SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

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BLANCHE CINCOTTA,

Plaintiff,

-against-

BROOKS RANGE CONTRACT SERVICES, INC.,

Defendants.

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DCM Part 3

Present:

Hon. Desmond A. Green

DECISION AND ORDER

Index No. 150809/2015

Motion No. 2600-001

The following papers numbered 1 to 3 were fully submitted on the 27th day of September, 2017:

Pages Numbered

Notice of Motion for Summary Judgment

By Defendant, with Supporting Papers, Exhibits and Memorandum of Law

(dated June 27, 2017) 1

Affirmation in Opposition

With Supporting Papers, Exhibits and Memorandum of Law

(dated September 20, 2017) 2

Reply Affirmation

(dated September 25, 2017) 3

Upon the foregoing papers, defendant's motion for summary judgment is denied.

In this personal injury action, it is alleged that on September 22, 2012, plaintiff Blanche Cincotta (hereinafter "plaintiff") was caused to trip and fall due to "a sidewalk defect, located on Whitehall Street, approximately 85 feet from the corner of Bridge Street" (*see* Verified Complaint, para 9).[1] The subject premises, located at 2 Whitehall Street/1 Bowling Green, New York, New York and also known as the Alexander Hamilton US Custom House, is owned by the United States through the Government Services Administration (hereinafter "GSA"). It is undisputed that the GSA entered into an agreement with defendant Brooks Range Contract Services, Inc (hereinafter "Brooks Range") on or about July 1, 2011, to provide, inter alia, maintenance and repair services for the premises. Plaintiff commenced the instant action against Brooks Range alleging, inter alia, defendant's negligence in "permit[ing] the sidewalk... [to] become and remain in a dangerous and defective condition" (id. at 9, 13). Plaintiff further alleges that defendant "had knowledge and notice of the condition... or in the exercise of due care and by proper inspection could and should have had such knowledge" (id. at 10).

In its motion for summary judgment, defendant Brooks Range contends that since it was not the property owner, it did not owe plaintiff a duty of care. On behalf of Brooks Range, its project manager, Matthew Sadocha, attests in an affidavit that "[a]fter the contract was signed through the date of the accident: A GSA inspector inspected the premises on a regular basis and Brooks Range met the GSA's building manager at least 3 times a week regarding the maintenance and repair of the premises" (*see* Affidavit in Support by Matthew Sadocha, para 6). Mr. Sadocha further attests that "Brooks Range has not created nor received any complaints regarding the alleged defect before the alleged accident of September 22, 2012" (id. at 9). Lastly, Mr. Sadocha attests that pursuant to the contract, Brooks Range

[1] Plaintiff attests in an affidavit that she was caused to fall due to a "depression or broken up section of the sidewalk" *(see* Affidavit of Blanche Cincotta, para 3).

was required to provide GSA with daily written reports "of any significant events regarding the maintenance and repair of the premises" and that "any sidewalk repairs must [be] authorized by GSA before they are done" (id. at 7-8).[2]

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the injury to the plaintiff (*see Donatien v. Long Is Coll Hosp*, 153 AD3d 600 [2nd Dept 2017]). Where there is no duty of care owed by the defendant to the plaintiff, there can be no breach, and thus, no liability can be imposed upon the defendant (id.).

Generally, an independent contractor owes no tort duty of care to third parties (*see Nachamie v. County of Nassau*, 147 AD3d 770, 774 [2nd Dept 2017]). However, there are narrow exceptions to this general rule. In particular, there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches [*i.e.*, creates] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (id. at 774; *see Espinal v. Melvill Snow Contrs*, 98 NY2d 136, 142-143 [2002]).

[2] The references cited by defendant did not appear to correspond with the actual provisions of the contract and "statement of work" document (*see* Defendant's Exhibit "C").

In the instant action, defendant has established that plaintiff was not a party to the subject contract. However, plaintiff does allege in her complaint that defendant "was responsible for the maintenance, repair, and operation of the roads and grounds located outside the premises including but not limited to the sidewalks" and therefore owed a duty of care to plaintiff (*see* Verified Complaint, para 7).

Inasmuch as plaintiff had alleged facts in the complaint that would establish the possible applicability of any of the Espinal exceptions, defendant was required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law *(see Hsu v. City of New York*, 145 AD3d 759, 761 [2nd Dept 2016]). Contrary to defendant's contention, it failed to show that it owed no duty of care to the plaintiff (*compare Koslosky v. Ross-Malmut*, 149 AD3d 925 [2nd Dept 2017], in which the pleadings did not allege facts that would establish the applicability of any of the Espinal factors).

In this regard, the following sections of defendants' agreement with the GSA present issues of fact as to whether the contract between GSA and Brooks Range was comprehensive and exclusive:

> "**The Contractor will provide to the [GSA] a daily written report... by 7:30 am every working day... for any significant events which occurred in the building...Contractor must also list... significant tenant complaints/service calls... [and] other conditions or events that he is aware of that could have an affect on the safe, orderly operation of the facility**" (*see* Defendant's Exhibit "C", Plaintiff's Exhibit "A", Statement of Work, pp 3-4).

> "**The Contractor shall provide management, supervision, labor, materials, equipment, and supplies and shall be responsible for**

> **the efficient, effective, economical, and satisfactory operation, scheduled and unscheduled maintenance, and repair of equipment and systems located within the property line of the Alexander Hamilton US Custom House, One Bowling Green, New York, NY**" (*see* Defendant's Exhibit "C", Plaintiff's Exhibit "B", Statement of Work, p 1, section C.1. Scope of Work, 1. General Overview, subsection A).

> "**At a minimum, the Contractor will be required to take all steps and measures which would be taken by a prudent building owner to maximize the life expectancy of the property/equipment by proper operation, maintenance and repair**" (id. at subsection C).

> "**The Contractor shall provide all labor, equipment and materials necessary to perform all architectural and structural maintenance and repairs to the interior and exterior of the facility including but not limited to:... sidewalks, driveways, roads, curbing, parking areas...**" (*see* Defendant's Exhibit "C", Plaintiff's Exhibit "C", Statement of Work, p 16, section 8 Architectural and Structural Repairs, subsection A).

The agreement specifically gives defendant the responsibility for performing those proper inspections and repairs at the premises, "which would be taken by a prudent building owner to maximize the life expectancy of the property". Based on the foregoing, defendant failed to establish, prima facie, that the agreement was *not* comprehensive and exclusive as to sidewalk maintenance (*see Palka v. Servicemaster Mgt Servs Corp*, 83 NY2d 579, 584 [1994]; *cf Somekh v. Valley Natl Bank*, 151 AD3d 783, 786 [2nd Dept 2017]; *Hsu v. City of New York*, 145 AD3d at 761) and therefore, failed to establish as a matter of law that it owed no duty of care to plaintiff.

Beyond that threshold issue, defendant also argues that it is not liable for plaintiff's injuries because it lacked actual or constructive notice of the alleged sidewalk defect. A defendant who moves for

summary judgment in a trip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence (*see Lombardo v. Kimco Cent Islip Venture, LLC*, 153 AD3d 1340 [2nd Dept 2017]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (id.). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (id.). Here, the submission of the project manager's affidavit was insufficient to satisfy defendant's initial burden on this issue.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

ENTER,

J. S. C.

DATED: NOV 14 2017