

**Asad v City of New York**

2023 NY Slip Op 31174(U)

April 14, 2023

Supreme Court, New York County

Docket Number: Index No. 450743/2022

Judge: J. Machelles 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

MUHAMMAD ASAD,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION, 181 AVENUE A,  
LLC,CM AND ASSOCIATES CONSTRUCTION  
MANAGEMENT LIMITED LIABILITY COMPANY,  
CONSOLIDATED EDISON, INC.,SEA-DAR ENTERPRISES,  
INC, SKINNER PLUMBING & HEATING CORP.,

Defendants.

-----X

CM AND ASSOCIATES CONSTRUCTION MANAGEMENT  
LIMITED LIABILITY COMPANY

Third-Party Plaintiff,

-against-

PACIFIC PLUMBING CORP.

Third-Party Defendant.

-----X

181 AVENUE A, LLC, CM AND ASSOCIATES  
CONSTRUCTION MANAGEMENT LIMITED LIABILITY  
COMPANY

Second Third-Party Plaintiffs,

-against-

TRANSCITY W&S LLC, CONCRETE INDUSTRIES ONE  
CORP.

Second Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 163, 165, 167, 171, 172, 173, 174, 177, 179, 180, 181, 182, 187, 188, 189, 190, 191, 192

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 164, 166, 168, 169, 170, 175, 176, 178, 183, 184, 185, 186 were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff alleges that on September 18, 2019, at approximately 3:00 p.m., in front of 436 East 11<sup>th</sup> Street, New York, New York (the "subject premises"), he tripped and fell due to a defect in the roadway.

Now pending before the court are two motions. The first is Motion #002 in which defendant SEA-DAR ENTERPRISES, INC. ("Sea-Dar") seeks an order, pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(1) and (7) and/or CPLR 3212, granting summary judgment in Sea-Dar's favor against the plaintiff MUHAMMAD ASAD. Sea-Dar also seeks an order dismissing the complaint and all cross claims against it, on the ground that plaintiff cannot establish a *prima facie* case of negligence on the part of Sea-Dar. The second is Motion #003 in which defendant SKINNER PLUMBING & HEATING CORP. ("Skinner") seeks an order, pursuant to CPLR 3212(a), granting Skinner summary judgment and dismissal of plaintiff MUHAMMAD ASAD's complaint and all cross-claims.

Oral arguments were heard in in court and on-the-record before the undersigned (Hon. J. Mabelle Sweeting) on March 23, 2023.

### 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. 1<sup>st</sup> 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, pursuant to the New York Court of Appeals, “We have 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]).

### Motion #002

#### ***Defendant Sea Dar’s Prima Facie Case***

Sea-Dar argues that it performed work at the subject premises, but the scope of its work was limited to interior renovations and did not include any exterior work in the public street or to the adjacent public sidewalks. Sea-Dar argues that it never applied for any permits, including any street opening permits, for any exterior work and it never stored any materials or equipment on the adjacent public sidewalks or the public street. Sea-Dar also maintains that it had no authority to supervise, direct or control any of the exterior work performed by any contractors or subcontractors. In support of these arguments, Sea-Dar submitted, *inter alia*, work permits for interior work at the subject premises (NYSCEF Document #151) and a sworn Affidavit by Sea-Dar’s former project manager, Isaac Flores (NYSCEF Document #149). The Affidavit states, in part:

1. I was employed by SEA-DAR ENTERPRISES, INC. ("SEA-DAR"), a defendant in the captioned matter, as the Project Manager [...]
2. As such, I am familiar with the facts and circumstances as averred herein based - upon a review of corporate books and records and contracts and agreements entered into by SEA-DAR, as well as my personal knowledge as Project Manager.
3. [...] SEA-DAR is engaged in the business of interior small projects/renovations in the New York metropolitan area.

[...]

6. Pursuant to its Proposal with Rockwell Residence, SEA-DAR was issued Permit nos. "123510049-01-EW-MH" and "123510049-01-EWOT" on June 28, 2019 [...]

[...]

8. SEA-DAR has never performed any exterior work, supervised directed, or controlled any exterior work of any nature, or hired any subcontractors to perform any exterior work in the public street or the adjacent public sidewalks at or near 436 E. 11<sup>th</sup> Street, New York, New York. SEA-DAR never obtained any permits for any exterior work, including any street opening permits, and never stored any materials or equipment on the adjacent public sidewalks

or the public street. SEA-DAR had no authority to supervise, direct or control any of the exterior work performed by any contractors or subcontractors or to stop any exterior work due to

any dangerous conditions.

Here, it is undisputed that plaintiff's accident occurred in the roadway, and Sea-Dar's permits confirm that its work was limited to the interior of the subject premises. The permit states: "PROPOSED MINOR INTERIOR RENOVATION OF EXISTING APARTMENT. NO CHANGE IN USE, EGRESS OR OCCUPANCY." In his affidavit, Mr. Flores stated that, "SEA-DAR never obtained any permits for any exterior work." Mr. Flores also stated that Sea-Dar never performed any exterior work, supervised, directed or controlled any exterior work of any nature, or hired any subcontractors to perform any exterior work in the public street or the adjacent public sidewalks at or near the premises. He further averred that Sea-Dar never obtained any permits for any exterior work and never stored any materials or equipment on the adjacent public sidewalks or the public street.

Given the above, this court finds that Sea-Dar has established a *prima facie* case for summary judgment, and the burden now shifts to the parties opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial of the action.

Opposition papers were filed by: 181 AVENUE A LLC (“181”) and CM AND ASSOCIATES CONSTRUCTION MANAGEMENT LIMITED LIABILITY COMPANY (“CMA”) (NYSCEF Document #167); Consolidated Edison Company of New York, Inc. s/h/a Consolidated Edison, Inc. (“Con Ed”) (NYSCEF Document #171); and by plaintiff MUHAMMAD ASAD (NYSCEF Document #179). All opposition papers argue that this motion should be denied as premature.

Specifically, 181 and CMA argue that both Sea-Dar’s and the plaintiff’s depositions remain outstanding. As such, they argue, 181 and CMA are not in possession of facts necessary to determine Sea-Dar’s potential culpability for the alleged accident because plaintiff’s account of the accident has not yet been the subject of sworn testimony. Con Ed adopts both the legal and factual arguments made by 181 and CMA.

Plaintiff argues that Sea-Dar’s motion for summary judgment is premature because material facts are within Sea-Dar’s exclusive knowledge and Sea-Dar has not presented any witnesses for depositions. Plaintiff argues that he should be able to question Sea-Dar about the work performed, including when the work began and was completed. He should also be permitted to question Sea-Dar on whether other permits existed and additional work was performed and on whether the work performed *could* affect or had affected any underground piping and/or utilities. These arguments are speculative at best and, as the Court of Appeals has held, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions” are insufficient to defeat a *prima facie* case of summary judgment (Zuckerman v City of New York, et al, 49 NY2d 559, 562 [1980] [internal citations omitted]).

Further, to the extent that 181, CMA and Con Ed argue that plaintiff has not yet been deposed, this is not a sufficient basis to defeat a *prima facie* case for summary judgment. *See, e.g., Erkan v McDonald's Corp.*, 146 AD3d 466, 467 (1st Dept 2017) (“Here, defendants' primary argument before the motion court was that the motion was premature because plaintiff had not yet been deposed. However, they failed to identify what information is in the exclusive control of plaintiff that would raise a material issue of fact such that CPLR 3212(f) would warrant denial of the motion”).

Finally, to the extent that plaintiff argues that there may have been other permits in existence, Mr. Flores’s Affidavit, which is not in dispute, states that Sea-Dar never obtained any permits for any exterior work, including any street opening permits.

### Motion #003

#### ***Skinner’s Prima Facie Case***

Movant Skinner argues that although it performed interior plumbing work on the third floor of the subject premises, it never performed any exterior work at or about this premises; it never supervised, directed and/or controlled any exterior work at or about this premises; it never hired any contractors to perform any exterior work at or about this premises; and it never obtained any permits for any exterior work, including any street opening permits, at or about this premises. Accordingly, Skinner argues, it is nothing more than a contractor which did not create the roadway condition at issue herein, as it did not own, occupy, control or make special use of either the subject premises or the roadway abutting the same. Accordingly, Skinner argues, it cannot be held legally liable herein.

In support of these arguments, Skinner submitted, *inter alia*, an “invoice/contract” for interior work at the subject premises (NYSCEF Documents #161). Skinner also submitted a sworn Affidavit by Skinner’s President, Jesse Skinner, (NYSCEF Document #160), which states, in part:

2. By way of invoice/contract dated June 24, 2019, and signed/executed by myself on July 17, 2019, Skinner contracted with Sea-Dar Construction Company, ("Sea-Dar"), to perform plumbing work on the third floor of the premises located at 436 East 11th New York, NY.

[...]

5. All of Skinners' work at the premises located at 436 East 11th Street was interior.

6. Skinner has never performed any exterior work at or about the premises located at 436 East 11th Street, including, but not limited to, the abutting roadway.

7. Skinner has never supervised, directed and/controlled any exterior work at or about the premises located at 436 East 11th Street, including, but not limited to, the abutting roadway.

8. Skinner has never hired any contractors to perform any exterior work at or about the premises located at 436 East 11th Street, including, but not limited to, the abutting roadway.

9. Skinner has never obtained any permits for any exterior work, including any street opening permits, at or about the premises located at 43 East 11th Street, including, but not limited to, the abutting roadway.

As discussed above, it is undisputed that plaintiff’s accident occurred in the roadway. The invoice/contract submitted by Skinner lists only tasks that were performed in the interior of the premises, which this court notes was on the third floor. Mr. Skinner stated in his Affidavit that Skinner never performed any exterior work at or about the premises, including, but not limited to, the abutting roadway; that Skinner never supervised, directed and/controlled any exterior work at or about the premises, including, but not limited to, the abutting roadway; that Skinner never hired any contractors to perform any exterior work at or about the premises, including, but not limited to, the abutting roadway; and that Skinner never obtained any permits for any exterior work,

including any street opening permits, at or about the premises, including, but not limited to, the abutting roadway.

Given the above, this court finds that Skinner has established a *prima facie* case for summary judgment, and the burden shifts to the parties 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.

Opposition papers were filed by: 181 and CMA (NYSCEF Document #168); Con Ed (NYSCEF Document #169); and by plaintiff (NYSCEF Document #1175). Similar to the arguments raised in response to Motion Sequence #002, here, it is argued that this motion should be denied as premature because neither Skinner nor the plaintiff have been deposed and that there exist material facts that are within Skinner's exclusive knowledge. As in Motion #002, Con Ed adopts and incorporates both the legal and factual argument, made by 181 and CMA.

As was determined in Motion 002, it is undisputed on this record that Skinner performed work only on the interior of the subject premises, whereas the subject defect is located in the roadway in front of the subject premises. The fact that the plaintiff has not yet been deposed is insufficient to defeat a *prima facie* case for summary judgment. And, to the extent that plaintiff argues that there may be other permits in existence, Mr. Skinner's Affidavit, which is not in dispute, states that Skinner never obtained any permits for any exterior work, including any street opening permits, at or about the premises, including, but not limited to, the abutting roadway.

Conclusion

For all the reasons set forth herein, it is hereby:


**ORDERED** that Motion #002, filed by Sea-Dar, is **GRANTED** and the complaint and any cross-claims against it are dismissed; and it is further

**ORDERED** that Motion #003, filed by Skinner, is **GRANTED** and the complaint and any cross-claims against it are dismissed; and it is further

**ORDERED** that the caption shall be amended to remove Sea-Dar and Skinner as named defendants in that action; and it is further

**ORDERED** that the provisions of the Case Scheduling Order dated, March 15, 2023 and “so ordered” on March 17, 2013 (NYSCEF Doc. No. 216) for discovery, including the Examination Before Trial (“EBT”) of defendants Sea-Dar and Skinner are **VACATED**.

This is the Decision and Oder of this court.

<p><u>4/14/2023</u> DATE</p>			<p> _____ J. MACHELEE SWEETING, J.S.C.</p>	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE