SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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MELANIE GRITZ,

Plaintiff,

-against- Index No. 158962/14

LAND'S END II A. ASSOCIATES, GRENADIER REALTY CORP., TWO BRIDGES BUILDING ASSOCIATION LTD, CON EDISON AND VALI INDUSTRIES, INC.,

Defendants.

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JOAN M. KENNEY. J.

Motion sequence nos. 006, 007, and 009 are consolidated for disposition. In motion sequence no. 006, defendant Con Edison ((Con Edd) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing all claims as against it. In motion sequence no. 007, defendant Vali Industries, Inc. (Vali) moves for summary judgment dismissing all claims and cross claims asserted as against it, or in the alternative, dismissing this action, pursuant to CPLR 3126 due to inadequate witness disclosure. In motion sequence no. 009, defendants Grenadier Realty Corp. (Grenadier) and Two Bridges Associates Limited Partnership (Two Bridges), s/h/a Land's End II A. Associates and Two Bridges Building Association Ltd. move for summary judgment dismissing the complaint as to them.

Introduction

The complaint, as amplified by plaintiff's deposition testimony, alleges that, on November 24, 2013, a Sunday, plaintiff was injured when her right foot caught on a loose and bulging portion of an orange construction fence affixed to wooden poles and strung along the sidewalk in front of the building located at 265 Cherry Street in Manhattan (the Building). The poles, in turn, were fastened to a rectangular wood base 12 inches wide and 12 inches thick that

extended into the roadway. Plaintiff fell forward onto the sidewalk, fracturing her right ankle and injuring her lower back.

The fence had been erected by Vali on November 22nd to separate pedestrians from the work that Vali performed on behalf of Con Edison on November 22nd and 23rd, casting and regrading five steam manhole covers located on the sidewalk. On November 23rd, Vali opened the fence on the roadway side, poured concrete for the newly graded sidewalk, and re-closed the fence. On November 25th, Vali disassembled and removed the fence and the wooden base. The fence was left in place over Sunday, November 24th, because the concrete has a drying time of at least 24 hours. Corsair Affirmation, exhibit R at 28. Grenadier was the management company for the Building at the time of plaintiff's accident; Two Bridges was the owner.

Vali's work was in response to corrective action requests issued by the New York City Department of Transportation to Con Ed concerning a tripping hazard posed by above-grade manhole covers on the block in front of the Building. Con Ed called upon Vali, with which it had an area-wide contract covering Manhattan, to make the necessary repairs. The opening ticket for the work to be performed on the pavement in front of the Building, a document filled out by a Con Ed inspector "when a contractor excavates and there is paving or sidewalk that needs to be restored" (Purcaro affirmation, exhibit J at 82), is dated November 22, 2013. *Id.* at 87. Similarly, the Vali job ticket for the work is dated November 22, 2016 (*see id.*, exhibit P), and Vali's time sheet for November 22nd includes the notation, "lost time to set up 12 x 12 whaler [the rectangular wooden construction to which the poles holding the plastic netting are attached] at [Con Ed] inspector's request." *Id.*, exhibit Q at 1. The November 25th time sheet bears the notation, "Break down 12 x 12. Set up. Load 12 x 12 onto flatbed and return to Vali's yard. Off

load in yard." Exhibit Q at 9. Accordingly, plaintiff's deposition testimony, repeated in her affidavit, that she had seen the bulging fence in place for about two weeks before her accident, and that it remained in place for weeks thereafter, is manifestly false, and, hence, incredible as a matter of law. *See Espinal v Trezechahn 1065 Ave. of the Ams, LLC*, 94 AD3d 611, 613 (1st Dept 2012); *Loughlin v City of New York*, 186 AD2d 176, 176 (2d Dept 1992).

Motion sequence no. 006

It is undisputed that Con Ed did not participate in erecting the mesh fence, and plaintiff does not contend that Con Ed had a duty to inspect it at any time after Vali poured the concrete on the day before plaintiff's accident. Kanawa Howard, the Con Ed supervisor, who was at the work site both days that Vali worked on the job, testified at her deposition that she left after the concrete was poured and the fence was re-closed on November 23rd, and that, at that time, the orange mesh was properly in place, "nothing hanging, nothing loose." Corsair affirmation, exhibit R at 34. It is also undisputed that Con Ed was not given notice of any danger posed by the barrier, at any time prior to plaintiff's accident. Accordingly, Con Ed is entitled to summary judgment. *See Nealy v Pavarini-McGovern, LLC*, 135 AD3d 917. 919 (2d Dept 2016).

Motion sequence no. 007

After testifying that the mesh fence was in good condition at the end of the second work day, Ms. Howard was shown a photograph, taken after plaintiff's accident the following day, which shows a tear in the fence. Ms. Howard testified that the photograph showed that the fencing had been cut, and she speculated that it had been cut by someone who wanted to inscribe graffiti in the still-wet concrete. When asked how she could tell that the mesh had been cut, she answered that it had been tight at the end of the preceding work day, but that, in the photograph,

the mesh was draping. She also noted that two of the posts in the photograph were leaning and concluded that someone had leaned into them. She continued by saying, "everything is hammered in. Nails are hammered into here. I mean, I can't stop anybody from trying to tear it down." Corsair affirmation, exhibit R at 81, 91.

A contractor, like Vali, that fully complied with its contract, is not liable to third parties on general negligence grounds. *Miller v City of New York*, 100 AD3d 561 (1st Dept 2012). Plaintiff seeks to distinguish *Miller* on the ground that, in that case, the defendant had completed its work, whereas here, plaintiff's accident occurred before Vali had disassembled the fence and carted it away. Plaintiff does not contend, however, that, in completing that work, Vali was not in compliance with its contract.

Moreover, Ms. Howard's testimony, that the netting was properly taut at the end of the November 23rd workday and that the reason why it was bulging, or draping, on the day of plaintiff's accident is that it had intentionally been cut, is a sufficient ground for granting Vali's motion. Even assuming, *arguendo,* that Vali could have anticipated vandalism at the work site, it "had no reason to believe it would subject plaintiff[] or the public to any risk of injury." *Danielenko v Kinney Rent A Car*, 57 NY2d 198, 205 (1982).

Plaintiff opposes Vali's motion, citing *Gibaldi v South Brooklyn Savings Bank* (264 App Div 772, 772 [2d Dept 1942]) and *Cabral v Paladino Concrete Creations Corp.* (2013 WL 6219844 [Sup Ct, Westchester County 2013]). In *Cabral*, the court denied defendant's motion for summary judgment both because defendant had violated certain sections of the Yonkers Code, and because there was a question whether it was reasonable to leave a site, where work was ongoing, unsecured and uninspected for a three-week period. In *Gibaldi*, the fence that

plaintiff tripped over had repeatedly fallen over in a two-year period, and had always been put back up "in a makeshift way." Neither of these cases supports plaintiff's position.

Motion sequence no. 009

Quentin Snagg, chief construction inspector for Con Ed, testified at his deposition that none of the work performed on the block on which the Building stands was performed for the benefit of either Grenadier or Two Bridges, and it is undisputed that neither of those defendants used the sidewalk for any special purpose, played any role in erecting, maintaining, or removing the construction barrier, or did anything that increased the danger of the bulging netting. *See Puello v City of New York*, 35 AD3d 294, 294-295 (1st Dept 2006). Plaintiff argues, however, that, pursuant to Administrative Code of City of NY § 7-210 (b), Two Bridges had a duty to "remove snow, ice, dirt, or other material from the sidewalk," and that the orange netting in which her foot became entangled comes within "other material." Plaintiff testified that her foot got caught in one of the openings at the bottom of the netting, and that, at that time, no part of the netting was on the sidewalk. *See* Mabanta affirmation, exhibit F at 142-145. It is transparently clear that a building owner has no duty to remove, and indeed may incur liability for removing, a construction barrier that has been placed by a contractor between pedestrians and work that the contractor is performing for Con Ed. Even had part of the fence been affixed to the sidewalk, Two Bridges would have had no duty to remove it. *Smirnova v City of New York*, 64 AD3d 641, 642 (2d Dept 2009) (plywood bands attached to sidewalk by New York City Transit Authority not part of sidewalk for purposes of § 7-210). Accordingly, Two Bridges is entitled to summary judgment.

Conclusion

Accordingly, it is hereby

ORDERED that, in motion sequence no. 006, the motion of defendant Con Edison for summary judgment is granted and the complaint is dismissed as against said defendant with costs and disbursements as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that, in motion sequence no. 007, the motion of defendant Vali Industries, Inc. for summary judgment is granted and the complaint is dismissed as against said defendant with costs and disbursements as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that, in motion sequence no. 009,. the motion of defendants Grnadier Realty Corp. and Two Bridges Associates Limited Partnership, s/h/a Lands End II A. Associates and Two Bridges Building Association Ltd, for summary judgment is granted, and the complaint is dismissed as against said defendants with costs and disbursements as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 9, 2017

ENTER:

JOAN M. KENNEY
J.S.C.