

**Selman v City of New York**

2023 NY Slip Op 30017(U)

January 3, 2023

Supreme Court, New York County

Docket Number: Index No. 158632/2018

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

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RICHARD SELMAN,

Plaintiff,

INDEX NO. 158632/2018

MOTION DATE 04/22/2022

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, ANCHOR REALTY CORP., GLOBAL JOINT VENTURE INC., SHELROB REALTY CORP., ALWAYS FIRST, INC., ALWAYS FIRST DEMOLITION, E-J ELECTRIC INSTALLATION COMPANY, HELLMAN ELECTRIC CORP., SPRING SCAFFOLDING, LLC., J&D CARRYING AND CONSTRUCTION CORP., ROCK GROUP, N.Y. CORP., SSP CONSTRUCTION CORP.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for SUMMARY JUDGMENT

The instant motion arises out of an action to recover for personal injuries sustained by plaintiff Richard Selman (plaintiff), when he allegedly tripped and fell due to poor lighting and a defect in the roadway in front of 143 Bowery, New York, NY on June 22, 2017. Defendant J&D Carrying and Construction Corp. (J&D) now moves for an order granting summary judgment in its favor as against plaintiff. Co-defendant E-J Electric Installation Company (E-J Electric) and plaintiff submit opposition to the motion. Both J&D and E-J Electric are allegedly contractors/subcontractors that provided services at the accident location.

J&D argues that all claims and cross-claims asserted against it must be dismissed, because it did not have a duty to plaintiff as a matter of law. J&D asserts that the evidence establishes prima facie that it did not cause or create the alleged roadway defect, as it did not have a relationship to

the subject location at the time of or prior to the incident. It maintains that plaintiff's allegations against J&D are vague and unsubstantiated and that it did not perform any of the services plaintiff claims in his complaint. Further, J&D asserts that any contractual cross-claims against it must be dismissed, because it did not enter into any contracts with any party to this action and no party has produced any such contract.

In support of its motion, J&D submits an affidavit of its president, Manuel Mayancela, who attests that the company did not perform any work and/or place any container at or near the subject location at or prior to the time of the alleged incident. *See* NYSCEF doc. no. 67 at ¶ 4. Mr. Mayancela attests that a search of its database did not yield any results pertaining to tickets at the subject premises on the date of the accident, June 22, 2017, or any time prior thereto. *See id.* at ¶ 12. Rather, Mr. Mayancela attests that J&D's only relationship to the subject premises is that it delivered a 20-yard container to co-defendant Always First Demolition (Always First) at the roadway in front of 139 Bowery, New York, NY on December 4, 2017, almost six months after plaintiff's alleged trip and fall. *See id.* at ¶ 6. Mr. Mayancela further attests that this was the first time J&D delivered a container to the subject location. *See id.* at ¶ 5.

In opposition, co-defendant E-J Electric argues that J&D's motion is premature and must be denied, because it was filed before any party had an opportunity to conduct depositions, exchange discovery, or conference the matter with the Court, and J&D has not provided documentary evidence sufficient to establish that it was not negligent. Further, E-J Electric asserts that J&D relies on a self-serving employee affidavit.

Similarly, plaintiff opposes the motion, arguing that J&D's papers fail to present proof in admissible form sufficient to establish a *prima facie* entitlement to summary judgment, that crucial pre-trial discovery has yet to be completed, and that evidence material and relevant to a

determination of J&D's liability is within the exclusive knowledge and possession of J&D. Plaintiff also alleges that J&D is one of a group of contractors and subcontractors that provided construction, renovation, alternations work, and/or other services at the subject premises. Therefore, plaintiff argues that J&D may have caused or created the subject condition that led to his trip and fall, and/or made special use of the subject roadway, necessitating the exchange of discovery, which is incomplete.

Further, plaintiff argues that Mr. Mayancela's affidavit offers an insufficient basis in which to consider the documents offered by J&D as business records. Notably, Mr. Mayancela does not attest that he conducted the record search for service tickets at the time and location of the alleged incident, that he has personal familiarity with the record-keeping practices of J&D, or that the documents upon which he relies to support his contentions were created in the regular course of business. Similarly, plaintiff asserts that several documents J&D provided are from the New York City Department of Transportation (DOT) website and that no evidence has been presented to show when or who created those records, whether they were created in the regular course of business, or whether the content is accurate, certified, or original.

In reply, J&D argues that mere speculation that further discovery would produce evidence of liability is insufficient to preclude summary judgment. It asserts that neither plaintiff nor E-J Electric provides any proof that J&D created the defect, delivered a container at the subject location prior to plaintiff's alleged incident, or entered into contracts with any of the co-defendants for indemnification or failure to procure insurance. J&D maintains that it cannot produce records that it does not have and that Mr. Mayancela's sworn affidavit sufficiently demonstrates that the company could not have caused the subject defect. Further, J&D asserts that plaintiff has not identified any information that would be in the exclusive knowledge and possession of the

company and that plaintiff conceded that J&D responded to his discovery demands in December of 2020. Lastly, J&D maintains that E-J Electric has not served any discovery demands upon J&D and plaintiff has not attempted to advance further discovery within a reasonable amount of time.

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence in admissible form to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman*, 3 NY2d at 404. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf*, 153 AD2d at 521.

Here, triable issues of fact exist as to whether J&D caused or created the subject defect or made special use of the subject roadway. Mr. Mayancela’s attests that J&D’s only relationship to the subject premises is its delivery of a container nearly six months after plaintiff’s alleged incident, based on a records search. However, because Mr. Mayancela’s affidavit does not sufficiently attest to personal knowledge of the record search, subject location, or alleged incident, his affidavit fails to establish admissibility of J&D’s supporting documents. Therefore, J&D fails to demonstrate the absence of any material issue of fact. As J&D does not establish its *prima facie* case through admissible evidence, its motion for summary judgment is denied.

Accordingly, it is hereby

ORDERED that defendant J&D Carrying and Construction Corp.'s motion for summary judgment to dismiss all claims and cross-claims is denied; and it is further

ORDERED that the clerk shall schedule a preliminary conference to be held on the next available date<sup>1</sup>; and it is further

ORDERED that within 30 days of entry of this order, defendant J&D Carrying and Construction Corp. shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

This constitutes the decision and order of the Court.

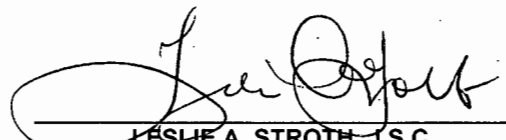
1/3/2023  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

  
LESLIE A. STROTH, J.S.C.

<sup>1</sup> The Court notes that prior to a preliminary conference the parties may consent to a case scheduling order, which may be emailed directly to chambers for review.