

<b>O'Brien v County of Nassau</b>
2024 NY Slip Op 35020(U)
February 7, 2024
Supreme Court, Nassau County
Docket Number: Index No. 600472/2020
Judge: Catherine Rizzo
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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**Hon. Catherine Rizzo  
Acting Justice of the Supreme Court**

\_\_\_\_\_  
**Patricia M. O'Brien**

**X**

**TRIAL/IAS, PART 44  
NASSAU COUNTY**

**Plaintiff,**

**INDEX NO.: 600472/2020**

**-against-**

**MOTION SUBMISSION  
DATE : 11/29/23**

**County of Nassau, and Three Arrows  
Hempstead, L.L.C.,**

**MOTION SEQUENCE  
NO.: 001, 002, 003, 004**

**Defendants.**

\_\_\_\_\_  
**Three Arrows Hempstead, L.L.C.,**

**X**

**Third-Party Plaintiff,**

**-against-**

**Building Service Industries, L.L.C., and 18  
Cooper Street, Inc.,**

**Third-Party Defendants.**

\_\_\_\_\_  
**Three Arrows Hempstead, L.L.C.,**

**X**

**Second Third-Party Plaintiff,**

**-against-**

**RDUА PARCELL 1 L.L.C.,**

**Second Third-Party Defendants.**

\_\_\_\_\_  
**X**

The following e-filed documents for Motion Sequence 001, 002, 003 and 004 listed by NYCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 001

Notice of Motion and Affidavits/Affirmations.....	<u>  X  </u>
Memorandum of Law in Support of Motion.....	<u>  X  </u>
Affidavits/Affirmations in Opposition.....	<u>  X  </u>
Memorandum of Law in Support of Reply.....	<u>  X  </u>

Motion Sequence 002

Notice of Motion and Affidavits/Affirmations.....	<u>  X  </u>
Memorandum of Law in Support of Motion.....	<u>  X  </u>
Affidavits/Affirmations in Opposition.....	<u>  X  </u>
Memorandum of Law in Support of Reply.....	<u>  X  </u>

Motion Sequence 003

Notice of Cross-Motion and Affidavits/Affirmations...	<u>  X  </u>
Affidavits/Affirmations in Opposition.....	<u>  X  </u>
Reply Affidavits/Affirmations.....	<u>  X  </u>

Motion Sequence 004

Notice of Motion and Affidavits/Affirmations.....	<u>  X  </u>
Affidavits/Affirmations in Opposition.....	<u>  X  </u>
Reply Affidavits/Affirmations.....	<u>  N/A  </u>

RELIEF REQUESTED

The defendant/third-party plaintiff/second-party plaintiff, Three Arrows Hempstead, LLC, (hereinafter referred to as “Three Arrows”) moves (Seq: 001) for an order pursuant to CPLR §3212 granting Three Arrows summary judgment against the plaintiff, and an order pursuant to CPLR §8303-A awarding Three Arrows costs and reasonable attorney fees in the sum of \$10,000.00. The plaintiff submits opposition. Three Arrows submits a reply.

The defendant/second third-party defendant, RDU A PARCEL 1 L.L.C., (hereinafter referred to as “RDU A”), moves (Seq:002) for an order pursuant to CPLR §§1003 and 3211(a)(5) & (7) dismissing the Amended Verified Complaint and Second Third-Party Complaint as and against RDU A on the grounds that the action against RDU A is barred by the three-year applicable statute of limitations pursuant to CPLR §214(5) and failure to state a cause of action. The plaintiff submits opposition. RDU A submits a reply.

The third-party defendant, Building Service Industries, L.L.C., (hereinafter referred to as “BSI”), cross-moves (Seq: 003) for an order pursuant to CPLR §3212 granting summary judgment to BSI dismissing all claims, cross-claims and third-party claims against it. The plaintiff submits opposition. BSI submits a reply.

RDU moves (Seq: 004) for an order for severance pursuant to CPLR §603 of the plaintiff’s claims and the second third-party action, and any crossclaims against RDU due to the late filing of such claims to all the motion to dismiss be decided, vacating the plaintiff’s note of issue and striking the action and/or the severed claims against RDU from the trial calendar on the grounds that RDU has not answer and discovery has not been conducted, extending the time for RDU to file dispositive motions for a period of 180 days from the date the decision is rendered in the motion to dismiss if RDU’s motion to dismiss is denied. Three Arrows and the Plaintiff submit opposition.

#### APPLICABLE LAW

Absent a duty of care to the injured person, a party cannot be held liable in negligence. (*Palsgraf v. Long Island Railroad Co.*, 248 NY 339). It is well established that a party cannot be held liable for injuries caused by an allegedly dangerous or defective condition on the premises when that party does not own, control or use the property. (*Dague v. 1818 New York Management Corp.*, 301 AD2d 561; *Febrescordero v. 2827 Boston Road Corp.*, 301 AD2d 401; *Cabales v. Little League of the Islips*, 292 AD2d 329; *Aversano v. City of New York*, 265 AD2d 437). It is axiomatic that before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff, whereby, in the absence of duty, there is no breach, and without a breach, there is no liability. (*Dague, supra*).

The Court in *Alfieri v. Carmelite Nursing Home, Inc.*, 907 NYS2d 577 has succinctly stated that the “Court of Appeals of the State of New York has consistently held for over 120 years that any post-accident modification or repairs made in an appliance, structure, or machine which caused an accident is neither evidence nor an admission of negligence.” (*Id.*, citing *Weiner v. Serps Auto Wrecker*, 300 NYS2d 852; *Cahill v. Kleinberg*, 233 NY 255). “Furthermore, the Court of Appeals has determined that subsequent remedial measures cannot be used to demonstrate defendant’s knowledge of an unsafe condition prior to the accident, thus creating a duty to take reasonable steps to warn against or prevent injury.” (*Id.*, citing *Corcoran v. Village of Peekskill*, 108 NY 151). The Court stated while subsequent remedial measures may not be admissible to show negligence, it may be admitted into evidence with appropriate instructions to demonstrate other issues, such as control and domain over the cause of the accident, conditions at the time of the accident, to identify the cause of an injury, or impeach a witness. (*Id.*) Negligence can only be determined “by what was known before and at the time of the accident,” and cannot be inferred from subsequent acts.” (*Pisula v. Roman Catholic Archdiocese of New York*, 201 AD3d 88, citing *Alfieri*).

Pursuant to CPLR §214(5) an action to recovery for personal injuries must be commenced within three years. On March 20, 2020, New York State Governor Cuomo issued Executive

Order No. 202.8, which directed that “any specific time limit for the commencement, filing, or service of any legal action, notice, motion or other process . . . as proscribed by the procedural laws of the state . . . including but not limited to . . . the practice law and rule . . . is hereby tolled.” The toll was lifted November 3, 2020 pursuant to Executive Order No. 202.67. It has also been held that the subject executive orders constitute a toll of filing deadlines. (*Brash v. Richards*, 195 AD3d 582, 582). The Court in *Baker v. 40 Wall Street Holdings Corp.*, explains that the Governor did not toll all statutes of limitations, but only suspended them, due to the COVID-19 Pandemic, and terminated the suspension on March 20, 2020. In *Baker*, the statute of limitations did not run until April 30, 2021 and therefore, was not affected in any way by the Governor’s Executive Orders. A party could benefit from the suspension of his or her statute of limitations, or filing deadline if it fell within the suspension period, as it did so in *Brash*. (*Id.*)

### DISCUSSION

The plaintiff initiated this action to recover for personal injuries sustained on November 30, 2018 as a result of a fall due to an alleged dangerous and defective condition while “[l]awfully walking at or near the sidewalk on Cooper Street abutting the rear of 40 Main Street.” The plaintiff alleged, by way of Summons and Complaint, that the County and/or the Town and/or the Village owned and maintained the sidewalk on which plaintiff was caused to fall. A stipulation of discontinuance was filed discontinuing the action as and against the Town and Village only.

Three Arrows, by way of motion for summary judgment, has made a *prima facie* showing that it is not the owner of the subject location where plaintiff fell. Three Arrows submits an affidavit by an engineer who avers that he conducted a survey and inspection of the location that plaintiff marked as a red circle during her deposition, identifying the specific point where she fell, and according to his extensive research, fieldwork and calculations opines that the crack that existed in November 2018 was not located in the boundaries of the subject location, to wit, property owned by Three Arrows, but rather located on property owned by RDU. As stated above, Three Arrows does not owe a duty to the plaintiff injured by an allegedly dangerous or defective condition on the premises when that party does not own, control or use the property. The plaintiff in opposition does not dispute that Three Arrows does not own the property, but rather assert that Three Arrows has not demonstrated that they did not create the subject dangerous condition, or that they did not have actual or constructive notice of the condition. The plaintiff refers to a citation that Three Arrows received from the Village of Hempstead for the subject sidewalk, and argues that the sidewalk was repaved by Three Arrows, thereby raising an issue of control. As provided above, subsequent remedial measures cannot be used to demonstrate defendant’s knowledge of an unsafe condition prior to the accident, thus creating a duty to take reasonable steps to warn against or prevent injury. Plaintiff’s fall occurred on November 30, 2018 and the remedial measures took place after plaintiff’s fall. Notwithstanding that plaintiff’s opposition fails to demonstrate whether the repaved or repaired sidewalk was located on property owned by Three Arrows, in the case at bar, it is undisputed that Three Arrows does not own the subject property. The subsequent remedial measure may not be used to demonstrate creation, negligence, notice or to create a duty not owed.

RDU A has demonstrated that the action initiated against RDU A is time-barred. The plaintiff fell on November 30, 2018 and the action as and against RDU A was filed against RDU A after the applicable three-year statute of limitations. The plaintiff, in opposition, does not dispute that the action initiated against RDU A is time-barred but rather asserts that plaintiff is entitled to the “relation-back” doctrine under *Duffy v. Horton Memorial Hospital*, 66 N.Y.2d 473. However as acknowledged by the plaintiff, the courts have held that a plaintiff may interpose a direct claim against a third-party defendant after the expiration of limitations “provided that the third-party action was commenced prior to the expiration of the statute of limitations.” (*Hemmings v St. Marks Hou. Assoc., L.P.*, 169 Misc. 2d 155; *Cucuzza v. Vacarro*, 1099 A.D.2d 101; *Duffy*.) Here, as provided by the plaintiff, the second third-party complaint as and against RDU A was filed on April 25, 2022 and served on RDU A on May 6, 2022, long after the statute of limitations expired. Plaintiff’s attempt to avail itself to the tolling doctrine provided in the Executive Orders issued during the COVID-19 Pandemic is not warranted. As demonstrated above, a party could benefit from the suspension of his or her statute of limitations, or filing deadline, if it fell within the suspension period. Here, the plaintiff’s statute of limitations did not fall within the suspension period.

BSI, by way of cross-motion submits that as the subject crack where the plaintiff fell is not owned by Three Arrows who is entitled to summary judgment, and it owed no duty to the plaintiff, and BSI’s relation to the subject premises is through a contract it entered into with Three Arrows for janitorial services within the building, the action, as and against BSI should also be dismissed. The plaintiff’s opposition does not raise a triable issue of fact to warrant denial of the motion.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

### CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Three Arrows’ motion (Seq:001) for summary judgment is granted and therefore, the plaintiff’s action, and any and all cross-claims, as and against Three Arrows, are hereby dismissed, and it is hereby further

ORDERED that branch of Three Arrows’ motion seeking sanctions against the plaintiff is denied, and it is hereby further


ORDERED that RDU A’s motion (Seq: 002) for summary judgment is granted and therefore, the plaintiff’s action and the Second Third-Party Plaintiff’s action, and any and all cross-claims, as and against RDU A, are hereby dismissed, and it is hereby further

ORDERED that BSI’s cross-motion (Seq: 003) for summary judgment is granted therefore, the third-party action and any and all cross-claims as and against BSI are hereby dismissed, and it is hereby further

ORDERED that RDUAs motion (Seq:004) to sever and vacate the note of issue is now moot.

This constitutes the decision and order of the Court.

ENTER:

  
HON. CATHERINE RIZZO, A.J.S.C.

Dated: February 7, 2024

**ENTERED**

**Feb 08 2024**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE