

Richardson v Restani Constr. Corp.
2023 NY Slip Op 30439(U)
February 10, 2023
Supreme Court, New York County
Docket Number: Index No. 159277/2020
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

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LEROY RICHARDSON and LAURA WEBSTER A/K/A
LAURA RICHARDSON,

Plaintiffs,

- v -

RESTANI CONSTRUCTION CORP, 170 VAN BRUNT
STREET, LLC, JAM PROJECTS, LLC, and JAM
PROJECTS, INC.

Defendants.

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INDEX NO. 159277/2020

MOTION DATE 03/15/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 61

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

In this personal injury action, defendant Restani Construction Corp. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claim brought against it by defendant Van Brunt Street, LLC. Plaintiffs oppose.

Background Information and Procedural History

Plaintiff Richardson alleges that he was injured on August 28, 2017 at approximately 8:45 p.m. when he tripped and fell on a cracked, uneven and depressed or uncovered hole in the roadway or parking lot adjacent to the premises located at 95 Bowne Street a/k/a 62 Imlay Street a/k/a 100 Imlay Street and/or 75 Bowne Street in Brooklyn, New York (the Premises) (NYSCEF 39). Plaintiffs allege that defendants owned, operated, controlled, managed, inspected, maintained or supervised the Premises, and that they caused and created or permitted the alleged defect to exist on the Premises (*id.*).

Plaintiffs commenced this action against Restani on October 30, 2020 by filing a summons and complaint (NYSCEF 49), and later amended the complaint to plead claims against the other defendants. Restani interposed an answer asserting a cross claim against defendants, as did Van Brunt. The complaint and cross claim against Van Brunt were dismissed (NYSCEF 58).

Restani now moves for summary judgment on the ground that it did not owe a duty of care to plaintiffs because it did not perform any work at or near the Premises before Richardson's accident. Restani's project manager, Vaccaro, avers that prior to the date of the accident, nonparty New York City Department of Transportation (DOT) had retained Restani to mill certain roadways located in Brooklyn, Queens and Staten Island (NYSCEF 38). As pertinent here, DOT issued Task Order #K12 dated July 5, 2018 to Restani, directing it to mill the roadway on Imlay Street between Summit and Pioneer Streets (NYSCEF 43), and issued several street opening permits for that area in effect from July 11 to October 8, 2018 (NYSCEF 42). The accident location identified in the complaint falls within that area (NYSCEF 38).

However, on July 19, 2018, DOT issued a revised Task Order #K12 removing Imlay Street from the list of roadways to be milled (NYSCEF 45). As a result, Restani performed no work on Imlay Street (NYSCEF 38). Vaccaro avers that he reviewed photographs of the accident location that had been taken by plaintiffs' counsel, and he opines that the photographs do not depict the area on Imlay Street where Restani's work was to take place, but instead depict the parking lot within the port area leading to the Brooklyn Cruise Terminal (*id.*). Moreover, the Task Order is dated more than one year after plaintiff's accident.

Plaintiffs, in response, maintain that the motion is premature as no discovery has been exchanged and depositions have not been conducted.

Discussion

A party moving for summary judgment under CPLR 3212 “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

Where a contractor establishes that it did not cause or create the allegedly dangerous condition on which the plaintiff fell, summary judgment in favor of that contractor is appropriate (*see Camacho v City of New York*, 135 AD3d 482, 482 [1st Dept 2016]; *Levine v City of New York*, 101 AD3d 419, 420 [1st Dept 2012]). Restani has demonstrated that it did not cause or create the condition on which Richardson allegedly fell and that there was no connection between its proposed milling work and that condition (*see McDaniel v City of New York*, 209 AD3d 409, 410 [1st Dept 2022]).

Plaintiffs fail to establish that the motion should be denied as premature, absent “an affidavit demonstrating the existence of an issue of fact . . . [or] any attempt to show that facts essential to justify their opposition to the motion existed that could not be stated” without the exchange of discovery or depositions of relevant witnesses (*Safier v Saggio Rest. Inc.*, 151 AD3d 543, 544 [1st Dept 2017]). Nor have plaintiffs demonstrated what discovery was needed to

oppose the motion or what additional discovery would reveal (*Sangare v 985 Bruckner Blvd. Hous. Dev. Fund. Corp.*, — AD3d —, 2023 NY Slip Op 00290, *1 [1st Dept 2023]).

The court records reflect that plaintiffs either failed to serve the remaining defendants Jam Projects, LLC and Jam Projects, Inc. with the amended complaint within 120 days of its filing (CPLR 306-b) or, if they were served within that timeframe, that plaintiffs failed to move for a default judgment against them within one year of their default as required by CPLR 3215(c). In either case, plaintiffs’ claims against these defendants must be dismissed.

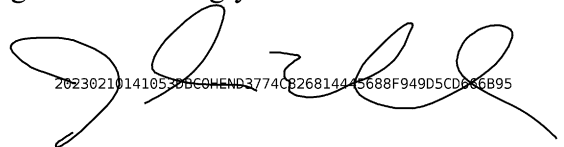
Accordingly, it is

ORDERED that the motion for summary judgment of defendant Restani Construction Corp. is granted and the complaint is dismissed against it; and it is further

ORDERED that the cross claim against defendant Restani Construction Corp. by defendant 170 Van Brunt Street, LLC is dismissed; and it is further

ORDERED that any claims and cross claims against defendants Jam Projects, LLC and Jam Projects, Inc. are dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.



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DAVID B. COHEN, J.S.C.

2/10/2023

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: