

Kamel v Pizzarotti, LLC

2023 NY Slip Op 30781(U)

March 16, 2023

Supreme Court, New York County

Docket Number: Index No. 151193/2021

Judge: J. Mabelle Sweeting

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

MICHAEL KAMEL,

Plaintiff,

- v -

PIZZAROTTI, LLC, 151 MAIDEN LLC, MARRIOTT
INTERNATIONAL, INC., P & T II CONTRACTING CORP.,
THE CITY OF NEW YORK, CONCRETE INDUSTRIES ONE
CORP.,

Defendants.

-----X

PIZZAROTTI, LLC

Plaintiff,

-against-

CONCRETE INDUSTRIES ONE CORP.

Defendant.

-----X

INDEX NO. 151193/2021
MOTION DATE 07/21/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595487/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 40, 41, 42, 45 were read on this motion to/for DISMISS.

In the underlying action, plaintiff claims to have sustained personal injuries as a result of a fall from a scooter on September 9, 2020 caused by a pothole in the public roadway located at or near 180 Maiden Lane, County, City and State of New York, about 20 feet from where Maiden Lane intersects with Front Street.

Pending before the court is Motion #001 in which defendant P&T II CONTRACTING CORP (“P&T”) seeks an order, pursuant to Civil Practice Law and Rules 3212, granting P&T summary judgment and dismissing the complaint and all cross claims arising therefrom.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and 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 [N.Y. Ct. of Appeals 1986]).

Further, the New York Court of Appeals “has repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments Made by the Parties

P&T argues that it had no connection with the area where plaintiff alleges to have fallen or the condition that caused the alleged accident, and therefore, owed no duty to plaintiff. Specifically, P&T argues that although it was involved in construction work in the area, the work undertaken by P&T was exclusively on Front Street, whereas plaintiff’s accident happened on Maiden Lane. In support of these arguments, P&T submitted the sworn Affidavit of Lenny Pereira, which states as follows:

1. I am the President and an authorized representative of defendant, P & T II CONTRACTING CORP..

2. As per the contract between the New York City Department of Design and Construction and P&T II CONTRACTING CORP. (already provided to plaintiff’s counsel by our attorney) that was in place at the time of this occurrence and which is kept in the ordinary course of the latter’s business, P&T II CONTRACTING CORP. was to perform reconstruction of Front Street from Old Slip to John Street, New York, NY. This work included street reconstruction, streetscaping, street lighting and traffic work. As of September 9, 2020, none of P&T II CONTRACTING CORP.’s work had anything to do with roadway or sidewalk work abutting 180 Maiden Lane, New York, NY. Moreover, the aforementioned work never involved roadway or sidewalk work on Maiden Lane at or near

the intersection with Front Street. The closest P&T II CONTRACTING CORP.'s work came to the subject location on September 9, 2020 was a test pit that was dug on Fulton Street at or near Pine Street. Otherwise, all of P&T II CONTRACTING CORP.'s work at that point was done on Fulton Street between Old Slip and Wall Street, the closest location to 180 Maiden Lane at that time being over 500 feet away.

Opposition papers were submitted by defendant/third party defendant CONCRETE INDUSTRIES ONE CORP. (“Concrete”) and by plaintiff.

Concrete argues that the Affidavit submitted by P&T is insufficient, because it failed to state that neither P&T’s equipment nor P&T’s employees used the roadway while engaged in work at the work site and that P&T failed to state that if such roadway was used, its employees and equipment did not create or worsen the roadway depression. Concrete also argues that this motion is premature, as P&T has not yet been deposed, and a deposition may reveal that several of P&T’s trucks and heavy machinery regularly used the roadway where plaintiff’s accident occurred.

Plaintiff also argues that this motion is premature, because no depositions have been conducted in this case, and none of the defendants has yet to respond to any of plaintiff’s discovery demands. Plaintiff further argues that P&T failed to meet its *prima facie* burden, as Mr. Pereira states that he is the “authorized representative” of P&T, but he does not state that he has personal knowledge of the locations of the work at issue. Plaintiff argues that Mr. Pereira does not state that he ever visited the area in question while P&T’s work was being performed, and that Mr. Pereira appears to have derived all of his knowledge from a review of documents and records.

Conclusions of Law


Here, P&T’s primary argument is that it did not perform any work on Maiden Lane, where plaintiff’s accident occurred, and P&T’s primary piece of evidence in support of their argument is the Affidavit of Lenny Pereira. However, plaintiff is correct that “A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's *prima facie* burden” with respect to summary judgment (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [NY Ct. of Appeals 2005]).

Here, Mr. Pereira’s affidavit is based not on any personal knowledge, but solely on his review of the “*contract between the New York City Department of Design and Construction and P&T II CONTRACTING CORP. [...], P&T II CONTRACTING CORP.*” This court finds that P&T has failed to meet its *prima facie* burden. Accordingly, the motion is denied and the case may proceed to discovery, as the parties have the right to question P&T to explore the assertions set forth in Mr. Pereira’s Affidavit as they relate to the claims and cross-claims alleged herein.

Accordingly, it is:

ORDERED that Motion Sequence #001 is DENIED, without prejudice; and it is further

ORDERED that P&T is given leave to file, at its election, another motion for summary judgment after relevant discovery has been completed.

<p><u>3/16/2023</u> DATE</p>			 <hr/> <p>J. MACHELLEE SWEETING, J.S.C.</p>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE