

Gordon v Uddin

2021 NY Slip Op 32495(U)

November 26, 2021

Supreme Court, New York County

Docket Number: Index No. 155912/2015

Judge: Lisa Headley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA HEADLEY PART 22

Justice

-----X

JACK GORDON,

Plaintiff,

- v -

NAZIM UDDIN, NEAL TAXI SERVICE, INC., YORKSHIRE
TOWERS COMPANY, LP, SCHNEIDER AND SCHNEIDER,
INC., DF RESTORATION, INC., SKYLINE SCAFFOLDING,
INC., SKANSKA USA, INC., TRAYLOR BROS., INC.

Defendant.

-----X

INDEX NO. 155912/2015

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 194, 195, 196, 197, 198, 201, 202, 205, 206, 208, 209, 210, 211, 212, 213, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, the plaintiff alleges that on December 1, 2013, at approximately 7:15 p.m., plaintiff, Jack Gordon (“plaintiff”), was struck by a taxi owned by defendant, Neal Taxi Service, Inc. (“defendant Neal Taxi Service”), and operated by defendant, Nazim Uddin (“defendant Uddin”), while plaintiff entered a driveway area from a sidewalk outside of 305-315 86th Street, New York, New York, (“the premises”). The premises is owned by co-defendant, Yorkshire Towers Company, LP (“defendant Yorkshire Towers”), and managed by co-defendant, Schneider and Schneider, Inc. (“defendant Schneider”). At the time of the accident, co-defendant DF Restoration, Inc. (“defendant DF”) was performing restoration work on a façade of the premises, and the movant-defendant Skyline was defendant DF’s subcontractor that was hired to install a sidewalk shed along the sidewalk abutting the premises. There was additional but unrelated construction work performed by co-defendant, Skanska USA, Inc. (“defendant Skanska”), and co-defendant Traylor Bros., Inc. (“defendant Traylor”), which involved construction of the Second Avenue subway line.

The movant-defendant Skyline Scaffolding, Inc. (“movant-defendant Skyline”) moves for summary judgment to dismiss the complaint and all cross claims brought against Skyline. Here, movant-defendant Skyline seeks summary judgment and dismissal from this action, based on several grounds. First, defendant Skyline argues that as an independent contractor, it owed no legal duty to plaintiff, with whom it had no contractual relationship. Second, defendant Skyline argues that it did not cause or create any condition which could have resulted in plaintiff’s injuries, and

therefore defendant Skyline could not be held liable to plaintiff. Thirdly, defendant Skyline argues that its sidewalk shed did not obstruct plaintiff's view prior to the accident, and that defendant Skyline did not attach any items or material on or near the sidewalk shed that would have obscured plaintiff's view. In addition, defendant Skyline argues that it did not approve or have notice of any items being attached to the shed by another party or entity prior to the accident.

In support of the motion to dismiss, defendant Skyline submitted, *inter alia*, the plaintiff's verified Bill of Particulars; the police accident report of the subject accident; the plaintiff's deposition testimony; the testimony of Lynn Schneider, from co-defendant, Yorkshire and Schneider; the testimony of Ibraim Redza, from defendant Skyline; and the testimony of Adam Pramberger, from co-defendant Skanska. In addition, defendant submitted the proposed contract between movant-defendant Skyline and co-defendant DF.

The verified Bill of Particulars alleges, *inter alia*, that movant-defendant Skyline's negligence consisted of permitting stop signs and other traffic control signage or devices to be affixed to the scaffolding and sidewalk shed in front of the premises, and allowing other semi-opaque material to be affixed to the scaffolding and sidewalk, which obstructed the vision of individuals entering the driveway in a dangerous way.

The accident police report dated December 1, 2013 states that plaintiff was struck by the vehicle operated by co-defendant Uddin in front of the premises owned by co-defendant Yorkshire. The report states that the accident was contributed due to "driver inattention/ distraction," and "failure to yield the right of way" on behalf of co-defendant Uddin.

Plaintiff testified at his deposition that he was walking home from the supermarket, approximately two blocks from his residence, when he was struck by the vehicle operated by Uddin. Plaintiff could not recall whether the street was illuminated at the time of the accident, which occurred, during the evening. Plaintiff testified that he did not first stop at the Jersey barrier and look beyond the fencing installed on the barrier to see if there were any vehicles entering the driveway area of the premises before the collision.

Plaintiff testified that the sidewalk shed installed by Skyline did not obstruct his view at any point prior to the accident. After being shown photographs of the location of the accident taken days after the accident, plaintiff admitted that he did not recall whether there was a yield sign or mirrors attached to the scaffolding at the time of the accident that could have obstructed his view.

Lynn Schneider, a partner of Yorkshire and president of Schneider, testified and identified the location of the premises, but she was unfamiliar with the movant-defendant Skyline. Ms. Schneider testified that she did not recall whether there was scaffolding installed at the premises, and whether there was any netting, signs or mats attached to the scaffolding outside the premises on the date of the accident.

Skyline's deposition testimony was provided by Ibraim Redza, the principal and president of Skyline. He testified that his duties as principal and president included measuring prospective scaffolding jobs, pricing jobs and inspecting the scaffolding once it was installed. Mr. Redza testified that he was personally familiar with the sidewalk shed installed at the premises. Mr. Redza

testified that movant-defendant Skyline and co-defendant DF entered into a proposed contract concerning the sidewalk shed's rental and installation as of February 3, 2012. Mr. Redza testified that the proposed contract's terms and conditions expressly stated that at no time could the sidewalk area or scaffolding be altered, removed or deviated from its original installation, and such alterations include attaching signage to the scaffolding and sidewalk shed. The proposed terms and conditions further provided that DF would inspect, maintain and keep equipment in a safe condition. Mr. Redza also testified that he personally participated in the installation of the scaffolding, inspected the installation upon completion, and confirmed that the installation conformed with the proposal and schematic drawings drafted and submitted to the New York City Department of Buildings. Mr. Redza testified that the movant-defendant Skyline did not install the Jersey barriers, gates, mirrors, stop or yield signs, mesh, netting or other items at or near the sidewalk shed.

Andrew Pramberger, a field engineer for co-defendant Skanska, testified Skanska was assigned to the MTA Capital Construction project at the 86th Street Subway station which involved the construction of the Second Avenue subway line. Mr. Pramberger testified that this was a joint venture for co-defendants, Skanska and Traylor. Mr. Pramberger admitted that Skanska installed the Jersey barriers located on the sidewalk bordering the entrance to the Yorkshire driveway. Mr. Pramberger also testified that Skanska installed 6-foot chain link fencing panes on top of the Jersey barriers and maintained noise blankets to the fencing in accordance with contractual obligations of the project. Further, Mr. Pramberger testified that Skanska's noise blankets were not attached to the sidewalk shed, but the chain link fence was attached to the shed with a tie wire. Mr. Pramberger testified Skanska also installed various signage, including a stop sign and a yield sign, convex mirrors and crosswalk stripping at the entrance to the driveway. Mr. Pramberger testified Skanska inspected and maintained the condition of signage and mirrors on a weekly or bi-weekly basis. Mr. Pramberger testified that there were records of the subject installations made by co-defendants, Skanska and Traylor. Mr. Pramberger also stated that Skanska never consulted the movant-defendant Skyline regarding the attachments Skanska made on or near the sidewalk shed.

Altogether, the movant-defendant Skyline argues that based on the evidence as stated herein, that Skyline is entitled to summary judgment because Skyline is not liable to plaintiff as a matter of law. Skyline contends that plaintiff expressly testified that he was not distracted by the sidewalk shed prior to the accident, that Skyline demonstrated that it did not install or affix any materials which would have distracted plaintiff, and that Skanska admittedly installed these materials near or on the sidewalk shed, without Skyline's prior knowledge or consent. Further, the movant-defendant Skyline seeks the dismissal of all cross claims brought by co-defendants, which are based upon indemnification and contribution. The movant-defendant Skyline contends that since Skyline is not negligent, then Skyline is not liable to the co-defendants seeking any relief in this action.

The plaintiff filed opposition to the motion. Plaintiff also argues that granting this motion would be premature because discovery is incomplete, and the note of issue has not yet been filed in this action. Plaintiff argues that there is an issue fact as to whether Skyline properly inspected

the scaffolding subsequent to its installation. Plaintiff argues that Skyline failed to annex an assigned copy of its proposed contract with DF. According to plaintiff's deposition testimony, plaintiff stated that he looked for approaching vehicles prior to entering the driveway entrance, and he could not determine whether the scaffolding, mesh or netting obscured his vision prior to the accident. Plaintiff submits an expert witness affidavit from Frank Susino, an engineer who investigated the premises after the accident. Plaintiff contends that Mr. Susino raises an issue as to the installation of mirrors and whether Skyline had installed them prior to the accident.

Co-defendants, Skanska and Traylor also oppose the motion on various grounds. Skanska and Traylor argue, *inter alia*, that the motion is premature because discovery has not been completed. They also argue that the motion is procedurally defective because the movant-defendant Skyline failed to annex their cross claim to the moving papers and failed to submit executed copies of the deposition testimonies. Skanska and Traylor also contend that the facts support summary judgment dismissing claims against Skanska and Traylor, and they argue that they do not owe a duty of due care to plaintiff. They submit with their moving papers an affidavit from C. Bruce Gambardella, an expert witness who concludes that Skanska and Traylor were not negligent on the basis that Skanska properly performed its contractual duties; that Skanska's installations did not obstruct plaintiff's vision prior to the accident, and actually minimized the risks to pedestrians, and that co-defendant Uddin's activities as a driver was the proximate cause of plaintiff's injuries. Skanska and Traylor argue that Skanska did not consult the movant-defendant Skyline about its installations because Skanska was not contractually obligated to do so. They also argue that Skanska had properly coordinated its activities with co-defendant Yorkshire for the duration of its project.

Co-defendants, Yorkshire and Schneider also submitted opposition to the motion, and argue, *inter alia*, that there is an issue of fact as to whether Skyline properly maintained the sidewalk shed. Yorkshire and Schneider argue that during plaintiff's deposition, plaintiff could not recall whether there was fencing or mesh at the location prior to the accident and the plaintiff could not decide what obscured his vision at that time. They contend that Mr. Redza testified that he did not recall whether Skyline installed material with orange stripes that hung from the sidewalk shed, and Redza did not recall receiving complaints about the scaffolding prior to the accident.

Co-defendants, Uddin and Neal Taxi also oppose the motion based on the issues raised in the parties' deposition testimonies. Uddin and Neal Taxi argue that plaintiff testified that his view was obscured by the netting, fencing and scaffolding on the premises. They contend that Mr. Redza testified that materials used that allegedly obscured plaintiff's vision could have been installed by the movant-defendant Skyline. Uddin and Neal Taxi argue that this raises an issue of fact regarding the installation of obscuring material on the premises.

In reply to plaintiff's opposition, the movant-defendant Skyline argues that it submitted a signed copy of the proposed contract with its moving papers. Skyline argues that summary judgment can be appropriate before a note of issue has been filed. Further, Skyline submits that plaintiff actually testified that he did not stop first at the Jersey barrier to see if any vehicles were entering the driveway area. According to Skyline, plaintiff expressly testified that he was not

obstructed by the scaffolding before the accident. Skyline contends that co-defendant Skanska installed the mirrors because Skyline was not contractually obligated to install them. Skyline also contends that it had no obligation to inspect the scaffolding because DF was contractually obligated to make inspections.

In reply to co-defendants Skanska and Traylor's opposition, Skyline argues that it properly annexed their cross claims to its moving papers. Skyline also argues that Skanska installed all of the materials near or on the sidewalk shed that has been objected to by plaintiff.

In reply to co-defendants Yorkshire and Schneider's opposition, Skyline argues that Mr. Redza testified that there was nothing wrong with the sidewalk shed upon the completion of the installation and that DF was thereafter contractually obligated to maintain the sidewalk shed. Skyline also argues that Mr. Redza testified that he received no complaints about the scaffolding prior to the subject accident.

In reply to co-defendants Uddin and Neal Taxi's opposition, Skyline contends that plaintiff testified that he could not recall whether there was mesh or netting that obscured his vision but testified that the scaffolding did not obscure his view. Further, Skyline contends that it did not install any of the materials as alleged in the complaint.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v. Hyman*, 43 A.D.3d 374, 375 (1st Dep't 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment' [internal citation omitted]." *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [internal citation omitted]." *Kershaw v. Hospital for Special Services*, 114 A.D.3d 75, 81 (1st Dep't 2013). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of act requiring a trial." *Id.* at 82.

In this personal injury action, the named defendants are allegedly liable for acts of negligence resulting in plaintiff's injuries. The issue raised by the movant-defendant Skyline is there was no duty owed to plaintiff, which would not merit a negligence cause of action. "The threshold question in any negligence action is whether the alleged tortfeasor owes a duty to the injured party, and the existence and scope of that duty is a legal question for the courts to determine." *Shelia C. v. Povich*, 11 A.D.3d 120, 125 (1st Dep't 2004).

The movant-defendant Skyline claims not to be an owner or lessee of the premises. Here, it is undisputed that Skyline was DF's subcontractor at the time of the accident. Plaintiff is not a party or third-party beneficiary to the contract between DF and Skyline. In support of the motion, Skyline references the case, *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 (2002), where the Court of Appeals concluded that, as a matter of policy, it had declined to impose tort liability in favor of a third-party based solely on a contractual obligation. However, the Court of Appeals also decided that there were situations where tort liability imposed in favor of third parties

would be appropriate. These situations include when the allegedly negligent party launched a force or instrument of harm against plaintiff; when plaintiff detrimentally relied upon the allegedly negligent party's continued performance of contractual duties; and when the allegedly negligent party entirely displaced the other party to the contract with respect to maintaining the premises.

Here, the movant-defendant Skyline has demonstrated that Skyline certainly did not launch a force or instrument against plaintiff. Although, plaintiff did not know of Skyline prior to the accident and could not have relied on its continued performance, there is no evidence that Skyline entirely displaced DF's contractual obligation to maintain the subway shed. The court considered the arguments presented and determined that Skyline did submit a copy of a signed proposed contract with DF, which was annexed with the terms and conditions provision. The provision of said contract expressly states that DF, the contractor, is the party designated to inspect and maintain the sidewalk shed during the duration of the work. Pursuant to this provision, Skyline did not regularly maintain or inspect the sidewalk shed and was not obligated to do so. Therefore, this court finds that the movant-defendant Skyline had no duty of due care towards plaintiff, which would not merit a negligence cause of action against the movant-defendant because when there is no duty, there can be no breach of that duty. Further, this court finds it appropriate to dismiss the cross claims.

Accordingly, it is hereby

ORDERED that defendant Skyline Scaffolding, Inc.'s motion for summary judgment to dismiss the complaint made against said defendant is **GRANTED**, and the complaint and cross claims are **DISMISSED** with costs and disbursements to defendant Skyline Scaffolding, Inc. as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered.

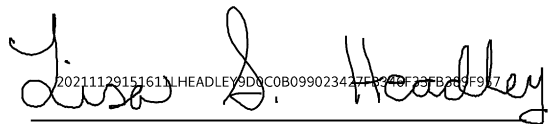
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry, the movant-defendant shall serve a copy of this decision/order upon all parties with notice of entry; and it is further

This constitutes the Decision and Order of the Court.

11/26/2021

DATE



LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE