

Adams v City of New York

2023 NY Slip Op 31985(U)

June 13, 2023

Supreme Court, New York County

Docket Number: Index No. 158089/2018

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

Justice

-----X

PAUL ADAMS,

Plaintiff,

- v -

CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., P & T II CONTRACTING
CORP., CARLO LIZZA & SONS PAVING,
INC., CITYBRIDGE, LLC, TIME WARNER CABLE NEW
YORK CITY LLC, HELLMAN ELECTRIC CORP., E-J
ELECTRIC INSTALLATION CORP.,

Defendants.

-----X

TIME WARNER CABLE NEW YORK CITY LLC,

Third-Party Plaintiff,

-against-

OLD HDE INC., HYLAN DATACOM & ELECTRICAL LLC.,
HYLAN DATACOM & ELECTRICAL INC.,

Third-Party Defendants.

-----X

CITYBRIDGE, LLC,

Second Third-Party Plaintiff,

-against-

OLE HDE INC., INDIVIDUALLY AND AS A SUCCESSOR IN
INTEREST TO HYLAN DATACOM & ELECTRICAL INC.,,
HYLAN DATACOME & ELECTRICAL LLC, INDIVIDUALLY
AND AS A SUCCESSOR IN INTEREST TO, HYLAN
DATACOM & ELECTRICAL, INC., HYLAN DATACOM &
ELECTRICAL INC., INDIVIDUALLY,

Second Third-Party Defendants.

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INDEX NO. 158089/2018

MOTION DATE 11/10/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 565725/2019

Second Third-Party
Index No. 595630/2022

The following e-filed documents, listed by NYSCEF document number (Motion 006) 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by defendant P&T II Contracting Corp. (“P&T”) for summary judgment dismissing the complaint and all crossclaims against it is granted for the reasons set forth below.

Plaintiff alleges that on June 1, 2017, he sustained injuries when he tripped and fell over an “uneven, misleveled, depressed and hazardous portion” of the crosswalk located in the southwest corner of the intersection of West 35th Street and Eighth Avenue, New York, New York, approximately five feet from the curb (NYSCEF Doc. Nos. 227 [Compl. at ¶¶86-97] and 229 [Bill of Particulars at ¶2]). Plaintiff alleges that defendants the City of New York (the “City”), Consolidated Edison Company of New York, Inc. (“ConEd”), P&T, Carlo Lizza & Sons Paving, Inc. (“Carlo Lizza”), Citybridge, LLC (“Citybridge”), Time Warner Cable New York City LLC (“Time Warner”), Hellman Electric Corp. (“Hellman”), and E-J Electric Installation Company (“E-J”) negligently caused and created the defect that caused his injuries (NYSCEF Doc. Nos. 227 [Compl. at ¶93]).

ConEd interposed an answer asserting crossclaims against P&T for indemnification, contribution, and breach of contract (NYSCEF Doc. No. 268 [Answers at p. 4]). Time Warner, Hellman, and E-J interposed answers asserting crossclaims against P&T for indemnification and contribution (*Id.* at pp. 16-17, 25-26, 102-103]). Carlo Lizza interposed an answer asserting a crossclaim against P&T for indemnification and contribution (*Id.* at p. 110). Citybridge interposed an answer asserting crossclaims against P&T for indemnification and contribution (*Id.* at p. 118-120) and also commenced a second-third party action against Hylan Datacom & Electrical LLC

(“Hylan”) asserting claims contractual and common law indemnification, contribution, and breach of contract (NYSCEF Doc. No. 255 [Second Third-Party Compl. at ¶¶28-45]). In its answer to the second third-party complaint, Hylan asserted, as relevant here, crossclaims against P&T for common law indemnification and contribution (NYSCEF Doc. No. 239 [Hylan Answer at ¶¶25-28]).

P&T now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff’s complaint and all crossclaims against it on the grounds that it did not perform any work at the subject intersection and therefore did not owe a duty to plaintiff. In support of its motion, P&T submits the EBT testimony of P&T’s treasurer, Lenny Pereira. Pereira oversees all of P&T’s operations and jobs involving water mains, sewers, and street restoration (NYSCEF Doc. No. 279 [Pereira EBT at pp. 10-11, 22, 24-25]). Pereira testified that, in early 2016, the City awarded P&T a contract for an accelerated water main project (the “Contract”) (Id. at pp. 10, 22, 29-33). He testified that the City issued permits to P&T in connection with the Contract for street excavation and water main installation at West 35th Street from Seventh to Eighth Avenue and Eighth Avenue to Ninth Avenue as well as a permit for work at Eighth Avenue between West 34th to West 35th Street (Id. at pp. 43-48, 57, 61). He further testified that P&T did not perform any work at these locations because the Contract’s budget was exhausted before P&T started moving its work east of Tenth Avenue (Id. at pp. 59-61, 76-77, 97-98). He testified that P&T did not store any equipment at the intersection of West 35th and Eighth Avenue (Id. at p. 90).

P&T also submits the EBT transcripts of witnesses for Citybridge, Carlo Lizza, E-J, Hellman, Hylan, and Time Warner, all of whom testified that they were not aware of any contract with P&T (See NYSCEF Doc. Nos. 278 [Williams EBT at pp. 84-87], 280 [Zigrossi EBT at pp.

120-121], 281 [Piazza EBT at pp. 159-160], 282 [Hughes EBT at p. 125], 283 [Young EBT at p. 89], 284 [Loggia EBT at pp. 77-78], and 285 [D'Arpa EBT at pp. 54-55]).

Plaintiff opposes the motion, arguing that P&T has not submitted any proof demonstrating that it neither performed work in the subject intersection or created the defective condition. Plaintiff emphasizes that P&T has not submitted the field notes from its supervisor for the subject project, Ricardo Guerrero, despite Pereira's testimony that he generally referred to such field notes to determine whether P&T performed work at a given location. Plaintiff also argues that two documents referenced in Pereira's EBT—a "final drawing" by the New York City Department of Design and Construction ("DDC") ostensibly outlining the entirety of the subject project, and an email chain between DDC employees which "includes an email dated July 5, 2017 ... [that] purportedly lists project locations that would not be completed under the ... [Contract]"—are inadmissible (NYSCEF Doc. No. 291 [Uy Affirm. in Opp. at ¶26]).

Hylan also opposes P&T's motion, to the extent P&T seeks to dismiss Hylan's crossclaims against it.

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]).

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause. One who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site" (Kenney v City

of New York, 30 AD3d 261, 262 [1st Dept 2006] [internal citations omitted]). Accordingly, “[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]).

P&T has met its burden here. It has established through Pereira’s undisputed testimony that it did no work at the subject location (See Bermudez v City of New York, 21 AD3d 258, 258-259 [1st Dept 2005] [summary judgment warranted in light of “[t]he undisputed testimony of [movant’s] project and office managers that, although it had obtained the permit, the City had cancelled the contract and, as a result, [movant] performed no work at the site”]).

Plaintiff fails to raise an issue of fact in opposition. The fact that the City issued permits to P&T to perform work in the vicinity of plaintiff’s fall is not sufficient, in and of itself, to do so (See Bermudez v City of New York, 21 AD3d 258, 258 [1st Dept 2005]). Neither does the fact that Pereira testified from his personal recollection that the Contract ended before any work in the subject intersection was performed without referring to the field notes of P&T’s supervisor for the subject project, Ricardo Guerrero, present a bar to summary judgment. Notably, while the City of New York is a party to this action it does not dispute his testimony that the budget for the Contract ran out before work was complete. Finally, plaintiff’s argument that certain documents referenced by Pereira in his EBT—i.e., the “final drawing” created by the DDC and emails between DDC employees related to the subject project—are inadmissible is of no moment, as P&T carried its prima facie burden through Pereira’s testimony rather than either of these documents. In light of the foregoing, plaintiff’s complaint is dismissed.

The crossclaims against P&T are also dismissed. As P&T performed no work at the subject intersection, no negligence on its part could have caused plaintiff's injuries and therefore no grounds for contribution and common law indemnification lie (See e.g., Martins v Little 40 Worth Assocs., Inc., 72 AD3d 483, 484 [1st Dept 2010]). Moreover, as it is undisputed that no answering party entered into a contract with P&T, all of the crossclaims against P&T for contractual indemnification and breach of contract must also be dismissed (See e.g., Stutterheim v First Shot Prods., 137 AD3d 690 [1st Dept 2016]).

Accordingly, it is

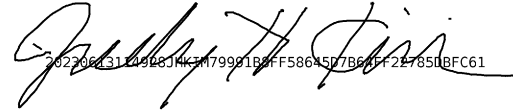
ORDERED that P&T II Contracting Corp.'s motion for summary judgment is granted and this action and all crossclaims are dismissed as to defendant P&T II Contracting Corp.; and it is further

ORDERED that within ten days of the date of this decision and order, counsel for P&T II Contracting Corp. 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 to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that all future papers filed with the court shall bear the revised caption; 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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6/13/2023

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