Ocean v Strivers Gardens Condominium Assn.
2018 NY Slip Op 32859(U)
November 7, 2018
Supreme Court, New York County
Docket Number: 154702/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART**

Justice

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INDEX NO. 154702/2016

AMIRA OCEAN,

Plaintiff,

MOTION SEQ. NO. 005

- v -

STRIVERS GARDENS CONDOMINIUM ASSOCIATION, NEW BEDFORD MANAGEMENT CORP., ROCK GROUP NY CORP., ROCK SCAFFOLDING CORP., YATES RESTORATION GROUP LTD, SUPERSTRUCTURES ENGINEERS AND ARCHITECTS, and RB NY ENTERPRISES INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 98, 100, 123, 124, 125, 126, 128, 129, 130, 131, 132, 133, 134, 135, 137

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action commenced by plaintiff Amira Ocean ("Ocean"), defendant Yates Restoration Group Ltd. ("Yates") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On February 24, 2016, plaintiff Ocean was allegedly struck by an unsecured piece of wood that fell from either a scaffold or a "sidewalk bridge" while she was walking on a sidewalk in front of 300 West 135th Street ("the premises") in Manhattan. (Docs. 81 at 2; 83 at 17–18; 88 at 2–3.) Plaintiff thereafter commenced this suit against defendants Strivers Gardens

Condominium Association ("Strivers Gardens"), New Bedford Management Corp. ("New Bedford"), Rock Group NY Corp. ("Rock Group"), Rock Scaffolding Corp., Yates, Superstructures Engineers and Architects ("Superstructures"), and RB NY Enterprises Inc. ("RB NY"), alleging that her injuries resulted from defendants' negligence in their maintenance and supervision of the sidewalk. (Docs. 83 at 17–18; 88 at 2; 132.)

In their answers, defendants Strivers Gardens, New Bedford, Rock Group, Superstructures, and RB NY asserted cross-claims against each other and Yates for contribution and indemnification. (Docs. 84 at 14–15; 85 at 6–7; 87 at 7–8.)

Yates moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross-claims. In support of the motion, Yates submits an affidavit by its president Michael Yates ("Mr. Yates"), its contract with Strivers Gardens for façade restorations ("the contract"), a work permit issued by the New York City Department of Buildings (DOB), and a notice to admit from defendants Strivers Gardens and New Bedford. Yates argues that it is entitled to judgment as a matter of law because, pursuant to the contract, a deposit of five percent of the contract sum was to be paid to Yates before it would initiate work on the project. (Doc. 9 at 3, 13.) Because it was not paid this deposit, Yates was not present at the premises and did not perform any work on the property until several months after plaintiff's accident. (Doc. 134 at 4–5.) Moreover, Yates asserts, it cannot be held liable for plaintiff's injuries since defendants Strivers Gardens and New Bedford, the owners of the premises (Doc. 92 at 2), stated in their notice to admit that Yates did not perform work at any time prior to the incident (*id.* at 2–3).

In opposition to the motion, plaintiff argues that summary judgment should be denied because it is premature, in that no depositions or discovery has taken place. (Doc. 93 at 2.) Defendant RB NY also maintains that summary judgment would be premature because it has

recently been added as a direct defendant in this litigation by plaintiff. (Doc. 128.) Defendant Superstructures opposes the motion on the ground that there are issues of fact as to Yates's responsibility in maintaining the sidewalk. (Doc. 123.) According to Superstructures, Yates's contract with Strivers Gardens obligated Yates to maintain, inspect, and repair an existing shed on the sidewalk nearly a year before plaintiff's accident, and that this obligation was not contingent upon Yates receiving a deposit from Strivers Gardens and New Bedford. (*Id.* at 4–9.)

In reply, Yates asserts that its motion is not premature because neither plaintiff nor defendants RB NY and Superstructures have shown how discovery would raise issues of fact. (Doc. 134 at 4–5.) Additionally, Yates argues in reply that it did not have a duty to maintain the sidewalk or the sidewalk shed because it was never paid the deposit required to commence work. (*Id.* at 5–7.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

In this action, Yates has submitted a plethora of documents establishing a prima facie showing that it was neither present on the premises nor doing construction work at the site prior to Ocean's accident. In his affidavit, Mr. Yates states that a contract was entered into with Strivers Gardens in March of 2015 for façade restorations. (Doc. 90 at 3.) Although Yates obtained a permit from DOB in May of 2015 to begin the work, Mr. Yates also says that the permit was rescinded in October of 2015 because Yates never received payment from Strivers Gardens and New Bedford. (*Id.* at 3–4.) This is supported by the contract, which provides that "Contractor [Yates] may bill Owner [Strivers Gardens and New Bedford] for an initial payment representing five percent of the Contract Sum prior to the commencement of the Work . . . ." (*Id.* at 13.) (*See Ingles v Architron Designers & Bldrs., Inc.*, 136 AD3d 605, 605 [1st Dept 2016] (summary judgment granted where defendant submitted an affidavit of its vice president, who asserted that work was not performed by the defendant company at the subject location); *see also Melcher v City of New York*, 38 AD3d 376, 376–77 [1st Dept 2007] (summary judgment appropriate where defendant's employees testified that no construction work was done where plaintiff was injured).)

Even more importantly, defendants Strivers Gardens and New Bedford, the owners of the premises (Docs. 90 at 11; 91 at 2), have acknowledged in a "Notice to Admit" that Yates did not assume the responsibility of doing construction work at the premises at any time prior to plaintiff's accident. (Doc. 91.) Further, Yates has furnished a copy of correspondence dated October 14, 2015, that it sent to DOB. (Doc. 90 at 37.) In that letter, Yates specifically requested: "At this time we are asking for Yates Restoration Group, Ltd. be withdrawn [sic] from the [DOB] as the General Contractor" (*id.*) of the construction site. Therefore, Yates has submitted sufficient evidence to show that it is not liable for plaintiff's accident because it does not appear

that Yates did any work at the site. (*See Bermudez v City of New York*, 21 AD3d 258, 258–59 [1st Dept 2005] (court granted summary judgment where defendant established that it had cancelled a construction contract and therefore had not commenced work at the site where plaintiff was injured).)

Plaintiff's and defendants' opposition papers have failed to raise a triable issue of fact in response. With respect to their argument that Yates' summary judgment motion is premature, it has been repeatedly held by courts that the fact "that discovery had not been completed was insufficient reason to deny appellants' motion for summary judgment." (*See, e.g.*, *Smith v Andre*, 43 AD3d 770, 771 [1st Dept 2007].) Instead, parties opposing a motion for summary judgment must at least show a "likelihood of discovery leading to such evidence" which would raise issues of fact. (*Frierson v. Concourse Plaza Assocs.*, 189 AD2d 609, 610 [1st Dept 1993].) Here, plaintiff and defendants RB NY and Superstructures have not even alleged what further evidence will be obtained in the discovery process showing Yates's liability. Indeed, defendants Strivers Gardens and New Bedford's admission that Yates was not present at the premises, and that it had not performed any construction work prior to plaintiff's accident, establishes the contrary. (Doc. 91.)

With respect to Superstructures' argument that Yates has an obligation to maintain and repair the sidewalk that was not contingent on Yates receiving payment from Strivers Gardens, this Court turns to the terms of the agreement between Yates and Strivers Gardens. In arguing against summary judgment, Superstructures cites Article 1 of the contract:

> The Work shall include the erection and maintenance of the Site of any and all sidewalk bridges and sheds, rigging and scaffolding in compliance with the requirements of "Applicable Law" (as hereinafter defined) and the Contract Documents, with the removal of such sidewalk bridges and sheds, scaffolding or rigging . . . .

(Doc. 90 at 11.)

Superstructures asserts that there is an issue of fact as to whether Yates complied with this provision. However, this Court determines that a holistic reading of the contract obviates Yates of any obligation to maintain the sidewalk and sidewalk shed absent payment from either Strivers Gardens or New Bedford. Article 3 of the same contract states that the "Contractor [Yates] may bill Owner [Strivers Gardens and New Bedford] for an initial payment representing five percent of the Contract Sum prior to the commencement of Work . . . ." (*Id.* at 13.) Thus, by reading these two provisions in tandem, it is clear that, although maintaining the sidewalk was part of Yates's duties under Article 1 of the agreement, Yates did not assume those duties absent payment of a five percent deposit pursuant to Article 3. Because plaintiff and defendants RB NY and Superstructures have failed to raise a triable issue of fact, summary judgment on the issue of Yates's liability to plaintiff must be granted. And, insofar as Yates has established that plaintiff's accident did not arise or result from its work, summary judgment dismissing the cross-claims of the co-defendants in this action for contribution and indemnification must also be granted. (*See Barto v NS Partners, LLC*, 74 AD3d 1717, 1720 [4th Dept 2010] (dismissing cross-claims for indemnification where defendant established its nonliability to plaintiff).)

In accordance with the foregoing, it is hereby:

ORDERED that defendant Yates Restoration Group Ltd.'s motion to dismiss the complaint and all cross-claims is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendant Yates Restoration Group Ltd. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

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

11/7/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE