Nascimento v City of New York
2021 NY Slip Op 30081(U)
January 12, 2021
Supreme Court, New York County
Docket Number: 158384/2018
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **IAS MOTION 62**

Justice

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MARCIA NASCIMENTO,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, LIVINGSTON BUILDERS INC.,EDUCATION 70, LLC,NICHOLSON AND GALLOWAY, INC.,

Defendant.

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INDEX NO. 158384/2018

MOTION DATE 10/07/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

LIVINGSTON BUILDERS INC.

Plaintiff,

-against-

NICHOLSON & GALLOWAY, INC.

Defendant.

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Third-Party
Index No. 595754/2019

LIVINGSTON BUILDERS INC.

Plaintiff,

-against-

SAFWAY ATLANTIC, LLC

Defendant.

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Second Third-Party
Index No. 595911/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

In this action, plaintiff alleges that she sustained personal injuries when she was hit by a tree branch as she was walking on the sidewalk adjacent to the property located at 125 East 70th Street on October 24, 2017.

Pending before the court is a motion filed by defendant Education 70 LLC, (the "defendant"), who owned the residence in front of which the incident occurred. The defendant seeks an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing plaintiff's Complaint against defendant. Specifically, defendant argues that it did not engage in any maintenance of the tree that caused plaintiff's injuries; it is not responsible for the maintenance of the tree that caused plaintiff's injuries; it did not have any involvement in the planting or cultivation of the tree adjacent to the subject premises; and it is not responsible for the maintenance or upkeep of the City-owned tree that is located near the street adjacent to the subject premises.

Upon the foregoing documents, this motion is DENIED with leave to re-file upon completion of further discovery.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the

non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

As defendant correctly argues, New York City Administrative Code section 18-105 provides, generally, that trees in streets are under the exclusive care and cultivation of the commissioner; and section 7-210 carves out an exemption for residential homeowners of owner-occupied one, two or three-family properties which, generally, relieves such homeowners of liability for failure to maintain the sidewalk in a reasonably safe condition.

Notwithstanding the above provisions however, photos of the site, as produced by plaintiff, show that significant renovation was occurring with respect to the building owned by defendant. Specifically, the photos show that a large scaffold "bridge" had been erected, including a tin roof, heavy wooden beams, and metal poles to support it. The photos also show the presence of a construction crane and that the tree in this case was encased by a wooden structure that is approximately 6 feet tall. As plaintiff rightly contends, a number of questions remain including, *inter alia*, why the tree branch fell; whether the tree was damaged because of the construction, removal, or use of the sidewalk bridge, or any other activity related to the renovation; which party erected the wooden structure that encased the tree and whether such erection disturbed the tree as to cause the branch to fall. These are all issues of fact, for which there remain outstanding questions. Accordingly, the motion is denied at this time, with leave to re-file upon discovery.[1]

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[1] The parties attribute discovery delays to scheduling conflicts due to the Covid-19 pandemic and the fact that two third party actions have been filed.

Defendant further argues that any liability would fall not on defendant as owner, but on co-defendant Livingston Builders, the independent contractor who was renovating the property. Defendant is correct that, generally, a principal will not be held liable for the actions of its independent contractors (Adams v. Hilton Hotels, Inc., 13 A.D.3d 175 [Sup. Ct. App. Div. 1st Dept. 2004] ["It is settled that ordinarily a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work."]).

However, there are exceptions to this rule (Saini v. Tonju Assocs., 299 A.D.2d 244 [Sup. Ct. App. Div. 1st Dept. 2002] ["The numerous exceptions to this rule, which, for the most part, are derived from public policy concerns, fall roughly into three basic categories: where the employer is negligent in selecting, instructing or supervising the independent contractor; where the independent contractor is hired to do work which is "inherently dangerous"; and where the employer bears a specific, nondelegable duty.])

Here, it is unclear at this time whether any of these exceptions apply. Accordingly, this motion is DENIED at this time, and defendant Education 70 LLC is given leave to re-file after further discovery has been conducted.

This is the order of the court.

1/12/2021
DATE

J. MACHELLE SWEETING, J.S.C.

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