

Thomas v City of New York

2023 NY Slip Op 31096(U)

April 6, 2023

Supreme Court, New York County

Docket Number: Index No. 157521/2017

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

JAMES THOMAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY
COMPANY (LIMITED) D/B/A EMPIRE CITY SUBWAY
CORP., WELSBACH ELECTRIC CORP., CITYBRIDGE,
LLC, EXTENENT SYSTEMS, INC.,

Defendants.

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INDEX NO. 157521/2017

MOTION DATE 10/04/2022,
10/04/2022

MOTION SEQ. NO. 003 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 88, 89, 90, 91, 92, 93, 99, 100, 101, 102, 103, 104

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motions by defendants Welsbach Electric Corp. (“Welsbach”) and CityBridge, LLC (“CityBridge” and, with Welsbach, the “Moving Defendants”) for summary judgment dismissing the complaint and all crossclaims against them are granted for the reasons set forth below.

Plaintiff, an employee of the New York City Police Department (“NYPD”), commenced this action seeking damages for injuries allegedly sustained on May 24, 2017, when he tripped and fell due to a pothole in the middle of the intersection of West 57th Street and Eighth Avenue, New York, New York (NYSCEF Doc. Nos. 54 [Complaint] and 56 [GML §50-h Tr. at pp. 8, 10]). Plaintiff’s complaint asserts claims sounding in negligence and violation of both General

Municipal Law §205-e and General Obligations Law §11-106, based upon defendants' alleged violations of: Labor Law §§ 27-a(3); Administrative Code §§19-152 and 7-201(c)(2); New York City Charter §§2903(b)(2) and 2904; and 34 RCNY §2-07(b)(1)(2)).

In motion sequence 003, Welsbach moves for summary judgment arguing that it did not cause or create the subject condition as it did not perform work at the site of plaintiff's fall. In motion sequence 005, CityBridge moves for summary judgment on the same grounds. These motions are consolidated for disposition.

In support of its motion, CityBridge submits the affidavit of Michael Zigrossi, in which he attests that:

I am employed by Intersection Parent, Inc., a parent company of a managing member of CityBridge, LLC, ("CityBridge") a defendant/third-party plaintiff in the above-referenced matter. I am currently employed as Vice President of Operations of Intersection Parent, Inc., responsible for CityBridge, LLC. I have been employed in this role since October 2019. In May 2017, I was employed as the Director of Operations for Intersection Parent, Inc., which supported the CityBridge project.

I conducted a search of CityBridge's records relative to the location of plaintiff's alleged accident.

CityBridge entered into a public communications structures Franchise Agreement with The City of New York for installation, operation and maintenance of LinkNYC kiosks. Annexed hereto as Exhibit "B" is a true and accurate copy of the aforementioned Franchise Agreement.

CityBridge entered into a sub-contract with Triumph Construction Corp., (hereinafter "Triumph") on October 29, 2015, whereby Triumph agreed to furnish all labor materials, tools, equipment and all other things necessary to remove phone booths and/or install LinkNYC kiosks. Annexed hereto as Exhibit "C" is a true and accurate copy of the aforementioned sub-contract.

The first phase of CityBridge's project took place in the years 2015-2016 at the sidewalk and roadway in close proximity to curb at 264 W. 57th street, County of New York, City of New York, 969 8th Avenue, County of New York, City of New York, 301 W.57th Street, County of New York, City of New York and 973 8th Avenue, City of New York, County of New York. Annexed hereto as Exhibit "D" are CityBridge's documents and progress photos that I reviewed in connection with my affidavit and the first phase. These documents were prepared and/or kept in the

regular business. No work took place on or in the place of accident. All work took place outside the above intersection. Trenching was required for the installation and connection of kiosks; however, no such trenching was performed at the place of accident. Triumph did not perform any work on behalf of CityBridge on or in the place of accident at any point in time prior to May 24, 2017.

The second phase of CityBridge's project took place in the years 2016-2017 at the sidewalk and roadway in close proximity to curb at 306 W. 57th street, County of New York, State of New York Annexed hereto as Exhibit "E" are CityBridge's documents and progress photos that I reviewed in connection with my affidavit and the first phase. These documents were prepared and/or kept in the regular business. No work took place in or on the place of accident. All work took place outside the above intersection. Trenching was required for the installation and connection kiosks; however, no such trenching was performed in or on the place of accident. Triumph did not perform any work on behalf of CityBridge within the place of accident at any point in time prior to May 24, 2017.

CityBridge did not cause or create the condition on place of accident prior to May 24, 2017.

CityBridge never received any notices or violations from any governmental agency regarding place of accident prior to May 24, 2017.

CityBridge never received any complaints from any governmental agency, individual, or entity regarding the place of accident, prior to May 24, 2017

CityBridge nor its contractor performed any work in or on the area depicted in the photographs annexed at Exhibit "A", at any point in time prior to or on May 24, 2017.

(NYSCEF Doc. No. 109 [Zigrossi Aff. at ¶¶1, 4-12]).

Welsbach, in support of its motion, submits the affidavit of Thomas Harrington in which he attests that:

I am employed by Welsbach Electric Corp. ("Welsbach"), as a project manager and I have been so employed since 1999.

...

Welsbach and the New York City Department of Transportation ("NYCDOT") entered into an agreement concerning the installation and removal of electrical traffic signal equipment in the five boroughs of the City of New York (the "Contract") covering the period from January 5, 2015 to May 31, 2017. A copy of the Contract is annexed hereto as Exhibit "A."

In the regular course of its business, Welsbach maintains, among other things, documents reflecting the work performed by Welsbach pursuant to the Contract. The records are maintained at Welsbach's office located at 111-01 14th Avenue, Queens, New York.

I conducted a search of Welsbach's records for the location of this accident. Pursuant to the Contract, The NYCDOT issued drawing LB2820M to Welsbach to install traffic equipment and accessible pedestrian signals at the intersection of Eighth Avenue and West 57th Street in Manhattan. A copy of the drawing is attached hereto as Exhibit "B." The drawing shows that Welsbach's work was confined to the dashed lines and the long black lines on the map which reflects Welsbach's trench. I have highlighted the location on the exhibit.

In order to perform the work, Welsbach obtained permits for its work for the period May 13, 2016 to August 5, 2016. Copies of these permits are annexed hereto as Exhibit "C." Welsbach renewed the permits for the period August 6, 2016 to September 30, 2016. Copies of those permits are annexed hereto as Exhibit "D."

Welsbach's work started on June 23, 2016. To install the new signals and equipment, Welsbach dug trenches from the southeast corner to the northeast corner, from the northeast corner to the northwest corner and from the northwest corner to the southwest corner. These trenches are approximately 1 foot wide. Welsbach performed no work in the middle of the intersection and did not create any rectangular excavations in the middle of the intersection. The excavation work was completed on July 31, 2016.

Welsbach subcontracted with Nico Asphalt Paving, Inc. ("Nico") to perform permanent restoration work and on July 25, 2016, Welsbach requested that Nico permanently restore the location, which NICO did on August 3, 2016. A copy of Welsbach's drawing sent to Nico on July 25, 2016 for final restoration together with Nico's invoice for the work is annexed hereto as Exhibit "F."

Welsbach then installed the new traffic signal equipment on August 6, 2016 and August 13, 2016. Copies of Welsbach's time sheets for this work are annexed hereto as Exhibit "G." All of Welsbach's work was completed more than nine (9) months prior to the date of the plaintiff's alleged fall on May 24, 2017.

...

This was the total amount of Welsbach's work at this intersection and Welsbach performed no other excavation or roadway work at this intersection. Welsbach performed no work in the middle of the intersection where I understand Plaintiff claims his fall occurred.

(NYSCEF Doc. No. 51 [Harrington Aff. at ¶¶1, 5-11, 13]).

In opposition, plaintiff argues that these motions are premature because discovery is incomplete, asserting that neither of the Moving Defendants has responded to plaintiff's discovery demands and depositions have yet to be conducted. Plaintiff further argues that work permits issued to the defendants by the City of New York indicate that triable issues of fact exist. Finally, plaintiff observes that CityBridge's contracts with Triumph and the City of New York which it submits in support of its motion are not signed¹ and contends that this invalidates its motion.

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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

"A defendant who moves for summary judgment in a trip and fall action has the initial burden of making a prima facie demonstration that it did not create the hazardous condition" (Briggs v Pick Quick Foods, Inc., 103 AD3d 526, 526 [1st Dept 2013] quoting Smith v Costco Wholesale Corp., 50 AD3d 499, 500 [1st Dept 2008]). In this case, Welsbach and CityBridge have met their burden through the Zigrossi and Harrington affidavits, and records attached thereto, establishing that they did not perform work in the middle of the intersection, where plaintiff was injured (See Amarosa v City of New York, 51 AD 3d 596 [1st Dept 2008] [the un rebutted affidavit of the project superintendent for the Tishman construction at 3 Times Square established that the 3 Times Square project was at the opposite end of West 43rd Street, at least 400 feet from the site of the accident"]).

¹ In fact, the contract with Triumph submitted by CityBridge is signed (See NYSCEF Doc. NO. 112 [CityBridge-Triumph Contract at p. 21])

Contrary to plaintiff's claim, CityBridge and Welsbach have also established that plaintiff has no claims against them pursuant to GOL §11-106 or GML §205-e.

GOL §11-106 confers on police officers a right of recovery for injuries sustained in the performance of their official duties that were proximately caused by a person or entity's neglect, willful omission, or intentional, willful or culpable conduct. As the Moving Defendants have established that no act on their part created the subject pothole, they bear no liability under this statute. General Municipal Law § 205-e, in turn, establishes a cause of action for police officers injured as a result of a person's negligent noncompliance "with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments" (GML §205-e). Plaintiff argues that issues of fact remain as to whether moving defendants violated any of the following statutes: Labor Law §27-a(3); Administrative Code §§ 19-152 and 7-201(c)(2), New York City Charter §§2903(b)(2) and 2904; and 34 RCNY §2-07(b)(1)(2). However, given the facts alleged here, none of these statutes apply to the Moving Defendants.

In opposition, plaintiff has failed to establish the existence of any triable issues of fact. Contrary to plaintiff's claim, the existence of the permits contemplating work in the vicinity of plaintiff's fall is insufficient to create such a triable issue of fact (See e.g., Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016]; see also Bermudez v City of New York, 21 AD3d 258 [1st Dept. 2005]). Neither does the Court credit plaintiff's argument that the motion is premature. Plaintiff's assertion that CityBridge and Welsbach have not responded to his document demands has been rebutted in the Moving Defendants' replies, which demonstrate that they timely responded to all discovery demands. Although depositions, this "does not render summary judgment premature" where, as here, "plaintiffs failed to show that discovery might lead

to facts that would support their opposition to the motion” (Kremer v Sinopia LLC, 104 AD3d 479, 481 [1st Dept 2013] citing Duane Morris LLP v Astor Holdings Inc., 61 AD3d 418 [1st Dept 2009]). Neither has plaintiff established that the unsigned contract between Welsbach and the City of New York submitted by Welsbach creates a question of fact as to the scope or nature of Welsbach’s work that would preclude summary judgment.

Finally, that branch of the Moving Defendants’ motions to dismiss all crossclaims for contractual and common law indemnification as against them are also granted. CityBridge and Welsbach have established that no negligence on their part caused plaintiff’s injuries and therefore no grounds for common law indemnification against them exists (See e.g., Martins v Little 40 Worth Assocs., Inc., 72 AD3d 483, 484 [1st Dept 2010]). The crossclaims for contractual indemnification asserted against CityBridge and Welsbach must also be dismissed, as it is undisputed that no party herein entered into an indemnification agreements with either CityBridge or Welsbach (See Stutterheim v First Shot Prods., 137 AD3d 690, 691 [1st Dept 2016]).

Accordingly, it is

ORDERED that Welsbach Electric Corp.’s motion for summary judgment is granted and this action and all crossclaims are dismissed as to defendant Welsbach Electric Corp; and it is further

ORDERED that CityBridge, LLC’s motion for summary judgment is granted and this action and all crossclaims are dismissed as to defendants City Bridge, LLC; and it is further

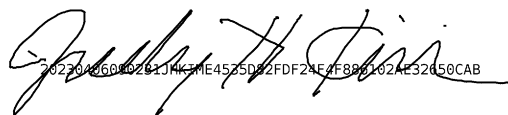
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that within ten days of the date of this decision and order, counsel for Welsbach Electric Corp. and CityBridge, LLC shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; 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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4/6/2023
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