

Frazier v City of New York

2023 NY Slip Op 32927(U)

August 23, 2023

Supreme Court, New York County

Docket Number: Index No. 452684/2022

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 05RCP

Justice

-----X

REGINALD FRAZIER,

Plaintiff,

- v -

CITY OF NEW YORK, CONSOLIDATED EDISON, INC.,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., WELSBACH ELECTRIC CORP., E-J ELECTRIC LLC,
RESTANI CONSTRUCTION CORP., RAMON GARRIDO,

Defendants.

-----X

E-J ELECTRIC LLC,

Third-Party Plaintiff,

-against-

NICO ASPHALT PAVING INC., CITYWIDE PAVING INC.,

Third-Party Defendants.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595255/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by defendant Welsbach Electric Corp. (“Welsbach”) for summary judgment dismissing this action as against it is granted for the reasons set forth below.

Plaintiff alleges that on August 5, 2020, he sustained injuries when he tripped and fell due to a crack in the roadway at the intersection of Dyckman Street and Broadway in New York County (NYSCEF Doc. Nos. 1 [Compl. at ¶¶42-44, 47-48]). At his General Municipal Law (“GML”) §50-

h hearing, plaintiff testified that on the date of the subject incident, at 2:15 am, he was working at the Dyckman subway station when the defendant Ramon Garrido began swinging a crate at him, which forced plaintiff to exit the station into the subject intersection, with Garrido in pursuit (NYSCEF Doc. No. 33 [GML §50-h at pp. 10, 18-24]). While backtracking into the intersection, plaintiff stepped into a crack in the roadway in the northeast corner of the intersection and, as he tried to pivot to get his leg out, fell over (Id. at 24-28). Plaintiff testified that the defect on which he tripped was not located within any marked crosswalk in the subject intersection (Id. at pp. 25-26).

Plaintiff's complaint asserts claims against defendants the City of New York (the "City"), Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc. ("ConEd"), Welsbach, E-J Electric LLC ("E-J"), and Restani Construction Corp. ("Restani"), alleging that these defendants were negligent in creating the alleged defect and failing to rectify it (NYSCEF Doc. Nos. 1 [Compl. at ¶43]). The City and Restani interposed Answers asserting crossclaims against Welsbach for contribution and indemnification (NYSCEF Doc. Nos. 35 [City Answer at ¶13] and 38 [Restani Answer at ¶¶30-32]). ConEd interposed an answer asserting crossclaims against Welsbach for indemnification and breach of contract for failing to procure insurance (NYSCEF Doc. No. 40 [ConEd Answer at ¶¶12-19]).

On March 20, 2023, E-J commenced a third-party action against Nico Asphalt Paving, Inc. and Citywide Paving, Inc. (collectively, "Nico") (NYSCEF Doc. No. 27 [Third-Party Compl.]). Nico subsequently interposed an answer to E-J's third-party complaint, asserting counterclaims against Welsbach for indemnification and contribution (NYSCEF Doc. No. 50 [Nico Answer at ¶¶38-39]).

Welsbach now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint and all crossclaims and counterclaims against it on the grounds that it did not perform work at the location of plaintiff's fall and therefore could not have created the defect at issue. In support of its motion, Welsbach submits the affidavit of Thomas Harrington, in which he attests that

I am employed by Welsbach Electric Corp. ("Welsbach") as a project manager, and I have been so employed since 1999. I am fully familiar with the facts set forth in this affidavit based upon my personal knowledge and my review of records prepared and maintained in the regular course of Welsbach's business.

My responsibilities as a project manager at Welsbach include maintaining work records for particular projects. I also schedule work, order materials, prepare invoices, track work and labor for particular projects, and coordinate with outside entities to perform these duties.

Welsbach and the New York City Department of Transportation ("NYCDOT") entered into an agreement concerning the installation and removal of electrical traffic signal safety in New York, New York (the "Contract"). A copy of the Contract is annexed as Exhibit "A."

In the ordinary course of its business, Welsbach maintains, among other things, documents reflecting the work performed by Welsbach under the Contract. The records are maintained at Welsbach's office located at 111-01 1401 Avenue, Queens, New York.

