

Mahtani v 96th St. Lofts LLC

2024 NY Slip Op 30637(U)

February 29, 2024

Supreme Court, New York County

Docket Number: Index No. 158613/2021

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** **04**

Justice

-----X

KARINA LAXMI MAHTANI,

Plaintiff,

- v -

96TH STREET LOFTS LLC, ROCK BUILDERS INC, RENT
A UNIT NY INC., SPRING SCAFFOLDING LLC,

Defendants.

-----X

INDEX NO. 158613/2021

MOTION DATE 12/23/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 117, 121, 122, 126, 127, 128, 129

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant 96th Street Lofts LLC’s motion, pursuant to CPLR §3212, for summary judgment dismissing this action and all crossclaims against it is denied, without prejudice, for the reasons set forth below.

Plaintiff’s complaint alleges that on June 15, 2021, she tripped and fell over an “industrial nut and bolt ... partially embedded into and jutting from the asphalt” of the roadway in front of 223 East 96th Street, New York, New York (the “Building”), sustaining injuries, and that the owner of the Building, 96th Street Lofts LLC (“96th Street”), as well as general contractors hired by 96th Street to perform “construction renovation, demolition, repair, and/or alteration” work on the Building, Rock Builders Inc. (“Rock Builders”) and Rent A Unit NY Inc. (“Rent A Unit”) negligently caused and created this defective condition¹ (NYSCEF Doc. No. 99 [Compl. at ¶¶18-

¹ Plaintiff also asserted negligence claims against defendant Spring Scaffolding LCC, which were dismissed pursuant to a decision and order dated December 14, 2022, granting Spring Scaffolding LLC’s motion for summary judgment (NYSCEF Doc. No. 83).

22, 38-39)). Defendant Rent A Unit interposed an answer asserting crossclaims against 96th Street for common law and contractual indemnification, contribution, and breach of contract for failing to procure insurance (NYSCEF Doc. No. 103 [Answer at ¶¶29-40]).

96th Street now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint and Rent A Unit's crossclaims on the grounds that 96th Street had no duty to maintain the roadway where plaintiff's accident occurred and did not cause or create the defective condition or have actual or construction notice of same.

In support of its motion, 96th Street submits the affidavit of David Salamon, the manager of 96th Street, attesting that:

96th Street Lofts LLC owned the property located at 223 East 96th Street in New York, NY ("the Premises") on June 15, 2021.

I understand that on June 15, 2021, plaintiff allegedly tripped-and-fell on a bolt partially imbedded in the asphalt on the roadway adjacent to the Premises.

96th Street Lofts LLC did not have any laborers at the Premises or perform any construction work at any time.

Instead, 96th Street Lofts LLC retained Rock Builders LLC to act as construction manager for the renovation of the Premises on November 1, 2019. See exhibit "G".

...

Representatives from 96th Street Lofts LLC would make occasional visits to the Premises. On those visits, 96th Street Lofts LLC never observed asphalt being poured on the roadway adjacent to the sidewalk at the Premises.

Additionally, 96th Street Lofts LLC did not have notice of any dangerous conditions in the roadway abutting the Premises at any time.

96th Street Lofts LLC had no duty to maintain the roadway adjacent to the Premises and has no knowledge regarding materials that may have been imbedded in the roadway there, including the subject bolt.

(NYSCEF Doc. No. 98 [Salamon Aff. At ¶¶2-5, 8-10]).

96th Street also moves for summary judgment dismissing Rent A Unit's crossclaim for contractual indemnification on the basis that it did not enter into a contract with Rent A Unit.

Plaintiff and Rent A Unit oppose 96th Street's motion.

DISCUSSION

"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 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]).

96th Street bears the burden on this motion to demonstrate that they did not "create the alleged dangerous condition, perform any repair work in the street abutting the premises, or make a special use of the street, and that no statute or ordinance conferred liability upon them" (Ankin v Spitz, 129 AD3d 1001, 1002 [2d Dept 2015]). It has not done so. While it has established, through Salamon's affidavit, that it did not directly create the subject condition, issues of fact remain as to whether Rock Builders could have negligently created this condition while performing work on behalf of 96th Street and, if so, whether 96th Street could be vicariously liable for such negligence (See Elgahsh v City of New York, 205 AD3d 503, 503 [1st Dept 2022] [denying summary judgment where "[m]aterial issues of fact exist as to the extent, if any, of defendants' direction, supervision, or control of the independent contractor's work at the site when the accident occurred"]; see also Emmons v City of New York, 283 AD2d 244, 245 [1st Dept 2001]). The

contract with Rock Builders submitted by 96th Street does not resolve this issue, as it does not detail the scope of the Rock Builders' work but only contains provisions for indemnification and insurance (NYSCEF Doc. No. 105).

This issue of fact also mandates the denial of that branch of 96th Street's motion for summary judgment dismissing Rent A Unit's crossclaims for common law indemnification and contribution (See Vitucci v Durst Pyramid LLC, 205 AD3d 441, 444 [1st Dept 2022]; Martins v Little 40 Worth Assoc., Inc., 72 AD3d 483, 484 [1st Dept 2010]). Finally, 96th Street's motion for summary judgment dismissing Rent A Unit's crossclaim for contractual indemnification and breach of contract is also denied. Contrary to its claim, 96th Street has not established that no contract existed between these parties. 96th Street's counsel assertion, in his affirmation in support of the instant motion, that no such contract exists has no probative value (See e.g., Nationwide Gen. Ins. Co. v South, 223 AD3d 411 [1st Dept 2024]).

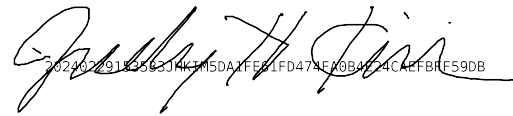
Accordingly, it is

ORDERED that 96th Street Lofts LLC's motion for summary judgment dismissing plaintiff's complaint and all crossclaims against it is denied, without prejudice, with leave to renew upon completion of discovery; and it is further

ORDERED that, within fifteen days of the date of this decision and order, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on defendants as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); 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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2/29/2024

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