

Adams v City of New York

2023 NY Slip Op 32130(U)

June 26, 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 12/06/2022
MOTION SEQ. NO. 005

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 005) 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261

were read on this motion to/for

DISMISS

Upon the foregoing documents, the motion by defendant CityBridge, LLC (“CityBridge”) 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 after tripping and falling over an “uneven, misleveled, depressed and hazardous portion” of the crosswalk at the southwest corner of West 35th Street and Eighth Avenue, New York, New York, approximately five feet from the curb (See 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 II Contracting Corp. (“P&T”), Carlo Lizza & Sons Paving, Inc. (“Lizza”), Citybridge, E-J Electric Installation Company (“E-J”), Hellman Electric Corp. (“Hellman”), and Time Warner Cable New York City LLC (“Time Warner”) negligently caused and created the defect that caused his injuries (NYSCEF Doc. Nos. 227 [Compl. at ¶93]).

ConEd interposed an answer asserting crossclaims against CityBridge for indemnification (NYSCEF Doc. No. 268 [Answers at p. 6]). Lizza, E-J, Hellman, P&T, and Time Warner interposed answers asserting crossclaims against CityBridge for indemnification and contribution (*Id.* at pp. 16-17, 25-26, 102-103, 110, 133-134). On August 15, 2022, CityBridge commenced a second-third party action against Hylan Datacom & Electrical LLC (“Hylan”), asserting claims for contractual and common law indemnification, contribution, and breach of contract (NYSCEF Doc. No. 255 [Second Third-Party Compl. at ¶¶28-45]). In its answer, Hylan asserted counterclaims against CityBridge for indemnification and contribution (NYSCER Doc. No. 256 [Answer]).

Plaintiff filed a note of issue on April 3, 2023, asserting that discovery proceedings known to be necessary were completed (NYSCEF Doc. No. 301). CityBridge 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 work at the subject intersection and therefore owed no duty to plaintiff or, alternatively, for judgment on its third-party claims against Hylan.

In support of its motion, CityBridge submits the examination before trial ("EBT") testimony of Michael Zigrossi, the director of operations for Intersection, the managing partner for CityBridge (NYSCEF Doc. No. 231 [Zigrossi EBT at pp. 9, 32]). Zigrossi testified that in 2015 the City awarded CityBridge a contract to develop LinkNYC, a project designed to replace payphones throughout the five boroughs with kiosks offering Wi-Fi services (Id. at pp. 31-36, 122). CityBridge did not perform the kiosk installation contemplated by this contract, but instead contracted with Triumph Construction ("Triumph"), Hylan, and MFM Contracting, to conduct the actual installation (Id. at pp. 43-45, 122-123). CityBridge employees and contractors conducted "arbitrary" site inspections and post-installation inspections concerning the installation of the kiosks (Id. at pp. 70, 128). During the EBT Zigrossi reviewed a number of permits issued by DOT to CityBridge for removal of payphones and installation of link kiosks at the subject intersection but testified that any work performed pursuant to the permit was performed by one of its three subcontractors, although he could not state which of the three subcontractors did so without reference to CityBridge's internal records system (Id. at pp. 45, 123-124, 134).

CityBridge also submits its contract with Hylan, entitled CityBridge-Hylan Subcontract (the "Contract"). The Contract required Hylan to, inter alia, "perform and furnish all the labor, supervisors, services, plans, equipment, tools, documentation, reports, of electrical installation and all other things necessary" for the installation of the LinksNYC kiosks (NYSCEF Doc. No. 237

[CityBridge-Hylan Contract at Art. 1]). This contract also provided that Hylan would “comply with all laws, rules, regulations and policies pertaining to the environment and public and occupational health and safety and shall conduct operations to avoid risk of harm to the health and safety of the public” and that it was responsible for “initiating, maintaining and supervising all safety precautions and programs in connection with the Work” and would “take all reasonable precautions for the health and safety of, and shall provide all reasonable protection to prevent damage, injury or loss to: (1) all employees involved in the Work and all other persons who may be affected thereby” (Id. at Art. XXII).

CityBridge argues that the foregoing establishes that: (1) it did not perform any work itself at the subject intersection and (2) even assuming its subcontractors were negligent, it did not supervise their work to such a degree that it could be held vicariously liable for any negligence by these subcontractors. Plaintiff opposes the motion, arguing that CityBridge has not established, as a matter of law, that it did not perform work at the subject intersection. Plaintiff points to four permits issued to CityBridge between January 1, 2016 and May 10, 2017, which contemplate opening the roadway at the subject intersection, specifically Permits M01-2016049-B68, M01-2016095-B67, M012017130-A64, M01-2016021-A41 (See NYSCEF Doc. No. 243). Plaintiff also notes that CityBridge has not produced its contract with the City for the LinkNYC project and argues that this contract is “highly relevant to determining the extent of CityBridge’s supervision over its contractors’ work” and, by extension, whether CityBridge could be held vicariously liable for its subcontractors’ negligence.

Hylan also opposes CityBridge’s motion to the extent CityBridge seeks summary judgment on its third-party claims against Hylan. Hylan argues that this branch of CityBridge’s motion is premature because Hylan has not had the opportunity to depose CityBridge’s witness regarding

CityBridge's third-party action and that outstanding issues of fact exist as to whether plaintiff's accident arose out of Hylan's work and whether CityBridge created the defective condition, in light of the fact that permits were issued under its name.

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. 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, 324 [1986] [internal citations omitted]).

CityBridge has satisfied its burden here. “To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause” (Kenney v City of New York, 30 AD3d 261, 262 [1st Dept 2006] [internal citations omitted]). However, a contractor who has contracted to render services does not owe a third party, such as plaintiff, a duty of care unless: (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, “launches a force or instrument of harm”; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has “entirely displaced the other party's duty to maintain the premises safely” (Medinas v MILT Holdings LLC, 131 AD3d 121 [1st Dept 2015] quoting Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002]), and CityBridge has established that these exceptions do not apply here.

Zigrossi's uncontroverted testimony that all work under the LinkNYC contract with the City was performed by its subcontractors establishes that it may not be liable under the first Espinal exception (See Kenny v Turner Const. Co., 155 AD3d 479 [1st Dept 2017]). Neither does the complaint allege that the plaintiff detrimentally relied on the continued performance of CityBridge's duties such that the second Espinal exception could apply. Nor does the third Espinal exception apply, as CityBridge could not have entirely displaced the City's duty to maintain the subject intersection in a reasonably safe condition, as the City's duty in this arena is non-delegable (See Sanchez v City of New York, 17 Misc 3d 1134(A) [Sup Ct, Queens County 2007] citing Stiuso v City of New York, 87 NY2d 889 [1995]). Finally, "as it is uncontroverted that while [CityBridge] inspected the work of its subcontractors, it otherwise did not direct or control them ... it is not vicariously liable for their negligence"¹ (Campbell v H&M Hennes & Mauritz L.P., 2022 NY Slip Op 32008[U] [Sup Ct, NY County 2022] citing Nelson v E&M 2710 Clarendon LLC, 129 AD3d 568 [1st Dept 2015]).

In light of the foregoing, that branch of CityBridge's motion for summary judgment dismissing the complaint as against it is granted and that branch of CityBridge's motion for summary judgment on its third-party claims is denied as moot.

Accordingly, it is

ORDERED that CityBridge, LLC's motion for summary judgment dismissing the complaint as against it is granted; and it is further

¹There is no evidence in the record revealing the degree to which Citybridge directed or controlled the work of its other two subcontractors, Triumph and MFM Contracting. This does not, however, present a bar to summary judgment—these subcontractors have not been named as defendants and nothing in the record suggests that plaintiff ever intended to hold Citybridge liable for any of their acts, let alone indicated this intent to Citybridge (See Gambacorta v Giordano, 193 AD3d 572 [1st Dept 2021]; Harty v Lenci, 294 AD2d 296 [1st Dept 2002]).

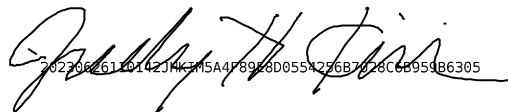
ORDERED that CityBridge LLC’s motion for summary judgment on its third-party claims is denied as moot; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this decision and order, with notice of entry, upon defendants within fifteen days of the date of this decision and order; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); 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 “Efiling” 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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6/26/2023

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