

Basdeo v New York Univ.
2023 NY Slip Op 35234(U)
October 31, 2023
Supreme Court, Queens County
Docket Number: Index No. 704335/2019
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20

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RODNEY BASDEO,

Plaintiff,

-against-

NEW YORK UNIVERSITY and RANALLO
CONTRACTING INC.

Defendants.

Index No.: 704335/2019

Motion Seq. No.: 6

Motion Date: 5.31.2023

Motion Cal. No.: 48

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NEW YORK UNIVERSITY,

Third-Party Plaintiff,

-against-

SKINNER PLUMBING & HEATING CORP.,

Third-Party Defendant,

-----X
NEW YORK UNIVERSITY,

Second Third-Party Plaintiff,

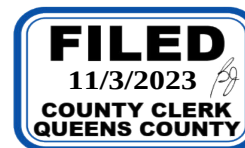
-against-

RANALLO CONTRACTING INC.,

Second Third-Party Defendant.

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The papers bearing NYSCEF Doc. Nos. 149-178, 204-205, 211 and 215 were read on the motion made by the defendant New York University ("NYU") for summary judgment.



The plaintiff, Rodney Basdeo (the “Plaintiff”), filed this cause seeking to recover monetary damages for bodily injuries allegedly sustained in an accident (the “Accident”). Presently before the Court is NYU’s motion for summary judgment dismissing the complaint. For the following reasons, the motion is granted in part and denied in part.

I. Factual Background

Although the facts are set forth in the Court’s Order with respect to the Plaintiff’s motion for, *inter alia*, summary judgment on the issue of liability, they are presented below for ease of reference.

The Accident took place on June 22, 2018, at approximately 11:30 a.m., at the premises known as 58 West 10th Street, New York, New York (the “Premises”). The Premises are known as the Lillian Vernon Creative Writer’s House and are owned by NYU.

The Plaintiff, who was employed by Skinner Plumbing & Heating (“Skinner”) as a plumber mechanic, was at the Premises to perform hydrostatic pre-testing of the fire sprinkler system.

The Plaintiff implicates a metal grate (the “Grate”) that collapsed as the cause of the Accident. The Grate is located outside of the Premises. Specifically, it is adjacent to the sidewalk and next to an entrance stairway.

The Grate is rectangular and made of iron. It consists of two equal sections or halves, which have the same design. It is decorative and thus contains various weldments, including longitudinal iron members, half circles, circles, and scrolls interconnected by welds.

The Grate is hinged along the right frame to permit the right half thereof to swing upward. When the right frame is placed in an upward position, it provides access to an 8-foot deep, 53-inch wide and 37-inch long shaft that leads to the basement. The left half of the Grate is welded and fixed to the frame. Beneath the Grate is a fixed steel ladder which provides access to the bottom of the shaft.

On the morning of the Accident, the Plaintiff stood on the Grate several times without incident. However, at approximately 11:30 a.m., as the Plaintiff was standing on the right side of the Grate to perform his work, it collapsed, causing him to fall 8 to 10 feet down the shaft.

The remaining factual contentions advanced by the parties that are relevant to this motion are presented below.

II. Discussion

As a general rule, “a defendant property owner moving for summary judgment has the burden of making a *prima facie* showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence” (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017] [citation omitted]).

A. Created Condition

There is no evidence in the record that NYU created any defective condition that resulted in the collapse of the Grate.

B. Actual Notice

A defendant has actual notice of a defective condition when it either creates same or was aware of its existence prior to the accident (*see Pianforini v. Kelties Bum Steer*, 258 AD2d 634 [2d Dept 1999]). “Actual notice may be delivered to a property owner either orally or in writing” (*Loco v Mater Cristi Catholic High School*, 142 AD3d 590, 591 [2d Dept 2016] [citation omitted]). If a defendant fails to meet its initial burden of establishing the absence of actual notice, its motion for summary disposition must be denied irrespective of the plaintiff’s opposition papers (*see Lamb v BOC Group, Inc.*, 199 AD3d 909 [2d Dept 2021]).

As noted, there is no evidence that NYU created any defective condition that resulted in the collapse of the Grate. However, there are triable issues of fact as to whether NYU was aware of a defective condition that caused the Grate to collapse. Here, Evangelos Polihrom (“Polihrom”), NYU’s Facilities Supervisor had advised NYU’s General Manager, Gerard Savoy (“Savoy”) prior to the Accident that the Grate required repair. Polihrom also admitted at his deposition that during an inspection conducted on June 11, 2018, just 11 days before the Accident, he observed rust on the Grate and that a piece thereof was missing. These facts, standing alone, raise triable issues of fact as to whether NYU was aware of defective conditions relating to the Grate and whether these conditions caused the Grate to collapse. Furthermore, the conflicting expert affidavits as to the cause of the Grate’s collapse further preclude the grant of summary judgment on the issue of actual notice (*see Mable v 384 East Associates, LLC*, 175 AD3d 1127 [1st Dept 2019]).

C. Constructive Notice

“A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected” (*Tuck v Surrey Carlton Hous. Dev. Fund Corp.*, 208 AD3d 1383, 1384 [2d Dept 2022]). A general awareness of a dangerous condition is “legally insufficient to constitute notice of the particular condition that caused the subject incident” (*J.G. v L.I. Adventureland*, 215 Ad3d 737, 737 [2d Dept 2023]; *see Wilson v New York City Hous. Auth.*, 186 AD3d 535, 537 [2d Dept 2020]; *Pagan v New York City Hous. Auth.*, 172 AD3d 888 [2d Dept 2019]; *Mauge v Barrow St. Ale House*, 70 AD3d 1016 [2d Dept 2010]).

There are triable issues of fact as to whether NYU had constructive notice of any defective condition that caused the Grate to collapse. Here, the parties submit conflicting expert affidavits as to whether the defect that caused the Grate to collapse was latent. Thus “... a classic battle of the experts [is presented], and conflicting expert opinions may not be resolved on a motion for summary judgment (*see Gilbert v Daniels*, 214 AD3d 1469, 1470 [4th Dept 2023]).

Furthermore, “the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question” (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]).

D. The Branch of the Motion for Summary Judgment as to the Plaintiff’s Labor Law Claims

The Labor Law § 200 cause of action is dismissed because the Plaintiff was not employed in construction at the time of the Accident and his employer had not been hired to perform any construction at the Premises (*see Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109 [1991]).

The Labor Law § 240 [1] cause of action is dismissed because the Plaintiff was not engaged in a covered activity, *i.e.*, the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, when the Accident occurred (*see Soto v J. Crew Inc.*, 21 NY3d 562 [2013]).

The Labor Law § 241 [6] claims are dismissed because the Plaintiff was not engaged in construction, demolition or excavation work at the time of the Accident (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]).

The Labor Law causes of action are also dismissed on the separate and independent ground that the Plaintiff does not oppose NYU’s application in this regard. Where a party does not oppose a motion or branches thereof, he or she is deemed to have acquiesced in the relief sought therein (*see Flake v Van Wagenen*, 54 NY 25 [1873]; *Mixon v TBV, Inc.*, 76 AD3d 144 [2d Dept 2010]).

III. Conclusion

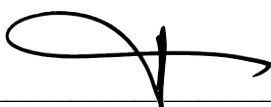
For the reasons stated above, it is hereby:

ORDERED, the NYU’s motion is granted solely to the extent that the claim that NYU created the defect that caused the Grate to collapse and all Labor Law causes of action are dismissed; and it is further,

ORDERED, that NYU’s motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
October 31, 2023



MOJGAN C. LANCMAN, J.S.C.

