Nachmani v City of New York
2018 NY Slip Op 30351(U)
February 23, 2018
Supreme Court, New York County
Docket Number: 150890/14
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 52

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JOAN NACHMANI,

Plaintiff, Index No. 150890/14

-against- **Decision and Order**

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and TRIUMPH CONSTRUCTION CORP.,

Defendants.

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ALEXANDER M. TISCH, J.:

Motion sequence Nos. 001 and 002 are consolidated for disposition. In motion sequence No. 001, defendant Triumph Construction Corp. (Triumph) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. In motion sequence No. 002, defendant Consolidated Edison Company of New York, Inc. (Con Ed) also moves, pursuant to CPLR 3212, for similar relief in its favor.

Plaintiff Joan Nachmani (plaintiff) brings this action to recover damages for personal injuries she allegedly sustained on January 22, 2013, when she slipped and fell on an icy condition within the crosswalk across West 28th Street, at its intersection with Sixth Avenue, in New York, New York (complaint, ¶ 11). On or about April 17, 2013, plaintiff served defendant the City of New York (the City) with her notice of claim. She commenced the instant action against the City, Con Ed and Triumph on January 29, 2014. Con Ed interposed an answer asserting two affirmative defenses and a cross claim against the City and Triumph on March 3, 2014. Triumph interposed an answer asserting twenty-six affirmative defenses and two cross claims against the City and Con Ed on March 14, 2014. The City's answer, served on or about February 24, 2014, asserted four affirmative defenses and a cross claim against Con Ed and Triumph.

Depositions have been held of the parties in this action. According to the deposition of plaintiff, just prior to her fall, she had been walking from the southwest corner to the northwest corner in the westernmost crosswalk of West 28th Street, at its intersection with Sixth Avenue (the Subject Intersection) (Triumph's moving papers, exhibit G, plaintiff's deposition, tr at 21). After her fall, she looked down and observed an uneven depression in the roadway that was covered by black ice (*id.* at 30, 53), and that the ice had spread from where she fell to a valve in the street on West 28th Street (*id.* at 92-93). When shown defendant's exhibit 5, a photograph produced during discovery, she identified the metal plate valve cover from the ice and water allegedly had streamed (*id.* at 61-62), and testified that it was a "dark round object" (*id.* at 63).

Abraham Lopez, a record searcher from the Office of Litigation Services of the City's Department of Transportation, testified, inter alia, that a search of the records of the Subject Intersection for the two-year period prior to, and including, plaintiff's alleged accident, revealed that, among the 51 issued permits (*id.*, exhibit J, Lopez' deposition tr at 9-11), there were two involving work performed by Triumph: (1) a permit ending in 021 to Con Ed, valid from February 9, 2011 to March 9, 2011, to open a portion of the roadway on West 28th Street, between Sixth and Seventh Avenues, for the purpose of constructing or altering a manhole or casting (First Permit) (*id.* at 18; *id.*, exhibit K, First Permit); and (2) a permit ending in 069 to Triumph, valid from September 8, 2012 to November 4, 2012, to open the roadway at the intersection of 6th Avenue and West 28th Street, for the purpose of repairing electric/communications (Second Permit) (*id.* at 54; *id.*, exhibit L, Second Permit). Lopez also testified that, during the relevant period, permits had been issued to other companies for work to be performed in the Subject Intersection, including one for opening the roadway or sidewalk on West 28th Street, from 6th to 7th Avenue issued in December 2012 (*id.* at 22), and three for repairing the water and sewer in front of 123-125 West 28th Street, issued in June 2011, September 2012 and October 2012, respectively.

Dominick Cuzzi, Triumph's project manager, testified, inter alia, that Triumph's business includes construction, excavation and installation (Triumph's moving papers, exhibit M, Cuzzi's deposition tr at 11); that Con Ed hired Triumph to perform the work required under the First Permit (*id.* at 25); that this work, consisting of the replacement of an existing manhole casting, was performed on February 24, 2011 on West 28th Street, "fifty feet" from the Subject Intersection (*id.* at 26-28); and that the excavation was 13 feet by 11 feet (*id.* at 30). When shown photographs labeled defendant's exhibits 1, 2 and 5 (Triumph's moving papers, exhibit H, defendant's exhibits 1, 2, 5), which plaintiff had identified as the alleged accident site (Triumph's moving papers, exhibit G, plaintiff's tr at 51-63), Cuzzi testified that the area in which Triumph had performed the work under the First Permit was not depicted in the photos (*id.* at 39-41); that Triumph had nothing to do with the manhole depicted therein (*id.* at 41-42); and that he knew this because the manhole photographed was a Q-8 casting manhole, which is "a circle," and Triumph had installed a S-5 casting, which is a "big rectangular box" (*id.* at 42-43). With respect to the Second Permit, Cuzzi stated that Triumph's work, scheduled for September 2012, consisted of providing electrical power for a newsstand (*id.* at 14-17; exhibit L, Second Permit application); and that the application filed by Triumph provided for the work to be done from September 1, 2012 to September 30, 2012 on Sixth Avenue, between West 28th Street and West 29th Street, 40 feet east of the Subject Intersection where plaintiff's accident allegedly occurred (*id.* at 17-19).

Yesenia Campoverde, Con Ed's specialist, stated that a permit search disclosed that Con Ed retained Triumph to perform the work required under the First Permit (Triumph's moving papers, exhibit O, Campoverde's deposition tr at 13); that the work was done on West 28th Street, 50 feet west of the southwest corner of the Subject Intersection on February 24, 2011 (*id.* at 16-17); that the street opening measuring 13 feet by 11 feet (*id.* at 14), was subsequently restored by a separate paving contractor (*id.* at 18); and that no subsequent corrective action was requested by Con Ed regarding Triumph's work (*id.* at 18, 63). Campoverde also admitted that a separate search regarding the Subject

Intersection, conducted on April 28, 2015, disclosed sixteen permits for work performed for it by other contractors (*id.* at 27-58; Triumph's exhibit Q, search results), including backfill work by Nico Asphalt Paving, Inc. in December 2012, a month before the alleged accident, approximately 32 feet west thereof (Campoverde's deposition tr at 56-58).

When Gregory Nichols, a construction laborer with the Bureau of Water and Sewer, was shown the photograph labeled defendant's exhibit 1, he identified two City manholes within the subject crosswalk (Con Ed's moving papers, exhibit H, Nichols' deposition tr at 32, 44-45). He also identified these two City manholes in a photograph labeled plaintiff's exhibit 1, stating that the second square manhole was a valve that ran to the hydrant, in the photograph (*id.* at 32-33). He also called this manhole "a hydrant valve cover" (*id.* at 45).

In motion sequence No. 001, Triumph now moves for summary judgment dismissing the complaint against it. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"To establish a prima facie case of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). The question of whether a duty of care exists is one for the court to decide (*Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]).

As argued by Triumph, a contractor generally does not owe a duty of care to non-contracting third parties, such as the plaintiff (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]. A contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see*

Church v Callanan Indus, 99 NY2d 104, 111 [2002]). There are, however, three exceptions to this general rule:

> "'(1) where the contracting party, in failing to exercise reasonable care in the performance of his 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 premise safely"'

(*Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007] [internal citations omitted], quoting *Espinal v Melville Snow Contrs*, 98 NY2d 136, 140 [2002]). "[A] launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition" (*Santos v Deanco Servs., Inc.*, 142 AD3d 137, 141 [2d Dept 2016]; *see also Church,* 99 NY2d at 112).

Here, plaintiff relies on the first exception, in that she alleges that Triumph was negligent in, inter alia, its performance of its work, and its failure to inspect, make proper repairs to the street following the performance of its work, check and close the water valve, repair and properly close the metal plate cover; she also complains that it allowed a slippery and hazardous condition to form and remain in the crosswalk (Triumph's moving papers, exhibit F, plaintiff's bill of particulars, ¶ 1). The latter two exceptions are inapplicable to this action, inasmuch as plaintiff does not allege facts in the complaint or bill of particulars, or testify to facts in her deposition, that could potentially warrant the application of the detrimental reliance exception, i.e., that plaintiff detrimentally relied on Triumph's continued performance of its contractual duties (*see Espinal*, 98 NY2d at 140). Additionally, there is no evidence that Triumph had a contract for routine or systematic maintenance of the crosswalk (*see Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411, 412 [1st Dept 2010]).

In seeking summary judgment, Triumph argues that the evidence establishes that the work performed by Triumph, with respect to the two aforementioned permits, was not within the crosswalk and was not related to the source of the water, that purportedly turned to ice or the metal plate cover from which it came. Triumph notes plaintiff's testimony, that she had been walking from the southwest

to the northwest corner in the westernmost crosswalk across West 28th Street at its intersection with Sixth Avenue, when she fell as a result of an uneven depression in the crosswalk that was covered with ice formed from water leaking from a nearby metal plate valve cover. Triumph refers to those portions of Cuzzi's testimony, which was later confirmed by Campoverde's testimony,to establish that Triumph's work, with respect to the First Permit in February 2011, two years prior to the plaintiff's accident, did not involve any water related work, and was performed on West 28th Street, between 6th and 7th Avenues, 50 feet west of the Subject Intersection, and, thus, away from the alleged accident site and the metal plate valve cover. Triumph also refers to Cuzzi's unchallenged testimony that the work performed by Triumph, with respect to the Second Permit in September 2012, four months prior to plaintiff's accident, involved work on Sixth Avenue between West 28th Street and West 29th Street, 40 feet east of the crosswalk where the accident occurred, and related to electrical work. Triumph sufficiently makes a prima facie showing that its work did not cause or exacerbate the dangerous condition that allegedly caused plaintiff's fall.

The court notes that plaintiff does not oppose Triumph's application. While Con Ed opposes Triumph's application, it does not proffer any evidence that could raise an issue of fact as to Triumph's negligence. It also admits that Triumph's work on behalf of Con Ed was not related to the condition alleged to have caused plaintiff's accident. It nonetheless argues that it may be entitled to common-law and contractual indemnification, under its contract with Triumph, if Con Edison is found negligent for causing or creating the roadway defect (Con Ed's counsel's affirmation, ¶ 11).

The City also opposes Triumph's application, contending that there is a question of fact as to whether Triumph caused and created the alleged defective condition when it performed its work with respect to the Second Permit. It notes that the diagrams related to the Second Permit indicate that, during the course of its work, Triumph was going to make a 20-foot opening within the Subject Intersection (*see* the City's exhibit A, permit application and related diagrams). The City maintains that,

while the opening may not have been made directly within the subject crosswalk, the mere appearance that Triumph may have done work within the Subject Intersection prior to plaintiff's accident," was enough to raise an issue of fact (the City's counsel's affirmation, ¶ 5).

In reply, Triumph acknowledges that its contract with Con Ed requires it to indemnify Con Ed for claims "resulting in whole or in part from, or connected with, the performance of the work by the Contractor" (Con Ed's opposing papers, exhibit B, construction contract, ¶ 36). It, however, argues that this indemnity provision does not apply to the present action, because it did not perform work in the location of plaintiff's accident or the metal plate from which water purportedly leaked. Triumph further maintains that there is no basis for a finding of liability against it.

Here, neither Con Ed nor the City point to any facts in evidence whereby trier of facts could reasonably infer that Triumph's work, related to the First or Second Permit caused or exacerbated the alleged hazardous condition that caused plaintiff's fall (*see Santos*, 142 AD3d at 143). There is unchallenged testimony in the record regarding the locations where Triumph performed its work, which indicate that the work was performed 40 or 50 feet away from the Subject Intersection. Further the record establishes that Triumph's work was not related to the metal plate cover from which plaintiff alleged that water had seeped. The City's reliance on the diagrams attached to the Second Permit, without reference to any facts in evidence that would link Triumph's work with the metal plate identified by plaintiff, is insufficient to raise an issue of fact (*id.*). Thus, "it would be mere speculation [on the record before us] to conclude that the allegedly dangerous condition which caused the plaintiff to . . . fall was caused by any affirmative act of negligence by [Triumph]" (*Fernandez v 707, Inc.*, 85 AD3d 539, 541 [1st Dept 2011] [internal quotations marks and citation omitted]). Therefore, that branch of Triumph's application for summary judgment dismissing the complaint asserted against it is granted.

Triumph also moves for summary judgment dismissing the cross claims asserted against it. The cross claims by the City and Con Ed for common-law indemnification, as well as the contribution cross

claim by the City, require a finding of negligence by Triumph (*see Wilk v Columbia Univ.*, 150 AD3d 502, 504 [1st Dept 2017]). Therefore, in the absence of any evidence that Triumph's work caused or created the condition that caused plaintiff's alleged fall, that branch of Triumph's application for summary judgment dismissing these cross claims is also granted.

Con Ed's cross claim for contractual indemnification against Triumph is also dismissed. The indemnification provision in the contract between Triumph and Con Ed provides for indemnification of claims "resulting in whole or in part from, or connected with, the performance of the work" by Triumph (Con Ed's opposing papers, exhibit B, construction contract, ¶ 36). Since the record is devoid of any evidence that plaintiff's accident was caused by Triumph's work, Con-Ed's cross-claim for contractual indemnification is also dismissed (*see Rosen v New York City Tr. Auth.*, 295 AD2d 126, 126 [1st Dept 2002]).

In motion sequence No. 002, Con Ed also moves for summary judgment dismissing the complaint and cross claims asserted against it, arguing that the record demonstrates that neither it, nor anyone on its behalf, performed any work at the location of plaintiff's accident, and that the metal plate valve located in the subject crosswalk was not owned or controlled by Con Ed. In support of its motion, it relies on the deposition of its witness, Campoverde, who testified that a record search of the Subject Intersection, including 30 feet from each corner, for the two-year period preceding plaintiff's accident, disclosed: (1) one permit, one opening ticket and one paving order in connection with the work that Triumph performed 50 feet west of the southwest corner of the Subject Intersection (Campoverde's deposition tr at 15-16); and (2) two additional opening tickets concerning work performed on behalf of Con Ed also far west of the Subject Intersection (Campoverde's deposition tr at 28, 42-45, 57-58). It also refers to the deposition of the City's witness, Nichol, wherein he identified, in a photograph labeled plaintiff's exhibit one, two manholes in the subject crosswalk that belonged to the City (Nichols' deposition tr at 32).

Here, Con Ed fails to meet its burden of demonstrating that it is entitled to summary judgment. As noted by plaintiff, during Campoverde's deposition, she was unable to answer questions regarding certain other emergency control system tickets, including: (1) one ending in 767, wherein she noted the following remarks inputted in connection therewith, "September 6th [2011] excavated over main and service cut" (Campoverde deposition tr at 48), but did not have any understanding as to what work was done, how far from the Subject Intersection the work had been done, or what the ticket's remarks meant (*id.* at 48-50); and (2) another ending in 186, wherein she testified that its purpose was for a gas leak at the Subject Intersection, but did not know if any excavation had been performed in connection therewith (*id.* at 61). Thus, Campoverde's testimony raises a question of fact as to whether work was performed in connection with these tickets, among others, and whether any work, including excavation work by Con Ed or someone on behalf of Con Ed caused the alleged hazardous condition in the crosswalk (*see Torres v City of New York*, 83 AD3d 577, 577 [1st Dept 2011]).

Further, while Con Ed relies on Nichol's testimony, that there are two City manholes in the subject crosswalk, there is also evidence in the record of a manhole cover owned by Con Ed in the Subject Intersection. During his deposition, Eric Michelstein, Con Ed's designer, made such identification, when looking at the photograph labeled defendant's exhibit 1 (plaintiff's exhibit A, Michelstein's deposition tr at 27, 30). Additionally, there is a Department of Transportation (DOT) HIQA Inspection report, which states that Con Ed owns a utility cover near the Subject Intersection (plaintiff's opposing papers, exhibit C, DOT's HIQA Inspection report). As noted by plaintiff and the City, the Rules of the City of New York, 34 RCNY 2-07 (b) (2), require that Con Ed, as owner of the utility cover, "shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating" (*see also Lewis v City of New York*, 89 AD3d 410, 411 [1st Dept 2011]). Plaintiff testified that she saw ice extending from a metal plate cover near the Subject Intersection, which

covered the uneven depression in the roadway. Since Con Ed fails to demonstrate that its metal plate cover, or the area extending 12 inches outward from the perimeter of the cover was not part of the area in which plaintiff allegedly fell, or that it did not cause or exacerbate the condition that led to plaintiff's accident, it did not make a prima facie showing of entitlement to summary judgment (*see id.*).

In view of the foregoing, Con Ed's motion for summary judgment dismissing the complaint and the cross claims against it is denied.

Accordingly, it is

ORDERED that the motion by Triumph Construction Corp. for summary judgment dismissing the complaint and all cross claims against it, motion sequence No. 001, is granted and the complaint against said defendant is dismissed; and it is further

ORDERED that the motion by Consolidated Edison Company of New York, Inc. for summary judgment dismissing the complaint and all cross-claims against it, motion sequence no. 002, is denied.

Dated: February 23, 2018

A.J. S. C.

HON. ALEXANDER M. TISCH