

Papadopoulos v City of New York

2024 NY Slip Op 32923(U)

August 19, 2024

Supreme Court, New York County

Docket Number: Index No. 162682/2015

Judge: Richard Tsai

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

PRESENT: HON. RICHARD A. TSAI **PART** **21**

Justice

-----X

EFTHYMIOS PAPAPOPOULOS,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON,
INC.,CONSOLIDATED EDISON COMPANY OF NEW
YORK, PARAMOUNT FEE, L.P., PARAMOUNT
LEASEHOLD, L.P., NEWARK & CO REAL ESTATE, THE
WORLD ENTERTAINMENT, LLC, and HARD ROCK CAFE
INTERNATIONAL(USA) INC.,

Defendants.

-----X

PARAMOUNT FEE, L.P., PARAMOUNT LEASEHOLD, L.P.,
and NEWARK & CO REAL ESTATE,

Third-Party Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY and
METROPOLITAN TRANSPORTATION AUTHORITY,

Third-Party Defendants.

-----X

PARAMOUNT FEE, L.P., PARAMOUNT LEASEHOLD, L.P.,
and NEWARK & CO REAL ESTATE,

Second Third-Party Plaintiffs,

-against-

PRINCIPAL BUILDING SERVICES, LLC, and 1501
BROADWAY RESTAURANT, INC. D/B/A HARU SUSHI,

Second Third-Party Defendants.

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INDEX NO. 162682/2015

MOTION DATE 06/09/2023,
03/11/2024

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595189/2020

Second Third-Party
Index No. 595544/2020

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 1, 110, 139, 199,
267-278, 280, 285-288, 290-291, 295, 297, 301-303, 305-306, 308, 357

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document numbers (Motion 008) 13, 203-218, 298, 315, 333-348, 352-356

were read on this motion for

JUDGMENT – SUMMARY

In this personal injury action, plaintiff Efthymios Papadopoulos alleges that he slipped, tripped and fell on the sidewalk in front of a building located in midtown Manhattan and sustained bodily injuries.

Third-party defendants New York City Transit Authority and Metropolitan Transportation Authority, sued herein as Metropolitan Transit Authority¹ (collectively, the Third-Party Transit Defendants), now move for summary judgment dismissing the third-party complaint (Motion Seq. No 007). Plaintiff opposes the motion. Defendants Paramount Fee, L.P., Paramount Leasehold, L.P. and Newark & Co. Real Estate (collectively, the Paramount Defendants) partially oppose the motion.

The Paramount Defendants also move for summary judgment dismissing plaintiff's action as against them (Motion Seq. No. 008). Plaintiff opposes the motion; the Third-Party Transit Defendants do not oppose the motion.

This decision addresses both motions.

BACKGROUND

The complaint alleges that, on February 2, 2015 at or about 7 p.m., plaintiff was “caused to slip, trip and fall upon a defect of the concrete pavement, adjacent to a utility vault cover and within 12 inches thereof, which was also icy and not properly maintained from snow and ice” (complaint ¶ 7 [NYSCEF Doc. No. 1]). The incident allegedly occurred “in front of 205 West 43rd Street, New York, New York” (*id.* ¶ 8).

Issue was joined as to the Paramount Defendants on or about February 12, 2016 (see answer [NYSCEF Doc. No. 13]).

On February 25, 2020, the Paramount Defendants commenced a third-party action against the Third-Party Transit Defendants seeking, among other things, claims for contractual indemnification, common-law indemnification, contribution and failure to procure insurance (see third-party complaint [NYSCEF Doc. Nos. 110, 212]). Issue was joined as to the Third-Party Transit Defendants in the third-party action on or about October 21, 2020 (NYSCEF Doc. No. 139).

On February 23, 2023, plaintiff filed the note of issue and certificate of trial readiness (see NYSCEF Doc. No. 199).

¹ In the third-party summons, the caption names this third-party defendant as “Metropolitan Transit Authority,” whereas the third-party complaint actually names the defendant as “Metropolitan Transportation Authority” (see NYSCEF Doc. No. 110).

On March 10, 2023, the Paramount Defendants moved for summary judgment dismissing the action as against it (see NYSCEF Doc. Nos. 203-218 [Motion Seq. No. 004]). By decision and order dated November 29, 2023, the Supreme Court justice previously assigned to this action denied the Paramount Defendants' motion for summary judgment due to a defective statement of material facts, without prejudice, and with leave to refile within 20 days (see NYSCEF Doc. No. 315).

On June 9, 2023, the Third-Party Transit Defendants moved for summary judgment dismissing the third-party complaint, which is now before this court.²

On December 12, 2023, the Paramount Defendants filed an "amended" notice of motion for summary judgment, which was returned for correction by court staff, who indicated that a new motion is required in light of the decision.

On March 11, 2024, the Paramount Defendants moved for summary judgment dismissing the complaint as against them, which is now before this court.

DISCUSSION

"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 demonstrate the absence of any material issues of fact. If the moving party produces the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019] [internal citations and quotation marks omitted]).

I. The Paramount Defendants' Motion for Summary Judgment (Seq. No. 008)

The Paramount Defendants argue that they are not liable because they do not own, operate, maintain, or control the steel plate in question, or the sidewalk immediately adjacent to it (i.e., the sidewalk within 12 inches of the plate) (affirmation of counsel to the Paramount Defendants in support of motion ¶¶ 10-17 [NYSCEF Doc. No. 335]). Alternatively, they argue that they did not have sufficient time to clear the metal plate of ice/snow following an ice storm, which had ended two hours and twenty minutes prior to plaintiff's alleged accident (*id.* ¶¶ 18-25).

A. Lack of Ownership, Operation, Maintenance, or Control of the Plate

34 RCNY § 2-07 (b) imposes upon the owner of a cover or grating on a street a nondelegable duty of maintenance and repair of the cover or grating, as well as the area extending 12 inches from its perimeter (*Roa v City of New York*, 188 AD3d 504 [1st Dept 2020]; *Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]; *Hurley v Related Mgt.*

² The Third-Party Transit Defendants' motion was referred to this court by decision and order dated July 1, 2024 (NYSCEF Doc. No. 357).

Co., 74 AD3d 648 [1st Dept 2010]). 34 RCNY § 2-07 (b) (3) states, “Street hardware shall be flush with the surrounding street surface.”

To establish that the Paramount Defendants do not own, maintain, or control the plate, they submit the deposition testimonies of Philip Dombkowski, Thomas Mule, and Michael Kastrati.

Dombkowski testified that he is a General Superintendent, Iron operations for the NYCTA (Paramount Defendants’ Exhibit J in support of motion, Dombkowski EBT [NYSCEF Doc. No. 345], at 8, lines 3-8). He stated that his daily duties involve overseeing all of the iron operations throughout the system in all five boroughs (*id.*, lines 11-16). He further testified that “iron operations” means taking care of the elevated structure and steel work through the system, which would include iron that is on the sidewalks of the City, such as hatches, if they are owned by New York City Transit (*id.* at 9, lines 2-6; at 10, lines 2-5).

Based on pictures of the where the accident occurred, Dombkowski identified the plate as an “egress hatch,” “like a secondary egress for a room or a building or a room” (*id.* at 14, lines 14-18). When asked who owns the plate, Dombkowski replied, “By the picture I can only assume that it’s owned by the Transit Authority” (*id.* at 15, lines 23-25). He acknowledged that the Transit Authority is responsible for repairing the first 12 inches around the plate (*id.* at 23, line 24 through 24, line 3). Dombkowski testified that he saw “minor crackage on the concrete around the plate” and that the “crackage” was within 12 inches of the plate (*id.* at 23, lines 18-22; at 24, lines 15-22).

Mule testified at his deposition that he is a superintendent of ironworkers for New York City Transit (Paramount Defendants’ Exhibit K in support of motion, Mule EBT [NYSCEF Doc. No. 346], at 11, line 25 through 12, line 3). When asked if the plate in a photograph was a Transit Authority plate, Mule answered, “It possibly could be” (*id.* at 17, line 14). According to Mule, if the plate were a NYCTA plate, the plate would be an egress and ingress plate (*id.* at 17, lines 15-22), and if a Transit room was below this plate, it would be the responsibility of the Transit to keep the edges clear from defects and also keeping the plate clear of ice and snow (*id.* at 18, lines 14-18; at 25, lines 15-20).

Kastrati testified that he is an employee of defendant Paramount Leasehold, who works as the superintendent of 1501 Broadway (Paramount Defendants’ Exhibit I in support of motion, Kastrati EBT [NYSCEF Doc. No. 344], at 8, lines 4-7; at 9, lines 2-4). When shown the steel plate (referred to as a “utility vault” in the deposition) on which plaintiff allegedly fell, Kastrati testified that this belonged to the MTA, because he had observed MTA workers going through it (*id.* at 43, lines 11-25). Kastrati stated that he did not have keys to the vault and never opened it (*id.* at 55 lines 4-11).

The Third-Party Transit Defendants did not oppose the Paramount Defendants’ motion. Thus, they do not dispute the Paramount Defendants’ contention that the New York City Transit Authority is responsible for maintaining the utility vault plate. Plaintiff appears to concede that the Paramount Defendants do not own the utility vault plate

(see affirmation of plaintiff's counsel in opposition ¶ 16 [NYSCEF Doc. No. 352] ["the appliance is apparently owned by Third-Party Defendant MTA").

Nevertheless, plaintiff argues that the Paramount Defendants, as the alleged abutting property owners, have a concurrent duty to install the concrete around the plate pursuant to Administrative Code § 7-210 (see affirmation of plaintiff's counsel in opposition ¶ 29 [NYSCEF Doc. No. 352]). This argument is unavailing.

As the Paramount Defendants point out, the Appellate Division, First Department held, "There is nothing in Administrative Code § 7-210 to show that the City Council intended to supplant the provisions of 34 RCNY 2-07 and to allow a plaintiff to shift the statutory obligation of the MTA to the abutting property owner" (*Storper*, 76 AD3d 426, 427 [1st Dept 2010]). Thus, "34 RCNY 2-07(b) provides an exception to the landowner's liability with respect to covers and their surrounding street areas" (*Jones v Vornado New York RR One L.L.C.*, 223 AD3d 467, 468 [1st Dept 2024]). As discussed above, 34 RCNY § 2-07 (b) (3) requires that "Street hardware shall be flush with the surrounding street surface." Insofar as plaintiff alleges that there was tripping hazard because the utility vault cover was not flush with the surrounding sidewalk (see affirmation of plaintiff's counsel in opposition ¶ 8), that duty fell upon the owner of utility vault cover, not the Paramount Defendants.

Thus, the Paramount Defendants are granted summary judgment dismissing the complaint as against them.

In light of the court's determination that the Paramount Defendants did not have a duty to maintain or repair the utility vault plate and the 12-inch area extending from its perimeter, this court need not reach the Paramount Defendants' alternative storm in progress defense.

Because the Paramount Defendants can no longer be held liable to plaintiff, the second and third causes of action of the first third-party complaint, which seek common-law indemnification and contribution, are dismissed by operation of law (see *e.g. Bendel v Ramsey Winch Co.*, 145 AD3d 500, 501 [1st Dept 2016] [in view of the dismissal of the complaint in its entirety as against a defendant, the cross claims against that defendant are also dismissed]; see *Phillips v Trommel Constr.*, 101 AD3d 1097, 1098 [2d Dept 2012] [cross claims which were predicated on complaint must be dismissed when complaint was dismissed]).

II. The Third-Party Transit Defendants' Motion for Summary Judgment (Seq. No. 007)

The Third-Party Transit Defendants argue that they cannot be held liable to Plaintiff (and Paramount Defendants, as third-party plaintiffs) for the underlying action, due to Plaintiff's failure to timely serve them with a Notice of Claim within 90 days of the occurrence of the alleged incident or to commence a tort action against them within the

statutory one year and ninety-day period, as required by applicable law (Third-Party Transit Defendants' Memo of Law at 5-7 [NYSCEF Doc. No. 270]).

Additionally, they assert that a snowstorm was ongoing on the date of Plaintiff's alleged incident, and that, under the storm in progress doctrine, any duty the Third-Party Transit Defendants may have had to undertake measures to remove the snow were suspended until a reasonable period of time after the storm stopped (*id.* at 8-10).

The Paramount Defendants agree with the arguments of the Third-Party Transit Defendants, but contend that if the court denies the Paramount Defendants' motion for summary judgment, then the Third-Party Transit Defendants' motion should be denied as well (affirmation of counsel to the Paramount Defendants in opposition ¶¶ 3-4 [NYSCEF Doc. No. 286]).

A. Failure to Serve a Timely Notice of Claim

Where an action against the MTA and the NYCTA is founded on a tort (except for wrongful death), Public Authorities Law §§ 1212 (2) and 1276 (2) require service of notices of claim upon the NYCTA and MTA, respectively, prior to the commencement of the action, "within the time limited by and in compliance with all of the requirements of section [50-e] of the general municipal law." A notice of claim is also required where an action against the NYCTA is based on the negligence of an employee "in the operation of a vehicle or other facility of transportation under the jurisdiction and control of the authority" (Public Authorities Law § 1212 [3], [4]). General Municipal Law § 50-e (1) (a) provides that the notice of claim must be served "within ninety days after the claim arises."

However, in this case, plaintiff did not name the Third-Party Transit Defendants as direct defendants. Thus, plaintiff was not required to serve any timely notice of claim upon the Third-Party Transit Defendants to maintain the action.

As to the Paramount Defendants, "no filing of claim . . . is required in order to maintain the third-party action" (*Valstrey Serv. Corp. v Bd. of Elections, Nassau County*, 2 NY2d 413, 416 [1957]; *Zillman v Meadowbrook Hosp. Co., Inc.*, 45 AD2d 267, 270 [2d Dept 1974]).

B. Storm in Progress Doctrine

As a threshold matter, plaintiff's argument that summary judgment based on the "storm in progress" defense should be denied because it was not pleaded in the answer of the Third-Party Transit Defendants is unavailing, "since '[t]here is no prohibition against moving for summary judgment based on an unpleaded defense where the opposing party is not taken by surprise and does not suffer prejudice as a result'" (*Matthew Adam Props., Inc. v The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 600 [1st Dept 2015]). Here, plaintiff has not established any surprise or prejudice.

It bears repeating that the Third-Party Transit Defendants are not named as direct defendants in plaintiff's action. Thus, the Third-Party Transit Defendants' argument of a storm in progress is applicable only to the third cause of action of the third-party complaint, which seeks contribution against them, to the extent that the Paramount Defendants seek to hold the Third-Party Transit Defendants liable as alleged joint tortfeasors who breached a duty owed to plaintiff (see *Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559, 568 [1987]).

As discussed above, because the Paramount Defendants can no longer be held liable to plaintiff, the second and third causes of action of the first third-party complaint, which seek common-law indemnification and contribution, are dismissed by operation of law. Thus, the storm in progress defense is rendered academic.

To the extent that the Third-Party Transit Defendants rely on the storm in progress defense as a ground for dismissing the remaining causes of action of the third-party complaint, summary judgment is denied. The remaining causes of action seek contractual indemnification (first cause of action) and allege failure to procure insurance pursuant to a contract/written agreement (fourth cause of action). A priori, a storm in progress would not relieve the parties of their contractual obligations, unless the parties' contractual agreement expressly provided as such. On this motion, the Third-Party Transit Defendants did not submit any contractual agreements with the Paramount Defendants.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Paramount Fee, L.P., Paramount Leasehold, L.P. and Newark & Co. Real Estate (Seq. No. 008) is **GRANTED**, the complaint is severed and dismissed as against these defendants, with costs and disbursements to said defendants, as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of these defendants accordingly; and it is further

ORDERED that the second and third causes of action of the first third-party complaint against third-party defendants New York City Transit Authority and Metropolitan Transportation Authority, sued herein as Metropolitan Transit Authority are dismissed; and it is further

ORDERED that the motion for summary judgment by third-party defendants New York City Transit Authority and Metropolitan Transportation Authority, sued herein as

Metropolitan Transit Authority, (Seq. No. 007) is **DENIED**; and it is further **ORDERED** that the remainder of the action shall continue.



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8/19/2024
DATE

RICHARD TSAI, J.S.C.

CHECK ONE:

SEQ NO. 7

SEQ NO. 8

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

DENIED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE