

**Johnston v Guma Constr. Corp.**

2024 NY Slip Op 34606(U)

December 27, 2024

Supreme Court, New York County

Docket Number: Index No. 157395/2023

Judge: Jeanine R. Johnson

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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. JEANINE R. JOHNSON PART 52-M**

*Justice*

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BRIAN JOHNSTON,

Plaintiff,

**INDEX NO. 157395/2023**

**MOTION DATE 05/21/2024**

**MOTION SEQ. NO. 001**

- v -

GUMA CONSTRUCTION CORP., EAST 12TH STREET  
TENANTS HDFC HOUSING DEVELOPMENT FUND  
CORPORATION, 527-529 EAST 12TH STREET HOUSING  
DEVELOPMENT FUND CORPORATION, RESTORING  
COMMUNITIES HOUSING DEVELOPMENT FUND  
CORPORATION, JMS VILLAGE LLC, DS 531 E. 12TH  
OWNER LLC, 7376 CONSTRUCTION LLC, BELLET  
CONSTRUCTION CO., INC., TRI BOROUGH  
SCAFFOLDING AND HOISTING, INC., TRIBOROUGH  
SCAFFOLDING AND HOISTING SERVICES INC., THE  
CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 75, 76, 77, 78, 79, 80, 81, 98, 99, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents and oral argument heard on October 9, 2024, Defendant, TRIBOROUGH AND HOISTING INC. and TRIBOROUGH SCAFFOLDING AND HOISTING SERVICES INC. (hereinafter "TRIBOROUGH") motion for summary judgment pursuant to CPLR §§ 3212 and 3211(a)(1) seeking dismissal is granted.

To succeed on a motion for summary judgment, the moving party must make a prima facie showing of entitlement to summary judgment as a matter of law by demonstrating the absence of any material issues of fact. *See generally Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d 1039 (2016). *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014); CPLR §3212(b). "If the moving party makes out a prima facie showing, the burden then shifts to

the non-moving party to establish the existence of material issues of fact which preclude judgment as a matter of law.” *Jacobsen*, 22 N.Y.3d at 833. If there are no material, triable issues of fact, summary judgment must be granted. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). “The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion.” *Erkan v McDonald’s Corp*, 146 AD3d 466, 468 (1st Dept 2017).

Defendant, Triborough, asserts Plaintiff’s complaint and Defendants’, Bellet Construction Co. Inc., Restoring Communities Housing Development Fund Corporation, 7376 Construction LLC, DS 531 E. 12<sup>th</sup> Owner LLC, JMS Village LLC, The City of New York and NYC Department of Transportation cross-claims should be dismissed because their work was completed on July 1, 2022, twelve days prior to Plaintiff’s accident on July 13, 2022, and none of their work involved the use of a dumpster or rubber bollard, which were the mechanisms that are alleged to have caused Plaintiff’s injuries. In support of this claim, Plaintiff submitted the affidavit of Jared Bohrer, Vice President and part owner, who oversees the operations for the company and a copy of the project file that detailed the scope of the work completed.

Plaintiff argues Defendant’s motion is premature because discovery demands and depositions are outstanding. Specifically, Plaintiff contends it is unknown which Defendant owned and placed the dumpster in the bike lane, causing him to swerve and the root cause of the subject defective rubber bollard.

This Court finds that Defendant, Triborough, has established that none of the scaffolding work they completed involved the dumpster or rubber bollard at issue, making out a prima facie showing for dismissal that has not been refuted by the Plaintiff’s request for additional discovery. *Erkan v McDonald’s Corp*, 146 AD3d 466, 468 (1st Dept 2017); *DaSilva v Haks*

*Engrs.*, 125 AD3d 480, 482 (1st Dept 2015) (“A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.”).

Accordingly, it is hereby,

ORDERED that Defendant, Triborough’s, motion for summary judgment is granted; it is further;

ORDERED that all claims and cross-claims asserted against the Defendant, Triborough are dismissed; it is further

ORDERED that the action is severed and continued against the remaining Defendants, it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; it is further

ORDERED that the caption is amended to read as follows:

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BRIAN JOHNSTON,  
Plaintiff,

- v -

GUMA CONSTRUCTION CORP., EAST 12TH STREET TENANTS  
HDFC HOUSING DEVELOPMENT FUND CORPORATION,  
527-529 EAST 12TH STREET HOUSING DEVELOPMENT FUND  
CORPORATION, RESTORING COMMUNITIES HOUSING  
DEVELOPMENT FUND CORPORATION, JMS VILLAGE LLC,  
DS 531 E. 12TH OWNER LLC, 7376 CONSTRUCTION LLC,  
BELLET CONSTRUCTION CO., INC., THE CITY OF NEW YORK,  
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION  
Defendant(s).

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it is further;

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court 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 the court's website).

This constitutes the Decision and Order of the Court.

12/27/2024  
DATE

  
JEANINE R. JOHNSON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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