SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

KEVIN PETERS, Index No.: 704967/2021

Plaintiff,

-against-

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

Defendants

----------X

MEMORANDUM OF LAW

Brody, O'Connor & O'Connor, Esqs.
535 8th Avenue, Floor 19
New York, New York 10018
Telephone: (212) 233-2505

Attorneys for the Defendant,
ICM GLOBAL DESIGN, INC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

The within Memorandum of Law is submitted in support of the instant Motion filed on behalf of Defendant, ICM GLOBAL DESIGN, INC. (hereinafter "ICM"), which seeks an Order:

(a) that this Court so order the discontinuance of Plaintiff's claims and dismiss the within action in its entirety including all cross-claims asserted by co-defendants; or alternatively

(b) converting the Motion to a Summary Judgment Motion pursuant to CPLR §3212(b) and §3212(c) dismissing the case as against ICM;

(c) together with such other and/or further relief as to this Court may seem just, proper and equitable.

PRELIMINARY STATEMENT

The Complaint in the within action alleges that a sidewalk abutting the premises located at 11 Northern Boulevard, in the County of Queens, and State of New York (hereinafter, "subject premises") had a defective condition which caused plaintiff, on September 28, 2020, to trip, fall and sustain injuries. Defendant ICM did not own the premises adjacent to the accident location, nor did ICM operate, manage, control, supervise or maintain the subject premises in any manner at any time prior to or related to the time of the incident. ICM, pursuant to certain agreements with Defendant, 166 NORTHERN REALTY CORP, performed interior construction work and secured the property line when work at the project stopped. The affidavits annexed to the moving papers, conclusively establish that ICM was never a proper party to the within action, as it never controlled, maintained nor performed work on the sidewalk.

On December 6, 2021 a Stipulation of Discontinuance dated November 29, 2021, was executed by both Defendant ICM and Plaintiff. The same Stipulation was forwarded to Counsel for the City of New York and Counsel for 166 Northern Realty Corp. (hereinafter "Owner"). To date, the City and Owner have not responded in any form with regards to the Stipulation.

Accordingly, for the reasons set forth herein, this Court must so order the discontinuance of Plaintiff's claims and dismiss the complaint as against ICM for the same reasons.

FACTS

Plaintiff's Allegations

Plaintiff alleged he sustained an injury on September 28, 2020, at 5:30 A.M. while he was walking on a sidewalk abutting the premises located at 11 Northern Boulevard, Queens, New York and falling due to a defective condition that Defendants had constructive and actual notice of. See the Summons and Complaint, annexed to the Brody Affirmation as **Exhibit "A".**

As to defendant ICM, Plaintiff alleges that defendant ICM operated, managed, controlled, supervised, repaired, maintained, inspected, managed, and worked on the subject premises at the time of the incident. See **Exhibit "A"** at ¶ 41.

The Affidavit of Sam Yung

As set forth in the accompanying Affidavit of Sam Yung, President and Chief Executive Officer of ICM, Defendant ICM did not own or operate the premises where the accident allegedly happened. Further, ICM did not manage, control, supervise, maintain, inspect, or work at the subject premises in any manner related to the time of the incident. See **Exhibit "E"** at ¶14 and 16.

Ming Lam of 166 NORTHERN REALTY CORP., (hereinafter "Owner") is Owner of the subject premises at 166-11 Northern Boulevard, Queens, New York On or about February 9, 2018, ICM, as the General Contractor entered into an agreement with Owner to continue an already commenced construction project at the premises. In fact, when ICM arrived for construction, the site was already half built by a prior contractor. See **Exhibit "E"** at ¶ 7. The following month, ICM commenced construction activities by installing sheetrock to enclose the

walls of the subject premises; ICM enclosed all bathrooms of subject premises, built metal stairs from the basement leading up to the second floor, added a roof onto the premises, laid electrical systems, and the plumbing system. Finally, ICM built walls to enclose the subject premises while construction was ongoing. At no time was work was performed on the exterior grounds or the sidewalk where Plaintiff was allegedly injured on September 28, 2020. See **Exhibit "E"** at ¶8.

On or about June 14, 2018, ICM was issued a Permit via the New York City Department of Buildings for a partial demolition at the subject premises. ICM had applied for a demolition permit for repair work – specifically to fill hollow spaces with cement, in already erected walls. At no point did ICM conduct demolition work. The only reason a Permit for "demolition" was sought and issued thereon, is because it was the closest option to what ICM required; ICM specified that there exists no permit for "repair work done by prior general contractor." See **Exhibit "E"** at ¶9.

None of the work related to the permit has anything to do with the sidewalk. On or about January of 2019, ICM ended its work and awaited Owner's execution of a proposal to continue the project. See **Exhibit "E"** at ¶10. After February of 2019, ICM only entered the premises for maintenance and upkeep of the project area. Again, no work was done on the sidewalk where Plaintiff allegedly tripped and fell. See **Exhibit "E"** at ¶11. Then, on or about March 20, 2020, due to the COVID-19 pandemic, ICM halted its work, entering only to change the battery of the camera connected to the surveillance system. See **Exhibit "E"** at ¶12. The premises, not including the sidewalk, was totally enclosed by a wall at this point. Id. ICM was not involved in any work at, near, or about the premises at any proximate time to the claimed accident.

ICM was never involved in the construction, repair, or maintenance of the sidewalk, or any portion of the subject premises that abuts the street where Plaintiff alleges to have injured

himself on September 28, 2020. ICM never altered, damaged, nor repaired the sidewalk at subject premises on or before the same. No one from ICM was present at the subject premises on September 28, 2020, nor had they been at any recent time prior thereto. Moreover, Plaintiff was injured half a year after ICM halted construction and all upkeep work at the subject premises. See **Exhibit "E"** at ¶¶4, 10, and 12.

LEGAL ARGUMENT

POINT I

STANDARD FOR DETERMINING A MOTION TO DISMISS

"A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence should be granted where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law." Mawere v Landau, 130 AD3d 986, 987, 15 NYS3d 120 (2d Dept. 2015). "To constitute documentary evidence, the evidence must be unambiguous, authentic, and undeniable (Granada Condominium III Assn. v Palomino, 78 AD3d 996, 997, 913 NYS2d 668 [2010]), such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (see Prott v Lewin & Baglio, LLP, 150 AD3d 908, 55 NYS3d 98 [2017])." Phillips v Taco Bell Corp., 152 A.D.3d 806, 807, 60 N.Y.S.3d 67, 69 (2d Dept. 2017). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963, 728 N.Y.S.2d 824 (2d Dept. 2001), leave to appeal denied 97 N.Y.2d 605, 762 N.E.2d 930, 737 N.Y.S.2d 52. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively

establishing a defense as a matter of law." See Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to § 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174, 787 N.Y.S.2d 15 (1st Dept. 2004). "[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53, 618 N.Y.S.2d 820 (1st Dept. 1994) (internal citation omitted).

POINT II

THE IMMEDIATE ACTION MUST BE DISMISSED BECAUSE DEFENDANT ICM DOES NOT OWE ANY DUTY TO ANY PARTY

Prior to executing the Stipulation of Discontinuance, Plaintiff alleged a cause of action for negligence based upon Defendant ICM's breach of its duty to maintain the premises, including its abutting sidewalk that plaintiff traversed, in a reasonably safe and suitable condition. However, Defendant ICM did not own, operate, manage, control, supervise, maintain, inspect, or work at the subject premises in any manner related to the time of the incident. As ICM had no duty with respect to the premises at the time of the incident or prior thereto, it not only owed no duty to Plaintiff, but it also did not owe the City of New York and Owner any duties, either.

In order to prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his injuries. See Pulka v Edelman, 40 NY2d 781, 358 N.E.2d 1019, 390 NYS2d 393 (1976).

Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use. Rodriguez v. 5432-50 Myrtle Ave., LLC, 148 A.D.3d 947, 50 N.Y.S.3d 99 (2d Dept. 2017); Russo v Frankels Garden City Realty Co., 93 AD3d 708, 940 NYS2d 144 (2d Dept 2012); Filers v Horwitz Family Ltd. Partnership, 36 AD3d 849, 831 NYS2d 417 (2d Dept 2007). Where there is no ownership, occupancy, or control, "a party cannot be held liable for injuries caused by the dangerous or defective condition of the property." Ruffino v. New York City Tr. Auth., 55 A.D.3d 817, 865 N.Y.S.2d 667 (2d Dept. 2008) (internal quotation marks and citations omitted).

Sam Yung affirms that ICM did not work at, near, or about the subject sidewalk, controverting any claim that ICM owed the Plaintiff a duty. See Araujo v Mercer Sq. Owners Corp., 33 Misc. 3d 835, 841 (Sup. Ct. 2011) ("A defendant stands liable in negligence only for breach of a duty of care owed to the plaintiff"); Sanchez v. State of New York, 99 N.Y.2d 247, 253 (2002); *Holdampf v. A.C. & S., Inc. (In re N.Y. City Asbestos Litig.)*, 14 A.D.3d 112, 115 (App. Div. 1st Dept) ("A defendant may be held liable for negligence only when it breaches a duty of care owed to the plaintiff… In the absence of a duty running to the injured person, there can be no liability in damages…"); Strauss v Belle Realty Co., 65 N.Y.2d 399, 402 (1985); Pulka v Edelman, 40 N.Y.2d 781, 782, (1976); Lauer v City of New York, 95 N.Y.2d 95, 100, (2000).

It is irrefutably evident that ICM neither owned, operated, managed, controlled, supervised, maintained, or inspected, the subject premises where the Plaintiff's alleged accident and injuries occurred, nor was ICM engaged in construction related work on the date Plaintiff alleges the incident occurred. Moreover, ICM was not engaged in construction on the street where Plaintiff alleges he sustained his injuries. Therefore, contrary to Plaintiff's allegations, the

documentary evidence establishes that ICM did not owe a duty to Plaintiff to maintain the premises where Plaintiff walked on the date of the alleged incident.

Thus, the evidence demonstrably refutes Plaintiff's factual allegations, "conclusively establishing [ICM's] defense as a matter of law" (Goshen, 98 N.Y.2d at 326) because, where there is no ownership, occupancy or control, "a party cannot be held liable for injuries caused by the dangerous or defective condition of the property." Ruffino, 55 A.D.3d at 865. For this reason, the complaint, and any asserted cross claims, must be dismissed, promptly.

It is well settled, that a contractor hired to perform work is generally not liable in tort to a non-contracting third-party when he/she/it breaches a contract and said breach causes injury to a third-party. Stiver v. Good & fair Carting & Moving, Inc., 9 NY3d 253, 878 N.E.2d 1001, 848 N.Y.S.2d 585 (2007); Church v. Callanan Industries, Inc., 99 NY2d 104, 782 N.E.2d 50, 752 N.Y.S.2d 254 (2002); Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002); Moch v. Rensselaer Water Co., 247 NY 160, 159 N.E. 896 (1928); Bugiada v. Iko, 274 AD2d 368, 710 N.Y.S.2d 117 (2nd Dept. 2000).

A "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136, 139, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002). When there is a breach, such contractors are generally only liable to the person who hired them and are not liable to third parties for any injuries resulting from a breach of their contractual obligation. Id. Consequently, if a contractor is to be held liable for injury to a third-party, occasioned by their work, one of three scenarios must exist: (1) the contractor causes or creates the condition alleged to have caused injury; (2) the contractor is responsible for a non contracting third-party's injury when the third-party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and

actively, causes injury; and (3) when the contract is comprehensive and exclusive as to maintenance, so that due to its broadness the contractor displaces and in fact assumes the owner or possessors duty to safely maintain the premises. Church v. Callanan Industries, Inc., 99 NY2d 104, 782 N.E.2d 50, 752 N.Y.S.2d 254 (2002); and Espinal, supra. Absent these circumstances there is no liability to a contracting third party.

Here, the evidence provided "resolves all factual issues as a matter of law and definitely disposes of the [P]laintiff's claim" and the co-defendants' claims (City of New York and 166 Northern Realty Corp.). (Ozdemir, 285 A.D.2d at 961). The evidence further utterly refutes Plaintiff's and the co-defendants' factual allegations, conclusively establishing ICM's defense as a matter of law. (Goshen, 98 N.Y.2d at 326). Specifically, ICM had a limited contractual role at the site, which did not involve the sidewalk, and created no duty to any party related thereto. It was not at the site remote in time to the accident, and did not launch a force of harm which resulted in the accident.

POINT III

THIS COURT SHOULD CONVERT THE MOTION TO ONE FOR SUMMARY JUDGMENT IF NECESSARY

If one or both Defendants with to oppose the motion and keep ICM in the case, then the Court should convert the motion to a summary judgment motion. Pursuant to CPLR 3211 (c), "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion."

Here, the mere fact that ICM worked on the subject premises abutting the street Plaintiff was allegedly injured six months prior, is not a basis to keep it in a case. The mere hope that one of the Defendants could maybe, possibly, find something to refute the affidavits of three parties is not basis to oppose the motion. See, e.g. Yoo v A.C.N.C. Corp., 2015 NY Slip Op 31639[U], *6-7 [Sup Ct, NY County 2015]) ("although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent, the mere hope that further discovery will reveal the existence of a triable issue of fact, is insufficient to delay determination of the motion." Weber Chester v. Alsol Enterprises, Ltd., 95 A.D.3d 922, 943 N.Y.S.2d 761 (2d Dept. 2012). Given that ICM has absolutely nothing to do with the street Plaintiff tripped and fell on, the complaint, and any asserted cross claims, must be promptly dismissed.

Further, on December 6, 2021, ICM contacted counsel for Plaintiff, counsel for co-Defendant, the City of New York, and counsel for co-defendant, Owner, by e-mail, attaching a Stipulation for Discontinuance which Plaintiff's counsel signed and returned. See **Exhibit "F."** On the same day, Mr. Mark Fang, counsel for Owner, responded to a chain of emails confirming adjournment of depositions for December 7, 2021, the following day. ICM stated its position of awaiting co-Defendants' responses regarding the Stipulation for Discontinuance.

The next day, Plaintiff's counsel by its Calendar Coordinator contacted all parties' counsel to reschedule depositions. See **Exhibit "G".** On December 9, 2021, Mr. Fang requested mid-March dates to conduct depositions. On December 9, 2021, ICM's counsel wrote to Mr. Fang to either execute the above mentioned Stipulation, or to advise of Owner's position on the proposed stipulation. See **Exhibit "G."** On December 21, 2021, ICM requested Owner's position

on the Stipulation, again. See **Exhibit "G."** To wit, Owner has not extended any form of communication regarding the Stipulation – which Plaintiff's counsel signed immediately.

CONCLUSION

For the reasons set forth herein, this Court should grant the within motion of ICM GLOBAL DESIGN, INC. in its entirety and issue an Order: (A) pursuant to CPLR §3211(a)(1) and §3211(a)(7) dismissing Plaintiff's Complaint and any pending cross-claims against Defendant, ICM GLOBAL DESIGN, INC.; or alternatively; (B) Converting the Motion to a Summary Judgment Motion pursuant to CPLR §3211(c) and §3212(c); and granting Summary Judgment dismissing the case as against ICM GLOBAL DESIGN, INC; (C) Together with such other and/or further relief as to this Court may seem just, proper and equitable.

Dated: New York, New York
March 8, 2022

SCOTT A. BRODY

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I hereby certify pursuant to 22 NYCRR § 202.8-b that the total number of words in this Memorandum of Law, inclusive of point headings and footnotes and exclusive of the caption and signature block is 2,969. I certify that this Memorandum complies with the word count limit pursuant to 22 NYCRR § 202.8-b (a).

Dated: New York, New York
March 8, 2022

SCOTT A. BRODY