

Eviner v Citibank N.A

2025 NY Slip Op 33204(U)

August 27, 2025

Supreme Court, New York County

Docket Number: Index No. 151878/2023

Judge: Richard Tsai

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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. RICHARD TSAI PART 21

Justice

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AYTEN EVINER, Plaintiff,

- v -

CITIBANK N.A, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ANDAMIO SCAFFOLDING LLC, BOROWIDE ELECTRICAL CONTRACTORS INC., THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY and DOLP 205 LEASEHOLD LLC,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 79-87, 89-97 were read on this motion to/for JUDGMENT - SUMMARY.

In this action, plaintiff Ayten Eviner alleges that, on July 1, 2022, she tripped and fell on a sidewalk in front of 205 East 42nd Street in Manhattan due to "the sidewalk at the aforesaid location being broken, uneven, raised, with missing portions, dangerous, hazardous and a trap like condition" (exhibit A in opposition to motion [NYSCEF Doc. No. 90], plaintiff's bill of particulars ¶¶ 2-5). During discovery, plaintiff provided the following pictures of the alleged sidewalk defect that caused her fall:





(exhibit D in opposition to motion [NYSCEF Doc. No. 93], photographs [cropped, rotated and size adjusted] at 3 and 5). At plaintiff's statutory hearing, plaintiff explained stated that her foot got caught "on the uneven surface, and I fell forward" (exhibit C in opposition to motion [NYSCEF Doc. No. 92], statutory hearing transcript at 25, lines 11-15). Plaintiff testified that she was about six inches from the metal scaffolding when she tripped (*id.* at 32, line 19 through 33, at 19).

Defendant Andamio Scaffolding Inc. (Andamio) now moves for summary judgment dismissing all cross-claims as against it. Defendants DOLP 205 Leasehold LLC and Citibank N.A. (collectively, the DOLP defendants) oppose the motion. Plaintiff, who has already discontinued her claims as against Andamio without prejudice, partially opposes the motion.

DISCUSSION

"To prevail on a motion for summary judgment, the movant must make a prima facie showing by submitting evidence that demonstrates the absence of any material issues of fact. Once that initial showing has been made, the burden shifts to the opposing party to show there are disputed facts requiring a trial. All facts are viewed in the light most favorable to the non-moving party" (*Nellenback v Madison County*, — NY3d —, 2025 NY Slip Op 02263 [2025] [internal citations omitted]).

I. Cross-Claims for Common-Law Indemnification and Contribution

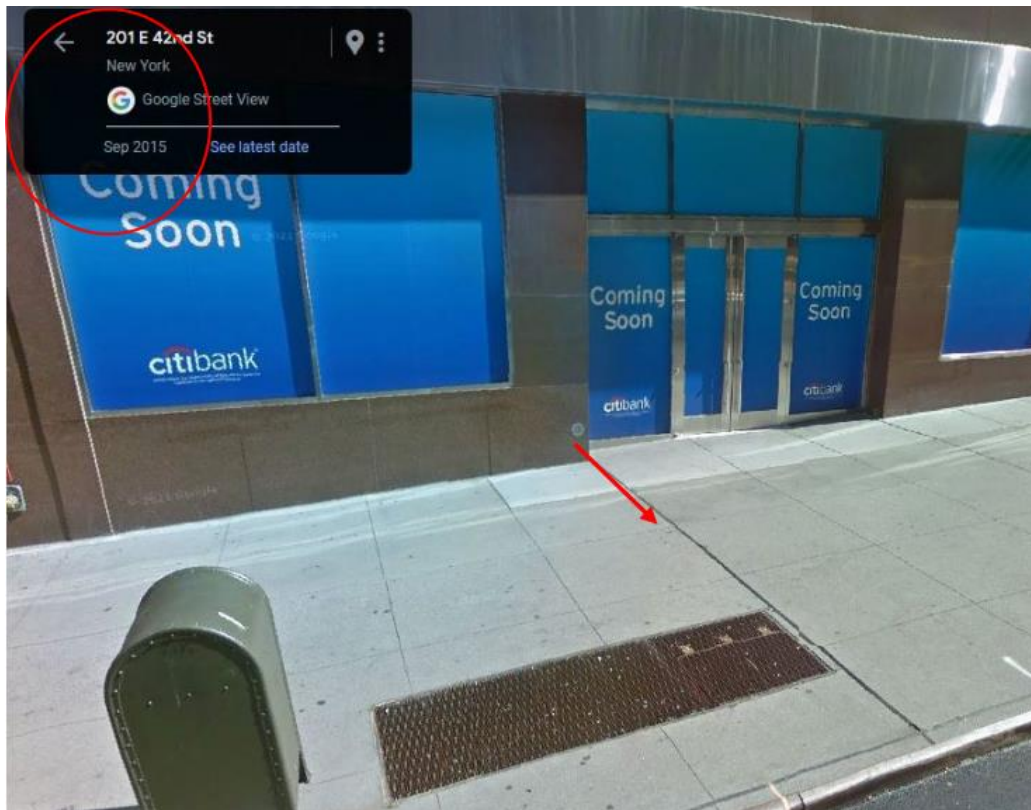
“In the classic indemnification case, the one seeking indemnity had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party” (*Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 16 [2d Dept 2019] [internal quotation marks omitted]). In actions for premises liability, “[i]f, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of a contractor engaged by a landowner, the contractor may be held liable to the landowner for common-law indemnification” (*Arrendal v Trizechahn Corp.*, 98 AD3d 699 [2d Dept 2012] [internal citations omitted]).

“Contribution is generally available as a remedy when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person. . . . The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003] [internal quotation marks, citations and emendation omitted]).

Through the affidavit of its president Rene Nunez, Andamio contends that it merely installed the sidewalk bridge, which did not involve any work that affected the sidewalk surface (exhibit B in support of motion [NYSCEF Doc. No. 83], affidavit of Rene Nunez ¶¶ 2-5, 10-12 [describing history of Andamio’s work regarding the subject sidewalk shed]). Andamio asserts that it “was not required to inspect, maintain or repair the sidewalk” (*id.* ¶ 10).

Based on a Google Map image from September 2015, Andamio claims that the gap “existed for at least seven (7) years prior to the date of loss” and that “Andamio's work did not create the sidewalk defect that existed prior to installation of the sidewalk shed”:

(Continued on next page)



(affirmation of Andamio’s counsel in support of motion ¶ 4 [inserting photographs] [cropped, rotated and size adjusted]; see also Nunez affidavit ¶1, 9-12 [cropped and size adjusted]).

In opposition to this motion, the DOLP defendants argue that Nunez’s affidavit is conclusory and self-serving (affirmation in opposition to motion [NYSCEF Doc. No. 21] ¶ 21). They contend that Nunez’s affidavit is bereft of any details concerning “how the sidewalk bridge scaffolding was installed into the sidewalk and the work it entailed”, including “how intrusive this work was, what tools and machinery were required to install it and whether that process could have caused height differential in the sidewalk immediately adjacent to it” (*id.* ¶ 22). The DOLP defendants further argue that the Google Maps images fail to resolve all triable issues of fact as it is “impossible to tell” whether the photos depict a height differential—with no measurements provided—and that such photos are “nothing more than inadmissible hearsay which cannot be authenticated by Andamio” (*id.* ¶ 23). Lastly, they contend the motion is premature, as discovery is needed to provide answers to these questions.

Plaintiff supports dismissal of the cross-claims against Andamio without prejudice (see plaintiff’s affirmation in partial opposition [NYSCEF Doc. No. 94] ¶ 8). Plaintiff argues that “the motion practice” by the DOLP defendants “is merely a

delay tactic and they should be compelled to proceed with discovery and schedule a witness for deposition” (*id.* ¶ 5).

In reply, Andamio reiterates its arguments and asserts that the motion should be granted because the DOLP defendants “offer nothing more than mere speculation that Andamio’s work and/or presence on the subject premises caused and/or contributed to the subject accident” (reply affirmation in further support of motion [NYSCEF Doc. No. 95] ¶ 9).

The fact that plaintiff discontinued her claims against Andamio without prejudice does not automatically result in dismissal of the cross-claims of the other defendants against Andamio.

The court agrees that Nunez’s assertion that “Andamio’s work did not create the sidewalk defect that existed prior to installation of the sidewalk shed” (Nunez affidavit ¶¶ 1, 12) is conclusory, and therefore insufficient to meet Andamio’s prima facie burden (*Felle v Maxaner*, 232 AD3d 853, 854 [2d Dept 2024] [“A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent’s prima facie burden on a motion for summary judgment”]).

Even if the court were inclined to take judicial notice of the Google Maps images pursuant to CPLR 4532–b, the court cannot find, as a matter of law, that the images establish that the same height differential between two sidewalk flags existed several years before the accident. The September 2015 Google Maps image that Andamio relies on is simply not clear enough to make this finding as a matter of law.

Therefore, summary judgment dismissing all cross-claims against Andamio for common-law indemnification and contribution is denied.

II. Claims for Contractual Indemnification

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]). On this motion, the DOLP defendants do not dispute that the contract for the installation of the sidewalk shed—annexed as exhibit B1 in support of this motion (NYSCEF Doc. No. 84)—did not require Andamio to defend or indemnify any party.

Therefore, the cross-claims against Andamio for contractual indemnification are dismissed.

CONCLUSION

Accordingly, upon the foregoing documents, it is hereby **ORDERED** that the motion by defendant Andamio Scaffolding LLC for summary judgment dismissing all cross-claims as against it is **GRANTED TO THE EXTENT** that all cross-claims against it for contractual indemnification are dismissed, and the motion is otherwise denied.

The parties are reminded of the upcoming status conference in this matter scheduled for **August 28, 2025** at **9:30 AM** in courtroom **280** at 80 Centre Street, New York, NY.



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<u>8/27/2025</u>			<u>RICHARD TSAI, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE