

Berch v Hardwell Acquisiton LLC.

2023 NY Slip Op 33113(U)

August 9, 2023

Supreme Court, New York County

Docket Number: Index No. 161096/2013

Judge: Denise M. Dominguez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 161096/2013

SUSAN BERCH,

MOTION SEQ. NO. 007

Plaintiff

- v -

**DECISION + ORDER ON
MOTION**

HARDWELL ACQUISITON LLC.,

Defendant

-----X

HARDWELL ACQUISITON LLC.

Third-Party
Index No. 595707/2016

Third Party Plaintiff

-v-

NEW YORK CITY TRANSIT AUTHORITY

Third Party Defendant

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

For the reasons that follow, the summary judgement motion by Third-Party Defendant NEW YORK CITY TRANSIT AUTHORITY (TRANSIT) is granted.

At the time the note of issue was filed, Plaintiff's only remaining claims were against Defendant and Third-Party Plaintiff, HARDWELL ACQUISITION LLC (HARDWELL), arising out of a January 8, 2013, incident where Plaintiff alleges twisting her foot on a crack and hole on the sidewalk abutting 346 7th Avenue, New York County. ¹

TRANSIT now moves for summary judgment. In support, TRANSIT submits deposition transcripts, Google photos, its 1953 Lease Agreement with the City of New York (the City), and

¹ The lengthy procedural history of this matter is set forth in this Court's decision concerning HARDWELL's motion for summary judgment, Motion Seq. 5.

an affidavit of its Maintenance Supervisor, Giuseppe Spagnolo (Spagnolo). HARDWELL does not oppose. Plaintiff in Motion Seq. 5 filed a combined opposition to this motion.

In moving for summary judgment pursuant to CPLR 3212, TRANSIT, even if unopposed, has the high burden of establishing entitlement to judgment as a matter of law dispelling material questions of fact for a trial (*see* CPLR §3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986], *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Further, regarding accidents on defective sidewalks, liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property ... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*Minott v. City of New York*, 230 AD2d 719[1996]).

Moreover, Section 7-210 of the New York City Administrative Code unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition and provides that said owners are liable for personal injury that is proximately caused by such failure (*Sangaray v. W. River Assocs., LLC*. 26 NY3d 793 [2016]). While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210. (*Xiang Fu He v. Troon Mgmt., Inc.*, 34 NY3d 167 [2019]). This duty is modified by Title 34 of the Rules & Regulations of the City of New York §2-07(b)(1), which provides that the owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad, if such pad is installed (34 RCNY §2-07[b][1]).

In addition, based on the recent Appellate Division, Second Department case, *Fajardo v. City of New York*, 197 AD3d 456 [2d Dept 2021], holding that based on the lease agreement between the City and TRANSIT, the City, not TRANSIT, has the non-delegable duty to maintain the 12 inch area around the grates pursuant to 34 RCNY §2-07[b][1].

Here, HARDWELL's third-party complaint against TRANSIT asserts claims in contribution and common-law indemnification, based upon TRANSIT's alleged failure to maintain the sidewalk area near the subject grate where Plaintiff allegedly fell.

TRANSIT thus argues that it is entitled to summary judgment because it did not own the sidewalk, nor have a duty to maintain the sidewalk, and as it did not create the subject condition.

In support of the argument that TRANSIT does not own or have a duty to maintain this sidewalk, TRANSIT properly relies on Section 7-210 of the New York City Administrative Code or Title 34 of the Rules & Regulations of the City of New York and the *Fajardo* decision to establish that the City and HARDWELL are the property owners.

In support of the argument that TRANSIT did not perform any work on the sidewalk causing such condition, TRANSIT relies upon the City's records, previously submitted in connection with the City's own summary judgment motion (Motion Seq. 3) and the Affidavit of Spagnolo to show that TRANSIT did not perform any work to the subject sidewalk area prior to or following this incident.

Upon review, the City's DOT records with supporting affidavits show that the permits to open/occupy the roadway and/or sidewalk and the corrective action reports (from the two years preceding the accident) only concern the opposite side of 7th Avenue from where the subject accident occurred (341-357 7th Avenue) and not 346 7th Avenue, where the accident occurred. Further, as per Spagnolo's affidavit, TRANSIT records do not reflect that TRANSIT performed any work at or near the subject crack/hole. Further, the City is no longer a party in this action and it is undisputed that HARDWELL owns 346 7th Avenue, the property adjacent to the subject sidewalk.

Accordingly, TRANSIT has met its prima facie burden in establishing that as it was not the owner of the subject sidewalk or grate, it did not have a duty to maintain either in a reasonably safe condition. TRANSIT has also shown that it did not perform any work in the location of the defect two years prior to the accident, or in the eight years following the Plaintiff's accident.

In opposition, Plaintiff argues that even if the City is charged with a non-delegable duty to maintain the 12 inch area around the grate pursuant to 34 RCNY §2-07[b][1], TRANSIT's motion should be denied as TRANSIT may be obligated to indemnify the City pursuant to the lease agreement. Plaintiff relies upon this Court's post *Fajardo* decision in *Ryan v. The City of New York*, No. 159891/2016, 2022 WL 124941 (N.Y. Sup. Ct. Jan. 12, 2022). In *Ryan*, it was held that the City had a non-delegable duty pursuant to 34 RCNY §2-07[b][1] and that the City was entitled to indemnification from TRANSIT pursuant to the 1953 Lease Agreement. However, Plaintiff offers no basis as to why *Ryan* would prevent granting the within motion. Despite any obligations

of a lessee to repair a sidewalk, same does not impose upon the lessee a duty to a third party (*see Collado v. Cruz*, 81 AD3d 542 [1st Dept 2011]). Moreover, the City, who is no longer a party in this action, does not have any contractual or common-law indemnification claims against TRANSIT. As Plaintiff does not raise any material questions of fact, TRANSIT's motion to is granted.

Accordingly, it is hereby

ORDERED that Third-Party Defendant NEW YORK CITY TRANSIT AUTHORITY's motion is granted ; and it is further

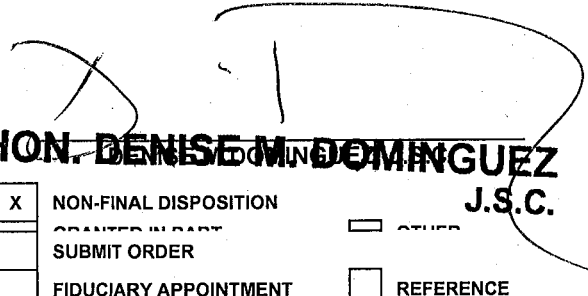
ORDERED that the action is severed and continued against the remaining Defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal against Third-Party Defendant NEW YORK CITY TRANSIT AUTHORITY and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that as the NEW YORK CITY TRANSIT AUTHORITY is no longer a party in this action, this action, including any other pending motions, is transferred to an IAS part; and it is further

ORDERED that counsel for Defendant NEW YORK CITY TRANSIT AUTHORITY shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon all parties.

8/9/2023
DATE


HON. DENISE M. DOMINGUEZ
J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
	<input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE