

Werner v Joseph L. Balkan, Inc.

2024 NY Slip Op 34799(U)

June 28, 2024

Supreme Court, Queens County

Docket Number: Index No. 701785/2020

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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JOSEPH P. WERNER, III,

Index No.:701785/2020

Motion Date: 4/15/2024

Plaintiff,

Motion Cal. No.: 25

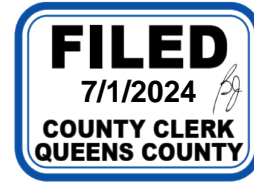
-against-

Motion Sequence No.: 2

JOSEPH L. BALKAN, INC., THE BROOKLYN UNION
GAS COMPANY D/B/A NATIONAL GRID and THE
CITY OF NEW YORK,

Defendants.

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The following efiled papers numbered 38-58, 76-85 submitted and considered on this motion by Defendants The Brooklyn Union Gas Company d/b/a National Grid (hereinafter “BUG”) seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 granting defendants summary judgment and dismissing Plaintiff Joseph P. Werner, III’s (hereinafter referred to as “Plaintiff” or “Werner”) claims and all cross-claims by co-Defendants against BUG.

Motion Sequence 2	Papers <u>Numbered</u>
Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 38-58
Affirmations in Opposition-Affidavits Exhibits.....	EF 76-79, 80-81
Affirmation in Reply-Affidavits-Exhibits.....	EF 82-85

Relevant Factual and Procedural Background

This action arises from an incident on April 17, 2019, wherein Werner sustained personal injuries after his skateboard struck a sinkhole in the roadway in front of 164-29 99th Street, Howard Beach, New York. Werner alleges that the sinkhole was caused by the negligent excavation and backfilling work performed by the Defendants, BUG and Joseph L. Balkan, Inc. (“Balkan”).

BUG hired Hallen Construction (hereinafter “Hallen” or “Hallen Construction”) to perform gas main work in the same area. Hallen’s work, performed under permits issued to BUG, involved excavation and backfilling and was conducted between March 9, 2019, and April 14, 2019, just days before the Plaintiff’s accident. Although the permits listed the address as 164-20 99th Street, the

work extended to 164-29 99th Street, where the incident occurred. BUG moves for summary judgment, contending it did not create the defect and that Hallen Construction, hired as an independent contractor, performed the work in question.

BUG relies on the deposition testimony of Walter Stone (hereinafter “Stone”), its representative, who testified about the relationship between BUG and Hallen Construction and the work performed. Stone testified that Hallen was responsible for the excavation and backfilling work and that BUG did not perform the actual work itself. Stone's testimony detailed the extensive nature of Hallen's work, including removing rocks and debris and managing the instability caused by the sandy subsurface conditions. The area was noted for being prone to puddling, which could contribute to the formation of defects in the roadway.

Law and Application

CPLR §3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to

a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

“The movant 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” (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “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” (*see Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also J. B. v Monroe-Woodbury Cent. School Dist.*, 224 AD3d 722, 724 [2d Dept 2024]). Summary judgment is a drastic measure that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]; *Doize v. Holiday Inn Ronkonkoma*, 6 A.D.3d 573, 774 N.Y.S.2d 792 [2nd Dept. 2004]). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]; quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d at 335 [2011]). “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*see Moonilal v R.C. Church of St. Mary Gate of Heaven*, 225 AD3d 592, 593 [2d Dept 2024]; citing *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; *see also Adams v Bruno*, 124 AD3d 566, 567 [2d Dept 2015]).

BUG argues it cannot be held liable for the actions of Hallen Construction, an independent contractor, and that it did not create the defect in the roadway. “The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts” (*see Rosenberg v Equit. Life Assur. Soc. of U.S.*, 79 NY2d 663, 668 [1992]; citing *Whitaker v Norman*, 75 NY2d 779, 782 [1989]; *McDonald v Shell Oil Co.*, 20 NY2d 160, 166 [1967]; *Besner v Cent. Tr. Co. of New York*, 230 NY 357, 362 [1921]). However, under the circumstances and in light most favorable to Werner, BUG has failed to establish prima facie that Hallen was its independent contractor, and that the so-called “independent contractor rule” therefore applied (*see Mele v USTA Const.*, 82 AD3d 944, 944 [2d Dept 2011]; citing *Willis v City of New York*, 266 AD2d 208, 209 [2d Dept 1999]). Here, BUG has failed to provide the contract between BUG and Hallen or any other documentation clarifying the degree of control, direction, or supervision BUG exercised over

Hallen's work. The absence of such evidence undermines BUG's argument that Hallen was an independent contractor for whom BUG bears no liability.

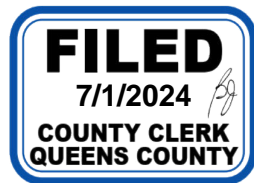
“A contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street” (see *Encalada v Brooklyn Union Gas Co.*, 221 AD3d 860, 860 [2d Dept 2023]; citing *Brown v Welsbach Corp.*, 301 NY 202, 205 [1950]; *McGee v City of New York*, 161 AD3d 1062, 1062 [2d Dept 2018]). Here, BUG has also failed to conclusively establish that Hallen’s work did not create the defect (see *Id.* at 860; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Stone testified that Hallen performed two excavations and backfilled each, describing the work as involving the removal of rocks and debris from the site, Stone's testimony indicated that the area was prone to puddling and instability due to its sandy subsurface conditions. The proximity in time between the completion of Hallen's work on April 14, 2019 and the accident on April 17, 2019 further suggests a potential link between the work performed and the formation of the defect. The City of New York's records show a 311 call was made on April 15, 2019, reporting cave-in in the area, and the site was inspected and marked as "in-compliance" on the morning of the accident. This inspection noted the work as active and in compliance with standards, suggesting ongoing issues with the roadway conditions that cannot be solely attributed to Balkan’s earlier work. Further, the argument that the exact location where Hallen performed its work is not the same as the Werner’s accident location is also unsupported by any evidence. These factors collectively underscore the necessity for a trial to resolve these material issues of fact.

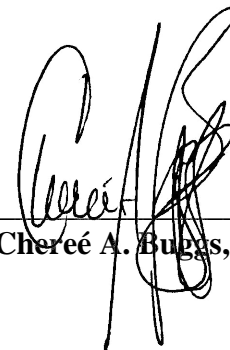
Hence, this Court finds that genuine triable issues of facts exists and BUG has failed to meet its prima facie burden of demonstrating that Hallen is its independent contractor or that Bug did not create the alleged defect in the roadway. The lack of evidence regarding the contractual relationship with Hallen and the failure to conclusively prove that the work did not contribute to the defect preclude a finding in BUG's favor. Accordingly, it is hereby

ORDERED, that the motion by The Brooklyn Union Gas Company d/b/a National Grid is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: June 28, 2024





Hon. Chereé A. Buggs, JSC