

**Hayes v Hunters Key LLC**

2023 NY Slip Op 32128(U)

June 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156760/2020

Judge: John J. Kelley

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

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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EVA HAYES,

Plaintiff,

- v -

HUNTERS KEY LLC, UDR 10 HANOVER LLC, MICHAEL  
G. FAHEY ARCHITECT, P.C., FAHEY, INC., LTI  
CONSTRUCTION CORP., MICHAEL G. FAHEY, and  
BLUESTONE LANE 90 WATER, LLC,

Defendants.

-----X

HUNTERS KEY, LLC, and MICHAEL G. FAHEY, in his  
capacity as member of HUNTERS KEY, LLC, only,

Third-Party Plaintiffs,

-against-

BLUESTONE LANE 90 WATER, LLC,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 150, 151, 155, 156

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for negligence, arising from a trip-and-fall accident on a sidewalk, the defendant UDR 10 Hanover, LLC (UDR), moves pursuant to CPLR 3212 for summary judgment dismissing the amended complaint and all cross claims insofar as asserted against it. Although the plaintiff and several of UDR's codefendants do not oppose the motion, the defendants Fahey, Inc., and the defendants Hunters Key, LLC (Hunters Key) and Michael G. Fahey, in his capacity as member of Hunters Key, LLC, only (together the Hunters Key

defendants), oppose the motion. The motion is granted, and UDR is awarded summary judgment dismissing the amended complaint and all cross claims insofar as asserted against it.

On February 12, 2020, the plaintiff, Eva Hayes, tripped and fell on a public sidewalk that she initially claimed abutted two buildings, respectively designated as 90 Water Street and 10 Hanover Square in Manhattan. As of the date of the accident, the premises at 90 Water Street were owned solely by Hunters Key, while UDR owned the premises at 10 Hanover Square. Also as of that date, Hunters Key, as well as the defendants Fahey, Inc., LTI Construction Corp. (LTI), and Michael G. Fahey Architect, P.C. (MGFA), all had offices at 90 Water Street. Fahey is a member of Hunters Key, the sole shareholder of Fahey, Inc., one of two shareholders of LTI, and the sole shareholder of MGFA. In addition, on August 18, 2016, the defendant Bluestone Lane 90 Water, LLC (Bluestone), had entered into a commercial lease with Hunters Key, pursuant to which it leased the first floor at 90 Water Street, along with an area of non-contiguous space in the basement of that building. Bluestone was in possession of that space as of the date of the accident.

According to UDR, the accident did *not* happen on a sidewalk at the border of the two subject buildings. Rather, it asserted that, as the plaintiff was walking along the sidewalk, with only 90 Water Street to her right side and the street to her left, her right foot became caught in a broken and uneven area of the sidewalk. Although the plaintiff testified at her deposition that she tripped on the sidewalk abutting 90 Water Street only, in the course of her testimony she circled a portion of a photograph that appeared to encompass a portion of the sidewalk abutting both 90 Water Street and 10 Hanover Square. In connection with the plaintiff's identification of the location of her fall, UDR asserted that the area that the plaintiff had circled was "admittedly too big," so that it erroneously appeared to encompass a part of the sidewalk that also abutted 10 Hanover Square. It pointed out that the plaintiff also marked several other photographs, one of which was marked to show that she had fallen in a narrower area near a discarded cigarette butt that was depicted in the middle of the photograph. UDR further argued that the same

cigarette butt was visible in both that and yet another photograph, and that the cigarette butt was depicted as being in front of 90 Water Street. In this regard, UDR contended that the latter photograph depicted a planter pedestal that had been installed in front of 90 Water Street, and that the cigarette butt appeared immediately adjacent to the planter pedestal.

In April 2020, Hunters Key contracted with Tony's Masonry to replace the sidewalk abutting 90 Water Street, although Tony's Masonry identified "Fahey Design Build" as the owner for whom the work was intended. LTI paid Tony's Masonry for the sidewalk replacement.

In addition, UDR retained land surveyor Angelo Fiorenza to survey the accident location, and thereupon fix the property line between 90 Water Street and 10 Hanover Square. Fiorenza submitted an affidavit describing his findings. According to Fiorenza, the property line between the two properties is located one foot and six inches to the south of the stairway in front of 90 Water Street, and photographs that he took depicted the property line extended onto the sidewalk by means of a blue line. Fiorenza explained that the photographs depicted the installation of a new planter measuring 15 $\frac{5}{8}$  inches wide that had been placed  $\frac{1}{4}$  inch to the south of that stairway, and that his measurements indicated that the property line was 2 $\frac{1}{8}$  inches to the south of the southernmost edge of the planter. Fiorenza opined that the alleged defective condition, as described by the plaintiff, was located on a sidewalk that abutted only the premises at 90 Water Street. Moreover, regardless of the reason that Hunters Key gave for replacing the sidewalk, Fiorenza opined that the precise location at which the plaintiff asserted that she had fallen was within the area of sidewalk that Tony's Masonry had replaced.

The plaintiff initially commenced this action against all of the defendants, save Bluestone, but later amended her complaint to add causes of action against Bluestone. In its answer to the amended complaint, Fahey, Inc., did not assert any cross claims against UDR. The Hunters Key defendants, in their answer to the amended complaint, asserted cross claims against UDR for "indemnity and/or contribution," but the factual basis of their cross claim was based solely on contribution, as the cross claim asserted that UDR was also at fault in the

happening of the accident. In this regard, the court notes that the Hunters Key defendants' cross claim against UDR did not specifically assert that the plaintiff had sought to hold them vicariously or statutorily liable for UDR's negligence in the absence of their own negligence (common-law indemnification) or that UDR contractually agreed to hold them harmless for any particular occurrence (contractual indemnification). LTI asserted three cross claims against UDR, sounding respectively in contribution, common-law indemnification, and contractual indemnification. Bluestone asserted two cross claims against UDR, sounding in common-law and contractual indemnification, respectively. On May 5, 2022, the plaintiff discontinued the action against MGFA.

The legal standards applicable to summary judgment motions in trip-and-fall actions on New York City sidewalks were articulated in detail in this court's June 23, 2023 order disposing of Motion Sequence 002. With respect to the plaintiff's claims against it, UDR established, prima facie, that the portion of the sidewalk on which she had fallen did not abut its building and, hence, that it owed no duty to the plaintiff to maintain or repair that portion of the sidewalk. Since the plaintiff did not oppose UDR's motion, she failed to raise a triable issue of fact, and summary judgment must be awarded to UDR dismissing the amended complaint insofar as asserted against it.

Inasmuch as Fahey, Inc., did not assert a cross claim against UDR, that branch of UDR's motion seeking summary judgment dismissing all cross claims asserted against it did not seek relief against Fahey, Inc. Hence, Fahey, Inc., will not be aggrieved by any order disposing of this motion (*see Mixon v TBV, Inc.*, 76 AD3d 144, 149 [2d Dept 2010]), and the papers submitted by Fahey, Inc., need not be considered in deciding the issues before the court. In any event, since this court, in its June 23, 2023 order, awarded summary judgment to Fahey, Inc., dismissing the amended complaint and all cross claims asserted against it, including the cross claim asserted by UDR, it no longer has any stake in the outcome of this action.

In connection with the argument advanced by the Hunters Key defendants, the question relevant here is whether UDR, by submitting the plaintiff's deposition transcript and copies of the photographs that she marked thereat, failed to make a prima facie showing of its entitlement to judgment as a matter of law with respect to the Hunters Key defendants' cross claim. The court concludes that UDR made the necessary prima facie showing that the portion of the sidewalk on which the plaintiff fell did not abut its building, and that the Hunters Key defendants failed to raise a triable issue of fact in opposition to that showing.

The only evidence that supported the Hunters Key defendants' contention was a single photograph that the plaintiff marked at her deposition, on which she circled a somewhat extensive area of sidewalk in response to a request that she mark the photograph to depict the area of sidewalk on which she had fallen. Since the deposition was conducted electronically, she was asked to make that marking with an electronic pen. After she first attempted to circle the relevant area, she asserted "I'm doing it too big, I'm sorry." The deposition proceeded as follows:

"Q: Ms. Hayes, the last thing your answer was that the circle was too big. Do you see the black bar in the picture where there's an undo button. Just above the picture there's a black toolbar, it says mouse, select text, eraser, format.

"A. Scroll down on the picture a little bit.

"Q. Hang on, I have to take control away to do that. I will do the undo, if that is okay?

"A. Yes, please do that. I'm going to give the screen back to you and now you should be able to redo the circle, just try to circle the area.

"A. That was my circle."

She further explained that it was *not* her testimony that she couldn't identify the area where she fell or that "a smaller circle would not encompass the area" where she had tripped. In other words, she attested that a smaller circle would indeed encompass that area. From that point forward in the deposition, she marked a smaller circumference on numerous photographs to

identify the area where she tripped, all of which was located on the sidewalk abutting 90 Water Street, and none of which abutted 10 Hanover Square.

Contrary to the Hudson Key defendants' contention, the plaintiff's testimony was not "inconsistent," which, if so, would have reflected the existence of a triable issue of fact (see *Nye v Putnam Nursing & Rehab. Ctr.*, 62 AD3d 767, 768 [2d Dept 2009]). Rather, she corrected an error that arose solely from the technical limitations of the electronic device that she was using at the deposition. The record reflects that she had always intended to mark the area with a smaller circle, that other photographs showed a more circumscribed area that excluded sidewalk elements abutting 10 Hanover Square, and that she steadfastly insisted thereafter that she had fallen in an area of the sidewalk that abutted only 90 Water Street.

Moreover, although evidence of post-accident repairs is not admissible to establish that a defective condition existed in the first instance, it is admissible on the issue of ownership and control of premises or equipment that caused injury (see *Cooke v City of New York*, 95 AD3d 537, 538 [1st Dept 2012]; *Cortes v Central El., Inc.*, 45 AD3d 323, 324 [1st Dept 2007]; *Fernandez v Higdon Elevator Co.*, 220 AD2d 293, 293 [1st Dept 1995]). UDR established that Hunters Key completely repaired the portion of the sidewalk upon which the plaintiff claimed she had fallen. In opposition to that showing, the Hunters Key defendants failed to rebut that showing with its attorney's affirmation, which simply incorporated by reference the attorney's affirmation submitted by Fahey, Inc., which, in turn, articulated only speculative criticisms of Fiorenza's expert affidavit.

With respect to the cross claims asserted against it by LHI and Bluestone, UDR established, prima facie, that it was not legally responsible for the maintenance and repair subject portion of the sidewalk and, hence, was not liable for contribution. It further established, prima facie, that neither LHI nor Bluestone could be held vicariously or statutorily liable for UDR's negligence, and that neither LHI nor Bluestone had entered into an indemnification agreement with it. Since neither LHI nor Bluestone opposed UDR's motion, they failed to raise

a triable issue of fact, and UDR must be awarded summary judgment dismissing those defendants' cross claims against it.

In light of the foregoing, it is

ORDERED that the motion is granted, and the defendant UDR 10 Hanover, LLC, is awarded summary judgment dismissing the amended complaint and all cross claims insofar as asserted against it, and the amended complaint and all cross claims asserted against it are dismissed; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant UDR 10 Hanover, LLC; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the amended complaint and all cross claims insofar as asserted against the defendant UDR 10 Hanover, LLC.

This constitutes the Decision and Order of the court.

6/26/2023  
DATE

  
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JOHN J. MELLEY, J.S.C.

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"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: