

Marcello v City of New York

2025 NY Slip Op 32686(U)

July 22, 2025

Supreme Court, New York County

Docket Number: Index No. 155633/2022

Judge: Hasa A. Kingo

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

PRESENT: HON. HASA A. KINGO PART 05M

Justice

-----X

PATRICIA MARCELLO,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, THE NEW YORK
CITY DEPARTMENT OF ENVIRONMENTAL
PROTECTION, EMPIRE CITY SUBWAY COMPANY
(LIMITED), EJM CONSULTING LLC, SPECTRUM NEW
YORK METRO, LLC, JEK COMMUNICATIONS, INC.

Defendant.

-----X

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SPECTRUM NEW YORK METRO, LLC,

Third-Party Plaintiff,

- v -

JEK COMMUNICATIONS, INC.

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 103, 104, 105

were read on this motion for DISMISSAL/SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 80, 100, 101, 102, 107, 108

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 106

were read on this motion to AMEND CAPTION/PLEADINGS.

**DECISION + ORDER ON
MOTION**

Third-party defendant JEK Communications, Inc. (“JEK”) seeks an order dismissing defendant/third-party plaintiff Spectrum New York Metro, LLC’s (“Spectrum”) third-party complaint in its entirety and, in the alternative, granting summary judgment in favor of JEK (Motion Seq. 002). JEK maintains that the work it performed under its contract with Spectrum was confined to the east side of Sixth Avenue, well removed from the northwest corner of West 58th Street and Sixth Avenue where Plaintiff Patricia Marcello (“Plaintiff”) allegedly fell. Asserting that it neither created nor contributed to the condition at issue, JEK contends that it owes no duty of contractual indemnification, common-law indemnification, or contribution. JEK further moves to dismiss Plaintiff’s pending motion (Motion Seq. 004) on the grounds that any attempt to name JEK as a direct defendant is untimely, prejudicial, and lacks any substantive merit.

Spectrum’s own application (Motion Seq. 003), seeks summary judgment on its contractual indemnification claim against JEK, urging the court to enforce the broad indemnity provision in the Spectrum–JEK master contract. Spectrum argues that any claim “arising from, related to, or based upon” JEK’s work, as defined by the contract, triggers JEK’s obligation to defend and reimburse Spectrum for all expenses, including attorney’s fees, incurred in this litigation.

Plaintiff’s motion requests leave to amend her complaint to add JEK as a direct defendant and to assert causes of action for negligence, breach of contract, and statutory violations under CPLR § 3025(b). Plaintiff asserts that JEK was placed on notice upon service of the third-party complaint and that her proposed allegations relate back to the date of impleader, thereby avoiding any statute of limitations bar.

BACKGROUND AND PROCEDURAL HISTORY

This personal injury action arises from an incident on December 17, 2021, in which Plaintiff allegedly tripped and fell due to a cracked and depressed roadway near the northwest corner of West 58th Street and Sixth Avenue in Manhattan.

Plaintiff initially commenced separate actions against various municipal and private defendants. These actions were consolidated by court order on May 16, 2024. Prior to consolidation, on September 8, 2023, Spectrum initiated a third-party action against JEK, alleging causes of action for contractual and common law indemnification, contribution, and failure to procure insurance. JEK answered and asserted counterclaims.

JEK performed work pursuant to a contract with Spectrum from April 30 to May 29, 2020, involving the installation of underground conduits on West 58th Street, extending east from Sixth Avenue toward Grand Army Plaza.

ARGUMENTS

In support of its motion, JEK argues that its work was confined to the east side of Sixth Avenue and extended eastward. It claims Plaintiff’s fall occurred on the west side of the intersection, rendering its work unrelated. JEK relies on photographs, maps, permits, and affidavits to assert that the location of its work is indisputably distant from the alleged defect. JEK also

argues that the indemnification clause in the Spectrum contract is inapplicable here because there is no nexus between Plaintiff's accident and its work.

Conversely, Spectrum contends that JEK's work was conducted under permits for areas that include or abut the site of Plaintiff's fall. Spectrum argues that the indemnity clause applies to any claims arising out of JEK's work, regardless of whether JEK is ultimately found liable. Spectrum relies heavily on *Espinal v. City of New York*, 107 AD3d 411 (1st Dept 2013), and similar cases, asserting that a mere connection between the work and Plaintiff's claim suffices to trigger the duty to indemnify.

By her own motion, Plaintiff seeks to add JEK as a direct defendant, arguing that JEK was on notice due to its involvement in the third-party action. Plaintiff contends that the work was conducted "in the vicinity" of the accident and that the proposed claims are not time-barred under CPLR §§ 203 and 3025.

In response, JEK asserts that there is no factual basis to support the indemnification claim because there is no causal link between its work and the accident. It argues that Spectrum is attempting to use indemnity provisions to insulate itself from any liability without evidence that JEK's work created or contributed to the dangerous condition. JEK further argues that Plaintiff's motion to amend is untimely and prejudicial and lacks merit because there is no evidence of JEK's involvement in the alleged defect.

DISCUSSION

I. JEK's Motion to Dismiss and for Summary Judgment

JEK's motion is brought under several procedural statutes, each imposing distinct standards. The court will address those standards, and their application to this case, in turn.

1. CPLR § 3211(a)(1): Documentary Evidence

A court may grant dismissal under CPLR § 3211(a)(1) only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thereby "utterly refut[ing]" the pleader's allegation (*Phillips v. Taco Bell Corp.*, 152 AD3d 806, 806–07 [2d Dept 2017]). To qualify, a document must be "unambiguous," "undisputedly authentic," and "essentially undeniable" (*VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

Here, JEK presents a tranche of municipal permits (M01-2020119-A60 & A61), detailed work logs, and the unchallenged affidavit of its supervisor, Christopher Forsyth. Those materials unequivocally fix JEK's operations to the east side of Sixth Avenue between April 30 and May 29, 2020. Conversely, Plaintiff's fall indisputably occurred on the northwest corner of West 58th Street and Sixth Avenue. There exists no documentary trace—no plan, no record, no permit—suggesting JEK performed any work at that location. Under *Art & Fashion Group Corp. v. Cyclops Prod., Inc.*, 120 AD3d 436, 438 (1st Dept 2014), such an evidentiary record "definitely disposes of the plaintiff's claim." Spectrum offers no contemporaneous documents to the contrary.

As such, as a matter of law, JEK's "unambiguous, authentic, and undeniable" documentary evidence compels dismissal.

2. CPLR § 3211(a)(7): Failure to State a Cause of Action

Even if the documentary record were not dispositive, dismissal is still warranted under CPLR § 3211(a)(7). On such a motion, the court "accept[s] the facts as alleged . . . as true, accord[s] the pleader every possible favorable inference, and determine[s] whether those facts fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]). Yet, Spectrum's third-party complaint fails to allege the indispensable element of nexus between JEK's work and Plaintiff's injury.

Spectrum pleads contractual indemnity and common-law contribution, but never plausibly alleges that JEK's operations "caused, contributed to, or were connected with" the defect at the accident site. That deficiency is fatal. Under *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 (2002), a pleading must "manifest any cause of action cognizable at law." Here, no such cause survives—even viewed in the light most favorable to Spectrum.

Spectrum's reliance on *Brown v. Two Exchange Partners*, 146 AD2d 129 (1st Dept 1989), is misplaced. *Brown* was explicitly overruled by *Vasquez v. Manhattan College*, 223 AD3d 601 (1st Dept 2024), which held that any indemnity clause lacking a savings clause to carve out the indemnitee's own negligence is void under General Obligations Law ("GOL") § 5-322.1. The Master Contract here contains no such provision, and to enforce it would transform JEK into Spectrum's insurer—precisely the statutory proscription. Even under *Espinal v. City of New York*, 107 AD3d 411 (1st Dept 2013), some connection between the contractor's work and the plaintiff's accident is required. JEK's work was geographically remote and factually disconnected from the accident site; mere listing of a permit number should not, and does not, suffice.

Spectrum has made no showing that it is a valid successor or assignee under the original Charter–JEK agreement. Without such standing, it cannot invoke any contractual right to indemnification. Accordingly, dismissal is warranted pursuant to CPLR § 3211(a)(7).

3. CPLR § 3212: Summary Judgment

Finally, summary judgment under CPLR § 3212 is appropriate. Indeed, a motion for summary judgment "shall be granted if, upon all the papers and proofs 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" (CPLR § 3212 [b]). "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a prima facie case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of*

New York, 49 NY2d 557, 562 [1980]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

JEK has not only met but exceeded that burden. The same permits and work logs that support dismissal under § 3211(a)(1) also establish that: 1.) JEK did not perform or supervise any work at the northwest corner of 58th Street; 2.) there is no evidence of any contract, plan, or permit authorizing JEK to excavate on the west side of Sixth Avenue; and 3.) Plaintiff’s fall was unrelated to JEK’s documented operations. The documentary evidence, including permits and sworn testimony, establishes that JEK’s work was confined to the east side of Sixth Avenue, and the accident occurred on the northwest corner—well outside the area of JEK’s operations.

The Appellate Division, First Department, has long held that dismissal is warranted where the movant shows that it did not create or contribute to the alleged condition (*see Tavaréz v. Herrasme*, 140 AD3d 453, 454 [1st Dept 2016]; *Flores v. City of New York*, 66 AD3d 599, 600 [1st Dept 2009]). Here, JEK has provided unrefuted documentary and testimonial evidence demonstrating it neither performed work nor exercised control at or near the location of Plaintiff’s fall.

As in *Tavaréz*, 140 AD3d at 454, *supra*, JEK’s uncontroverted evidence “utterly refutes” any allegation of liability. Spectrum has produced no admissible proof creating a triable issue; indeed, no witness or document contradicts JEK’s geographic and temporal limits of work. In the absence of any triable dispute on causation or control, summary judgment is not only proper but required.

II. Spectrum’s Motion for Summary Judgment

For the reasons detailed above, Spectrum’s motion for summary judgment must be denied. Summary judgment is a “drastic remedy,” appropriate only when “no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law” (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Spectrum proceeds on the assumption that its broad indemnity clause is automatically triggered by the mere existence of any claim tangentially involving public sidewalks. Yet JEK has submitted permits, project logs, dated field diagrams, and the affidavit of Christopher Forsyth, each of which confines JEK’s underground conduit installations to the east side of Sixth Avenue from April 30 to May 29, 2020. Plaintiff’s fall, by contrast, occurred at the northwest corner of West 58th Street—well outside that defined work area. In *Tavaréz*, 140 AD3d at 454, *supra*, the Appellate Division, First Department, held that where a contractor “did not create or contribute to” the defect, summary dismissal is warranted. JEK’s uncontradicted record “utterly refutes” any claim it caused, controlled, or even approached the site of the accident.

Even under a liberal reading of the indemnification provision, Spectrum must show a connection—not merely an abstract “claim”—between JEK’s contracted work and the hazard that befell Plaintiff. In *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 776 (1987), the Court of Appeals held that indemnity lies only where the plaintiff’s injury “arises out of, in

connection with or as a consequence of the performance of the [contractor's] work.” Here, no document, no affidavit, and no conceded fact in the record satisfies that standard. To the contrary, every piece of evidence places JEK’s operations on the opposite side of Sixth Avenue, negating any causal or geographical link.

Spectrum argues that this court’s rulings prior rulings in *Jacob Auslander v. The City of New York et al.*, Index No. 153268/2023 and *Elaine Allen v. The City of New York, et al.*, Index No. 154024/2018 compel a different result. But those decisions turned on undisputed proof that the contractor’s work overlapped the accident site, or that the permit covered precisely the curb lane where injury occurred. Indeed, although *Auslander* and *Allen* did conclude that a contractor’s indemnity obligation was triggered, at least in part, by the existence of a street-opening permit conferring adjacent rights, here the proofs present a materially different landscape. JEK’s permits and project logs unequivocally confine its operations to the east side of Sixth Avenue. Plaintiff’s fall, by contrast, occurred on the northwest corner of West 58th Street—a location untouched by JEK’s crew. Unlike *Allen*, in which Hylan’s work plainly abutted the accident site, JEK’s work area was separated by the full width of Sixth Avenue. Likewise, in *Auslander*, the contractor’s permit covered the exact roadway segment where decedent fell, and the contractor never contested that it worked at that precise location.

Spectrum’s reliance on a pre-2009 understanding of indemnity also ignores *Vasquez v. Manhattan College*, 223 AD3d 601 (1st Dept 2024), which invalidates any clause lacking a “savings clause” to carve out liability for the indemnitee’s own negligence. Absent such language, the Master Contract’s indemnity provision is void under GOL § 5-322.1. To grant Spectrum summary judgment would effectively transform JEK into Spectrum’s insurer for all sidewalk claims—a result flatly prohibited by statute and public policy.

Spectrum has not borne its “heavy” burden and has pointed to no undisputed fact tying JEK’s documented work to the location or cause of Plaintiff’s accident. Given the geographic disconnect, the absence of any conceded involvement by JEK at the northwest corner of 58th Street, and the controlling requirements of *Drzewinski*, 70 NY2d 774, *supra*, and GOL § 5-322.1, summary judgment for Spectrum would be premature and unjust. Spectrum’s cross-motion is therefore denied in its entirety.

III. Plaintiff’s Motion to Amend under CPLR § 3025

Leave to amend “shall be freely given” unless the proffered amendment is “palpably insufficient” or would cause “undue prejudice,” or if the moving party has unduly delayed or acted in bad faith. CPLR § 3025(b). Here, Plaintiff’s proposed amendment to add JEK as a direct defendant purportedly relates back under CPLR § 203 on the theory that JEK was impleaded in September 2023. But nearly a year passed before Plaintiff sought to amend, well after the December 17, 2024 statute of limitations deadline. Although mere delay is not dispositive, Plaintiff offers no persuasive excuse for this hiatus. More importantly, her proposed allegations lack factual underpinning: they rest on the same tenuous permit evidence that fails to establish JEK’s work at the accident location, rendering the amendment “devoid of merit.” Moreover, JEK and Spectrum are adversaries in their indemnification dispute, dispelling any notion that JEK and Spectrum share the requisite unity of interest that would justify amendment. Indeed, Plaintiff conceded at oral argument before the court on July 22, 2025, that JEK and Spectrum are not united

in interest. Under these circumstances, granting leave would prejudice JEK through the revival of time-barred claims and impose undue burden and expense. Amendment is therefore denied.

Accordingly, it is hereby:

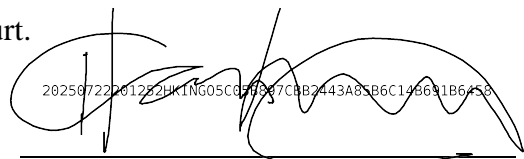
ORDERED that Motion Sequence 002 by Third-Party Defendant JEK Communications, Inc. is granted its entirety; and it is further

ORDERED that Motion Sequence 003 by Spectrum New York Metro, LLC is denied in its entirety; and it is further

ORDERED that Motion Sequence 004 by Plaintiff Patricia Marcello to amend her complaint to add JEK Communications, Inc. as a direct defendant and assert causes of action against it is denied in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing all claims and cross-claims against Third-Party Defendant JEK Communications in their entirety.

This constitutes the decision and order of the court.


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HASA A. KINGO, J.S.C.

7/22/2025

DATE

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