

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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KEVIN PETERS,

Index No. 704967/2021

Plaintiff,

-against-

Part 6

Motion Date: May 9, 2022

THE CITY OF NEW YORK, 166 NORTHERN
REALTY CORP., and ICM GLOBAL DESIGN, INC.,

Calendar No. 26

Sequence No. 1

Defendants.

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The following papers numbered 1 to 13 read on this motion by defendant ICM GLOBAL DESIGN, INC for dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3211(a)(1) and §3211(a)(7), or alternatively for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against defendant ICM GLOBAL DESIGN, INC pursuant to CPLR §3211(c) and §3212(c).

Papers

Numbered

Notice of Motion, Affirmation, Memorandum, Exhibits.....1-5

Affidavit in Opposition, Memorandum, Exhibits.....6-9

Reply Affirmation, Memorandum, Exhibits.....10-13

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant ICM Global Design, Inc's (hereinafter referred to as "ICM Global") motion for dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3211(a)(1) and §3211(a)(7) or alternatively for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3211(c) and §3212(c) is denied as defendant ICM Global failed to establish no dispute exists regarding whether it performed work on the sidewalk that caused plaintiff's accident, and there is significant discovery outstanding that precludes a finding that there are no issues of fact in dispute. (*See Hawana v. Carbuccia*, 164 A.D.3d 563 [2d Dept. 2018].)

Plaintiff commenced this action for personal injuries sustained on September 28, 2020 at 5:30 am when he tripped and fell on the sidewalk abutting the premises located at 11 Northern Boulevard in Queens, New York. Plaintiff filed the Summons and Complaint on March 3, 2021 and issue was joined on April 22, 2021. Defendant City filed an Answer with cross-claims against co-defendants 166 Northern Realty Corp., (hereinafter referred to as "Northern Realty") and ICM

Global on April 30, 2021.

Defendant ICM Global presented the pleadings, email exchanges between the parties, a partially executed stipulation of discontinuance, a photograph of where the accident allegedly happened, and an affidavit of merit from Sam Yung, President and Chief Executive Officer of ICM in support of its motion. Sam Yung articulated defendant ICM Global is a general contracting company that contracted with co-defendant Northern Realty, which is the owner of the premises at the accident location. Sam Yung further articulated the scope of work was limited to interior work only and defendant ICM Global did not perform any work on the exterior grounds or the sidewalk where plaintiff's accident occurred. Based upon the evidence presented, defendant ICM Global argues it is entitled to dismissal of all claims and cross-claims against it, as it could not be liable for any sidewalk defect that caused plaintiff's accident.

Co-defendant Northern Realty opposed the motion, and presented the contract between ICM Global and Northern Realty, and an affidavit of merit from Holman Lam, an officer of Northern Realty. Holman Lam articulated that in fulfillment of the contract, defendant ICM Global hired a subcontractor KJK Electric, Inc., to perform work with Con Edison in and around the subject sidewalks. The contract indicates the pedestrian sidewalk falls within the scope of work and may have been performed at the location where plaintiff fell. Based upon the evidence, co-defendant Northern Realty argues that it raised an issue of fact through the contract and Lam affidavit that ICM Global's subcontractor may have performed work on the sidewalk where plaintiff's injury occurred, potentially imputing liability to defendant ICM Global.

On a motion to dismiss, the standard is whether the facts as alleged fit within any cognizable legal theory. (*Katz v. Hampton Hills Assoc. Gen. Partnership*, 186 A.D.3d 688, 690 [2d Dept. 2020].) The court must determine whether the pleadings state a cause of action, not whether the proponent of the pleading has a cause of action. (*Oluwo v. Sutton*, 2022 N.Y. Slip Op. 03734 at 3 [2d Dept. 6/8/2022].) In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Id.*) "A motion to dismiss merely addresses the adequacy of the pleadings, and does not reach the substantive merits of a party's cause of action." (*Id.*) "When the moving party submits evidentiary material in support of [the] motion, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one." (*Houtenbos v. Fordune Assn., Inc.*, 200 A.d.3d 662, 664 [2d Dept. 2021].) "However, a motion to dismiss pursuant to CPLR §3211(a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." (*Id.*)

"While affidavits may be considered, if the motion has not been converted to a CPLR

§3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims.” (*Nonnon v. City of New York*, 9 N.Y.3d 825, 827 [2007] citing to *Rovello v. Orfino Realty, Co.*, 40 N.Y.2d 633, 635-636 [1979].) “By contract, a motion for summary judgment, which seeks a determination that there are no material issues of fact for trial, assumes a complete evidentiary record.” (*Id.*)

CPLR §3212(f) permits a court to deny a motion for summary judgment where it appears that the facts essential to oppose the motion exist but cannot then be stated.....and the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. (*Sepulveda v. Cammeby’s Mgt. Co., LLC*, 119 A.D.3d 927 [2d Dept. 2014].)

Defendant ICM Global’s motion to dismiss is denied, as defendant ICM Global failed to establish no significant dispute exists regarding whether it performed work on the sidewalk that caused plaintiff’s accident. Defendant ICM Global and co-defendant Northern Realty presented contradictory affidavits regarding the scope of ICM Global’s work. While defendant ICM Global’s affidavit indicated they did not perform any exterior work or work on the sidewalk, co-defendant Northern Realty’s affidavit demonstrated the sidewalk was included in the scope of defendant ICM Global’s work. The Lam affidavit further demonstrated ICM Global subcontracted an electrical company that performed work on the sidewalk where plaintiff fell. (*See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 [1993].) The contract between defendant ICM Global and co-defendant Northern Realty is silent with respect to whether ICM Global is responsible for any subcontractor’s negligence. It is noted neither party presented a contract or agreement between defendant ICM Global and the subcontractor electrical company, and therefore defendant ICMS Global failed to eliminate all issues with regard to its liability for the sidewalk.

Pursuant to CPLR 3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In a premises liability case, a defendant real property owner, or a party in possession or

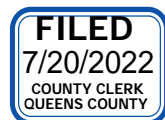
control of real property who moves for summary judgment can establish its prima facie entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon Enters., Inc.*, 172 A.D.3d 678-679 [2d Dept. 2019].)

Defendant ICM Global's motion for summary judgment is denied as premature, as there is significant discovery outstanding that precludes a finding that there are no issues of fact in dispute. (*See Gruenfeld v. City of New Rochelle*, 72 A.D.3d 1025 [2d Dept. 2010].) Defendant ICM Global and co-defendant Northern Realty submitted affidavits, but did not submit any deposition testimony as the depositions have been adjourned and implied they have not been held to date. As depositions may provide greater understanding of what entities were responsible for sidewalk maintenance, defendant ICM Global's motion for summary judgment is denied as premature and may be renewed upon completion of depositions. (*See Knapp v. Town of Hempstead*, 130 A.D.3d 579 [2d Dept. 2015].)

Accordingly, defendant ICM Global Design, Inc.'s motion for dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3211(a)(1) and §3211(a)(7) or alternatively for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3211(c) and §3212(c) is denied.

This constitutes the decision and Order of the Court.

Dated: July 15, 2022



Tracy Catapano-Fox
Tracy Catapano-Fox, J.S.C.