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| Dinan v City of New York |
| 2013 NY Slip Op 32134(U) |
| September 9, 2013 |
| Supreme Court, New York County |
| Docket Number: 107965/2007 |
| Judge: Kathryn Freed |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 107965/2007
DINAN, ROBERT S.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT *CAL:30*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED


SEP 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9-9-13
SEP 09 2013



HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
ROBERT S. DINAN,
Plaintiff,

-against-

Index No 107965/07

THE CITY OF NEW YORK,
Defendant.
-----X

THE CITY OF NEW YORK,
Third-Party Plaintiff,

-against-

SIGNATURE CONSTRUCTION GROUP, INC. and
EOP-MIDDLETOWN PROPERTIES, LLC,
Third-Party Defendants.

FILED

SEP 11 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
PRESENT: HON. KATHRYN FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS | NUMBERED |
|---|-------------------------|
| NOTICE OF MOTION AND AFFIDAVITS ATTACHED..... |1-2 (exhs. F,C &J) |
| AFFIDAVITS ANNEXED..... | |
| ANSWERING AFFIDAVITS..... | |
| EXHIBITS..... | |
| OTHER.....(X-motion)..... |3 (exhs. D-J) |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this personal injury action, then third-party defendant Signature Construction Group, Inc. (Signature) moved, under motion sequence number 003, for an order, pursuant to CPLR§3212, dismissing the third-party complaint and all cross claims against it. Third-party defendant EOP-Middletown Properties, LLC (EOP-Middleton) served a cross motion for an order precluding defendant/third-party plaintiff The City of New York (the City) from offering at trial, evidence as to any allegations contained in the third-party complaint and for a dismissal of that complaint. By order dated April 9, 2013, this Court granted partial summary judgment in favor of Signature and

dismissed the third-party complaint and all cross claims against it on the merits and with prejudice. What remains before the court, is the relief requested in EOP's cross motion.

Plaintiff Robert S. Dinan (Dinan) alleges that, on May 15, 2006, while working as a New York City police officer assigned to the 17th police precinct in Manhattan, he was caused to trip and fall as he attempted to enter the parking garage beneath the precinct station house. The precinct station house was located in the first two floors of a building at 167 East 51st Street (the Premises), which, in the spring of 2006, was undergoing extensive renovations.¹ Among the inconveniences caused by the renovation work, was the officers' inability to access their locker room. As a result, a temporary, or "makeshift," locker room (Locker Room) was set up in the parking garage connected to, and running beneath, the station house. Access to said Locker Room required one to cross over a metal catch basin grate located at the entrance to the parking garage (metal grate). At the time of Dinan's accident, and for at least two months prior to that date, a piece of plywood, approximately two feet by two feet, was lying on top of the metal catch basis grate.

According to Dinan, his accident occurred when he was returning to the Locker Room at the end of his tour of duty, at or around 11:00 p.m. His superior officer, Lieutenant O'Sullivan, called him by name just as he was stepping onto the plywood with his left foot. As Dinan turned to respond, the plywood, which was wet due to earlier rainfall that evening and unsecured, shifted and slid out from under him. His left foot became struck in the bent and/or broken grating underneath, causing him to lose his balance, fall and sustain serious injuries to his left foot and ankle. As a result of the accident, Dinan was placed on limited duty, then restricted duty, and finally, on February 28,

¹ The Fire Department City of New York (FDNY) firehouse adjacent to the 17th Precinct station house was also undergoing renovation.

2008, he took a disability retirement from the NYPD, and is no longer police officer with the NYPD.

Dinan commenced this action to recover damages for his alleged injuries by filing a summons and complaint in the office of the New York County Clerk on June 7, 2007. His allegations against the City are based on its ownership and/or leasehold of the Premises, charging it with negligence in its maintenance, operation, management, use and/or control of the Premises, and with creating and/or permitting the entrance to the Locker Room to remain in a dangerous and defective condition. Dinan's complaint also charges the City with violating various sections of New York City's Administrative Code, and New York State's Labor Law, Industrial Code, and General Municipal Law.

