

**Goldman v Vanguard Const. & Dev. Co., Inc.**

2023 NY Slip Op 34438(U)

December 15, 2023

Supreme Court, New York County

Docket Number: Index No. 154934/2019

Judge: Richard Latin

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

**PRESENT:** HON. RICHARD LATIN **PART** **46M**

*Justice*

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VALERIE GOLDMAN,

Plaintiff,

- v -

VANGUARD CONSTRUCTION AND DEVELOPMENT  
COMPANY, INC.,

Defendant.

-----X

**INDEX NO.** 154934/2019

**MOTION DATE** 2/14/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action, Valerie Goldman (“plaintiff”) asserts a claim for injuries she allegedly suffered on April 12, 2017 on the grounds of Stony Brook Hospital in Suffolk County, New York (New York State Courts Electronic Filing System [NYSCEF] Doc. No. 1, Summons and Complaint, ¶ 7). Currently, defendant moves, pursuant to CPLR 3212, for summary judgment to dismiss the complaint. Plaintiff cross-moves, pursuant to CPLR 3025 (c), for leave to serve the proposed amended bill of particulars nunc pro tunc. For the reasons below, the court denies both motions.

Plaintiff is a resident of Suffolk County who works as an administrative assistant for the United University Professionals at Stony Brook University Hospital (*id.* at ¶ 1; NYSCEF Doc. No. 42, Exhibit C, Plaintiff’s Bill of Particulars at ¶¶ 7, 9; NYSCEF Doc. No. 47, Exhibit H, Plaintiff’s tr at p 12, lines 2-7). At her deposition on April 18, 2022, plaintiff testified that she was walking to work from a parking lot on a sidewalk path to the entrance of the hospital when a section of the

fence fell on her (NYSCEF Doc. No. 47, Exhibit H, Plaintiff's tr at p 16-18). She testified that there was construction by a subterranean staircase that led to the entrance of the hospital (*id.* at p 20, lines 9-14). Plaintiff alleges that the fencing fell on top of her due to defendant's employees' negligence in transporting the fencing (NYSCEF Doc. No. 1, Summons and Complaint, ¶ 7; NYSCEF Doc. No. 42, Exhibit C, Plaintiff's Bill of Particulars at ¶ 16). However, at deposition plaintiff testified that two construction workers who were inside the construction site removed cement bags that were keeping the fence in place, and that this was what caused a section of the fence to fall on her (*id.* at p 24, lines 1-16; p 29, lines 15-25; p 30, lines 1-3).

According to plaintiff, the two workers who were responsible for the accident wore reflective vests, but she did not notice if they were wearing identification or clothing that identified their employer (*id.* at p 28, lines 18-25). She testified that other than on April 12, 2017, she never saw workers moving the fence during the construction work (*id.* at p 30, lines 4-9). Plaintiff testified that she did not see materials around the area near the accident (*id.* at p 30, lines 16-25). Plaintiff avers that as a result of the accident she is disabled, she "has been unable to attend to [her] usual vocation and activities" and she will continue to incur medical expenses (NYSCEF Doc. No. 1 at ¶ 15).

On May 15, 2019, plaintiff commenced this action against defendant Vanguard Construction and Development, Inc. (Vanguard or defendant), the general contractor of the rehab walkway campus underpass project at Stony Brook Hospital ("the project"). Allegedly, defendant "owned, operated, managed, maintained, possessed, supervised and controlled the premises located at Stony Brook Hospital" at the time of the alleged accident (NYSCEF Doc. No. 1, Complaint at ¶ 4). The complaint involves, inter alia, claims of common law negligence, negligent supervision of employees, negligent use and control of the premises, negligent hiring, failure to

keep the premises in a reasonable safe condition from hazards, and negligent supervision of patrons traversing the parking lot of said premises (*id.* at ¶¶ 8-9, 14).

In its answer filed on June 10, 2019, defendant sets forth a general denial and 25 affirmative defenses (NYSCEF Doc. No. 5, Answer). They are, inter alia, the following: the negligence of another party for which defendant is not responsible; the injuries were not reasonably foreseeable; defendant did not create the defect or unsafe condition; no actual notice or constructive notice of any unsafe condition and no opportunity to remediate any such unsafe condition; and defendant did not have sufficient control over the work. The parties have completed discovery and plaintiff filed the note of issue on August 31, 2022.

In support of its summary judgment motion, defendant submits the August 4, 2022 deposition transcript of its former senior project manager and current director of construction, John Palino (NYSCEF Doc. No. 48, Exhibit I, Defendant's tr). Mr. Palino testified that he began working for defendant as a senior project manager eight or nine years prior to the deposition date (*id.* at p 12, lines 10-16). Mr. Palino further testified that he oversaw the project and the staff members involved with the project (*id.* at p 13, lines 2-15). Mr. Palino further testified that the project involved removing and replacing the bridge which led from the second story of the hospital to the ground level and through a tunnel under Nicolls Road on the Stony Brook campus (*id.* at p 13, lines 12-22). Mr. Palino testified that defendant hired non-party Thomas A. Eason Construction LLC (Eason) as the concrete subcontractor to work at the project site (*id.* at p 15, lines 3-12). Mr. Palino stated that he was not aware if at any given time defendant's laborers were at the construction site (*id.* at p 15, lines 13-22). Mr. Palino testified that Giovanni Ragusa <sup>1</sup> of Vanguard was the site manager on the job and was present at the site at least five days a week (*id.* at p 16,

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<sup>1</sup> Mr. Palino did not remember his last name in the deposition.

lines 6-13).<sup>2</sup> Mr. Palino went to the site as part of his oversight of the project, but he did not have a set schedule (*id.* at p 16, lines 17-20).

Defendant also submits a copy of the executed subcontract between Vanguard and Eason along with an affidavit from Mr. Palino (NYSCEF Doc. No. 49, Exhibit J, John Palino aff ¶ 4). The subcontract sets forth that Eason was to provide demolition, excavation, concrete, shoring, general site protection, all labor, materials and equipment necessary for the project. In addition, Eason was responsible for maintaining the moveable site fence that was furnished by Vanguard.

In his affidavit, Mr. Palino states that he was onsite for the project on an as-needed basis (*id.* at ¶ 5). He states, without further detail, that defendant did not direct, control or supervise the means and methods of any subcontractors' work related to the project (*id.* at ¶ 7). In similar fashion, he asserts simply that defendant did not direct, control or supervise any of the subcontractors' work in relation to moving the temporary fencing at the project (*id.* at ¶ 8). Further, Mr. Palino states that Mr. Ragusa was the site manager for the project and that defendant and its employees did not move the temporary fencing at the underpass project on the date of the accident (*id.* at ¶ ¶ 9-10). Mr. Palino asserts that the two witnesses of the subject accident, Jairo Calixto and Paulo Dasilva, were not employed by defendant at the time of the accident or any other time (*id.* at ¶ ¶ 11-14). Further, Mr. Palino states that defendant was not aware of any unsafe conditions, complaints or prior accidents related to the moving of the temporary fencing at the project prior to the accident (*id.* at ¶ ¶ 15-17). Mr. Palino further avows that defendant did not receive prior complaints regarding Eason and SDL or any of their subcontractors prior to the alleged accident (*id.* at ¶ 18).

In opposition, plaintiff argues that defendant is vicariously liable for the subcontractor's negligence in installing, maintaining and moving the temporary fence that fell on the plaintiff.

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<sup>2</sup> According to Mr. Palino's deposition testimony, Mr. Ragusa is no longer employed by defendant.

Plaintiff asserts that defendant was responsible for overall work safety as it pertained to non-laborers and innocent pedestrians. In addition, plaintiff claims that the agreement between Vanguard and Eason is inadmissible because Mr. Palino failed to authenticate the signatures contained within this agreement. Plaintiff also asserts that defendant did not provide a copy of the contract between Stony Brook Hospital and defendant which she claims would explain defendant's responsibility for work site safety as to pedestrians like plaintiff. Plaintiff posits that defendant fails to establish a prima facie entitlement to summary judgment since defendant failed to show that there was an inspection of the fence prior to the accident or at any time at all. Lastly, plaintiff argues that questions of fact exist as to whether the workers moving the fence at the time of the accident were employed by defendant.<sup>3</sup> In support of her opposition, plaintiff relies on Mr. Palino's statement at deposition that he did not know if at any given time laborers from Vanguard were at the construction project site (NYSCEF Doc. No. 62, Exhibit H, Defendant's tr at p 15, lines 13-22). When questioned about whether Vanguard employees would move, adjust or change locations of the temporary fence used to cordon off the construction site from the walkway leading from the parking lot to the building where plaintiff works, Mr. Palino speculated that "[p]robably [it was] not a [V]anguard employee but maybe one of the subcontractors" (*id.* at p 26, lines 19-23). Further, when asked if "[he] ever saw a [V]anguard construction or a [V]anguard subcontractor moving, adjusting or changing the location of any temporary fencing while [he was] there," Mr. Palino testified "I'm going to say yes" (*id.* at p 27, lines 7-12).

In addition, plaintiff cross-moves to amend the bill of particulars to add Industrial Code § 23-1.33, 23-1.33 (a) (1), 23-1.33 (a) (2), 23-1.33 (a) (3), 23-1.33 (b) (1), 23-1.33 (b) (2), 23-1.33

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<sup>3</sup> The court does not address plaintiff's argument that defendant intentionally withheld the identity of the subcontractor prior to the expiration of the statute of limitations, as plaintiff neither provides legal support for her position nor offers evidence that she pursued this discovery outside of the bill of particulars.

(d) (1), 23-1.33 (f) (3) and 23-1.33 (f) (4) which she claims are pertinent because they relate to defendant's failure to protect the plaintiff as she walked by the construction site on the adjacent pathway (NYSCEF Doc. No. 54, Affirmation of Plaintiff's Counsel at ¶ 22). Plaintiff attaches the proposed amended bill of particulars to its motion (NYSCEF Doc. No. 64, Exhibit J). Industrial Code § 23-1.33 is a general safety standard pertaining to the protection of persons that pass by construction, demolition or excavation operations. Industrial Code § 23-1.33 (a) (1), (2) and (3) requires protection for persons passing by construction sites which must be equipped to not endanger persons passing by on any sidewalk. The type of protection includes fences as relevant here. Industrial Code § 23-1.33 (b) (1) and (2) provides for protection for pedestrians on a public thoroughfare adjacent to a construction area. Industrial Code § 23-1.33 (d) (1) provides that existing and temporary walkways must be maintained free from obstructions, tripping hazards, snow, sleet, ice and the like. Industrial Code § 23-1.33 (f) (3) and (4) pertains to protection from associated hazards. This section provides that public thoroughfares will be set up and maintained well outside a demolition site and that material piles will be maintained to prevent them from falling on persons using the thoroughfare.

In its opposition to the cross-motion and in reply, defendant argues that, while plaintiff raises vicarious liability as the primary reason for liability, she does not set forth legal theories and facts to support her vicarious liability argument. Plaintiff does not specify an applicable exception to the general rule that a party is not liable for the acts of its independent contractor and does not explain the relevance of the contract between Stony Brook and defendant. Defendant argues that the question of whether it assumed supervisory responsibilities pursuant to its contract with Stony Brook University is not determinative. Instead, defendant states, the decisive question is whether it exercised control over the work that caused the accident or the allegedly hazardous condition.

Defendant annexes a copy of the contract between defendant and the State University Construction Fund for the project, which states, at Section 2.18, paragraph (4), that “[t]he Contractor [Vanguard] shall be fully responsible for the, inter alia, supervision of all of its subcontractors and of all work and it shall check all space requirements of the work and coordinate and adjust the same so that conflicts in space do not occur in the work being performed by it with its own employees and with the work being performed by its subcontractors and so that all equipment, piping, wiring, etc., can be installed, where possible, in the spaced allowed for same” (NYSCEF Doc. No. 72). It argues that even if defendant assumed overall supervisory/safety responsibilities under the contract, defendant was not involved in the work that caused the accident and it did not create or have notice of an alleged condition.<sup>4</sup> Defendant claims that by alleging in its answer that the accident was caused by the negligence of third parties, it put plaintiff on notice of this defense.

Next, defendant asserts that it does not have the burden to prove when the fence was last inspected because this matter does not involve a condition at the premises. Defendant argues that there is no question of fact as to who moved the fence at the time of the accident because its workers were not present at the site. According to defendant, Mr. Palino’s statement “[p]robably not a [V]anguard employee but maybe one of the subcontractors” in response to the question of whether there were occasions that defendant’s employees would be moving the fence is sufficient to show that defendant’s laborers did not move the fence (NYSCEF Doc. No. 62, Defendant’s tr at p 26, lines 19-23).

In response to the cross-motion, defendant argues that Industrial Code § 23-1.33 (a) (1), (2) and (3) are inapplicable because defendant supplied a fence which provides protection for

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<sup>4</sup> Contrary to plaintiff’s argument, Mr. Palino properly authenticated the contract (*see* CPLR § 4518; *Marina Towers Assoc., L.P. v Yu*, 177 AD3d 469, 469 [1st Dept 2019]). Defendant introduces the document with a second affidavit by Mr. Palino that authenticates the contract.

persons passing by the construction project. Defendant avers that Industrial Code § 23-1.33 (b) (1) and (2) are inapplicable because the temporary fence was put in place to protect pedestrians and a temporary walkway was not necessary at the subject premises. According to defendant, Industrial Code § 23-1.33 (d) (1) is inapplicable because plaintiff did not testify at her deposition that there were obstructions or tripping hazards on the walkway at the time of the accident. Defendant asserts that Industrial Code § 23-1.33 (f) (3) and (4) are inapplicable because the site of the accident was not a demolition zone and plaintiff did not testify as to materials stored adjacent to the walkway.

In reply, plaintiff argues that Industrial Code § 23-1.33 (a) (1), (2) and (3) applies because it requires that defendant properly secure the fence in order to protect persons like plaintiff who pass by a construction area. As already mentioned above, plaintiff contends that defendant's construction workers moved cement bags causing the fence to fall on plaintiff as she walked by the construction site. Plaintiff further argues that Industrial Code § 23-1.33 (b) (1) and (2) applies because defendant failed to properly shore the fence, and thus the fence fell and injured plaintiff. Plaintiff contends that Industrial Code § 23-1.33 (d) (1) applies here because the fence was the obstruction that fell due to the defendant's workers' negligence and this provision is not limited to defects such as snow, sleet and the like. Plaintiff argues that defendant's workers violated Industrial Code § 23-1.33 (f) (4) when they moved the cement bags, i.e., materials, causing the fence to hit her while she walked on the adjacent thoroughfare. Lastly, plaintiff argues that Industrial Code § 23-1.33 (b) (1) (i) applies because plaintiff was a pedestrian on a sidewalk adjacent to a work area and the code imposes a duty under Labor Law § 241 (6).

On a motion for summary judgment, the moving party "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]; CPLR 3212 [b]). If the moving party, here, defendant, meets the initial burden, then the burden shifts to the plaintiff who must present sufficient evidence to establish the existence of a material issue of fact (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). To make this determination, courts “view the evidence in the light most favorable to the nonmoving party, including drawing all reasonable inferences in favor of the moving party” (*Vega v Metropolitan Transp. Auth.*, 212 AD3d 587, 588 [1st Dept 2023]). “[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotation marks and citations omitted]). To make a prima facie case of negligence, a plaintiff must show that a defendant owed her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013]). The threshold issue is whether defendant owes a duty of care toward the injured party (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]).

In general, “a party that hires an independent contractor cannot be held liable for the negligence of that independent contractor” (*Linder v United Metro Energy Servs. Corp.*, 193 AD3d 513, 513 [1st Dept 2021], quoting *Concord Vil. Owners, Inc. v Trinity Communications Corp.*, 61 AD 3d 410, 411 [1st Dept 2009]). The reason for this rule is that “one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor” (*Linder*, 193 AD3d at 513, quoting *Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257-258 [2008]). The exceptions are where there is negligence in hiring the independent contractor, where an independent contractor is hired to perform inherently dangerous work or where the owner is subject to a nondelegable duty (*Linder*, 193 AD3d at 513-514). A general contractor may be liable for a plaintiff’s injuries if it

performs the alleged defective work or if its contractual obligations to supervise the work created a duty of care to a plaintiff (*Stone v 685 Fifth Ave. Owner, LLC*, 2019 NY Slip Op 30752[U] [Sup Ct, NY County 2019], citing *Kenny v Turner Constr. Co.*, 155 AD3d 479, 480 [1st Dept 2017]).

Here, defendant correctly argues that it owes no duty toward the plaintiff. As the general contractor, defendant is not responsible for the work where the accident occurred. As stated above, defendant hired a subcontractor and did not supervise the subcontractor's employees. Also, defendant was never notified of complaints regarding the subcontractor. Therefore, since it did not perform the alleged defective work and its obligation pursuant to its contract with Stony Brook was merely to supervise the project, defendant does not owe a duty of care to the plaintiff (*Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 [1st Dept 2000]; *see also Kenny*, 155 AD3d at 480). As such, the burden shifts to plaintiff to raise a triable issue of fact precluding an award of summary judgment in favor of defendant.

Although defendant is not vicariously liable, plaintiff raises an issue of fact as to whether Vanguard employees might have removed the cement bags or transported the fence at the time of the accident. As mentioned earlier, Mr. Palino speculated that a Vanguard employee may not have moved the fence, but he did not state so definitively. Only Mr. Palino's subsequent affidavit states that defendant was never in control of the project site or the fence. These inconsistencies raise issues of fact that must be resolved (*see Amaya v Purves Holdings LLC*, 194 AD3d 536, 537 [1st Dept 2021]; *Lebedev v Blavatnik*, 193 AD3d 175, 184 [1st Dept 2021]).

Next, the court considers plaintiff's cross-motion. "In the absence of prejudice, leave to amend the pleadings shall be freely given unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Tribeca Space Mgrs., Inc. v Tribeca Mews Ltd.*, 200 AD3d 626, 628 [1st Dept 2021]). It is within the court's discretion to allow or disallow the amendment (*Green v*

*Esplanade Venture Partnership*, 36 NY3d 513, 526 [2021]). “A motion to supplement a bill of particulars is governed by the same standards as a motion to amend a pleading” (*Moore v New York City Tr. Auth.*, 161 AD2d 505, 506 [1st Dept 1990]). Proposed amendments that lack merit warrant denial of a motion to amend the bill of particulars (*Cruz v Sharkey’s Trucking Corp.*, 192 AD3d 576, 577 [1st Dept 2021]). “Further, where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied” (*Henchy v VAS Express Corp.*, 115 AD3d 478, 480 [1st Dept 2014] [internal quotation marks and citation omitted]).

Here, plaintiff seeks to amend the bill of particulars adding Industrial Code § 23-1.33, which sets forth standards for protection of pedestrians passing by structures where there is construction, demolition or excavation (*Leighton v Chaber, LLC*, 204 AD3d 903, 904 [2d Dept 2002]) and thus “applies to persons passing by construction operations” (*Lawyer v Hoffman*, 275 AD2d 541, 542 [3d Dept 2000]). Industrial Code § 23-1.33 does not apply to workers on a construction site (*Turgeon v Vassar Coll.*, 172 AD3d 1134, 1135 [2d Dept 2019]). It cannot support a claim under Labor Law § 241 (6) as it does not “mandate compliance with specifications” (*McMahon v Durst*, 224 AD2d 324, 324 [1st Dept 1996]). To the extent that plaintiff attempts to state a claim under Labor Law § 241 (6), plaintiff was not engaged in the construction project therefore she is not within the class of persons entitled to protection under Labor Law § 241 (*Tornello v Beaver Brook Assoc., LLC*, 8 AD3d 7, 8 [1st Dept 2004]). The court now turns to each section of the code that plaintiff seeks to amend the bill of particulars.

As already stated, Industrial Code § 23-1.33 (a) (1) and (2) applies to persons passing by construction. Similarly, plaintiff fails to show that Industrial Code § 23-1.33 (b) is applicable as it also is a general safety standard that does not “mandate compliance with specifications”

(*McMahon*, 224 AD2d at 324, citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). Further, Industrial Code § 23-1.33 (b) (1) (ii), (iii), and (iv), as well as Industrial Code § 23-1.33 (b) (2) and § 23-1.33 (f) are inapplicable to the facts at hand. Industrial Code § 23-1.33 (f) also does not apply because plaintiff does not show that the fence at issue here constitutes “material” within the meaning of this statute (see *Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 585 [1st Dept 2008]) or that any materials were stored in the area of the accident (see *Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]). For the same reason, Industrial Code § 23-1.33 (d) does not apply since plaintiff does not demonstrate that the fence constitutes an “obstruction[ ], tripping hazard[ ], snow, sleet, ice and accumulation[ ] of water, dirt or dust and of any other material or object[ ]” within the meaning of this statute (Industrial Code § 23-1.33 [d] [1]) and thus the “regulation is too general and ‘does not mandate compliance with specifications’” (*Trotman v Boston Props.*, 59 Misc 3d 1230[A], 2018 NY Slip Op 50803[U] [Sup Ct, Bronx Cty 2018]), quoting *McMahon*, 224 AD2d at 324).

Based on the foregoing, plaintiff’s cross-motion is thereby denied.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment is denied; and it is further

ORDERED that the plaintiff’s cross-motion is denied.

12/15/2023  
DATE

  
RICHARD LATIN, J.S.C.

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