

Severinghaus v City of New York

2023 NY Slip Op 30460(U)

February 14, 2023

Supreme Court, New York County

Docket Number: Index No. 161545/2018

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

INDEX NO. 161545/2018

DORIS SEVERINGHAUS,

MOTION DATE 10/11/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

CITY OF NEW YORK, 249 CENTRAL PARK WEST LLC,
STEEL SYSTEMS, LLC, ALLIANCE CONTRACTING
GROUP OF NY, INC.

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing papers, defendant Alliance Contracting Group of NY, Inc.’s motion for summary judgment is denied for the reasons set forth below.

In this negligence action, plaintiff alleges that she sustained personal injuries from an October 24, 2017 trip and fall caused by a mis-leveled sidewalk flag at the southwest corner of West 85th Street and Central Park West, New York, New York (NYSCEF Doc. No. 82 [Compl. at ¶¶2, 43-44]). This sidewalk flag abutted 249 Central Park West (the “Building”) (NYSCEF Doc. No. 86 [Notice of Claim]). On the date of plaintiff’s fall, scaffolding was in place around the Building (NYSCEF Doc. No. 87 [Severinghaus EBT at pp. 18-19]).

As pertinent here, plaintiff alleges that defendant Alliance Contracting Group of NY, Inc. (“Alliance”) owned, operated, maintained, controlled, managed, or repaired the sidewalk flag at issue and was negligent in performing these functions, thereby creating the subject defect or failing to correct it (NYSCEF Doc. No. 82 [Compl. at ¶¶34-40, 45]).

Alliance now moves, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all crossclaims against it on the grounds that it did not cause, create or exacerbate the sidewalk condition at issue. Alliance relies principally on a decision by this Court (Hon. Dakota D. Ramseur) dated October 26, 2021 (the “Prior Decision”), which granted co-defendant Tufco, Inc.’s motion, pursuant to CPLR §3212, for summary judgment and dismissed the complaint and all crossclaims against it. In that decision, Justice Ramseur noted that:

Photographs of the subject sidewalk depict a sidewalk flag raised approximately one and a half inches (notice of claim at 4-6). The photographs also depict a scaffolding adjacent to the building and scaffolding support poles near the defect.

...

Here, Tufco establishes that it did not have a duty to maintain the subject roadway or create the alleged defect that caused plaintiff’s accident. To that end, Tufco submits the affidavit of Carmine Tufano (Carmine), the chief executive officer of Tufco, attesting that the company was hired to perform work within the interior and the exterior facade of the building located at 249 Central Park West, and that it did not perform any work on the sidewalk. Carmine indicates that as part of the project, Tufco received three work permits related to the premises prohibiting concrete work at the premises or otherwise unrelated to the subject sidewalk. Carmine further attests that the agreed upon scope of work did not include the sidewalk. To the extent that the April 29, 2015 agreement calls for concrete and excavation work, the agreement does not address any sidewalk work at the premises. Tufco also submits photos of the subject sidewalk captured by Google Maps from as early as August 2009 clearly depicting the alleged defective condition ...

In opposition, plaintiff fails to raise an issue of fact as to whether Tufco created the defect in the roadway. Plaintiff contends that Tufco’s motion is premature to the extent that the deposition of Tufco has not occurred, and that questions exist as to the extent of the work performed by Tufco at the premises, whether Tufco operated equipment on the subject sidewalk, and whether their work exacerbated the already existing raised sidewalk ... Plaintiff’s argument that additional discovery is required relies on speculation. Specifically, there is no evidentiary basis to connect Tufco’s work with the alleged defect, especially in light of the fact that the sidewalk was in a defective condition for several years prior to plaintiff’s accident...

(NYSCEF Doc. No. 72 [October 26, 2021 Decision and Order] [internal citations omitted] [emphasis added]).

This decision was affirmed by the Appellate Division, First Department (Severinghaus v TUFCO, Inc., 208 AD3d 1119 [1st Dept 2022]).

Alliance also submits the affidavit of its president and owner, Alejandro Tejada, who avers that:

On or about May 18, 2015, Central Park West LLC (“the owner”) retained Alliance to perform brownstone facade restoration work at the property located at 249 Central Park West, New York, New York (“the premises”) ...

Prior to May 18, 2015, Alliance never performed work, of any kind or nature, at the premises.

Prior to Plaintiff’s alleged accident on October 24, 2017, Alliance never transported materials or any equipment on the sidewalk. Conversely, all materials and equipment utilized by Alliance at the premises were hoisted to the top of the sidewalk shed at the premises and then transported to the building at the premises.

