

Schoepflin v Trinity Bldrs. of N.Y. Inc.

2025 NY Slip Op 34164(U)

October 31, 2025

Supreme Court, New York County

Docket Number: Index No. 154137/2021

Judge: Mary V. Rosado

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

PRESENT: HON. MARY V. ROSADO PART **33M**

Justice

-----X

KATHYRN SCHOEPFLIN,

Plaintiff,

- v -

TRINITY BUILDERS OF NEW YORK INC., GRAMERCY 128
WEST LLC, LRC CONSTRUCTION LLC, DANA LOZITO,
BILL LOZITO,

Defendant.

-----X

GRAMERCY 128 WEST LLC, LRC CONSTRUCTION LLC

Plaintiff,

-against-

ABLE SAFETY CONSULTING LLC

Defendant.

-----X

INDEX NO. 154137/2021

MOTION DATE 03/21/2025,
03/24/2025,
03/25/2025

MOTION SEQ. NO. 002 003 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596000/2022

The following e-filed documents, listed by NYSCEF document number (Motion 002) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 188, 189, 190, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 217

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 185, 186, 187, 216, 218, 220, 221

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 219, 222, 223, 224, 225

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of August 19, 2025, motion sequences 002 through 004 are consolidated for disposition and decided as follows:

- A. Defendants/Third-Party Plaintiffs Gramercy 128 West LLC (“Gramercy”) and LRC Construction LLC’s (“LRC Construction”) motion for summary judgment (“Mot. Seq. 002”) dismissing Plaintiff Kathryn Schoepflin’s (“Plaintiff”) Complaint and all cross claims asserted against them is granted in part and denied in part.
- B. Third-Party Defendant Able Safety Consulting, LLC’s (“Able Safety”) motion for summary judgment (“Mot. Seq. 003”) dismissing the Third-Party Complaint is granted.
- C. Defendants Trinity Buildings of New York, Inc. (“Trinity”), Dana Lozito (“Dana”) and Bill Lozito’s (“Bill”) (collectively “Trinity Defendants”) motion for summary judgment (“Mot. Seq. 004”) dismissing Plaintiff’s complaint and all crossclaims asserted against them is granted in part and denied in part. Plaintiff’s cross motion for summary judgment on her claim for negligence based on *res ipsa loquitor* is denied.

I. Background

On March 26, 2019, Plaintiff was walking on a makeshift pedestrian walkway created with barricades due to ongoing construction at 128 West 23rd Street (the “Premises”) when fencing placed on top of the barricades allegedly fell and hit her (NYSCEF Doc. 138 at 26; 31; 40; 42-44). Gramercy owned the Premises (NYSCEF Doc. 142). LRC Construction was the general contractor at the Premises (NYSCEF Doc. 140 at 20). Trinity was a concrete subcontractor at the Premises (NYSCEF Doc. 140 at 50). Able was contracted to serve as a site safety manager and only had authority to make recommendations as to safety (NYSCEF Doc. 210 at 59-60).

According to LRC Construction, Trinity was responsible for creating the makeshift walkway (NYSCEF Doc. 140 at 90). Trinity’s superintendent, Bill Lozito, testified he witnessed Plaintiff leave a taxicab, duck underneath parking tape and into the pedestrian walkway, and then saw some barricades tip over slightly at a 15-degree angle (NYSCEF Doc. 208 at 26). Mr. Lozito testified

the chain fence remained intact (NYSCEF Doc. 208 at 35). Mr. Lozito testified that while Trinity moved barricades to accommodate their work, the barricades and fence were provided by another company unrelated to Trinity (NYSCEF Doc. 208 at 37). Dana Ware, who witnessed the accident, testified she saw the fence get blown in the wind and fall on Plaintiff (NYSCEF Doc. 211 at 14). Now, each party moves or cross moves for summary judgment. The motions are consolidated for disposition as decided for the reasons set forth below.

II. Discussion

A. Gramercy and LRC Construction's Motion (Mot. Seq. 002)

Gramercy and LRC Construction's motion is granted in part and denied in part. Plaintiff's opposition does not directly address Gramercy and LRC Construction's argument that the claims asserted against them premised on a violation of New York City Administrative Code § 7-210¹ should be dismissed and thus, the alleged violation of New York City Administrative Code § 7-210 is dismissed as abandoned. Even if Plaintiff did oppose dismissal of this claim, it would still require dismissal as it is undisputed Plaintiff's accident happened not on a sidewalk, but on a makeshift walkway which was on the public street. As held by the First Department, since § 7-210 imposes a new duty on landowners and creates liability where non previously existed – it must be strictly construed and cannot be interpreted to extend a landowner's obligations (*see Green v Himon*, 165 AD3d 590, 591 [1st Dept 2018]).

However, Gramercy and LRC Construction may still be held liable under a theory of common law negligence. Gramercy and LRC Construction's arguments that Plaintiff did not adequately put them on notice of her theory of liability premised on Gramercy and LRC Construction's "special use" of the street is unavailing. Plaintiff stated in detail in her bill of

¹ This ordinance imposes a duty on property owners to maintain the sidewalk abutting their property in a reasonably safe condition.

particulars that Gramercy and LRC Construction were liable for their negligence in “creating the subject sidewalk” which caused “a hazard to the public” and, amongst other things, “caused...to exist a dangerous condition on said sidewalk and its adjacent area” (NYSCEF Doc. 136). The cases relied on by Gramercy and LRC Construction to argue notice was not properly given deal with notices of claim, which have a far stricter pleading requirement pursuant to statute. In any event, it can be reasonably inferred from the plain language of Plaintiff’s bill of particulars that she is alleging a dangerous condition on a sidewalk created by Defendants – namely the makeshift walkway created by Defendants.

The creation of a temporary walkway in what would normally be a public street to allow for more space on the construction site constitutes a special use of that street (*see, e.g. Montolio v Negev LLC*, 86 AD3d 483, 483 [1st Dept 2011]; *McKenzie v Columbus Centre, LLC*, 40 AD3d 312, 312-13 [1st Dept 2007]). Gramercy and LRC Construction may be held vicariously liable for their agents and subcontractors who created the temporary walkway and moved the barricades and fencing (*see Pesante v Vertical Industrial Development Corp.*, 29 NY3d 983, 983-84 [2017]; *Tobola v 123 Washington, LLC*, 15 AD3d 456, 457 [1st Dept 2021]). Gramercy and LRC Construction’s arguments that Plaintiff cannot show they had notice of any dangerous condition, or that there was anything defective with the barriers, misconstrues their burden on summary judgment, which requires more than just pointing to gaps in Plaintiff’s evidence (*see, e.g. Powell v City of New York*, 218 AD3d 1, 4 [1st Dept 2023]). There has been no evidence presented of the last time the barriers and fencing were inspected or maintained prior to Plaintiff’s accident and thus Gramercy and LRC Construction have failed to meet their burden for summary judgment dismissing Plaintiff’s negligence claims asserted against them (*Henriquez v Appula Mgt. Corp.*, 234 AD3d 592, 593 [1st Dept 2025]).

Therefore, Gramercy and LRC Construction's motion is granted to the extent that Plaintiff's alleged violation of New York City Administrative Code § 7-210 is dismissed.²

B. Able Safety's Motion (Mot. Seq. 003)

Able Safety's motion for summary judgment is granted. The unrefuted testimonial and documentary evidence shows Able Safety was only authorized to make recommendations as to safety practices but did not have authority to stop or change how certain work was done. As held by the First Department, where a site safety manager does not have the authority to control work at a construction site, they cannot be held liable under a theory of common law negligence (*see Torres-Quito v 1711 LLC*, 227 AD3d 113, 119 [1st Dept 2024]; *see also Dejesus v Downtown Re Holdings LLC*, 217 AD3d 524, 526-27 [1st Dept 2023]; *Martinez v 342 Prop. LLC*, 89 AD3d 468, 469 [1st Dept 2011]). Because there is no evidence of Able Safety's negligence, the claims asserted against Able Safety in the Third-Party Complaint and any crossclaims asserted against Able Safety, which depend on some finding of negligence against Able Safety, must be dismissed. Able Safety's counterclaims against Gramercy and LRC Construction are dismissed as academic.

C. Trinity Defendants' Motion and Plaintiff's Cross Motion (Mot. Seq. 004)

The Trinity Defendants' motion is granted in part and denied in part. As a preliminary matter, the claims asserted against Bill and Dana Lozito are dismissed as there are no allegations that they were individually negligent, and any allegations against them are solely related to actions taken in their capacity as officers of Trinity. Nor is there any claim to pierce the corporate veil. Therefore, the claims and crossclaims asserted against Bill and Dana Lozito are dismissed. To the extent Plaintiff seeks to hold Trinity liable for violations of New York City Administrative Code

² Although Gramercy and LRC Construction seek dismissal of all crossclaims asserted against them, they proffer no particularized arguments in their motion in chief for dismissal of those crossclaims and instead focus their arguments solely on dismissal of Plaintiff's Complaint.

§§ 7-210, 19-182.1, and 23-301.1, these sections only apply to the owners of property and are inapplicable to Trinity who is a subcontractor on a construction site. Therefore, to the extent these violations are alleged against Trinity, they are dismissed. Finally, since Able Safety is dismissed, its crossclaims asserted against Trinity are dismissed as academic.

However, the motion to dismiss Plaintiff's common law negligence claim against Trinity is denied. To the extent Trinity argues it did not create or exacerbate a hazardous condition, or launch a force or instrument of harm, it failed to eliminate triable issues of fact. There is evidence in the record that at the time of Plaintiff's accident, Trinity was responsible for moving the fencing which allegedly caused Plaintiff's injury. To the extent Trinity argues it did not create or have notice of any dangerous condition, Trinity failed to meet its heavy burden on summary judgment. Specifically, although Trinity testified it employed a construction safety supervisor named Guillermo Samaniego, who was on site every day, there is no testimony from this individual submitted on the motion to eliminate issues of fact regarding notice and whether the barriers and fencing were negligently maintained or moved. Nor has Trinity produced any documentation as to when the barriers and fencing were last inspected or maintained.

Finally, although Trinity seeks dismissal of all crossclaims asserted against them, they have proffered no arguments in support of this relief in their motion papers. In any event, since there are issues of fact as to Trinity's negligence, dismissal of the contractual indemnification, common law indemnification, and contribution crossclaims asserted against them by Gramercy and LRC Construction is premature. Nor has Trinity met its burden on summary judgment that it procured the requisite insurance (*Ruisech v Structure Tone Inc.*, 208 AD3d 412, 417 [1st Dept 2022]; *Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017]).

Plaintiff's cross motion for summary judgment is denied. Procedurally, Trinity's argument that the motion is untimely is without merit as the cross motion seeks mirror-image relief to Trinity's timely motion (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). However, on the merits, Plaintiff's motion is denied. As conceded by Plaintiff, *res ipsa loquitur* gives rise to summary judgment "only in the rarest" of cases (*Morejob v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). This is not one of those rare cases. Specifically, the barrier and fence which allegedly caused Plaintiff's accident were separating a pedestrian walkway that was available to the public at large and a busy construction site with different trades present. Given these facts and numerous potential actors who may have interfered with the barricade and fencing, Plaintiff failed to establish that the instrumentality causing her harm was in Defendants' exclusive control, a required element of *res ipsa loquitur* (*see, e.g. Parris v Port of New York Authority*, 47 AD3d 460, 461 [1st Dept 2008]). Therefore, Plaintiff's cross motion is denied.

Accordingly, it is hereby,

ORDERED Gramercy and LRC Construction's motion (Mot. Seq. 002) is granted to the extent that Plaintiff's alleged violation of New York City Administrative Code § 7-210 is dismissed and Able Safety's counterclaims are dismissed, but the remainder of the motion is denied; and it is further

ORDERED that Able Safety's motion (Mot. Seq. 003) for summary judgment dismissing the Third-Party Complaint and all crossclaims asserted against it is granted; and it is further

ORDERED that the Trinity Defendants' motion (Mot. Seq. 004) is granted to the extent that all claims and crossclaims asserted against Bill and Dana Lozito are dismissed, Able Safety's crossclaims asserted against Trinity are dismissed, and Plaintiff's alleged violations of New York

City Administrative Code §§ 7-210, 19-182.1, and 23-301.1 asserted against Trinity are dismissed, and the remainder of the Trinity Defendants' motion is denied; and it is further

ORDERED that Plaintiff's cross motion for summary judgment on the issue of liability with respect to her negligence claim pursuant to the doctrine of *res ipsa loquitor* is denied; and it is further

ORDERED that within ten days of entry, counsel for Able Safety shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

10/31/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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