SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ANNA LASCAR,

Plaintiff,

- v -

DANELLA CONSTRUCTION OF NY, INC.,NICO ASPHALT PAVING INC.,CITYWIDE PAVING INCORPORATED FORMALLY KNOWN AS NICO ASPHALT PAVING INC.,CITYWIDE PAVING, INC.,THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Defendants.

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INDEX NO. 158468/2022

MOTION DATE 01/18/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS.

In the underlying action, plaintiff ANNA LASCAR alleges that on October 18, 2021, she sustained injuries due to a defective condition on the street in front of East 65th Street near the intersection of 5th Avenue and adjacent to 838 5th Avenue in Manhattan, New York (the "subject premises"). Specifically, plaintiff alleges that the defective condition was in an area on the street where the pavement had "rolled up" to the curb (photos attached to plaintiff's Notice of Claim can be found at NYSCEF Doc. 53, Exhibit B).

This action was filed against the following defendants: The City Of New York (the "City"), Consolidated Edison Company Of New York, Inc. ("Con Ed"), Danella Construction Of NY, Inc. ("Danellla"); and against Nico Asphalt Paving Inc., Citywide Paving Incorporated Formally Known As Nico Asphalt Paving Inc., and Citywide Paving, Inc. (which shall be referred to, collectively, as "Nico").

Now pending before the court is a motion by Danella seeking an order:

(1) pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(1) and 3211(a)(7), granting Danella's motion to dismiss (which Danella filed in lieu of filing an Answer) because Danella performed no work at the premises where the accident is alleged to have occurred; or, alternatively;

(2) pursuant to CPLR 3211(c), treating this motion as one for summary judgment, and upon treating this motion as one for summary judgment, and upon the documentation submitted as part of this motion, granting Danella summary judgment.

Standard for Summary Judgment

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 [Sup. Ct. App. Div. 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 [Sup. Ct. App. Div. 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]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction […] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Danella argues that it last performed work at the subject premises approximately six years prior to plaintiff's incident, and at the time of the accident, Danella did not control, manage, maintain or supervise the subject premises. Danella argues that the work it performed did not involve any work on the street, where plaintiff fell, and that additional work was performed by an unknown party at the subject premises subsequent to the work performed by Danella.

In support of its arguments, Danella submitted, *inter alia*, a sworn Affidavit by Charles Agro, (NYSCEF Doc. 29), a Superintendent in the Steam Operations department for Danella.

In support of its argument that subsequent work was performed on the subject premises, Danella submitted a series of Google Maps images that show the area where plaintiff fell, from May 2016 (NYSCEF Doc. 36); October 2017 (NYSCEF Doc. 37); May 2019 (NYSCEF Doc. 38); and November 2019 (NYSCEF Doc. 39). Plaintiff argues that these photos show that the defect that plaintiff claims caused her to fall was not present until sometime in 2019, which was more than three years after Danella had finished its work at the subject premises.

Opposition papers were filed by plaintiff and by Nico.

Plaintiff argues that the evidentiary materials submitted by Danella do not conclusively prove that Danella could not be found vicariously liable under a theory of r*espondeat superior*. Plaintiff argues that the Subcontract (NYSCEF Doc. 53, Exhibit E) annexed to Mr. Agro's Affidavit shows that Danella may have maintained control over the method and means by which Nico was to perform its work, thereby raising issues of fact and necessitating the need for further discovery on this issue. Plaintiff also argues that Danella's motion is premature, as plaintiff should be afforded an opportunity to depose the defendants to clarify the specifics of the work Danella performed, and the control Danella had over the method and means by which the work was performed by Nico.

Nico argues that this motion is premature, as discovery has not begun, a bill of particulars has not been provided, there has not yet been any paper discovery exchanged by the parties, and depositions have not been held. Nico argues that it should be afforded an opportunity to discern, among other things, when Danella's work finished, and the extent to which that work was completed.

In Reply, Danella argues that it cannot be held vicariously liable for Nico's actions, because: (i) Nico was not on Danella's payroll; (ii) no exclusivity clause denied Nico its right and opportunity to engage in other employment outside the agreement with Danella; (iii) Nico controlled its workforce and material, as the Subcontract showed that Nico was penalized if it failed to make due payments for its laborers or materials, and the Subcontract also contained a clause that states, *"Subcontractor shall also be fully responsible for (1) any defective or improper work or material, (2) any damages caused thereby, and (3) the repair or replacement of any such work or materials […]"*; and (iv) Con Edison directed the Subcontract's inception, performance, and termination. In sum, plaintiff argues, "Thus, NICO did not perform work for DANELLA but instead for Con Edison."

Conclusions of Law

As noted above, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact, and on a motion to dismiss pursuant to CPLR 3211, the court is to accord plaintiff the benefit of every possible favorable inference. Here, the court finds that Danella has failed to meet its burden of proof under CPLR 3211 or 3212.

There is no dispute that after Danella performed its repairs on the steam system in 2016, the subsequent paving work to the street was carried out by Nico, and not by Danella directly. However, Danella has not eliminated questions of fact regarding its involvement in Nico's work and whether Danella could be held vicariously responsible under a theory of *respondeat superior*. First, the Affidavit of Mr. Argo is contradictory, as it states, that Nico "subcontracted from Danella to perform the asphalt pavement replacement services," but also states, "Danella did not hire any subcontractors for pavement of the Premises." More importantly, Danella's argument that "Nico did not perform work for DANELLA but instead for Con Edison" is belied by the Subcontract itself (NYSCEF Doc. 53, Exhibit E), which is titled, "SUBCONTRACT AGREEMENT BETWEEN DANELLA CONSTRUCTION OF NY, INC. AND NICO ASPHALT PAVING INC." The body of the Subcontract also includes the following provision:

> 5. Subcontractor further agrees to immediately ***comply with all orders and directions given by Contractor***, irrespective of whether or not Subcontractor shall dispute the same in any particular case. Subcontractor shall not employ men or means, or use materials, which may cause strikes or other labor troubles by workmen employed by Contractor or any other Contractor, Subcontractor or person performing work in connection with the Prime Contract, ***and shall conform to the labor policies of Contractor***. [emphasis added]

Notably, Nico does not claim to have worked completely independent of Danella. In fact, Nico opposes this motion.

Further, with respect to Danella's arguments about the Google Maps photos, it is not immediately clear on this record that the subject defect was not created until 2019. The court finds that further discovery, including depositions, are necessary for the parties to determine, among other things, the extent of Danella's involvement, if any, with Nico's work and when the subject defect came to exist.

Conclusion

For the reasons stated above, it is hereby:

ORDERED that Danella's motion is DENIED, without prejudice, as premature; and it is further

ORDERED that Danella may re-file this motion, at is election, after relevant discovery has been conducted.

5/18/2023
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**