I conducted a search of Welsbach's records for the location of this accident and determined the only work performed by Welsbach at the intersection of Dyckman Street and Broadway on or before August 5, 2020, was in 2014, six years before the date of loss.

Under the Contract, Welsbach was required to install new traffic signals at the intersection. To perform the work, Welsbach applied for-and NYCDOT issued-several street opening permits for the period of May 19, 2014, to August 17, 2014, and a single street opening permit for the period of October 8, 2014, to October 30, 2014. Copies of those permits are annexed as Exhibit "B."

Welsbach commenced work on July 5, 2014 and completed work on October 4, 2014. Copies of Welsbach's time sheets for this work are

annexed as Exhibit “C.” A diagram of the intersection showing the location of Welsbach’s work is annexed as Exhibit “D.”

Welsbach’s excavation work is limited to the areas depicted in Exhibit D and did not extend to any other part of the intersection; Exhibit D makes clear that Welsbach did not perform work at the location where Plaintiff claims he fell.

I reviewed a Google Maps image dated September 2014 annexed as Exhibit “E” that depicts the intersection on Broadway facing westbound. Welsbach’s work is depicted as the dark line going across Broadway at the bottom of the photo, and across Dyckman on the left-hand side of the photo. These areas correspond with the highlighted intersection diagram.

Once Welsbach completes its work, Welsbach issues an invoice to NYCDOT requesting payment. Before issuing payment, NYCDOT inspects Welsbach’s work for quantity and quality. Payment is not authorized if any issue exists. A copy of the Welsbach invoices with the NYCDOT stamped approval is annexed as Exhibit “F.”

This constitutes the extent of the work performed by Welsbach at the intersection in the six years prior to plaintiff’s alleged fall.

Welsbach could not have caused or created the condition that [p]laintiff alleges caused his accident because Welsbach performed no other roadwork at the intersection from October 4, 2014, through the date of [p]laintiff’s fall, on August 5, 2020.

(NYSCEF Doc. No. 47 [Harrington Aff. at ¶¶1-2, 4-13] [emphasis added]).

Welsbach also submits photos previously marked by plaintiff indicating that he fell in the middle of the intersection, towards the northeast corner of Dyckman Street and Broadway (See NYSCEF Doc. No. 46). The diagram and Google Maps image attached in Harrington’s affidavit reflect that the only work Welsbach performed in the general vicinity of this location was entirely within the crosswalk of Broadway and did not extend into the intersection itself (NYSCEF Doc. No. 47 [Harrington Aff. at Exs. D and E]).

E-J, Nico, Restani, and plaintiff oppose Welsbach’s motion.

Nico, citing Mallen v Dekalb Corp., 181 AD3d 669 (2d Dept 2020), argues that Welsbach cannot establish that it did not perform work at the site of plaintiff's fall because the precise accident location has not been established, since plaintiff's pleadings were not personally verified by plaintiff. Nico further argues that the marked photos submitted by Welsbach may not be used to establish the site of plaintiff's fall because they were not marked by plaintiff at his GML §50-h hearing or examination before trial and therefore have not been authenticated. Finally, Nico, along with E-J, Restani, and plaintiff¹, argues that summary judgment is premature because discovery is incomplete and that further discovery may raise issues of fact as to the scope of the work Welsbach performed at the subject intersection. Restani specifies that discovery from the City, in particular, is what it seeks for such confirmation.

In reply, Welsbach rejects Nico's argument that the precise location of plaintiff's fall has not been established, and argues that the photos marked by plaintiff are presumptively admissible under CPLR §4540-a, as plaintiff produced these photos in discovery. Welsbach also asserts that Restani's argument that further discovery from the City may raise an issue of fact as to the work performed by Welsbach is belied by the City's failure to oppose Welsbach's motion.

DISCUSSION

Welsbach's motion is granted. "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

¹ The Court rejects Welsbach's contention that plaintiff's untimely opposition should not be considered. Welsbach has not alleged any prejudice resulting from plaintiff's two-day-delay in filing his opposition (See Morgan v Candia, 69 AD3d 500 [1st Dept 2010]).

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]).

“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 [1st Dept 2013] quoting Smith v Costco Wholesale Corp., 50 AD3d 499 [1st Dept 2008]). Here, Welsbach has carried its prima facie burden through Harrington’s affidavit, and the exhibits attached thereto, which establish that Welsbach did not perform work at the site of plaintiff’s fall (See Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016] [“Defendant made a prima facie showing that it did not perform any work at the location of plaintiff’s alleged fall, by submitting, among other things, the affidavit of its vice president, who asserted that the work was performed in front of 360 W. 28th Street, and did not extend to the location where plaintiff allegedly fell”]; see also Amarosa v City of New York, 51 AD 3d 596 [1st Dept 2008] [“the un rebutted affidavit of the project superintendent for the Tishman construction at 3 Times Square established that the 3 Times Square project was at the opposite end of West 43rd Street, at least 400 feet from the site of the accident”]; see also

E-J, Nico, Restani, and plaintiff’s arguments in opposition fail.

Nico’s argument that the site of plaintiff’s fall remains undetermined is meritless and its reliance on Mallen v Dekalb Corp., 181 AD3d 669 (2d Dept 2020) in support of this argument is entirely misplaced. In that case, defendant’s motion for summary judgment was granted where it was established through plaintiff’s deposition testimony that plaintiff could not identify the cause or location of her fall. Here, plaintiff testified at his GML §50-h hearing as to the cause and location

of his fall. The photographs marked by plaintiff also establish the location of this fall. Contrary to Nico's claim, these photos are properly submitted in connection with this motion, as plaintiff does not dispute the authenticity of such photos or that he produced same in discovery and, per CPLR §4540-a,

[m]aterial produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility

(CPLR §4540-a). Nico has “not adduced evidence to rebut the presumption of authenticity by a preponderance of evidence” (Sands Bros. Venture Capital II, LLC v Park Ave. Bank, 67 Misc 3d 1216(A) [Sup Ct, NY County 2020] [internal citations omitted]).

Finally, neither E-J, Nico, Restani, or plaintiff has demonstrated “that discovery might lead to relevant evidence or that the facts essential to justify their opposition to the motion [are] exclusively within [Welsbach's] knowledge and control” (Bacchus v. Bronx Lebanon Hosp. Ctr., 192 A.D.3d 553, 554 [1st Dept 2021]). Instead they make entirely speculative arguments that additional discovery is necessary to confirm the scope of Welsbach's work as set out by Harrington (See DaSilva v Haks Engrs., 125 AD3d 480, 482 [1st Dept 2015] [“[p]laintiff's argument, that he had no access to vital information about defendants' actual roles and duties at the job site, or that he was deprived of an opportunity to elicit material facts, only expresses a mere hope or speculation that discovery might turn up some evidence giving rise to a triable issue of fact”]). To the extent Restani argues that discovery is needed from the City, specifically, to confirm the scope of Welsbach's work for the City, the Court agrees with Welsbach that this argument is entirely undermined by the City's failure to oppose this motion.

That branch of Welsbach's motion to dismiss all crossclaims and counterclaims against it is also granted. As Welsbach has established that its work at the intersection could not have created the defective condition no grounds for indemnification or contribution exist (See Wilk v Columbia Univ., 150 AD3d 502, 503-504 [1st Dept 2017]). Similarly, Welsbach's motion to dismiss ConEd's crossclaim for breach of contract is granted, because it is undisputed that no contract exists between the parties.

Accordingly, it is

ORDERED that Welsbach Electric Corp.'s motion for summary judgment is granted and this action and all crossclaims and counterclaims are dismissed as against Welsbach Electric Corp; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

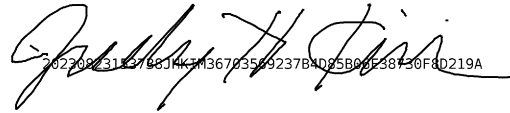
ORDERED that the caption is to be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that within ten days of the date of this decision and order, counsel for Welsbach Electric 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 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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8/23/2023

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