SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KATIE WALMSLEY and ROBERT BIKEL,

Index No. 151165/15

Plaintiffs,

-against-

DECISION/ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CRAIG GEOTECHNICAL DRILLING CO., INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), AQUIFER DRILLING & TESTING, INC., WALDORF EXTERIORS, LLC, TUTOR PERINI CORPORATION, ABLE RIGGING CONTRACTORS, INC. and DOMANI CONSULTING,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2
Affidavits in Opposition.....	3,4,5,6
Replying Affidavits.....	7,8
Exhibits.....	9

Plaintiffs Katie Walmsley and Robert Bikel commenced the instant action seeking to recover damages for personal injuries allegedly sustained by plaintiff Walmsley when she tripped and fell on the sidewalk. Defendant Waldorf Exteriors, LLC ("Waldorf") now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint. Plaintiffs separately move for an Order pursuant to CPLR § 602(a) consolidating this action with another action pending in Supreme Court, New York County. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. On or about February 18, 2012, at approximately 1:30

p.m., plaintiff Walmsley allegedly tripped and fell on a raised, cracked and uneven area of flagstone sidewalk in front of the premises located at 500 West 30th Street, New York, New York (the "subject premises") and sustained injuries (the "incident"). In or around November 2012, plaintiff Walmsley and her husband, plaintiff Bikel, commenced an action in Supreme Court, New York County against the City of New York (the "City") and 500 West 30th, LLC under Index No. 157970/12 ("Action #1") in which they asserted causes of action for negligence and loss of consortium arising out of the incident. Plaintiffs assert that during discovery in Action #1, they learned that certain entities had applied to the City for permits to perform work in the area in which the incident occurred.

Thus, in or around February 2015, rather than add said entities as defendants in Action #1, plaintiffs commenced the instant action against those entities alleging causes of action for negligence and loss of consortium. Defendant Waldorf now moves for summary judgment dismissing the complaint as against it. Plaintiff also moves to consolidate the instant action with Action #1 currently pending before Justice Margaret Chan in Part 52.

As an initial matter, plaintiffs' motion for an Order pursuant to CPLR § 602(a) consolidating the instant action with Action #1 is denied without prejudice to be brought before Justice Chan under Index No. 157970/12 on the ground that Action #1 was commenced before the instant action and thus, any consolidation of the two cases must occur under that index number.

The court now turns to Waldorf's motion for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68

N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, Waldorf has established its *prima facie* right to summary judgment dismissing the complaint on the ground that it did not perform any work at the alleged accident location and thus, was not responsible for creating the condition which allegedly caused plaintiff's accident. Daniel O'Brien, Waldorf's Project Manager, has affirmed that Waldorf was only hired to clean the interior of the subject premises during the construction thereof and that Waldorf "did no work on the exterior of [the subject premises]," "did no work on the sidewalk in front of [the subject premises]" and "was not contracted to do any exterior or sidewalk work."

In response, plaintiffs and Waldorf's co-defendants have failed to raise an issue of fact sufficient to defeat Waldorf's motion for summary judgment. In opposition to Waldorf's motion, they provide two permits that were issued to Waldorf in April 2011, one for the period from May 2, 2011 until May 11, 2011 and the other for the period from May 11, 2011 until May 20, 2011, pursuant to which Waldorf was granted permission "to open the roadway and/or sidewalk at" "West 30 Street" from "10 Avenue" to "11 Avenue" which they assert raise an issue of fact as to whether Waldorf caused or created the defective condition which caused plaintiff's fall. However, it is well-settled that the mere existence of a permit allowing a defendant to perform work in the location of a plaintiff's accident is insufficient to raise an issue of fact as to whether such work was actually performed. *See Bermudez v. City of New York*, 21 A.D.3d 258

(1st Dept 2005).

Plaintiffs and Waldorf's co-defendants' assertion that Waldorf's motion should be denied because it is undisputed that Waldorf performed work on the northern sidewalk of West 30th Street is without merit as plaintiff's accident did not occur on the northern sidewalk of West 30th Street. Specifically, plaintiff's Bill of Particulars asserts that the incident occurred on the southern sidewalk of 30th Street approximately twenty to thirty-five feet from the intersection of 30th Street and 11th Avenue. Further, although plaintiff's original Notice of Claim filed with the City asserted that her accident occurred on the northern sidewalk of West 30th Street, defendant Tutor Perini Corporation ("Tutor") has provided a portion of the transcript of plaintiff's 50-h hearing during which plaintiff's counsel stated, on the record, "that it was the southern sidewalk where the incident occurred, not northern side" and that any statement to the contrary in the original Notice of Claim "was a typographical error by [plaintiff's counsel's] office." Moreover, neither plaintiffs nor any of Waldorf's co-defendants have provided any evidence other than the original Notice of Claim to suggest that plaintiff's accident did not occur on the southern sidewalk of West 30th Street.

Accordingly, Waldorf's motion for summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety as against Waldorf. However, plaintiffs' motion to consolidate this action with Action #1 is denied without prejudice with leave to be brought before Justice Chan in Part 52. This constitutes the decision and order of the court.

Dated: 12/7/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.