Mitchell v Hamilton & Church Props., LLC
2016 NY Slip Op 30161(U)
January 28, 2016
Supreme Court, Kings County
Docket Number: 503381/13
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of January, 2016.

PRESENT:

HON. KAREN B. ROTHERBERG,
Justice.

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MANCHE MITCHELL,

Plaintiff,

- against -

Index No. 503381/13

HAMILTON & CHURCH PROPERTIES, LLC, JAN HIRD POKORNY ASSOCIATES, INC., INTEGRITY CONTRACTING, INC., AND STEVEN ALAN HOLDINGS, LLC,

Defendants.

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The following papers numbered 1 to 13 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 2, 7, 8-9
Opposing Affidavits (Affirmations)	3-5, 10, 11, 12
Reply Affidavits (Affirmations)	6 , 13
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Integrity Contracting Inc., (Integrity) moves for an order, pursuant to CPLR 3212, dismissing plaintiff Manche Mitchell's complaint and all cross claims interposed against Integrity. Jan Hird Pokorny Associates Inc., (JHPA) cross-moves for an order dismissing plaintiff's claims as asserted against JHPA and all cross claims as against JHPA.

Facts and Procedural History

On March 23, 2013 at approximately 4:00 P.M., plaintiff was walking on the sidewalk in front of a building located at 230 Elizabeth in New York, New York, when plaintiff tripped and fell over an eight inch high parapet wall or coping stone that surrounded a sidewalk cellar entrance. The building is a three story mixed use building with commercial space on the ground floor, which has been owned since 2006, by Hamilton & Church Properties, LLC (Hamilton & Church). Adam Woodward is the sole shareholder and officer of Hamilton & Church. Steven Alan Holdings is the commercial tenant on the ground level. Thereafter a renovation project was undertaken commencing in 2009. The architect for the renovation was JHPA and the general contractor was Integrity.

Plaintiff commenced the instant action with service of a summons and complaint. Thereafter Hamilton & Church, Integrity, JHPA and Steven Alan Holdings served answers. Plaintiff served and filed a Note of Issue on February 26, 2015 and the instant summary judgment motions were made.

Integrity's Motion

Integrity moves for summary judgment dismissing plaintiff's claims as asserted against it and any cross claims. Integrity argues that plaintiff's complaint must be dismissed because it did not owe a duty to plaintiff. Integrity points out that a contractor hired by an owner to perform work on its premises owes no duty to an injured third-party where, as here, the injured plaintiff was not an intended third-party beneficiary of the contract between the

premises owner and Integrity. Integrity argues that it was hired to be the general contractor and did not perform any of the physical work, which was performed by subcontractors.

Integrity argues that a contractor who follows an owner or architect's plans and specifications is not liable for any defect in the design of the project absent a showing that a defect was so glaringly obvious that a reasonable contractor would not have followed them. Integrity points out that railings were actually removed from Integrity's contract by JHPA, and thus Integrity was not requested or required to install railings around the cellar entrance. Moreover, Integrity claims that several of the cellar entrances on the street where plaintiff fell were constructed and existed without railings including the one adjacent to the premises. Thus, Integrity argues that the design of the cellar stairway was not "glaringly out of the ordinary". Furthermore, at his deposition JHPA representative, Robert Motzkin, testified that the railing was actually taken out of Integrity's contract. Mr. Motzkin testified that it was his understanding that the owner would install a railing at a later date in consultation with the first floor tenant.

Finally, Integrity argues that the condition was open and obvious, and was not inherently dangerous as a matter of law.

Plaintiff opposes Integrity's motion contending that the parapet over which plaintiff tripped was an actionable defect and an acknowledged tripping hazard. Plaintiff points to the testimony of Mr. Motzkin and Mr. Kevin Seymour, a former JHPA architect, both of whom testified that leaving the curb and coping stones in place without a railing as a visual

cue constituted a tripping hazard. Plaintiff also submits an affidavit from Ronnette Riley, a licensed architect who reviewed all of the documents and photographs related to this matter, visited the site and measured and photographed it. Ms. Riley opines that "good and accepted architectural practice at the time that the modifications at issue were made required that either the gate and railings be reinstalled around the cellar access area, or that the parapet and coping stones be removed and the hatch/Bilco doors be installed flush with the sidewalk surface." She further states that once the gate and railings were removed a tripping hazard was created because the parapet and coping stone were similar in color to the sidewalk and there was no longer a visual cue to alert a pedestrian to the situation, and that the failure to either place a railing or to make the hatch doors flush with the sidewalk constituted a violation of various provisions of the New York City Building Code as well as the New York City Department of Transportation requirements for sidewalk vaults. Specifically, she contends that the 2008 Building Code applies to this property, and contends that the parapet configuration violated Chapter 32 relating to encroachments into the public right of way since it lacked railings and was an impermissible above-grade encroachment. Ms. Riley also opines that the cellar doors at issue with the raised parapet and surrounding coping stones was a substancial sidewalk defect in violation of the New York City Department of Transportation's Highway Rules, pointing to § 27-314 which requires that the covering of the cellar opening be flush with the surrounding pavement.

In addition, plaintiff maintains that Integrity, as the general contractor, was responsible for removing the original railings around the parapet and failing to replace them or ensuring that before the Bilco doors were installed the parapet was removed so that the doors would be flush with the sidewalk. Plaintiff argues that Integrity was responsible for ensuring that its work did not violate any applicable codes and regulations. Moreover, the fact that Integrity removed the original railing and failed to take any steps to ensure the safety of the area renders it liable because it renderd the location more dangerous than when it had encountered it. Plaintiff argues that Integrity should have known that the plans as revised without the railings were glaringly defective.

Plaintiff argues that there is no merit to Integrity's claim that it cannot be liable because it did not create the hazardous condition inasmuch as Integrity may be held liable for the acts of its subcontractors, which it supervised, directed and controlled. Finally, plaintiff argues that the question of whether a condition is open and obvious is generally a jury question and that the court should only make such a determination when the facts compel such a conclusion.

Hamilton & Church also opposes Integrity's motion, and requests that if plaintiff's claims are dismissed plaintiff's as against Integrity that Hamitlon & Church's cross-claims be converted into third-party claims. Hamilton & Church argue that questions of fact exist regarding which defendant, if any, actuually directed that the original railing be removed and points to Integity's own motion papers which cites Mr. Woodward's testimony that he could

not recall why the gate was removed or any conversations regarding this issue. Moreover, Hamilton & Church points out that Integrity served as the general contractor could be held liable for any affirmative act of negligence by it, or any of its subcontractors.

In a supplemental affirmation in support of its motion, Integrity points to an errata sheet in connection with his examination before trial submitted by Mr. Motzkin with regard to the railing:

> Q: Does it indicate who asked for the change?
> A: A change order for a credit would not have been issued without Mr. Woodward's direction to JHPA and Integrity. The guardrail and gate were removed from JHPA's and Integrity's contracts. (Page 70, line 12)
> Q:And when you last visited the site back in 2011 the building was constructed pursuant to the drawings and specifications that were provided to Integrity, correct, at that time?
> A: No, The guardrails and gate weren't installed because Mr. Woodward said that he wanted the guardrails and gate to be integrated with the design of the storefront, but not to omit them completely. It was simply excluded from JHPA's and Integrity's contract commitments, but not from the project (Page 77, line 20).

In reply, Integrity argues that plaintiff has failed to raise an issue of fact with regard to the rule that a contractor may only be held liable to a third party where the contractor launches an instrument of harm. Here, Integrity maintains it did not create the complained of condition and thus did not launch an instrument of harm, pointing to Motzkin's testimony at pages 83-84:

> Q: Again, they were taken out of your contract or Integrity's contract? They were taken out of your contract and Integrity's contract?

A: Correct
Q: The railings were taken out of the contract, correct?
A: Correct.
Q: So Jan Hird was not required to provide the design with the railings, correct, when it was taken out and Integrity was not required to install railings becasue there was no design for the railings, correct?
A: Yes.

Thus, Integrity contends that it could not have installed something it was not contracted to install as it was not contained in the design specifications or drawings. Integrity argues that even if the Building Code provisions cited by plaintiff's expert were applicable to the construction it would not apply to Integrity because it neither designed, nor installed, any component of the appurtenance which caused plaintiff's fall. Integrity maintains that it was justified in following the plans and specification it was provided by the architect, and moreover the condition was open and obvious.

Additionally, Integrity argues that Hamilton & Church's assertion that there is a question of fact as to which defendant actually directed that the fence be removed is not accurate. Mr. Woodward testified that he did not recall the discussions to remove the gate while Mr. Motzkin testified that the decison to remove the gate was made by Mr. Woodward.

With regard to Hamilton & Church's request that if Integrity's motion is granted then Hamilton & Church's cross-claims for indemnity should be converted into third-party claims, Integrity argues that there is no contractual obligation on the part of Integrity to indemnify Hamilton. Integrity further argues that Hamilton & Church's common law claim for

contribution and/or indemnification should also be dismissed as there was no duty of care running from Integrity to plaintiff.

Discussion

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

"[T]he mere happening of an accident does not constitute negligence" (*Drivas v Breger*, 273 AD2d 151, 151-152 [2000] *quoting Candelier v City of New York*, 129 AD2d 145, 148). It is well settled that "to establish a prima facie case of negligence, a plaintiff must demonstrate the existence of duty owed by the defendant to the plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach" *(Bluth v Bias Yaakov Academy for Girls*, 123 AD3d 866 [2014];see *Solomon v City of New York*, 66 NY2d 027

[1985]; *Conneally v Diocese of Rotckville Ctr.*, 116 AD3d 905 [2014]; *Rubin v Staten Is. Univ. Hosp.*, 39 AD3d 618 [2007]). With regard to duty, "it is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman,* 40 NY2d 781 [1976]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 562 [2003]). The issue of the existence of a duty of care is a legal issue for the court to decide in the first instance (*see Palka v Servicemaster Management Services Corp.,* 83 NY2d 579 [1994]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10 [2011]).

Importantly, the court in *Stiver v Good & Fair Carting & Moving, Inc.*, (9 NY3d 253, 257 [2007]) noted that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*see Rothstein v Elohim*, 133 AD3d 839 [2d Dep't 2015]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2012]). However, certain exceptions to this general rule exist "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] 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" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140[citations and internal quotation marks omitted]).

Here, plaintiff and Hamilton & Church argue that liability should be imposed upon Integrity becuase it launched an instrument of harm, namely the removal of the initial railing

and failure to replace it or otherwise make the area safe. Integrity points to the testimony of the JHPA witness, Mr. Motzkin, who confirms that the replacement of the railing was specifically removed from the contract's specifications and that the owner was given a credit for the amount it would have cost had the railing been installed. Moreover, Mr. Motzkin testified that JHPA's original design included a railing but that its design was revised as an accommodation to Mr. Woodward who wanted to wait until the new storefront was designed to decide how to proceed with that particular area. Mr. Motzkin further testified that Integrity, as a contractor ,was required to follow whatever plans or specifications were submitted to them by the architect.

A contractor that performs its work in accordance with contract plans may not be held liable unless those plans are "so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially dangerous" (*Nichols-Sisson v Windstar Airport Serv., Inc.*, 99 AD3d 770, 772 [2012] quoting *West v City of Troy*, 231 AD2d 825, 826 [1996]; *see Hartofil v McCourt & Trudden Funeral Home, Inc.*, 57 AD3d 943, 945 [2008]; *Gee v City of New York*, 304 AD2d at 616; *Stevens v Bast Hatfield, Inc.*, 226 AD2d 981 [1996]; *Morriseau v Rifenburg Constr.*, 223 AD2d 981, 982 [1996]). Here, Integrity has demosntrated that it relied upon the plans prepared by the architecht at the owner's behest and the opponents have failed to raise a triable issue of fact as to whether the contract plans were so clearly defective that a contractor of ordinary prudence would not have performed the work (*see Rappel v Wincoma Homeowners Assn.*,

125 AD3d 833, 835 [2015]; *Zaslow v City of New York*, 124 AD3d 642, 643-644 [2015] [court found that defendant contractor was entitled to summary judgment where its submissions demonstrated it had completed its work in accordance the contract specifications and a final acceptance of the work was issued prior to the accident]; *Peluso v ERM*, 63 AD3d 1025, 1026 [2009] [court held that the defendants justifiably relied upon the contractual specifications, where it was not apparent that those specifications were defective, since the defendants reasonably believed that the employer would repave the parking lot after their work was completed, thereby eliminating any dangerous condition likely to cause injury] Moreover, the record shows that irrespective of which defendant directed the removal, JHPA or Hamilton & Church, there is no evidence that Integrity directed the removal, rather the record demonstrates that it was removed from Integrity's contract and Integrity was bound to follow the architectural drawings which were not patently defective.

Based upon the foregoing, Integrity's motion for summary judgment dismissing plaintiff's claims and all cross claims is granted and said claims are hereby dismissed. In addition, Hamilton & Church's request that if Integrity's motion is granted that Hamilton & Church's cross-claims for indemnity be converted into third-party claims is denied. Integrity correctly points out that there is no contractual obligation on the part of Integrity to indemnify Hamilton & Church as evidenced by the copy of the contract submitted with its summary judgment motion.

JHPA's Cross Motion

Jan Hird Pokorny Associates cross moves for summary judgment dismissing all claims and cross claims as asserted against JHPA. Initially JHPA seeks leave to file this cross motion which was filed after the 60-day period in violation of Rule 13 of the Uniform Civil Trial Rules of the Supreme Court, Kings County.

CPLR Rule 3212 (a) states:

> Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Part C Rule 6 of the Kings County Supreme Court Uniform Civil Term Rules, effective January 2, 2010, and derived from the prior Kings County Supreme Court Uniform Civil Term Rule 13, states:

> Post Note of Issue Summary Judgment Motion: In cases where the City of New York is a defendant and is represented by the Tort Division of the Corporation counsel's office, summary judgement motions may be made no later than 120 days after the filing of a Note of Issue. In all other matters, including third party actions, motions for summary judgment may be made no later than 60 days after the filing of a Note of Issue. In both instances the above time limitations may only be extended by the Court upon good cause shown.

"[S]ummary judgment motions should be timely made, or good cause shown" (*Miceli v State Farm Mutual Automobile Ins. Co.*, 3 NY3d 725, 726 [2004]). That a summary judgment may be meritorious is not considered "good cause" (*id.* at 726). "[S]tatutory time

frames-- like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties" (*Id.* [citation omitted]). The note of issue in this case was filed on February 26, 2015. JHPA's cross motion for summary judgment was not made until June 25, 2015, almost four months after the note of issue was filed. JHPA argues that leave should be granted to file this motion because the testimony of non party witness Kevin Seymour was not available to the parties until May 15,2015, after the sixty day period had expired. JHPA notes that it and other defendants had moved to strike the note of issue because the record was not complete.

Here, the court finds that JHPA established good cause in support of that branch of its cross motion which was for leave to file the instant cross motion for summary judgment. (see *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124 [2000]; *Jones v Grand Opal Constr. Corp.*, 64 AD3d 543 [2009]; *Sclafani v Washington Mut.*, 36 AD3d 682 [2007]; *Herrera v Felice Realty Corp.*, 22 AD3d 723, 724[2005]).

Turning to the remainder of JHPA's cross motion, JHPA argues that it had no duty to a third-party pedestrian such as plaintiff given the facts and circumstances of the instant case. JHPA argues that the testimony of its former employee Kevin Seymour, as well as the notation of a credit from Integrity to Hamilton & Church demonstrates that JHPA was directed by Hamilton & Church to leave out the iron fence despite the fact that JHPA had included such a fence in its original architectural designs. Thus, JHPA contends that in the

performance of its contractual obligations it did not launch an instrument of harm by creating or exacerbating a dangerous condition.

JHPA contends that there is no question of fact to sustain a claim against them and points to the testimony of Messrs. Seymour and Motzkin, both of whom testified that the directive to remove the railings at issue came from the property owner Mr. Woodward and that it was solely his decision not to have the railings re-installed. Next, JHPA argues that the condition was open and obvious and not inherently dangerous.

In opposition, plaintiff argues that the parapet, or coping stones that plaintiff tripped over was an a tripping hazard pointing to the deposition testimony of Mr. Motzkin an architect employed by JHPA, who testified that the condition as it existed without a railing was a tripping hazard, and plaintiff's expert, Ms. Riley, who also opined that it was a tripping hazard and in violation of various Building Code and Department of Transportation regulations. Thus, plaintiff argues that there is no merit to JHPA's argument that the condition was open and obvious so as to preclude any liability on its part. Plaintiff argues that a question of whether a condition is open and obvious is generally a jury question and that proof that a condition is open and obvious does not preclude a finding of liability for failure to maintain property in a safe condition.

In reply, JHPA argues that as an architectural firm, they did not own, lease or otherwise occupy the area where plaintiff fell and thus had no duty to maintain the premises in a safe condition; did not owe a duty to plaintiff; did not breach any duty or commit

negligence, affirmative or otherwise, in rendering architectural services which would subject JHPA to liability and did not create the condition.

Discussion

As discussed above, "it is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman,* 40 NY2d 781 [1976]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 562 [2003]). The issue of the existence of a duty of care is a legal issue for the court to decide in the first instance (*see Palka v Servicemaster Management Services Corp.,* 83 NY2d 579 [1994]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10 [2011]).

Here, plaintiff argues that JHPA owed him a duty as a result of its contract with Hamilton & Church, however, a party's duty of care to a non-contracting third party is limited to specific situations, as discussed above. Plaintiff argues that although JHPA's initial plans included the reinstallation of the railing, its redesign without the fence, resulted in the creation of a dangerous tripping hazard, thus the launching of an instrument of harm.

Here, there was testimony by both Mr. Motzkin and Mr. Seymour regarding the direction not to reinstall the iron fence/railing that had originally been at that location. Both testified that they were directed to remove the railing from their design at the behest of the owner Mr. Woodward because he intended to include this area as part of a redesign by the first floor tenant and Mr. Woodward did not recall the circumstances surrounding the

decision. In addition, Mr. Motzkin testified that the area without the railing constituted a tripping hazard, while Mr. Seymour testified that he would have to consult the applicable building code to render such a determination. Based upon the foregoing, the court finds that questions of fact exist regarding whether JHPA's design was negligent resulting in the launching of an instrument of harm and thus JHPA has failed to establish its freedom from negligence and entitlement to summary judgment in its favor.

Moreover, plaintiff has raised question of fact regarding whether the condition was open and obvious inasmuch as it is undisputed that the coping stones were the same color as the surrounding sidewalk and there was nothing to distinguish the height differential. Plaintiff's expert also raises questions of fact regarding the violation of various provisions of the Building Code and New York City Department of Transportation Rules which JHPA fails to rebut.

Based upon the foregoing, JHPA's motion for summary judgment is denied in its entirety.

The foregoing constitutes the decision, order and judgment of the court.

ENTER

J. S. C.

Karen B. Rothenberg
Justice, Supreme Court

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

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