Alliance was not the entity that installed the sidewalk shed at the premises. Prior to Plaintiff’s alleged accident on October 24, 2017, Alliance never maintained, repaired, or performed any work with respect to the sidewalk at, or abutting, the premises. As referenced within its contract with the owner, Alliance was not engaged to do so ... Alliance did not cause, contribute to, or exacerbate the sidewalk condition that Plaintiff claims to have caused Plaintiff’s fall.

(NYSCEF Doc. No. 94 [Tejada Aff. at ¶¶2-5] [emphasis added]). Alliance attaches the contract between Alliance and Central Park West LLC (the “Contract”) referenced in Tejada’s affidavit (Id. at pp. 5-30]).

Alliance argues that it has established its entitlement to summary judgment because: (1) Justice Ramseur’s determination in the Prior Decision that the sidewalk defect existed since August of 2009 establishes that Alliance did not cause or create the sidewalk defect; and (2) Tejada’s affidavit establishes that Alliance did not exacerbate the alleged sidewalk condition. Plaintiff opposes the motion, noting that under the Contract, Alliance was responsible for erecting and dismantling the scaffolding around the Building, and argues that an issue of fact exist as to whether this construction, or the continued presence of the scaffolding itself, could have

exacerbated the preexisting sidewalk condition. In reply, Alliance asserts that it hired co-defendant Steel Systems, LLC to perform the sidewalk bridge and scaffolding work (NYSCEF Doc. No. 99 [Gorelick Reply Affirm. at ¶4]) and submits printouts from the New York City Department of Buildings (“DOB”) website documenting the issuance of permits to Steel Systems, LLC to perform this work (NYSCEF Doc. No. 100).

DISCUSSION

“The 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Alliance has failed to make a prima facie showing here.

Alliance has established that it did not cause or create the subject defect. As Justice Ramseur noted, undisputed documentary evidence in the form of Google Maps images of the subject location (See CPLR §4532-b) establishes that the subject sidewalk flag was raised prior to Alliance’s work in that area. However, an issue of fact remains as to whether the work Alliance performed under the Contract exacerbated this condition. Specifically, the Contract indicates that Alliance contracted to erect the scaffolding around the Building and Alliance has not established that this construction work, or the resulting scaffolding, did not exacerbate this condition (See Bivona v City of New York, 198 AD2d 61 [1st Dept 1993] [“defendant has not established a prima facie case that the weight of the bridge, and its long presence on the site, could not have caused

the sidewalk to crack or shift in some manner”]). Instead, Alliance argues that it bears no liability here because it did not construct the scaffolding. However, the basis for this assertion—Tejada’s affidavit—is called into question by the plain terms of the Contract. To the extent Alliance attempts to resolve this question in reply, it has failed to do so—the “bare affirmation of the plaintiff’s attorney” that Steel Systems, LLC was hired to do this work is without evidentiary value, as it has not been established that he has any personal knowledge as to this issue (See Wolfson v Rockledge Scaffolding Corp., 67 AD3d 1001, 1002 [2d Dept 2009]) while the DOB records are new evidence that may not be submitted in reply (See Ruland v 130 FG, LLC, 181 AD3d 441 [1st Dept 2020] [“defendant cannot remedy a fundamental deficiency in its moving papers with evidence submitted in reply”]; see also Benedetto v Hyatt Corp., 203 AD3d 505 [1st Dept 2022]). In light of the foregoing, Alliance’s motion for summary judgment is denied without prejudice. That branch of Alliance’s motion seeking sanctions against plaintiff based on her failure to discontinue this action as against Alliance is denied.

Accordingly, it is

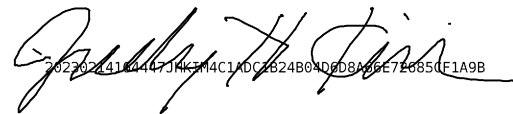
ORDERED that the branch of Alliance Contracting Group of NY, Inc.’s motion for summary judgment dismissing this action and all crossclaims as against it is denied; and it is further

ORDERED that the branch of Alliance Contracting Group of NY, Inc.’s motion seeking sanctions as against plaintiff is denied; and it is further

ORDERED that plaintiff shall, within twenty days of the date of this decision and order, serve a copy of this decision and order, with notice of entry, upon all defendants, as well as 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/supctmanh).

This constitutes the decision and order of the Court.



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2/14/2023

DATE

HON. JUDY H. KIM, 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