

Vargas v 76 Bowery LLC

2023 NY Slip Op 32381(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 160141/2020

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

-----X

DIMAS VARGAS,

Plaintiff,

- v -

76 BOWERY LLC, TITAN REALTY & CONSTRUCTION
LLC,

Defendants.

-----X

INDEX NO. 160141/2020

MOTION DATE 03/31/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendants 76 Bowery LLC (76 Bowery) and Titan Realty & Construction LLC (Titan) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on August 16, 2019, in which plaintiff was injured when he tripped and fell on debris on a roof located at 74 Bowery in Manhattan. Plaintiff was employed as managing director of the New York Jewelers Exchange (NYJE) at that address. On the day of the accident, plaintiff did a walkthrough at 74 Bowery and then went to his office there. Thereafter, the building's porter notified plaintiff that there was debris on the roof and showed him its location. Plaintiff alleges that, when he went to the location, he tripped on the debris and was injured. He subsequently commenced the instant negligence action against defendants.

At his deposition, plaintiff testified that the debris on which he fell came from the roof of the adjoining building, 76 Bowery, at which stucco and waterproofing were being applied as part of a construction project. Titan was allegedly the contractor on the project. On several occasions before his accident, he had complained to 76 Bowery's principal, Steve Dadourian, about debris emanating from that building and landing on the roof of 74 Bowery, and Dadourian then had workers clean up the debris. However, plaintiff did not complain to Dadourian about the specific debris on which he fell until after the accident (NYSCEF 43).

Titan's principal, Keith Zenobio, testified that in August 2019, a building was under construction at 76 Broadway, which required the installation of foam sheets on the exterior of the building in order to waterproof the structure. At the time of the accident, Titan had two employees, neither of whom was involved in the installation of the waterproofing, and Zenobio did not know the identity of the contractor hired to clean the debris from the roof (NYSCEF 44).

According to Zenobio, at some point, Dadourian received a text from plaintiff asking 76 Bowery to clear debris from the roof of 74 Bowery, and the debris was then cleared. Zenobio maintained that he personally never received a complaint about any debris, but he was unaware whether any complaints were made to anyone else at Titan prior to the incident (*Id.*).

A work log submitted by defendants reflects that, on August 14, 2019, workers employed by MA Improvements Inc. (MAI) installed waterproofing at 76 Bowery, and on August 15th, MAI cleaned debris near a scaffold on the roof of 76 Bowery. No work log is submitted reflecting what work, if any, MAI performed on the date of the accident. A January 2019 purchase order reflects that Mai had been hired by Titan, acting as agent and representative of 76 Bowery, to perform unspecified work at the premises (NYSCEF 45, 46).

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. They maintain that they did not create or have notice of the debris on which plaintiff fell, observing that Dadourian received no complaint about the debris until after the incident. Moreover, pursuant to a license agreement between NYJE and 76 Bowery, defendants had no duty to inspect the roof of 74 Bowery unless NYJE asked them to do so, which did not occur (NYSCEF 47).

In opposition, plaintiff argues that issues of fact exist regarding whether defendants had actual and/or constructive notice of the recurring hazardous condition, relying on his affidavit in which he attests, inter alia, that he complained to Dadourian about debris on the roof of 74 Bowery during the week before his accident (NYSCEF 56).

In reply, defendants argue that plaintiff fails to raise an issue of fact and that he improperly attempts to use his affidavit to feign a factual issue (NYSCEF 61).

LEGAL CONCLUSIONS

It is well settled that a party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [*citations omitted*]). In considering such a motion, the court must view the facts in the light most favorable to the non-moving party (*See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the movant fails to meet this burden, the motion must be denied despite the sufficiency of the opposing papers. If the movant meets its burden, it becomes incumbent on the non-moving party to raise a material issue of fact (*See, Vega, supra*). “The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted

where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]).

In order to prove a negligence claim, a plaintiff must establish a duty owed to him or her by the defendant, a breach of the duty, and an injury proximately caused by the breach (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). A landowner has a duty to an adjacent landowner to "exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property." (*Associated Mut. Ins. Coop v 198, LLC*, 78 AD3d 597, 597 [1st Dept 2010] [*internal quotation marks and citations omitted*]).

Here, defendants failed to establish as a matter of law that they lacked actual or constructive notice of the debris on which plaintiff fell (*see Balbuena v 395 Hudson N.Y., LLC*, 214 AD3d 586, 587-588 [1st Dept 2023]). Plaintiff's testimony that he complained to Dadourian several times about debris on the roof of 74 Broadway before his accident was undisputed, and indeed, Zenobio acknowledged that such complaints were made to Dadourian before the occurrence. Although Zenobio maintained that he did not personally receive any complaints about the debris, he was unable to state whether any such complaints were made to other Titan employees. Therefore, defendants fail to establish, prima facie, that they did not have notice of a recurring dangerous condition on the roof of 74 Bowery (*See De Barcadel v 1015 Concourse Owners Corp.*, 204 AD3d 605 [1st Dept 2022]; *see also Cavedo v Flushing Commons Prop. Owner, LLC*, ___ AD3d ___ [1st Dept 2023]).

Defendants' argument regarding the license agreement between NYJE and 76 Bowery is misplaced, as they fail to acknowledge the existence of several provisions therein which require

that any work performed on the roof of 76 Bowery be performed safely so as to avoid any injuries to persons at 74 Bowery.

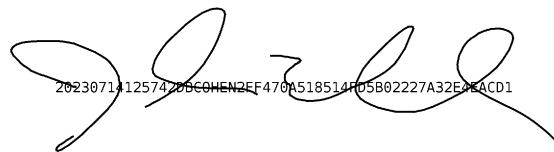
Also without merit is defendants' contention that plaintiff attempts to create a feigned issue of fact based on the statement in his affidavit that he complained to Dadourian about debris during the week before the accident. That statement is consistent with plaintiff's deposition testimony that he asked 76 Bowery to clean debris from the roof on more than one occasion before the accident.

Moreover, the decision in *Blech v West Park Presbyterian Church*, 97 AD3d 443 (1st Dept 2012), in which a contractor was awarded summary judgment where it established that it performed no work at the location in question, on which defendants rely, is inapposite, as here, 76 Bowery had a duty to prevent any reasonably foreseeable injury which could occur at 74 Bowery (*See Associated Mut. Ins. Coop. v 198, LLC*, 78 AD3d 597, *supra*).

Finally, the January 2019 purchase order reflects that Titan, as 76 Bowery's agent and representative, hired MAI to perform work at the premises, and it appears that MAI cleaned debris on the roof of 76 Bowery one day before plaintiff's accident, thereby also raising a triable issue as to whether defendants created the dangerous condition or may be held liable therefor.

The parties' remaining arguments are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED, that the motion is denied.


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DAVID B. COHEN, J.S.C.

7/14/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE