

**Beltres-Diaz v City of New York**

2024 NY Slip Op 34075(U)

November 15, 2024

Supreme Court, New York County

Docket Number: Index No. 158619/2018

Judge: J. Machelle Sweeting

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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. J. MACHELLE SWEETING PART 62**

*Justice*

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FELIX BELTRES-DIAZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, and 146 ATTORNEY ST. LLC.,

Defendants.

-----X

146 ATTORNEY ST. LLC.,

Third-Party Plaintiff,

-against-

VERIZON NEW YORK INC.,

Third-Party Defendant.

-----X

INDEX NO. 158619/2018

MOTION DATE 04/15/2024

MOTION SEQ. NO. 006

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595696/2019

The following e-filed documents, listed by NYSCEF document number (Motion 006) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133 were read on this motion to/for JUDGMENT - SUMMARY.

Defendant/third-party plaintiff 146 Attorney St. LLC (“146 Attorney”) moves under CPLR § 3211 and CPLR § 3212 for summary judgment dismissing all claims and cross-claims against it. In addition, 146 Attorney seeks sanctions and attorney’s fees against plaintiff and co-defendant City of New York for their failure to discontinue their claims against 146 Attorney, thus necessitating this motion. For the reasons below, the court grants the motion to the extent of dismissing all claims and cross-claims against 146 Attorney and denies it to the extent that it seeks sanctions.

According to the verified complaint (NYSCEF Doc. No. 117), on September 9, 2017, plaintiff “tripped and/or fell due to a hole, defective, broken, cracked, raised, uneven and dangerous condition on the sidewalk and/or curb” at the corner of Attorney Street and Stanton Street (*id.*, ¶ 26). The complaint states that both 146 Attorney and the City controlled the sidewalk and the curb.

In support of its motion, 146 Attorney submits a copy of plaintiff’s 50-h hearing transcript, which includes photographs of the accident location (NYSCEF Doc. No. 123, \*7-9). The area where the accident occurred is at the street corner, at the pedestrian ramp. The photographs also reveal that there is a hole in this area. At plaintiff’s deposition, plaintiff confirmed that this was where he fell (NYSCEF Doc. No. 124 [Dep Transcript] at p. 33 lines 11-13). In addition, 146 Attorney submits the affidavit of Grace Demarinis Baldassarra, its manager (NYSCEF Doc. No. 126). The affidavit states that 146 Attorney did not use, maintain, or repair the pedestrian ramp and did not cause the defective condition. As liability generally exists “upon ownership, occupancy, control or special use of the property,” 146 Attorney states that it cannot be held liable for the defect (NYSCEF Doc. No. 166, \*9 [quoting *Noia v Maselli*, 45 AD3d 746, 746 (2d Dept 2007)]). Additionally, 146 Attorney states that under Administrative Code § 7-210, it is not liable for defects in the pedestrian ramp. Thus, dismissal is appropriate.

Also, 146 Attorney contends that the Baldassarra affidavit and the City’s own documents collectively establish its right to dismissal. It annexes an email chain in which counsel asked the parties to sign a stipulation to discontinue the case as against it (NYSCEF Doc. No. 129). It states that plaintiff and the City’s refusal to do was unreasonable. It cites *Torain v AG-Metropolitan 711 Stewart Ave., LLC* (58 Misc 3d 408, 411-412 [Sup Ct, Nassau County 2017]) for the proposition

that the refusal of a party to discontinue claims is sanctionable under the appropriate circumstances.

The City submits an affidavit in partial opposition to this motion. It does not oppose the dismissal of its cross-claims against 146 Attorney. However, it argues that its conduct is not sanctionable. More specifically, it argues that it did not act in a willful, contumacious, or frivolous manner. The City points to 146 Attorney's papers, which are allegedly "silent as to any allegedly willful or frivolous conduct by the City" (NYSCEF Doc. No. 127, ¶ 3). Further, it notes that the affidavit on which 146 Attorney relies is by its manager, and this is not an objective document or dispositive evidence. The City states that it had no obligation to discontinue voluntarily, particularly as depositions had not been completed when 146 Attorney made its request.<sup>1</sup>

In reply, 146 Attorney reiterates that it should not be named as a defendant in this case. It argues that because its proof was irrefutable and it made three requests for discontinuances, sanctions are appropriate. It reiterates that the City is chargeable with knowledge as of June 25, 2018, when plaintiff's 50-h hearing was held, and that various discovery productions and orders also made the City aware that 146 Attorney is not liable.

Plaintiff opposes the motion in its entirety. Primarily, plaintiff argues that the motion is premature. He points out that when he filed the papers, depositions of defendants had not taken place. Also, plaintiff notes that 146 Attorney commenced a third-party action against Verizon New York Inc. ("Verizon") (NYSCEF Doc. No. 29), and discovery concerning both Verizon and 146 Attorney's knowledge of the defect is critical. He contends that the principal document on which 146 Attorney relies, the Demarinis-Baldassarra affidavit, is self-serving.

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<sup>1</sup> 146 Attorney points to NYSCEF Doc. No. 112, which is an earlier order. The discovery conference order with the cited date is filed as NYSCEF Doc. No. 114.

146 Attorney replies that the third-party lawsuit and the dearth of discovery from Verizon establish that 146 Attorney had no ownership and maintenance obligations of the corner or pedestrian ramp, and therefore it cannot be responsible for the alleged defect.

The court grants the branch of the motion that seeks dismissal of all claims and cross-claims against 146 Attorney. “Although a landowner is responsible for maintaining abutting sidewalks (*see* Administrative Code of City of NY § 7-210), it is not responsible for maintaining pedestrian ramps unless it created the defect or the ramp was constructed for its special use” (*Harvey v Henry 85 LLC*, 176 AD3d 443, 444 [1st Dept 2019] [parenthetical in original]). It is not disputed that plaintiff fell in the area that included the pedestrian ramp. As 146 Attorney correctly notes, the complaint does not allege that the building derived a special benefit from either the curb cut or the pedestrian ramp, and it does not allege that 146 Attorney or its predecessor owners installed the curb or the ramp or made a special use of it (*see Lebron v City of New York*, 144 AD3d 566, 566 [1st Dept 2016]).

Additionally, in his opposition to this motion, plaintiff does not “present evidence sufficient to raise a triable issue of fact as to whether [146 Attorney] caused or created the condition or made special use of the cub cut” (*Fernandez v 2265 E. Tremon Realty, LLC*, 188 AD3d 529, 529-530 [1st Dept 2020]). Plaintiff’s argument that the motion is premature because of the dearth of discovery lacks merit because: (1) plaintiff merely provides vague statements as to what discovery documents might reveal, and (2) plaintiff filed the complaint in September 2018, and there have been multiple discovery motions and conferences. It also is notable that the City, which is responsible for the subject area, does not oppose dismissal of its cross-claims against 146 Attorney.

The court denies that branch of the motion that seeks sanctions against plaintiff and the City. Although courts have awarded sanctions where a party does not discontinue baseless claims (e.g., *Borstein v Heneberry*, 132 AD3d 447, 452 [1st Dept 2015]), far more is required than is at issue here. The court in *Torain*, on which 146 Attorney relies, determined that the plaintiff's very decision to commence the litigation was frivolous, as the plaintiff's attorney possessed clear documentary evidence that the defendant neither owned nor had a connection with the property in question (58 Misc 3d at 410-411). Further, although 146 Attorney states that it asked the parties to discontinue their claims against it three times, it appears that these requests were made as part of a single email chain, and that it did not make these requests until the month before it filed the current motion. Therefore, the court exercises its discretion and declines to award sanctions.

For the reasons above, it is

**ORDERED** that the motion is granted to the extent of dismissing all claims and cross-claims asserted against 146 Attorney; and it is further

**ORDERED** that, as 146 Attorney is no longer a party, the third-party action is dismissed; and it is further

**ORDERED** that the caption is amended to reflect the discontinuance of the third-party action and to remove 146 Attorney as a named defendant; and it is further

**ORDERED** that the new caption shall read:

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Felix Beltres-Diaz,

Plaintiff,

Index No. 158619/2018

-against-

THE CITY OF NEW YORK,

Defendant.

\_\_\_\_\_

The Clerk is directed to change the caption accordingly, and all future court papers shall use this caption; and it is further

**ORDERED** that the branch of the motion seeking sanctions is denied.

11/15/2024

DATE

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J. MACHELLE SHEETING, 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