

Bernfeld v CRC Assoc., Inc.

2023 NY Slip Op 30151(U)

January 17, 2023

Supreme Court, New York County

Docket Number: Index No. 151134/2018

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

-----X

LAWRENCE BERNFELD and VIRGINIA PEPE BERNFELD,

Plaintiffs,

INDEX NO. 151134/2018

MOTION DATE 02/11/2022

MOTION SEQ. NO. 001

- v -

CRC ASSOCIATES, INC., PRIMETIME EXCAVATING,
HELLMAN ELECTRICAL CORPORATION,
METROPOLITAN TRANSIT AUTHORITY, NEW YORK
CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK,
175 WEST 79TH STREET CORP. and SEEKEN 79
REALTY LLC.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

CRC ASSOCIATES, INC.,

Third-Party Plaintiff,

Third-Party
Index No. 595432/2019

-against-

175 WEST 79TH STREET CORP. and SEEKEN 79 REALTY
LLC,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 85, 86, 109, 110, 111, 112, 113, 116, 149

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

This personal injury action arises out of an accident that occurred on December 19, 2016, when plaintiff Lawrence Bernfeld allegedly slipped and fell on an icy condition on the sidewalk on West 79th Street near Amsterdam Avenue in New York County. In motion sequence no. 001, defendant/third-party plaintiff CRC Associates, Inc. (CRC) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it. Plaintiff and defendant City of New York oppose.

BACKGROUND

Plaintiff and his wife, suing derivatively, commenced this action sounding in negligence on February 6, 2018 by filing a summons and complaint. They allege in their verified bill of particulars that CRC negligently used the fire hydrant by improperly attaching a hose to it and allowing water to drip from it and form ice on the sidewalk (NYSCEF Doc No. 67). CRC subsequently commenced a third-party action against third-party defendants 175 West 79th Street Corp. and Seeken 79 Realty LLC (NYSCEF Doc No. 27), and plaintiff then added them as direct defendants (NYSCEF Doc No. 31-32). The action against Hellman Electrical Corporation has been discontinued (NYSCEF Doc No. 51), and the complaint and cross claims against the Metropolitan Transit Authority (MTA), New York City Transit Authority, and City have been dismissed (NYSCEF Doc Nos. 145-146).

Lawrence Bernfeld testified at his deposition that on the accident date, he left his apartment building at 175 West 79th Street in Manhattan through the front entrance on West 79th Street and was walking at “[s]omething of a diagonal” to his right when he slipped on ice on the sidewalk approximately one foot to the left of a fire hydrant, located approximately 40 to 50 feet from the intersection of West 79th and Amsterdam Avenue. The ground was not wet from precipitation, and he did not see the icy condition before he fell. There was construction activity taking place in the roadway at the corner, but plaintiff did not recall seeing anyone at the fire hydrant as he walked by it or if the hydrant was leaking water at that time (NYSCEF Doc No. 70).

Chetan Patel, CRC’s sole owner and officer, testified that MTA had hired CRC to perform electrical work related to the installation of new fare collection equipment, which involved laying conduit and wiring under the sidewalk for the machines, which the MTA would

later install. CRC subcontracted a portion of the contracted-for work, specifically sidewalk demolition, excavation and restoration and site protection, to defendant Primetime Excavating. Patel testified that CRC's work on the day of the accident took place on Amsterdam Avenue, and although he had never visited the worksite, there was no reason for CRC's electricians to use water in performing their work (NYSCEF Doc No. 72).

Alfred Amato, Primetime's president and sole officer and shareholder, testified that Primetime performed concrete work related to the installation of fare kiosks for the MTA under a contract with CRC. Amato testified that Primetime uses water from its concrete mixer to clean its tools. He also testified that Randy Dunkin, Primetime's job superintendent and site safety coordinator, oversaw the worksite on the day of the accident. Amato learned of plaintiff's accident from Dunkin, who called him from the site, and Amato told Dunkin to write a report, take photographs, and purchase salt to spread over the condition. Dunkin later told Amato that Primetime did not use the fire hydrant that day (NYSCEF Doc No. 71).

Dunkin testified that in the event Primetime had to use a saw machine to cut a concrete joint, it "might need water if there was a lot of dust created," and that Primetime "had like these tanks [in its truck] that hook into the back of the saw that you pump up or like a garden sprayer." He added that "you take the hose [from the tank] and plug it directly into the back of the saw, and then when you pump up the pressure, the water ... goes through the hoses on the saw and comes right out onto the blade." Primetime did not retrieve any water from the fire hydrant for its work that day, as the tank on the truck provided water for the saw, and he was unaware of any need for CRC's electricians to use water on the job that day. After Dunkin learned of plaintiff's accident, he walked to the accident location, and observed that it was "slippery" and there was a

“thin sheet for ice” in the vicinity of the fire hydrant. He purchased salt from a store on the corner and sprinkled it around the hydrant (NYSCEF Doc No. 75).

Dunkin also prepared an accident report, which reflects, as pertinent here, that there was ice present along the entire length of 79th Street as a result of snowfall earlier that week, and that he took photographs of the ice and water from melting snow (NYSCEF Doc No. 69).

Luis Jimenez, the porter at plaintiff’s apartment building, testified that he saw two men wearing hoodies and yellow vests, one of whom was holding a wrench, next to the fire hydrant before the accident. A hose had been connected to the hydrant and there was water leaking out of it, and the hose ran on the roadway next to the curb and around the corner to the bus stop on Amsterdam Avenue, where it was connected to a large saw machine. Jimenez testified that he told the men the fire hydrant was leaking, but one man “just shrugged” in response, and he later saw these same men working on the sidewalk on Amsterdam Avenue. After plaintiff told him about the accident, Jimenez walked outside and saw ice on the sidewalk next to the hydrant. He spoke to a man in charge of the construction site, who told him that they would take care of the ice. As Jimenez walked away, he “saw [the workers] rushing, putting the hose, trying to, like, to put the hose and everything away,” and he recorded two videos, one of which depicted an unknown person “pulling [the hose] ... back” and “[a]way from the corner” (NYSCEF Doc No. 76).

Andrezj Witek, the superintendent at plaintiff’s apartment building, testified that he recalled seeing a hose attached to the fire hydrant in front of building on the day of the accident, but he did not know who had made the connection, and he did not recall seeing any water dripping from the hydrant (NYSCEF Doc No. 77).

DISCUSSION

A party moving for summary judgment under CPLR 3212 “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidentiary in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

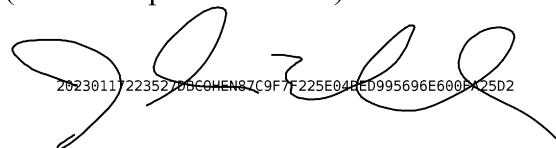
Where a contractor working on a public sidewalk or roadway establishes that it did not cause or create the allegedly dangerous condition on which the plaintiff fell, summary judgment in favor of that contractor is appropriate (*see Camacho v City of New York*, 135 AD3d 482, 482 [1st Dept 2016]; *Levine v City of New York*, 101 AD3d 419, 420 [1st Dept 2012]).

CRC moves for summary judgment dismissing the complaint against it on the ground that it did not use the subject fire hydrant in connection with its work, relying on the pleadings, deposition transcripts, and Dunkin’s accident report. However, Patel’s testimony that there was no reason for CRC’s electricians to use water to complete their work at the site is insufficient, especially as CRC provided no testimony from the two electricians who worked at the site that day, and as Patel was not present and, therefore, lacks personal knowledge as to CRC’s actions or inactions. Moreover, when Dunkin was asked whether the electricians needed to use water for their work on the accident date, he equivocated in his answers, and thus, his testimony is not dispositive on whether the electricians accessed the fire hydrant that day.

Because CRC failed to meet its initial burden, the motion is denied without regard to the sufficiency of the opposing papers. However, even if CRC met its burden, the testimony of the building’s porter and superintendent that a hose had been attached to the hydrant that day by construction workers and water was dripping out of it, and that after the accident, the porter saw workers rushing to disconnect the hose and remove it, is sufficient to raise a triable issue.

Accordingly, it is

ORDERED that the motion of defendant/third-party plaintiff CRC Associates, Inc. for summary judgment dismissing the complaint against it (motion sequence no. 001) is denied.



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1/17/2023

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE