

Pratts v City of New York
2022 NY Slip Op 32298(U)
July 14, 2022
Supreme Court, New York County
Docket Number: Index No. 153789/2014
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

Acting Justice

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INDEX NO. 153789/2014
YVIA PRATTS, MOTION DATE _____
Plaintiff, MOTION SEQ. NO. 011, 012, 013

- v -

THE CITY OF NEW YORK, NEW YORK CITY HEALTH
AND HOSPITALS CORPORATION, ARC ELECTRICAL &
MECHANICAL CONTRACTORS CORP., TDX
CONSTRUCTION CORPORATION, YORK SCAFFOLD
EQUIPMENT CORP, R.S.N. CONSTRUCTION CO., INC,
ROCKLEDGE SCAFFOLD CORP., K.E.S.
CONSTRUCTION CO., INC., ATLANTIC HOISTING &
SCAFFOLDING, LLC, and W&W GLASS, LLC

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 362-390, 428, 429, 436-438, 477-481, 499-501, 509, 523; (Motion 012) 391-425, 427, 430, 439-442, 502-508, 510, 516-522, 524, 525; (Motion 013) 443-470, 472-474, 482-498, 526-530

were read on these motions/ cross-motion for SUMMARY JUDGMENT and AMEND COMPLAINT.

Upon the foregoing documents, the motions and cross-motion are determined as follows:

On May 1, 2013, at approximately 9:45 am, Plaintiff allegedly tripped and fell over a support base for temporary cyclone fencing on the sidewalk outside Harlem Hospital Center's emergency entrance located at 70 West 137th Street, New York, New York. At that time, two construction projects were on-going. One was the construction of the new patient Pavilion that was at or near completion. Another was the construction of a pediatric emergency room within the Brown Pavilion that was adjacent to the new patient Pavilion.

The City of New York ("City") owns the sidewalk and hospital, and New York City Health and Hospitals Corporation ("HHC") operates Harlem Hospital Center. HHC contracted with non-party Dormitory Authority of the State of New York ("DASNY") to manage the design and construction of these projects at Harlem Hospital Center. DASNY contracted with TDX Construction Corporation ("TDX") to be the construction manager for both projects. DASNY engaged ARC Electrical & Mechanical Contractors Corp. ("ARC") as a contractor to perform various construction for the new patient Pavilion project only, including electrical work and sidewalk construction. All other captioned Defendants either successfully moved or entered stipulations dismissing the case against them.

Plaintiff commenced this action by filing complaint claiming negligence against the Defendants. City and HHC answered and pled crossclaims for contribution and contractual indemnification against the other Defendants. TDX answered and pled crossclaims for contribution and common law

indemnification against all other Defendants. TDX further pled crossclaims for contractual indemnification and breach of contract for failure to procure insurance against ARC only. ARC served an amended answer and asserted crossclaims for contribution, indemnification and breach of contract against all other Defendants.

ARC's motion for summary judgment dismissing Plaintiff's complaint and all crossclaims, made before depositions were held, was denied by order of Justice Frank P. Nervo dated May 22, 2015 (NYSCEF Doc N0 149). Justice Nervo held that the affidavits submitted in support and in opposition to the motion raised an issue of fact concerning whether ARC installed the fencing Plaintiff claims caused her to fall. ARC relied on an affidavit of George Kakleas ("Kakleas"), its former construction superintendent. Kakleas averred he was present at this project between 2010 and 2012 and stated ARC subcontracted with Recine Materials Corp. ("Recine") to perform the sidewalk work. He further stated that the sidewalk work was completed in 2011, that ARC completed its work before 2013, and ARC did not erect the temporary fencing. In opposition, TDX attached the affidavit of James Morley ("Morley"), TDX's Project Superintendent, who averred that ARC was the only contractor that furnished and erected temporary cyclone fencing at the jobsite and that ARC provided the fencing that Plaintiff claims caused her accident.

Now, ARC moves (Motion Sequence No 11) to renew its prior motion for summary judgment relying on the deposition testimony of the parties that was not available when ARC made its original motion. TDX moves (Motion Sequence No 12) moves for summary judgment dismissing Plaintiff's complaint and all crossclaims. TDX also moves for summary judgment on its claims for contractual indemnification and for breach of contract for failure to procure insurance against ARC. City and HHC move (Motion Sequence No 13) for summary judgment dismissing Plaintiff's complaint and all crossclaims. These Defendants also move for summary judgment on their claims for contractual indemnification against ARC and TDX. Plaintiff cross-moves (Motion Sequence No 13) to amend her complaint to plead compliance with General Municipal Law §205-e.

As to ARC's motion, "[a] motion for leave to renew ... shall be based upon new facts not offered on the prior motion that would change the prior determination ... and ... shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR §2221[e][2]; *see Goldman v Nationstar Mortgage, LLC*, 205 AD3d 1011 [2d Dept 2022]). In this case, the deposition testimony acquired after the original motion was decided constitutes "new facts not offered on the prior motion" (*see Han v Brighthouse Life Insurance Co of NY*, 192 AD3d 421, 422 [1st Dept 2021]).

"[T]he 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Miller v R.L.T. Properties*, ___ AD3d ___, 2022 NY Slip Op 03510 [2d Dept 2022]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]; *Solis v Aguilar*, __ AD3d ___, 2022 NY Slip Op 03540 [2d Dept 2022]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Deutsche Bank National Trust Company v Ebanks*, 189 AD3d 1535, 1536 [2d Dept 2020]).

ARC posits that any questions of fact that existed on the prior motion are now resolved by the subsequent deposition testimony of Morley, TDX's employee. Morley testified that ARC and Recine installed the new sidewalk at Harlem Hospital Center. ARC erected barricades and temporary chain-linked fences to keep pedestrians away. Morley averred ARC was the only contractor to install these barriers and was the only entity responsible for inspecting, monitoring, repairing, and replacing the barricades and fencing. Morley asserted ARC only performed work on the new patient Pavilion project and had no role in the pediatric emergency room project. Morley stated, based upon a review of photographs marked at the deposition, the new sidewalk was installed and the temporary fencing surrounding it was removed before January 15, 2013.

Morley acknowledged that some temporary fencing remained near the emergency room entrance in response to a request to him made by Trevor Henry ("Henry") of Harlem Hospital Center. Morley testified that the "purpose of the fencing was to prevent people from using that door or using those doors because of the work that was taking place in the pediatric ER that was in the Ronald Brown Pavilion." He claimed Harlem Hospital Center wanted to deter people from thinking that the emergency room was open. Morley could not recall who he spoke to about Henry's request but surmised he would have first contacted ARC. However, Morley was unsure if he spoke to Kakleas of ARC about this fencing. Morley stated that he asked Recine laborers that were removing the fence "to configure sections of fence at the entrance." As a result, Morley testified that the "pieces that were used to cordon off the entrance, they were moved from the position where they were bordering the sidewalk work and put into that entrance in front of the entrance." Morley admitted he directed the laborers where to put the fence and how many pieces of fence to use. He also inspected "the fencing and made sure that it was erected in a safe fashion" and that while this fencing was erected, Morley directed HRAD laborers hired by TDX to periodically check the stability of the fence. Morley claimed this portion of fence was not used to cordon off any work performed by ARC and was later removed by HRAD laborers.

This testimony demonstrates, *prima facie*, that ARC was not responsible for installation of the fence and resolves any issues of fact that existed on the prior motion. ARC, or its subcontractor Recine, originally supplied and installed the temporary chain-link fencing at the hospital, but the section of fence that Plaintiff blames for her fall was not installed by ARC. Rather, it was installed under Morley's direction at the behest of Henry of Harlem Hospital Center. But for Morley directing Recine laborers to erect the fencing in front of the emergency entrance, it would have been removed before Plaintiff's accident. Further, Morley and HRAD laborers maintained this fencing and ensured it was safe and stable in the months before Plaintiff's fall, not ARC.

Because ARC has demonstrated that the fence was not created as part of its work and that it was free of negligence, the cross-claims against it for contribution and common-law indemnification also fail (*see Nassau Roofing & Sheetmetal Co., Inc., v Facilities Development Corp.*, 71 NY2d 599, 603 [1988]; *Pimentel v DE Freight LLC*, 205 AD3d 591, 594 *citing Naughton v City of New York*, 94 AD3d 1, 10-11 [1st Dept 2012]). As per its contracts with DASNY, ARC was responsible to indemnify HHC and TDX only for liability "caused by, resulting from, arising out of or occurring in connection of the execution of the work of ARC." Since this accident was not caused by ARC's work, the contractual indemnification crossclaims also fail (*see Navedo v VNO 225 West 58th Street LLC*, 203 AD3d 406 [1st Dept 2022]; *cf. Ging v F.J. Sciamé Construction Co., Inc.*, 193 AD3d 415 [1st Dept 2021]). Likewise, ARC's obligation to provide TDX insurance coverage was not triggered (*see Digirolomo v 160 Madison Ave LLC*, 194 AD3d 640, 641 [1st Dept 2021]).

In opposition, Plaintiff nor the other Defendants raised an issue of fact. Plaintiff's claim that ARC caused or created the specific condition is belied by Morley's deposition testimony to the contrary. Further, the assertion by Plaintiff as well as City and HHC that the Justice Nervo's decision denying ARC's first motion for summary judgment is the law of the case is without merit based upon the new evidence, to wit Morley's deposition testimony (*see Strujan v Glencord Bldg Corp.*, 137 AD3d 1252, 1253 [2d Dept 2016]). Plaintiff's reliance on certain language in ARC's contract with DASNY is unavailing since the erection of the fence at issue did not arise out of ARC's work (*see Hogan v 590 Madison Avenue, LLC*, 194 AD3d 570 [1st Dept 2021]).

TDX's opposition that it is entitled to contractual indemnification from ARC since this accident was "caused by," "resulted from," arising out of," "occurring in connection with the execution of ARC's work" has been completely refuted by Morley's deposition testimony. TDX also claims that contractual identification is triggered since the fence was put in place to prevent the public from encroaching on ARC's work. Whether ARC was conducting work that was cordoned off by the fencing when the accident occurred is ultimately of no moment. The fence was erected at the direction of Morley with Recine laborers who repurposed a fence that was to be removed. Based on this testimony, ARC did not construct this fence, TDX did. Since ARC played no role and asserted no control over the work that created the alleged dangerous condition, it cannot be vicariously liable for the purported negligence of its subcontractor (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381-382 [1st Dept 2007]).

Defendants City and HHC argue that if they are found liable, ARC is also negligent for "launching a force or instrument of harm" (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]) and ARC owes the City and HHC full defense and indemnification. This argument overlooks Morley's new deposition testimony which demonstrates ARC did not erect the fence and, therefore, did not launch an instrument of harm. Moreover, since this accident did not arise out of ARC's work, the provisions for the defense and indemnification of the City and HHC were not triggered (*see Upson v Oliveira Contracting Inc.*, 201 AD3d 454 [1st Dept 2022]; *Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085 [2d Dept 2021]).

Accordingly, the branch of the motion for renew is granted and, upon renewal, ARC is granted summary judgment dismissing the complaint and all crossclaims.

TDX argues, in part, that it is entitled to summary judgment because the fence base which Plaintiff claims caused her to fall was an open and obvious condition that was not inherently dangerous. "There is no duty to protect or warn against an open and obvious condition which is not inherently dangerous" (*Ochoa-Hoernes v Finkelstein*, 172 AD3d 1080, 1081 [2d Dept 2019] *citing Grosskopf v Beechwood Org.*, 166 AD3d 860 [2d Dept 2018]; *see also Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). "For a condition to be 'open and obvious' as a matter of law, it must be one that could not be overlooked by any observer reasonably using his or her ordinary senses" (*Garrido v City of New York*, 9 AD3d 267 [1st Dept 2004] *quoting Tagle v Jakob*, 97 NY2d 165 [2001]). "A Court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion and may do so on the basis of clear and undisputed evidence" (*Tagle v Jakob*, *supra* at 169 [2001]; *see also Paone v County of Suffolk*, 251 AD2d 563, 564 [2d Dept 1998]).

In support of its motion, TDX proffers photographs of the accident location disclosed by Plaintiff as well as Plaintiff's deposition testimony. Plaintiff testified that just before her accident, she took six steps with the temporary fence on her right before tripping on the base of the fence. She averred that she did not see the base of the fence because she was distracted by looking for the address for her doctor's

office and was talking to a co-worker. Plaintiff testified that her co-worker took photographs of the accident location immediately after her accident. She attested to the accuracy of several photographs, and she wrote an "X" on one of the photographs identifying the fence base which caused her to fall.

The photographs and testimony established, *prima facie*, the temporary fence base was readily observable to Plaintiff prior to her fall, was open and obvious, and not inherently dangerous (*see Johnson v NYC Department of Parks and Recreation*, ___ AD3d ___, 2022 NY Slip Op 03503 [2d Dept 2022]; *Williams v E & R Jamaica Food Corp.*, 202 AD3d 1028, 1029 [2d Dept 2022]; *Sarab v BJ's Wholesale Club*, 174 AD3d 933, 934 [2d Dept 2019]; *Gerner v Shop Rite of Uniondale, Inc.*, 148 AD3d 1122, 1123 [2d Dept 2017]; *Benjamin v Trade Fair Supermarket, Inc.*, 119 AD3d 880, 881 [2d Dept 2014]; *Boyle v Pottery Barn Outlet*, 117 AD3d 665 [2d Dept 2014]; *Serrano v New York City Hous. Auth.*, 268 AD2d 230 [2d Dept 2000]).

In opposition, Plaintiff failed to raise an issue of fact. Contrary to Plaintiff's assertion, the fence base was not concealed and was readily apparent. Plaintiff's reliance on *Liriano v Hobart Corp.*, (92 NY2d 232 [1998]) is misplaced as it was a product liability case based upon a design defect. In any event, even in *Liriano*, the Court of Appeals indicated, "[w]here only one conclusion can be drawn from the established facts...the issue of whether the risk was open and obvious may be decided by the Court as a matter of law" (*Id.* at 242).

The branch of TDX's motion seeking summary judgment on its crossclaim for contractual indemnification from ARC is denied since, as determined above, the subject fence did not arise out of ARC's work and therefore did not trigger contractual indemnification.

The branch of TDX's motion for summary judgment on its crossclaim against ARC for breach of contract for failure to procure insurance, TDX failed establish a *prima facie* case. TDX asserts that under ARC's contract with DASNY, ARC was required to insure TDX on a primary basis. In support of this claim, TDX cites to the commercial general liability policy which states:

"As required by written contract. If required by written contract with the Additional Insured this insurance shall be on a primary/non-contributory basis. The inclusion of one or more Additional Insured under the term of this endorsement does not increase our limits of liability..."

This language does not limit additional insured coverage to only entities in contract with ARC as TDX suggests. TDX's assertion that ARC should have purchased an additional insured policy for entities not in direct privity with ARC covering liability "arising out of ARC's work." But, as determined supra, the condition at issue did not arise out of ARC's work.

Accordingly, the branches of TDX's motion for summary judgment on its crossclaims are denied.

The branch of City and HHC's motion (Motion Seq No 13) for summary judgment dismissing all Plaintiff's complaint and all crossclaims because the alleged condition was open and obvious is granted. In opposition, Plaintiff's assertion that whether the fence base was located on hospital property or jutted onto the public sidewalk is irrelevant to the issue of the open and obvious nature of the condition (*see Bartholomew v Sears Roebuck & Co.*, 159 AD3d 786 [2d Dept 2018]).

Accordingly, it is

ORDERED that ARC Electrical & Mechanical Contractors Corp's motion to renew is granted, and upon renewal, ARC Electrical & Mechanical Contractors Corp is granted summary judgment dismissing Plaintiff's complaint and all crossclaims, it is further

ORDERED that TDX Construction Corporation's motion for summary judgment is granted to the extent that the complaint and all crossclaims against TDX Construction Corporation are dismissed, otherwise the motion is denied, it is further

ORDERED that The City of New York's and New York City Health and Hospitals Corporation's motion for summary judgment is granted to the extent that the complaint and all crossclaims against the City of New York and New York City Health and Hospitals Corporation are dismissed, otherwise the motion is denied, it is further

ORDERED that Plaintiff's cross-motion is denied.

7/14/2022

DATE

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

Francis Kahn III

FRANCIS KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION J.S.C.