A General Municipal Law § 50 (h) hearing was held prior to the commencement of the action (on December 27, 2006) and after a period of discovery, the City commenced a third-party action, on or about December 2, 2010, naming Signature and EOP as third-party defendants. The third-party complaint, which sounds in negligence and indemnification, contains identical allegations as against each third-party defendant (Signature's notice of motion, exhibit C). Signature and EOP served their respective, verified answers on or about January 18, 2011 and February 25, 2011, denying the City's allegations and cross-claiming against each other for indemnification, contribution and an apportionment of damages.

Despite EOP's February 24, 2011 written demand for a bill of particulars, amplifying the City's complaint and differentiating between the allegations against it and the allegations against Signature, and its March 19, 2012 follow-up letter, the City provided only one bill of particulars. That bill of particulars, which is identified as a "Response to Demand of Signature Construction

Group, Inc. For a Verified Bill of Particulars,” and dated May 5, 2011, fails to differentiate between the third-party defendants (Signature’s notice of motion, exhibit I).

After Dinan was deposed, multiple depositions of various defense witnesses were conducted in an effort to discover who or what entity was responsible for the placement of the plywood on the metal grate and for maintaining the Premises in a safe condition. The City produced four witnesses for deposition: Sergeant Timothy Horohoe (Horohoe), Police Officer Ravi Jamindar (Jamindar), Suresh Patel (Patel) and retired Sergeant Salvatore Romano (Romano).

At his deposition, Horohoe testified that the City holds a long-term lease with the private entity that owns the Premises, and that the renovation work, which consisted of a complete overhaul of the 17th Precinct station house, commenced at the beginning of March 2006 (Signature’s notice of motion, exhibit K). He testified that the NYPD’s Capital Construction Unit (CCU) is responsible for overseeing construction and/or renovation of NYPD facilities, and that the NYPD’s Building Maintenance Section (BMS) handles minor work and repairs. Under the supervision of Lieutenant Lampone (Lampone), the operations coordinator, the police officers’ lockers were temporarily moved from the station house to the Locker Room at the start of the project in early March.

Horohoe explained that as part of his duties, as a sergeant assigned to the 17th Precinct, he was required to tour the entire facility, note any deficiencies, hazards or other conditions of concern, and to bring them to the attention of those in charge, including the precinct captain. Horohoe testified that a few days after the lockers were relocated, he attempted to bring the unsafe conditions he observed to Lampone’s attention, but that Lampone’s response was simply “Don’t give me a hard time” (Horohoe dep. at 23). He then went up the chain of command, and informed Captain John Wallace (Capt. Wallace) that there were health and safety conditions about the Premises that needed

to be addressed.

Capt. Wallace instructed him to write them down for discussion at the next commanding officers's (CO) bi-weekly meeting. On March 8, 2006, Horohoe filled out an NYPD Form 49, outlining the "deficiencies and hazards" he noted during his inspection earlier that day. In paragraph 4, he stated, in relevant part: "[t]he inspection of the former parking garage presently being utilized for locker rooms and dormitory space revealed an unsanitary and unsafe space. . . . The access to the front door is separated from sidewalk by grate covered by an unsecured piece of ply-wood" (Signature's notice of motion, exhibit L). He gave the Form 49 to Capt. Wallace and a copy to Lampone.

At the CO meeting, Capt. Wallace directed him to read his findings to the approximately, 12 supervisors, sergeants and lieutenants in attendance. On March 9, 2006, Inspector Anthony Tria (Insp. Tria) of the CCU, came to the station house. Capt. Wallace asked Horohoe to join him, Insp. Tria, and another, on their walk through the facilities under construction. Horohoe stated that he identified the specific conditions he was concerned about, including the unsecured plywood, as they toured the Premises. Insp. Tria assured him that any conditions that were not up to code would be addressed. Consequently, on the following day, March 10th, Capt. Wallace informed him (Horohoe) that the CCU would be addressing these conditions. Horohoe stated that he was unaware of any measures taken by anyone to correct the unsecured plywood prior to Dinan's accident.

Next, the City produced Jamindar, a police officer with the NYPD assigned to BMS as a records witness. Jamindar offered testimony concerning how BMS, the department charged with maintaining the facilities used by the NYPD, operates. Among other things, he testified that: the work of BMS is performed by uniformed police personnel and by civilian employees; BMS consists

of different unionized shops, such as laborers, carpenters, plumbers and electricians; and, from time to time, BMS brings in outside contractors to handle certain jobs. When asked how a precinct gets services from BMS, Jamindar explained that each precinct, or “command,” has designated personnel who are authorized to place a work order/request by electronically filling out a BMS work order document. Once BMS receives the request, it is routed to the appropriate shop where the shop’s department head assigns it out to a crew to handle. When the work is completed, the job is electronically marked “completed” in BMS’s computer system.

Jamindar’s record search for open or closed “NYPD Building Maintenance Section Work Order[s]” pertaining to the 17th Precinct, as related to Dinan’s claim, produced one request, dated March 13, 2006, from Lampono (the Work Order) (*see* Signature’s notice of motion, exhibit N). In the “description” section of the Work Order, Lampono requested that BMS “provide metal perforated grate over trough drain at top of ramp.” Jamindar testified that the description section of the Work Order form was the only part of the form which is filled out by non-BMS personnel.

While reviewing the Work Order with counsel during his deposition, Jamindar explained that the abbreviations and codes utilized by BMS personnel meant that the Work Order came from Lampono of the 17th Precinct on March 13, 2006, that the work was performed in the welding shop by BMS personnel, and that it was completed on August 1, 2006. He also explained the section of the Work Order designated for “additional information/comments,” which read: “secure to existing grade // submitted by the Capital Construction Unit as part of the 17th Precinct renovation project. // job complete,” and he testified that the Work Order indicates that the work was performed on July 27, 2006, by two BMS employees, and that the form contains no indication that an outside contractor was involved in this job.

Next, the City produced Patel, an engineer and associate project manager with the City's Department of Citywide Administrative Services (DCAS), whose job responsibilities include monitoring construction and providing services to City agencies when space is leased by the City from private entities. With respect to the 17th Precinct renovation, Patel explained that DCAS met on a weekly basis with the contractor that had previously won the bid for the project, Signature, and with the landlord, who he identified as EOP. Other than confirming that the makeshift locker room was set up in the parking garage and that access to it was available at the street level entrance to the automobile ramp, Patel had very little recall about the project, including whether there was a piece of plywood by that entrance.

The City also produced Romano, who, prior to his retirement in 2009, was a police sergeant assigned to the CCU. According to Romano, CCU was the department involved with developing construction projects for properties either owned or leased by the City (*see* Signature notice of motion, exhibit P). He testified that, in May 2006, he was the project manager for the construction aspect of the 17th Precinct renovation and that he answered to the commanding officer of the CCU, Insp. Tria. Romano testified that he visited the site at least once a week, sometimes twice, to check on the progress of the work and to attend weekly construction meetings. He stated that issues relating to safety concerns were discussed during these weekly meetings.

With respect to the parking garage, Romano confirmed that the police officers' lockers were moved into the parking garage early on in the project and that the garage door was converted to a regular entry door by Signature at about the same time. He recalled that there was an approximately, 12 feet long by 1 foot wide, metal catch basin grate by the outside entrance/garage door to the parking garage and he recalled seeing a piece of wood, or some other material, laying on top of the

metal grate, although he was not quite sure when he first noticed it. Romano was unaware whether anyone complained to Signature, EOP, DCAS or to any of the contractors about the plywood covering, but recalled that the grate had, in fact, been changed or repaired at some point. However, he could not specifically recall about when, or by whom, the change and/or repair was made.

With respect to any repairs that needed to be made at the 17th Precinct during the renovation project, Romano explained that, if they were within the scope of the project, then CCU would have gone directly to the contractor (Signature) to handle it, and if it was outside the scope of the project, CCU would have gone, through proper channels, to BMS. When shown a copy of the Form 49, and asked about whether the requested “metal perforated grate over trough drain at top of ramp” constituted work that within or outside the scope of Signature’s work, Romano stated that it was outside the scope of Signature’s responsibilities. He also stated that he had no knowledge as to whether Signature or EOP had any involvement with the plywood, or who or what entity might have been involved in placing it on top of the grating.

The president of Signature, Dan Tomai (Tomai) and the general manager of EOP, Anthony Zografros (Zografros) were also called to testify in this matter (*see* Signature’s notice of motion, exhibits R and S, respectively). Tomai testified, in relevant part, that his company was hired by EOP to be the construction manager for the 17th Precinct project, which began in early 2006, and was not completed until sometime in 2010. According to Tomai, Signature brought in subcontractors of various trades (electrical, plumbing, HVAC, structural steel, etc.) to perform different aspects of the renovation. Tomai stated that he, along with two other Signature employees, handled the liaison work between Signature and EOP, although he was the primary liaison. He recalled attending on-site, weekly meetings, which were also attended by representatives from DCAS, EOP, the architect

and the engineering firms, and on occasion, by representatives from the NYPD and the FDNY.

When asked about the metal catch basin grate, Tomai stated that, although he remembered entering and exiting the parking garage a number of times during the course of the renovation project, he did not recall seeing a piece of plywood over the metal grate, nor did he recall any mention of the grate or plywood at any of the weekly meetings he attended. He denied being asked to replace it, secure it, or take any other action with respect to the plywood and/or metal catch basin grate underneath.

Zografros explained that in May 2006, he held the position of property manager for EOP, and that he was involved in the 17th Precinct rehabilitation project and attended the weekly progress meetings. Although he recalled seeing the metal catch basin grate at the entrance to the parking garage, he did not recall seeing a piece of plywood on top of it. Zografros denied being told about an unsecured piece of plywood by the entrance to the parking garage and/or Locker Room, and he denied being asked to secure or cover the metal catch basin grate, or to approve a covering for the grate.

Also submitted is a copy of a follow up letter prepared by Insp. Tria, on March 10, 2006, and addressed to Capt. Wallace, responding, in large part, to the concerns raised by Horohoe during their tour of the Premises and to the items listed in the Form 49. In it, Insp. Tria provides the following response to the concern about the metal catch basin grate at the street level entrance to the Locker Room/parking garage: "Grating covered by unsecured plywood[.] Given the concern, the undersigned has initiated a work order to BMS to replace the plywood with perforated metal grate."

Signature proffered this evidence, in addition to copies of the parties' pleadings, discovery orders, the construction contract for the project and insurance documentation, in support of its timely

motion for summary judgment. The gravamen of Signature's motion, was that the evidence established that, while no one knows by whom, or at what point the plywood was placed across the grating, the City had actual notice as early as March 8, 2006, the date Horohoe filled out Form 49. That the City had actual notice of the problem was also confirmed by Insp. Tria's follow-up letter, dated March 10, 2006, and by Lampono's Work Order, dated March 13, 2006, indicating that there was a piece of unsecured plywood laying on the metal catch basin which posed a hazard and needed replacement. According to the same Work Order, the replacement was not completed prior to August 1, 2006.

Based on this evidence, Signature made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). No proof was offered demonstrating that Signature was involved with, or responsible for the plywood at the entrance to the parking garage, and without proof, there can be no finding of liability against Signature for Dinan's injuries. Furthermore, and as indicated above, the City, as well as EOP, consciously and purposefully elected not to oppose the motion. By not offering evidence rebutting Signature's prima facie showing, Signature's motion was granted on the merits and the third-party complaint and all cross claims against it were dismissed with prejudice (*see* order dated April 9, 2013).

EOP's cross motion for summary judgment is premised on, essentially, the same arguments and proofs offered by Signature. The City's opposition rests solely on procedural grounds, arguing that the cross motion must be denied because EOP filed it after the court-ordered deadline, without demonstrating good cause (*see Brill v. City of NY*, 2 N.Y.3d 648 [2004]), and because EOP seeks relief against a nonmoving party, in violation of CPLR§ 2215.

It is undisputed that due to delays in completing discovery and the necessity for counsel to obtain copies of the deposition transcripts prior to submitting their dispositive motions, by order dated March 13, 2012, the Honorable Barbara Jaffe, before whom this matter was then pending, extended the time to file motions for summary judgment to June 6, 2012. While Signature served and filed its motion prior to June 6, 2012, EOP did not. Although EOP failed to provide “a satisfactory explanation for the untimeliness” (*Brill v. City of NY*, 2 N.Y.3d at 652), or address the issue of cross-moving against a nonmovant, for the following reasons, it would be inappropriate to deny the cross motion.

It is well settled that “[a]n otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b])” (*Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 [1st Dept.2006]). Additionally, where the cross motion raises nearly identical issues as were asserted in the timely-served motion, the court may consider the cross movant’s arguments (*see Lapin v. Atlantic Realty Apts. Co., LLC*, 48 A.D.3d 337, 337 [1st Dept. 2008]).

An examination of the City’s third-party complaint and its bill of particulars fails to reveal claims against EOP which differ in any respect from those alleged against Signature. And EOP, like Signature, offers the same arguments in support of its motion, namely, that the proof, both testimonial and documentary, establish that there is no basis for holding it liable in this matter because there is no evidence that it was responsible for placing the unsecured plywood lying on top of the metal catch basin grate, and no evidence that it was responsible for correcting this condition. EOP points out that the words and/or deeds of the City’s employees, Horohoe, Lampone, Capt.

Wallace, Insp. Tria and the BMS department, conclusively establish that the City was placed on notice of the problem, and that the City took responsibility for correcting the problem. Inasmuch as the City handled the correction of this problem in-house and without contacting Signature, EOP, or any other non-City entity, there is no basis for holding EOP liable under a theory of negligence or indemnification.

Neither EOP's tardiness nor its assertion of a cross motion against a nonmoving party, precludes this court from adjudicating EOP's summary judgment motion because EOP's cross motion raises nearly identical issues as were asserted by Signature in its timely motion (*id.*). Like Signature, EOP has made a prima facie showing of entitlement to judgment as a matter of law, and the City's attempt to forestall summary judgment on procedural grounds alone is unavailing.

As there is no basis for a trial of the City's claims against EOP, it is

ORDERED that third-party defendant EOP-Middleton Properties, LLC's cross motion for summary judgment against defendant/third-party plaintiff The City of New York is granted and the third-party complaint and all cross claims against it are dismissed in their entirety with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that aspect of third-party defendant EOP-Middleton Properties, LLC's cross motion that seeks an order of preclusion against defendant/third-party plaintiff The City of New York is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of third-party defendant EOP-Middleton Properties, LLC; and it is further

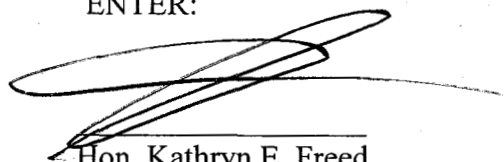
ORDERED that the action is severed and continued against the remaining defendant The City of New York; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: September 9, 2013

SEP 09 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED

SEP 11 2013

**NEW YORK
COUNTY CLERKS OFFICE**