone’s motion for summary judgment is denied and the Court turns to the City’s motion for summary judgment on its crossclaims against Picone.

That branch of the City’s motion for summary judgment on its cross-claims for contractual indemnification is denied. “The right to contractual indemnification depends upon the specific language of the contract” (Reisman v Bay Shore Union Free School Dist., 74 AD3d 772, 773 [2nd Dept 2010] [internal citations omitted]). The indemnity provision of the contract between the City and Picone provides:

To the fullest extent permitted by law, the Contractor shall defend, indemnify, and hold the City, its employees, and officials (the “Indemnitees”) harmless against any and all claims ... and costs and expenses of whatever kind (including but not limited to payment or reimbursement of attorneys' fees and disbursements) allegedly arising out of or in any way related to the operations of the Contractor and/or its Subcontractors in the performance of this Contract or from the Contractor's and/or its Subcontractors' failure to comply with any of the provisions of this Contract or of the Law ... The parties expressly agree that the indemnification obligation hereunder contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of Law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim (in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, by operation of Law, or otherwise)...

(NYSCEF Doc. No. 143 [Contract at §7.4] [emphasis added]),

The City argues that it has established that plaintiff's accident arose "out of or in any way related to the operations of" Picone based on the permits, the CAR and the pictures attached thereto (NYSCEF Doc. No 225 [DOT Records at pp. 98-102]). However, permits are not, in and of themselves, sufficient to establish Picone's liability (Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016] ["permits issued to defendant allowing it to pave a maximum of 100 feet of roadway do not raise an issue of fact as to whether it actually paved that amount or whether the work it performed encompassed the area of plaintiff's fall"]). Neither does the CAR establish that Picone created the subject condition, given the unresolved factual issue as to whether the defects outlined in the CAR were corrected well before plaintiff's accident. Therefore, as triable issues of fact as to whether plaintiff's injury arose or resulted from Picone's work, summary judgment on the City's motion for contractual indemnification is denied (See Freienstein v Mandarin Oriental New York Hotel, LLC, 44 Misc 3d 1220(A) [Sup Ct, NY County 2014]).

Finally, that branch of the City's motion for summary judgment on its cross-claim for common-law indemnification is also denied. To establish its entitlement to common-law indemnification, "a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (Naughton v. City of New York, 94 AD3d 1, 4 [1st Dept 2012] [internal citations omitted]). The City has not satisfied this standard, as it has not established that it has been held vicariously liable or that it was without negligence.

Accordingly, it is

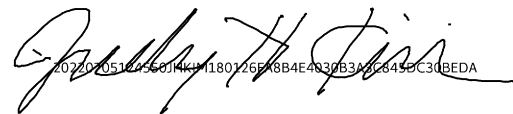
ORDERED that John P. Picone, Inc.’s motion for summary judgment dismissing plaintiff’s complaint against it is denied; and it is further

ORDERED that the motion by the City of New York for summary judgment on its cross-claims against John P. Picone, Inc. for contractual and common law indemnification is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E filing” page on this court’s website at the address www.nycourts.gov/suptctmanh).

This constitutes the decision and order of the Court.



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7/5/2022
DATE

CITY TRIAL READINESS PART, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: