

**Larson v 245 E. 19 Realty LLC**

2024 NY Slip Op 34448(U)

December 19, 2024

Supreme Court, New York County

Docket Number: Index No. 154475/2020

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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ANN LARSON,

Plaintiff,

- v -

245 E. 19 REALTY LLC, SW MANAGEMENT LLC, GOTHAM ANIMAL CLINIC P.C., NEW PACE CONTRACTING CORP.

Defendant.

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INDEX NO. 154475/2020

05/10/2024, 05/10/2024, 05/11/2024

MOTION DATE

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 175, 177, 179, 180, 181, 182, 183, 184, 189, 193, 194, 195

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 176, 185, 188, 190, 192

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 178, 186, 187, 191

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

Upon the foregoing documents, it is

In this slip and fall action defendant, New Pace Contracting Corp, ("New Pace") moves for summary judgment pursuant to CPLR § 3212 (MS # 3) to dismiss plaintiff's claims and co-defendants Gotham Animal Clinic P.C. ("Gotham"), 245 E 19 Realty LLC ("245") and SW Management LLC ("SW") cross-claims as against it. Gotham also moves for summary judgment pursuant to CPLR § 3212 (MS #4) to dismiss the complaint and the cross-claims as against it. Finally, 245 and SW move for summary judgment pursuant to CPLR § 3212 (MS #5) on their contractual indemnification, common law indemnification, and breach of contract for failure to procure insurance claims as against New Pace and Gotham.

*MS #3 New Pace's Summary Judgment Motion to Dismiss*

New Pace argues that the complaint must be dismissed because the alleged dangerous condition is trivial and thus non-actionable as a matter of law. When a “defect is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence, and yet an accident occurs that is traceable to the defect, there is no liability” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 81 [2015]). A “finding of triviality, as a matter of law, must be based on all the specific facts and circumstances of the case, not size alone” (*Suarez v Emerald 115 Mosholu LLC*, 164 AD3d 1130, 1131 [1st Dept 2018]). Thus, “whether a dangerous or defective condition exists on the property of another so as to create liability ... is generally a question of fact for the jury” (*id.*).

Here, plaintiff alleges that she was caused to fall due to the sand and grit which was on the sidewalk allegedly caused by New Pace's construction. Plaintiff testified that the “grit” was a fine sand covering the newly installed sidewalk causing it to be slippery (NYSCEF Doc No 146 at 74:19 – 75:9). Further she testified that the “grit” was the same color as the sidewalk so she could not see it until she actually slipped, although she also testified that she could feel it under her shoes earlier in the day (*id.* at 101:20 – 102:25). Considering plaintiff's allegations that the grit was covering the entire sidewalk and was difficult to see, it cannot be determined as a matter of law that the alleged defect was trivial and summary judgment will be denied on these grounds.

New Pace also argues that it owed no duty to plaintiff as generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). However, there is a triable issue of fact as to whether New Pace “launche[ds] an instrument of harm [by] negligently create[ing] or

exacerbat[ing] a dangerous condition” which can result in liability for any resulting injuries (*id.* at 142). While New Pace argues there is no evidence that their construction work caused the alleged condition, plaintiff averred that she observed New Pace performing construction in the area the days before her accident and this circumstantial evidence is sufficient to raise a question of fact as to New Pace’s creation of the allegedly dangerous condition.

Additionally, the portion of New Pace’s motion that seeks to dismiss the indemnification must be denied as New Pace has not established that it is free from negligence, or that the alleged dangerous condition did not arise from their work. Accordingly, New Pace’s summary judgment motion must be denied.

*MS # 4 Gotham’s Summary Judgment Motion to Dismiss*

Gotham argues that the complaint must be dismissed as against it, because it did not owe a duty to the plaintiff. While, plaintiff does not oppose this motion, co-defendants New Pace, 245, and SW submit opposition. Gotham argues that it was not responsible for clearing the “grit” which allegedly cause plaintiff’s injuries. However, Gotham’s lease states “If the premises are situated on the ground floor of building, Tenant thereof shall further, at Tenant’s expense, keep the sidewalks and curb in front of the said premises clean and free from, ice, snow, etc.” (NYSCEF Doc No 163).

While Gotham argues that even if this duty extended to the grit that allegedly caused plaintiff’s injuries, it did not have actual or constructive notice of the condition. But plaintiff’s affidavit states that she felt the grit with her feet earlier in the morning on the day of her accident (NYSCEF Doc No 184 ¶ 7). Since, plaintiff’s accident occurred late in the day at roughly 3:30 PM (*id.* at ¶ 8), there is an issue of fact as to whether the condition “exist[ed] for a sufficient length of time prior to [the] accident to permit a defendant[] to discover and remedy it”, thus

establishing constructive notice (*Utica Mut. Ins. Co. v Brooklyn Navy Yard Dev. Corp.*, 131 AD3d 470, 472 [2d Dept 2015]).

Further, the portion of Gotham's motion seeking dismissal of the indemnification and contribution cross-claims must also be denied as Gotham has not established that it is free from negligence. Accordingly, Gotham's summary judgment must be denied.

*MS #5 245 and SW's Summary Judgment Motion to Dismiss Cross-Claims*

245 and SW argue that they are entitled to summary judgment on their contractual indemnification, common law indemnification, and breach of contract for failure to procure insurance claims as against New Pace and Gotham. As for the common law indemnification claims, summary judgment must be denied because "[i]n order to establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor ... was responsible for negligence that contributed to the accident" (*Zubaidi v Hasbani*, 136 AD3d 703, 704 [2d Dept 2016]), and here 245 and SW have not established that either Gotham or New Pace was negligent.

As for the contractual indemnification claims, this too must be denied since "[t]he right to contractual indemnification depends upon the specific language of the contract" (*Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]); and here there are still outstanding questions of fact that will determine whether the indemnity provisions in the contracts between the co-defendants were triggered.

However, as for the breach of contract for a failure to procure insurance claims, it is undisputed that both New Pace (NYSCEF Doc No 168) and Gotham (NYSCEF Doc No 163) were required to name SW and 245 as additional insured under their contracts but have failed to

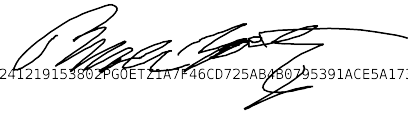
do so. Accordingly, summary judgment will be granted to SW and 245 on these cross-claims and otherwise denied.

Accordingly it is,

ORDERED that New Pace’s motion for summary judgment (MS #3) to dismiss the complaint and the counterclaims against it is denied; and it is further

ORDERED that Gotham’s motion for summary judgment (MS #4) to dismiss the complaint and the counterclaims as against it is denied; and it is further

ORDERED that the portion of SW and 245’s motion (MS #5) seeking summary judgment on their the breach of contract cross-claims as against New Pace and Gotham is granted and the motion is otherwise denied.

  
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<u>12/19/2024</u> DATE					<u>PAUL A. GOETZ, J.S.C.</u>		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE