# SUPREME COURT OF THE STATE OF NEW YORK
# I.A.S. PART 30 SUFFOLK COUNTY

**PRESENT:**
**HON. DAVID T. REILLY, JSC**

**INDEX NO.: 616207-2018**

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**COREY MANN and ALISON PIKE,**

**Plaintiff,**

**-against-**

**LONG ISLAND POWER AUTHORITY,**

**Defendant.**

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**Gruenberg Kelly Della**
**Attorneys for Plaintiffs**
**700 Koehler Avenue**
**Ronkonkoma, NY 11779**

**Krez & Flores, LLP**
**Attorneys for Defendant**
**225 Broadway, Suite 2800**
**New York, NY 10007**

| | |
|---|---|
| MOTION DATE: | 09/19/18 |
| SUBMITTED: | 10/03/18 |
| MOTION SEQ. NO.: | 1 |
| MOTION: | MD |

Upon the reading and filing of the following papers in this matter: (1) Plaintiffs' Order to Show Cause dated September 4, 2018 and supporting papers; (2) Defendant's Memorandum of Law dated September 14, 2018 ~~(and after hearing counsel in support and in opposition to the motion)~~ it is,

***ORDERED*** that plaintiffs' application for an Order granting them leave to serve a late notice of claim upon defendant pursuant to General Municipal Law §50-e(5) is denied.

Plaintiff alleges that he was injured while working as a foreman for PSEG Long Island on June 8, 2017. According to his affidavit, he was injured when a truck owned by LIPA rolled backwards pinning him against another truck owned by LIPA. This occurred as plaintiff was readying himself to get into the back truck to move the vehicle forward to the next series of telephone poles to complete work. As the result of the accident, plaintiff Corey Mann claims that he suffered a fractured pelvis/hip, torn labrum and other injuries to his lower back. He maintains that he was confined to his home for a period of fifteen weeks following the accident. Plaintiffs state that they spoke to an attorney regarding a worker's compensation claim shortly after the accident, but only contacted a personal injury attorney in February 2018. Plaintiffs now move for leave to serve a late notice of claim upon defendant pursuant to General Municipal Law §50-e(5). Defendant has submitted a memorandum of law in opposition. The application is determined as follows.

In deciding whether to grant leave to serve a late notice of claim, the Court must consider: (1) whether the plaintiff has demonstrated a reasonable excuse for his or her failure to serve a timely

notice of claim, (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, (3) whether the plaintiff was an infant, or was mentally or physically incapacitated, and (4) whether the delay would substantially prejudice the public corporation in maintaining its defense on the merits (***In the Matter of Doe v Goshen Cent. Schl. Dist.,*** 13 AD3d 526, 787 NYS2d 75 [2d Dept 2004]). The determination as to whether to grant an application for leave to serve a late notice of claim is entrusted to the sound discretion of the Court (***In the Matter of Doe v Goshen Cent. Schl. Dist.,*** *supra*). Under the circumstances of this case, including the fact that the claimant did not attempt to serve a notice of claim until some nine months after the incident at issue, has failed to offer a reasonable excuse for the delay, nor demonstrated sufficiently that LIPA had acquired actual knowledge of the facts constituting the claim within ninety days after the subject incident, constrains this Court to deny the plaintiffs' application (*see* ***Matter of Ruiz v City of New York***, 154 AD3d 945, 63 NYS2d 425 [2d Dept 2017]; ***Matter of Ashkenazie v City of New York***, 165 AD3d 785, 85 NYS3d 508 [2d Dept 2018]; ***Masaazi v NY City Bd. of Pub. Sch. No. 133***, 5 AD3d 491, 772 NYS2d 555 [2d Dept 2004]).

With respect to the issue of plaintiffs' alleged excuse for the delay, although they claim that the injuries sustained in the accident incapacitated plaintiff Mann "for a long period of time," plaintiffs were able to consult with an attorney concerning a worker's compensation claim within the statutory period and seemingly attend a series of physicians visits. Plaintiffs have set forth no other excuse for the lack of timely notice. In addition, while plaintiffs assert that LIPA was aware of the claim because it was investigated by PSEG Long Island and there was surveillance video of the incident, none of the plaintiffs' unsubstantiated contentions give rise to a determination that defendant LIPA acquired actual knowledge of the facts constituting the claim in a timely manner. Finally, inasmuch as the plaintiffs assign blame for the incident to the faulty condition of the trucks, it cannot be said that defendant would suffer no prejudice by allowing late notice of claim. Due to the passage of time it is likely that LIPA would not be in a position to make a detailed investigation of the condition of the trucks on the date of the incident and prepare a defense based upon those allegations, despite the existence of video surveillance.

Based upon the sum of the foregoing, the plaintiffs' application for leave to serve a late notice of claim pursuant to General Municipal Law §50-e(5) is denied.

This shall constitute the decision and Order of the Court.

**Dated:** **December 21, 2018**
**Riverhead, New York**

**DAVID T. REILLY**
**JUSTICE OF THE SUPREME COURT**

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION

PART 13

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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**HENDRICKSON, CAMILLE**

-against-

**NEW YORK CITY HOUSING**

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Index №. **0023437/2015**

Hon. ~~FERNANDO TAPIA~~, HON. GEORGE J. SILVER
Justice Supreme Court

[004]

The following papers numbered 1 to _____ Read on this motion, **REARGUE/RENEW/RESETTLE/RECONSI**
Noticed on **April 17 2018** and duly submitted as No. ____ on the Motion Calendar of _____

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | | |
| Answering Affidavit and Exhibits | | |
| Replying Affidavit and Exhibits | | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

Upon the foregoing papers this Motion is resolved in accordance with the attached written decision dated 10/29/18. The Parties are directed to appear for a status conference on 11/14/18 at 9:30 am.

Motion is Respectfully Referred to:
Justice: LAURA DOUGLAS
Dated: AUGUST 24, 2018

Dated: 10/29/18

George J. Silver

Hon. ~~FERNANDO TAPIA, J.S.C.~~
HON. GEORGE J. SILVER

**SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY**
**PRESENT: GEORGE J. SILVER**
*Justice*

**CAMILLE HENDRICKSON,**

**Plaintiff,** **INDEX NO. 23437/2015E**

**- v -** **MOTION DATE**
**MOTION SEQ. NO.**

**NEW YORK CITY HOUSING AUTHORITY,**

**Defendant.**

**Cross-Motion:** ☐ **Yes** ■ **No**

Plaintiff CAMILLE HENDRICKSON ("plaintiff") moves for an order, pursuant to CPLR §§ 2221(d) and (e), granting leave to reargue and/or renew this court's decision dated December 27, 2017.[1] Plaintiff also seeks an order, upon reargument and/or renewal, denying defendant's motion to preclude. Defendant opposes plaintiff's motion. For the reasons discussed below, the court denies plaintiff's motion.

## BACKGROUND

This personal injury action arises from a slip and fall incident which occurred on a stairway at 1481 Washington Avenue, Bronx, NY 10456 on July 14, 2014. This action was commenced with the filing of plaintiff's Summons and Complaint on June 5, 2015. Thereafter, defendant filed an Answer on July 20, 2016. On October 19, 2016, plaintiff served a bill of particulars alleging a head injury (post-concussive syndrome/headaches and post-traumatic headaches). On December 27, 2017, the court issued the instant order based on a June 15, 2017 stipulation[2] ("the stipulation")

[1] This decision precluded plaintiff from claiming any damages and offering any evidence relating to an alleged head injury due to plaintiff's failure to furnish discovery related to the same.
[2] Plaintiff stipulated that "[plaintiff's] current claims for exacerbation and/or aggravation of pre-existing injuries (as stated in BP) are confined to those pre-existing, asymptomatic back and/or neck injuries for which plaintiff had no treatment prior to July 14, 2014, which are already listed the BP, if any."

between the parties, in which plaintiff confined her current claims for exacerbation and/or aggravation of pre-existing injuries to the areas of her back and/or neck.[3]

Plaintiff argues that the court overlooked or misapprehended the facts and law in granting defendant's motion to preclude. Plaintiff contends that the authorization for her medical records for her prior head injury was inadvertently placed in the file and did not get sent to defense counsel, and that she only discovered the error when she received defendant's September 15, 2017 letter requesting the same. Plaintiff elaborates that she subsequently sent the authorization, but before it was received, defendant made its motion to preclude. Plaintiff further avers that her conduct was not willful or contumacious, and that defendant has not been prejudiced by the delay in receiving the authorization.

Additionally, plaintiff argues that she did not act in bad faith since the attorney who executed the stipulation in court was not the attorney assigned to this case, and the omission of the head injury from the stipulation was inadvertent. Plaintiff also asserts that her failure to provide the authorization was not deliberate. Plaintiff explains that although she testified about her prior head injury at a deposition in a separate lawsuit involving injuries sustained by her infant daughter, she did not allege any physical injuries in that case, and therefore, her attorney had no reason to review those injuries or look at her deposition testimony in that case. Plaintiff further posits that since her prior head injury occurred 25 years ago when she was 14 years old, it is likely that all related records have been destroyed. Lastly, plaintiff maintains that while it is true that a motion to renew must be based on newly discovered facts, the court should grant renewal in the interest of justice although not all of the requirements are met.

[3] The court takes judicial notice that plaintiff never moved to vacate the stipulation.

In opposition, defendant argues that renewal is inappropriate since plaintiff fails to submit new evidence or information that was not available at the time of the underlying motion. Defendant contends that plaintiff proffers the same arguments presented in her opposition to the motion to preclude, but fails to demonstrate that the court overlooked or misapprehended matters of fact or law. In that regard, defendant asserts that because plaintiff's arguments are substantively identical, the court may not come to a conclusion different from than that in the prior order.

In addition, defendant avers that plaintiff has failed to disclose her pre-existing head injury despite providing two discovery responses, three bills of particulars, and opposition to defendant's motion. Moreover, defendant contends that plaintiff's actions are in violation of four prior court orders that specifically requested information relating to plaintiff's pre-existing head injury. Defendant also points out that although the same law firm represented plaintiff in the prior lawsuit in which she testified about a pre-existing head injury, and despite defendant's attempts to seek such information via correspondence, plaintiff made no effort to disclose the existence of her injury. Rather, defendant claims that it discovered that plaintiff had a prior head injury that required brain surgery through publicly available documents relating to plaintiff's other case just days before a scheduled deposition in this case.

Defendant also highlights that plaintiff's opposition to its motion to compel failed disclose her prior head injury. Instead, plaintiff stipulated to withdrawing her claims regarding exacerbation of a prior head injury. Defendant further asserts that plaintiff's contention that the documents may have been destroyed is speculative, especially since her treatment continued until approximately 2010-2012. Lastly, defendant avers that granting plaintiff's application would effectively restart this litigation on the issue of plaintiff's head injuries, and that this delay would prejudice defendant.

In reply, plaintiff reiterates that her application should be granted in the interest of justice since her failure to provide the authorization was an "honest mistake." Plaintiff also contends that it is unlikely that records for such treatment still exist, and that she cannot remember where she last received treatment for migraines from 2010-2012. Plaintiff further asserts that defendant had the opportunity to ask questions about her prior head injury during her March 30, 2018 deposition, but declined to do so, and that plaintiff is willing to submit to an additional deposition and independent medical examination related to this injury.

**DISCUSSION**

CPLR § 2221(d) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR § 2221(e) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion."

Here, plaintiff has failed to proffer any new or additional facts justifying leave to renew. "An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court." (*Foley v. Roche*, 68 A.D.2d 558, 568 [1st Dept. 1979]; *see also Ulster Sav. Bank v. Goldman*, 183 Misc. 2d 893, 894–95 [Sup. Ct. 2000] ["A motion to renew *must* be based upon facts not offered on the prior motion that would change the prior determination."] [emphasis added]). Indeed, plaintiff concedes that while there are no new

facts to satisfy the requirements for leave to renew, the court should grant her application in the "interest of justice" (*see William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 [1st Dept. 1992]; *Foley*, 68 A.D.2d at 568 [denying leave to renew where "no additional material facts are alleged" and where the "application [is not] supported by new facts or information which could not have been readily and with due diligence made part of the original motion"]). The court declines to do so here. Therefore, that branch of plaintiff's motion for leave to renew is denied.

Similarly, plaintiff's application for leave to reargue is denied. "A motion for leave to reargue pursuant to CPLR [§] 2221 is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equip. Corp.*, 182 A.D.2d at 27, *supra*). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dept. 1979]). Here, plaintiff has failed to allege or demonstrate that the court overlooked or misapprehended the facts or law in deciding defendant's underlying motion to preclude plaintiff from claiming any damages and offering any evidence relating to a head injury (*300 W. Realty Co. v. City of New York*, 99 A.D.2d 708, 709 [1st Dept. 1984] [denying reargument where plaintiff made no showing or finding that the court overlooked or misapplied the statute]; *Spinale v. 10 W. 66th St. Corp.*, 193 A.D.2d 431, 432 [1st Dept. 1993] [denying leave to renew and reargue where there was "no showing that the court overlooked or misapprehended relevant facts or misapplied controlling law in the prior decision, nor did plaintiffs offer any evidence on that motion that was unavailable to them upon the court's original consideration of the case"]). Instead, plaintiff advances the same, if not identical, arguments she previously asserted in her opposition to defendant's initial motion to preclude—that the records from her prior head injury are likely to

have been destroyed since her injury occurred 25 years ago, the authorization was inadvertently placed in counsel's file and did not get sent to defendant, and that this error was not discovered until after defendant had already moved for preclusion (*William P. Pahl Equip. Corp.*, 182 A.D.2d at 28, *supra* [denying reargument where plaintiffs "repeated" the same argument made in their opposition to the motion to dismiss the original complaint]). Accordingly, plaintiff's application for leave to reargue is denied.

Because plaintiff has failed to meet her burden in demonstrating new or additional facts warranting renewal or that the court overlooked or misapprehended the facts or law so as to warrant reargument, plaintiff's motion is denied in its entirety.

Consequently, it is hereby

ORDERED that plaintiff's motion for leave to reargue and/or renew is denied; and it is further

ORDERED that plaintiff's application to deny defendant's motion to preclude upon reargument and/or renewal is denied as moot; and it is further

ORDERED that the parties shall appear for a status conference on November 14, 2018 at 9:30 a.m. at 851 Grand Concourse, Room 709 (Part 11), Bronx, New York 10451.

This constitutes the decision and order of the court.

Dated: October 29, 2018

HON. GEORGE J. SILVER

**Check one:** ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

**INJURIES/DAMAGES** *bone graft; decompression surgery; decreased range of motion; fusion, lumbar; hardware implanted; herniated disc at C3-4; herniated disc at C5-6; herniated disc at C6-7; herniated disc at L4-5; nerve impingement; physical therapy; pins/rods/screws*

Robalino claimed that he suffered herniations of his C3-4, C5-6, C6-7 and L4-5 intervertebral discs. He claimed that the herniations caused impingement of spinal nerves.

Robalino underwent about eight months of physical therapy, but he claimed that he suffered ongoing pain. During the early portion of 2014, he underwent decompressive surgery that involved fusion of his spine's L4-5 level, the implantation of stabilizing hardware that included a cage and screws, and the application of a stabilizing graft of bony matter.

Robalino claimed that his injuries prevented his performance of about eight weeks of work and thereafter necessitated a switch to a part-time work schedule, from a full-time work schedule. He further claimed that he suffers residual pain, that he suffers a residual diminution of his range of motion, that his pain prevents his tolerance of prolonged periods in which he is seated, and that his pain hinders his performance of rigorous physical activities, such as lifting heavy objects. He also claimed that he previously enjoyed playing sports recreationally, but that his residual effects prevent his resumption of that activity.

Robalino sought recovery of past lost earnings, damages for past pain and suffering, and damages for future pain and suffering.

**RESULT** The jury rendered a mixed verdict: It found that Valdez was liable for the accident, and it found that Martinez was not liable for the accident. It determined that Robalino's damages totaled $860,000.

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| **JOSE ROBALINO** | $60,000 past lost earnings<br>$68,000 past pain and suffering<br>$732,000 future pain and suffering<br>$860,000 |
| **INSURER(S)** | **Government Employees Insurance Co.** for Martinez<br>**Country-Wide Insurance Co.** for Valdez |
| **TRIAL DETAILS** | Trial Length: 2 days<br>Trial Deliberations: 2 hours<br>Jury Vote: 6-0 |
| **PLAINTIFF EXPERT(S)** | **John Abrahams, M.D.**, neurosurgery, White Plains, NY |
| **DEFENSE EXPERT(S)** | **Maury Harris, M.D.**, orthopedic surgery, New Hyde Park, NY<br>**Amit Khaneja**, neurology, Yonkers, NY |

**EDITOR'S NOTE** This report is based on information that was provided by plaintiff's counsel. Martinez's counsel did not respond to the reporter's phone calls, and Valdez's counsel declined to contribute.

*–Harmony Birch*

## KINGS COUNTY

### PREMISES LIABILITY

Negligent Assembly or Installation

# Landlord claimed tenant staged accident involving closet door

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| **VERDICT** | **Defense** |
| **CASE** | Cora Allen v. City of New York and the New York City Housing Authority, No. 503751/14 |
| **COURT** | Kings Supreme |
| **JUDGE** | Katherine Levine |
| **DATE** | 8/8/2018 |
| **PLAINTIFF ATTORNEY(S)** | **Anthony Hirschberger**, Hach & Rose, LLP, New York, NY |
| **DEFENSE ATTORNEY(S)** | **Paul A. Krez**, Krez & Flores, LLP, New York, NY |

**FACTS & ALLEGATIONS** On Sept. 19, 2013, plaintiff Cora Allen, a 56-year-old unemployed woman, claimed that she was struck by a falling closet door. She claimed that the incident occurred at her residence, an apartment that was located at 991 Myrtle Ave., in the Bedford-Stuyvesant section of Brooklyn. Allen further claimed that she suffered injuries of her back and neck.

Allen sued the premises' owner, the city of New York, and the premises' operator, the New York City Housing Authority. Allen alleged that the defendants had been negligent in their installation and maintenance of the door. She further alleged that the defendants' negligence created a dangerous condition that caused the accident.

Allen claimed that the door, a folding door that shielded a walk-in closet, had been malfunctioning, and she also claimed that she had repeatedly reported the malfunction. Allen's expert engineer opined that the door's fall was a result of two defects: a supporting bracket having been improperly installed and another supporting bracket having been lost and not replaced.

Defense counsel claimed that the door had been properly installed, that it had been properly maintained, and that it did not fall. He suggested that Allen fabricated the incident

after having removed the door, to install a washing machine in the closet. He presented an employee of the New York City Housing Authority. The witness claimed that he inspected Allen's apartment some 18 months prior to the accident and noted that the washing machine was located in the apartment's kitchen. The washing machine was in the closet at the time of the accident, but Allen claimed that the appliance had been relocated at an earlier date. She also claimed that the premises' manager had approved relocation of the appliance.

**INJURIES/DAMAGES** *aggravation of pre-existing condition; bone graft; bulging disc, cervical; fusion, cervical; fusion, cervical, two-level; fusion, lumbar; hardware implanted; plate*

Allen was retrieved by an ambulance, and she was transported to Bellevue Hospital Center, in Manhattan. She underwent minor treatment.

Allen had previously undergone fusion of her spine's C3-4, L2-3, L3-4, L4-5 and L5-S1 levels. She claimed that the accident involved trauma that fractured implanted screws that were securing the C3-4 and L5-S1 levels. She also claimed that she suffered trauma that produced a bulge of her C2-3 intervertebral disc.

On Dec. 29, 2015, Allen underwent surgery that involved a second fusion of her spine's L4-5 and L5-S1 levels, replacement of previously implanted hardware, implantation of a stabilizing cage, and implantation of a graft of bony matter. On Oct. 12, 2016, she underwent surgery that involved fusion of her spine's C5-6 and C6-7 levels, implantation of a stabilizing plate and a stabilizing cage, and implantation of a graft of bony matter.

Allen claimed that she suffers residual pain and limitations. She sought recovery of damages for past and future pain and suffering.

**RESULT** The jury rendered a defense verdict. It found that Allen was not struck by a falling door. According to plaintiff's and defense counsel, Allen's credibility may have been harmed by her behavior during the trial.

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| **DEMAND** | $950,000 |
| **OFFER** | $150,000 |
| **TRIAL DETAILS** | Trial Length: 5 days<br>Trial Deliberations: 2 hours<br>Jury Vote: 5-1<br>Jury Composition: 5 male, 1 female |
| **PLAINTIFF EXPERT(S)** | **Jeffrey Ketchman**, engineering, Westport, CT |
| **DEFENSE EXPERT(S)** | None reported |

**POST-TRIAL** Justice Katherine Levine denied plaintiff's counsel's oral motion for a new trial.

**EDITOR'S NOTE** This report is based on information that was provided by plaintiff's and defense counsel. Additional information was gleaned from court documents.

*–Harmony Birch*

## PREMISES LIABILITY

Negligent Repair and/or Maintenance — Dangerous Condition

# Landlords rejected ice's role in tenant's fall

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| **VERDICT** | **Defense** |
| **CASE** | Doron Guez v. Kenneth Frishberg and Sally Frishberg, No. 503452/16 |
| **COURT** | Kings Supreme |
| **JUDGE** | Larry D. Martin |
| **DATE** | 8/1/2018 |
| **PLAINTIFF ATTORNEY(S)** | **Daniella Levi**, Daniella Levi & Associates, P.C., Fresh Meadows, NY |
| **DEFENSE ATTORNEY(S)** | **James Deegan**, Gallo Vitucci Klar LLP, Woodbury, NY |

**FACTS & ALLEGATIONS** On Jan. 28, 2016, plaintiff Doron Guez, 52, a business's owner, fell while he was exiting his residence, an apartment building that was located at 1175 E. 13th St., in the Midwood section of Brooklyn. He fell to the bottom of a short stairway, and he claimed that he suffered injuries of an arm, his back and his neck.

Guez sued the premises' owners, Kenneth Frishberg and Sally Frishberg. Guez alleged that the defendants were negligent in their maintenance of the premises. He further alleged that the defendants' negligence created a dangerous condition that caused the accident.

Guez claimed that the accident was a result of him having slipped on ice that had accumulated on the building's porch and an attached stairway, which led to a sidewalk. He claimed that the ice was a product of water that had leaked from an awning and a gutter that were located above the landing. He further claimed that the awning and gutter frequently leaked. The defendants acknowledged having been aware of the leak and its tendency to cause icy conditions, but their counsel contended that Guez, whose tenancy spanned some 20 years, was aware of the recurrent leaks and therefore should have exercised greater caution while traversing the porch and the stairway.

Defense counsel also contended that the accident was not a product of an icy condition. According to a responding paramedic's report, Guez claimed that he slipped as a result of having tripped on the landing. The defense further

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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N.I., a minor over the age of fourteen years, by her mother and natural guardian VONEE WILEY, and VONEE WILEY, individually,

Plaintiff(s),

-against-

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY and NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Defendants.

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PART C-2

Present:
Hon. Thomas P. Aliotta

**DECISION AND ORDER**

Index No: 151145/2017
Motion No.: 001

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The following papers numbered 1 to 3 were marked fully submitted on this 10th day of January, 2018:

| | **Papers Numbered** |
|---|---|
| Notice of Motion by Defendant with supporting papers and exhibits (dated October 10, 2017) ..... | 1 |
| Affirmation In Opposition by Plaintiff (dated November 14, 2017) ..... | 2 |
| Reply Affirmation by Defendant (dated December 21, 2017)..... | 3 |

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Defendant moves pursuant to CPLR §3212 to dismiss the complaint due to plaintiffs' failure to appear for an examination pursuant to General Municipal Law § 50–h and Public Housing Law § 157(2). After a review of the moving papers, plaintiff's opposition and defendant's reply, the motion is granted. The complaint is dismissed.

This is a suit for damages arising out of personal injuries that occurred on April 1, 2016, when the infant plaintiff allegedly slipped and fell on a wet substance on the 6th floor staircase within 780 Henderson Avenue, Staten Island, New York.

On June 8, 2016, infant plaintiff by her mother and natural guardian, served a notice of claim upon the City of New York. Thereafter, defendant sought to conduct an examination of plaintiff pursuant to section 50–h of the General Municipal Law that was first scheduled for September 13, 2016. The hearing was then adjourned to October 20, 2016 on consent at the plaintiff's request. A number of examinations were subsequently scheduled, each of which was adjourned at the request of plaintiff or her attorney, on November 17, 2016, December 8, 2016 (no-show), February 24, 2017, April 19, 2017 and May 31, 2017. On the last of these appointments, neither plaintiff nor her lawyer appeared or scheduled a future hearing. Nonetheless, after having obtained a total of seven separate adjournments, two of which were no-shows, plaintiff commenced the instant action on April 27, 2017 by service of summons and complaint.

Compliance with a demand for an oral examination pursuant to General Municipal Law §50–h and Public Housing Law §157(2) is a condition precedent to the commencement of an action against the defendant New York City Housing Authority (see *Ross v. County of Suffolk*, 84 AD3d 775, 776 [2nd Dept. 2011]; *Bernoudy* v. *County of Westchester*, 40 AD3d 896, 897 [2nd Dept. 2009]).

While the failure to submit to such an examination may be excused in exceptional circumstances, such as extreme physical or psychological incapacity, such grounds are not

present here (see *Arcila v. Incorporated Vil. of Freeport*, 231 A.D.2d 660, 661; *Hur v. City of Poughkeepsie*, 71 A.D.2d 1014, 1015 [2nd Dept. 1979]).

It is alleged by plaintiff's attorney that the infant plaintiff failed to attend the scheduled hearings because her parent and natural guardian is a single mother, who works full time and also has another child who is autistic.

While the Court is sympathetic to the working mother's plight, it is not an exceptional circumstance that would warrant excusing the infant plaintiff's appearance at the 50-h hearing. (*See, i.e., Hymowitz v City of New York*, 122 AD3d 681, 681 [2nd Dept 2014];[1] *Steenbuck v Sklarow*, 63 AD3d 823, 824 [2nd Dept 2009]).[2]

Here, plaintiff did not appear on the seventh and last hearing date on May 31, 2017, nor did she take sufficient steps to reschedule a new hearing. Accordingly, the plaintiff's subsequent commencement of the action against the NYCHA without rescheduling the examination warrants dismissal of the complaint (see *Vartanian v. City of New York*, 48 AD3d 673, 674, [2nd Dept. 2008]; *Scalzo v. County of Suffolk*, 306 AD2d 397, 398 [2nd Dept. 2003]; *Best v. City of New York*, 97 AD2d 389[2nd Dept. 1983] affd. 61 NY2d 847 [1984]).

Accordingly, it is

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[1]Plaintiff's failure to appear for an examination pursuant to General Municipal Law § 50-h was excused in light of the decedent's death prior to service of the demand for her statutory examination.

[2] Plaintiff's failure to appear for General Municipal Law § 50-h hearing did not warrant dismissal of complaint, given the nature and extent of plaintiff's injuries as documented by his treating physician and testified to by his father, a co-guardian appointed pursuant to Mental Hygiene Law Article 81).

ORDERED that defendant, NEW YORK CITY HOUSING AUTHORITY's, motion for summary judgment is granted; and it is further

ORDERED that the Complaint and all cross-claims are dismissed as against defendant, NEW YORK CITY HOUSING AUTHORITY, only; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: March 16, 2018

HON. THOMAS P. ALIOTTA, J.S.C.

**PREMISES LIABILITY**

Negligent Repair and/or Maintenance — Dangerous Condition

# Defense: Landlord wasn't awa of hole blamed for tenant's fal

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| **VERDICT** | **Defense** |
| **CASE** | Aida Ortiz v. City of NY; & NYCHA, No. 14582/14 |
| **COURT** | Kings Supreme |
| **JUDGE** | Pamela L. Fisher |
| **DATE** | 1/9/2018 |
| **PLAINTIFF ATTORNEY(S)** | **Wayne A.J. Wattley**, Burns & Harris, New York, NY |
| **DEFENSE ATTORNEY(S)** | **William J. Blumenschein**, Krez & Flores, LLP, New York, NY (New York City Housing Authority)<br>**None reported** (City of New York) |

**FACTS & ALLEGATIONS** On Aug. 5, 2013, plaintiff A Ortiz, a part-time caterer and chef, injured herself while was traversing a common area of her residence: a hou complex that was located at 339 Wilson Ave., in the Bushv section of Brooklyn. She suffered an injury of an ankle.

Ortiz sued the premises' operator, the New York Housing Authority, and that agency's parent, the city New York. Ortiz alleged that the defendants were negli in their maintenance of the premises. She further alleged the defendants' negligence created a dangerous condi that caused the accident.

The city of New York was dismissed. The matter proce to a trial against the New York City Housing Authority.

Ortiz claimed that her injury was a result of her having inadvertently stepped into a hole in a grassy field. She claimed that grass clippings and overgrown grass covered and camouflaged the hole. She estimated that the hole's depth measured 5 inches, that its length measured 12 inches, and that its width measured 12 inches.

Defense counsel claimed that the New York City Housing Authority had not been aware of the hole's presence. The premises' groundskeeper claimed that the area had been mowed mere days prior to the accident and that he had not noticed the hole. He further claimed that every mowing was preceded by a careful inspection intended to identify debris that could damage the lawn mower.

**INJURIES/DAMAGES** *avulsion fracture; fracture, ankle; physical therapy*

The trial was bifurcated. Damages were not before the court.

Ortiz suffered an avulsion fracture of her right ankle. During the day that followed the accident, she presented to Wyckoff Heights Medical Center, in Brooklyn. An orthopedic boot was applied to her right foot. Ortiz claimed that the boot's use spanned months. She also underwent physical therapy.

Ortiz further claimed that she suffers residual pain that hinders her performance of everyday activities. She also claimed that her pain prevents her resumption of her job. Ortiz's expert orthopedist submitted a report in which he opined that Ortiz will develop complications that could include arthritis and/or a diminution of the right ankle's range of motion.

Ortiz sought recovery of damages for past and future pain and suffering.

The defense's expert orthopedist examined Ortiz, and he submitted a report in which he opined that Ortiz achieved an excellent recovery.

**RESULT** The jury rendered a defense verdict. It found that the New York City Housing Authority was not liable for the accident.

| | |
|---|---|
| **DEMAND** | $600,000 |
| **OFFER** | $40,000 |
| **TRIAL DETAILS** | Trial Length: 2 days<br>Trial Deliberations: 20 minutes<br>Jury Vote: 6-0<br>Jury Composition: 1 male, 5 female |

Housing Authority's counsel. The city of New York's counsel was not asked to contribute.

*–Alan Burdziak*

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 25

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X

KEENEY,RICHARD

Index №. 0021315/2012

-against-

Hon. LLINÉT M. ROSADO,

NEW YORK CITY HOUSING

Justice.

----------X

The following papers numbered 1-4 Read on this motion
Noticed on November 17, 2016 and duly submitted as No. ____ on the Motion Calendar of ____

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion, Order to show Cause- Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavits and Exhibits | 2 | |
| Replying Affidavit and Exhibit | 3 | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | 3 | |

This motion is decided in accordance with the attached decision.

Dated: September 26, 2017

Hon. LLINÉT M. ROSADO, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 25

RICHARD KEENEY and MARYANNE P. KEENEY, INDEX NUMBER:21315/2012E

Plaintiff,

-against-

Present:
HON. **LLINÉT M. ROSADO**

NEW YORK CITY HOUSING AUTHORITY,
Defendant.

Defendant move this Court for an Order pursuant to C.P.L.R. §3212, Public Housing Law §157 and General Municipal Law § 50-e, dismissing the plaintiffs' complaint as against them for failure to file a timely Notice of Claim on it; and dismissing any and all claims brought by plaintiff, Maryanne Keeney, on the basis that they were not alleged in the Notice of Claim. Plaintiff cross-moves this Court for an Order pursuant to General Municipal Law § 50-e and C.P.L.R. §2001, deeming the plaintiffs' Notice of Claim timely served *nunc pro tunc*, or alternatively, deeming the plaintiffs' late Notice of Claim timely served *nunc pro tunc* on the defendant by plaintiff's former counsel on October 20, 2011, and October 27, 2011. For the purposes of this decision, said motions are hereby consolidated.

The within personal injury action arises out of an incident that occurred on July 22, 2011 whereby plaintiff Richard Keeney, a lieutenant with the City of New York Police Department at the time, was allegedly caused to trip and fall on a broken concrete step while on duty performing a vertical search and descending the interior stairwell between the second floor and basement at the Jacob Riis House located at 1141 FDR Drive South, New York, New York.

Defendant herein now moves for an order pursuant to C.P.L.R. §3212, Public Housing Law §157, and General Municipal Law § 50-e dismissing the plaintiffs' complaint as against them for failure to file a timely Notice of Claim; and dismissing any and all claims brought by plaintiff, Maryanne Keeney, Richard Keeney's wife, on the basis that they were not alleged in the Notice of Claim. Specifically, defendant argues that it was served with the Notice of Claim on October 27, 2011, via certified mail, and received it on October 31, 2011. Defendant also argues that said Notice

of Claim did not allege any cause of action on behalf of plaintiff Maryanne Keeney and she never testified at a 50-h hearing. Finally, the defendant argues that the cause of action for personal injuries accrued on July 22, 2011 and the year and ninety days where plaintiffs could have sought leave of the Court to serve a late Notice of Claim expired on October 20, 2012. As such, defendants maintain that the action should be dismissed for plaintiffs' failure to comply with C.P.L.R. §3212, Public Housing Law §157 and General Municipal Law § 50-e. In support of the motion, defendant submit a copies of the pleadings and a copy of plaintiff's Notice of Claim and Envelope depicting the date of October 27, 2011. Notably, plaintiff Maryanne P. Keeney is not named in said Notice of Claim.

Plaintiffs oppose the motion and cross move this Court for an Order pursuant to General Municipal Law § 50-e and C.P.L.R. §2001, deeming the plaintiffs' Notice of Claim timely served *nunc pro tunc* based upon the facts of this case and service by the New York Police Department (hereinafter "NYPD") upon the defendant of the NYPD/NYCHA investigative reports concerning the underlying incident involving plaintiff Richard Keeney on July 22, 2011, and the following week thereafter by plaintiff Richard Keeney himself, or alternatively, deeming the plaintiffs' late Notice of Claim timely served *nunc pro tunc* on the defendant by plaintiffs former counsel on October 20, 2011 and October 27, 2011. Specifically, plaintiffs argue that defendant's motion should be denied because within 90 days of the claim's accrual, defendant received actual and written notice of the claim by NYPD particularly Sgt. Franklin Pineda and by plaintiff Richard Keeney himself; that on July 22, 2011, the date of the alleged incident, the NYPD, pursuant to NYPD /NYCHA protocol, the NYPD provided Defendant with four (4) investigative reports concerning the alleged incident; that plaintiff Richard Keeney affirmed that he hand delivered copies of all the NYPD investigative reports to defendant personally; that Defendant was on the distribution list for the NYPD/NYCHA investigative reports and acquired actual written knowledge of the essential facts constituting the claim within the 90-day period; that pursuant to plaintiff Richard Keeney's affidavit, Mr. Keeney personally confirmed with his department that defendant received the NYPD/NYCHA Field Report and copies of the NYPD Aided Report, Line of Duty Report, and the NYPD Witness Statement; that on October 20, 2011, a Notice of Claim was served timely upon the defendant's law department via facsimile transmission by plaintiff's former counsel, MacCarteny, MacCartney, Kerrigan and MacCartney, and verbal confirmation of receipt of same by defendant's law department was

obtained; that on October 27, 2011, the administrative staff of former counsel, MacCarteny, MacCartney, Kerrigan and MacCartney, placed the original Notice of Claim to defendant's law department; that after receipt of said notices from plaintiff's former counsel, the defendant's law department, on November 19, 2011, provided written correspondence acknowledging receipt of the claim and notified plaintiff's counsel that defendant had reviewed the claim, assigned a file number to the claim, and advised plaintiff's counsel and plaintiff Richard Keeney, that the defendant's law department was placing the claim into the Early Settlement Unit of the defendant's law department based upon the facts of the claim and no rejection, objection, nor statement regarding any deficiency or defect in the Notice of Claim nor the manner that it was served upon the defendant was ever sent by the law department; that after receipt of the Notice of Claim and review of the claim by the Defendant Law Department, a 50-h deposition was scheduled and conducted without objection to the Notice of Claim; that following service of plaintiff's Notice of Claim on October 20, 2011, a summons and Complaint dated June 26, 2012, was then served upon the defendant on June 28, 2012, explicitly stating in paragraph two of the Complaint, that the Notice of Claim had been served on defendant on October 20, 2011; that in defendant's Answer, dated August 3, 2012, admitted receipt of said notice; that defendant never raised any objection or specific denial as to timely service of Notice of Claim; that in the interest of justice, this Court deem the Notices of Claim timely; that pursuant to NY General Oblg. Law § 50-e(3) ( c ), the Notice of Claim served via facsimile transmission and the October 27, 2011 mailing of said Notice be deemed timely because it was sent timely and movant did not object and requested a 50-h examination of plaintiff; that the facts reveal Defendant received actual notice of the essential facts of this claim by the four NYPD/NYCHA investigative reports in July 2011, and as no prejudice can be shown, plaintiff's Notices of Claim should be deemed timely Nunc Pro Tunc; that plaintiffs have relied on defendant's actions and documents sent to plaintiff's counsel; and that defendant's allegation of an administrative delay in a mailing is without merit. Plaintiffs argue that for all the aforementioned reasons defendant's motion to dismiss should be denied and plaintiffs' cross motion seeking this Court to deem its Notice of Claim timely nunc pro tunc be granted. In support, plaintiff submits, as exhibits, plaintiff Richard Keeney's affidavit; the plaintiff Richard Keeney's 50-h hearing transcript; a copy of the NYPD/NYCHA Field Report; a copy of the NYPD Line of Duty Report; a copy of the NYPD

Witness Report; a copy of the NYPD Aided Report; copies of medical records for plaintiff Richard Keeney's right knee; copies of findings of NYPD regarding plaintiff Richard Keeney's inability to continue working; affidavit of plaintiff Richard Keeney's prior counsel Kevin D. O'Dell; copies of the Notice of Claim with attached cover letter; defendant law department's letter dated November 9, 2011; copies of the pleadings; correspondence from defendant dated February 11, 2015 and September 9, 2016; defendant's correspondence to plaintiff's prior counsel; copy of a decision in the Matter of Cianna Brown v Roosevelt Union Free School District, and a affidavit of Sgt. Pineda.

In reply to its motion and opposition to plaintiff's motion, defendant argues that plaintiff has failed to prove that a Notice of Claim was faxed to Defendant on October 20, 2011, the 90th and final day to have served said notice timely. Defendant argues that the affidavit of plaintiff's prior counsel proffered to establish that the Notice of Claim was faxed on October 20, 2011 is not only self-serving but void of any fax confirmation transmission evidencing the alleged faxed Notice of Claim. Additionally, defendant argues that said attorney does not provide a fax cover sheet or fax number to which the alleged notice was allegedly faxed to; does not disclose whom he allegedly spoke to at defendant's law department to confirm the Notice of Claim was received via fax on October 20, 2011; does not provide any affirmation or affidavit of service executed contemporaneously with the alleged fax, soon after the alleged fax, or at any time prior to defendant filing the instant motion. Moreover, defendant argues that in the alleged self-serving affidavit, plaintiff alleges that the fax transmission confirmation sheet was lost due to the case being moved from one office to another and the years of litigation conducted in the instant matter. Defendant finds it curious that the only thing missing from the file is said fax transmission confirmation sheet. Defendant also argues that plaintiff did not make any mention of or reference to the allegedly previously faxed October 20th Notice of Claim in its letter date stamped October 27, 2011. Further, defendant argues that the receipt of police records by defendant is not a substitute for a Notice of Claim and under Municipal Law §50-e and Public Housing Law 157(1), a Notice of Claim should have been served on defendant. Defendant also contests plaintiff's estoppel arguments on the ground that defendant never made an admission on receiving a timely Notice of Claim in its Answer and defendant's participation in discovery and settlement negotiations is immaterial under the standard for estoppel. Defendant vehemently denies receiving a faxed Notice of Claim and submits an affidavit of Mercedes Arazoza,

defendant's Principle Administrative Associate, and an affidavit of Jacqueline Forbes, Esq., defendant's Agency Attorney who was assigned to this matter beginning on November 2, 2011, to support said denial. Defendant argues that an application to file a late Notice of Claim must be made before the expiration of the applicable statute of limitations and plaintiff did not serve a timely Notice of Claim nor seek leave from the Court for an extension of time to which to do so until the instant cross-motion, four and a half years after said statute of limitations expired. As such, defendant argues that that the Court lacks the power to grant plaintiff's motion. Finally, defendant argues that the doctrine of equitable estoppel does not apply in the case at bar because defendant did not make any false representation to plaintiffs; there was no material concealment of facts; and defendant did not in any way mislead plaintiffs or stop or delay them from filing a timely motion with the Court to seek leave to serve a late Notice of Claim.

In reply to its motion and in support of the cross motion, plaintiffs argue that this Court has the discretion to deny defendant's motion seeking dismissal and find that defendant received notice of the essential facts of Lt. Keeney's claim within ninety days after the claim arose and that defendant's Answer admitted timely receipt of Notice of Claim on October 20, 2011. Plaintiffs argue that defendant has not alleged that it did not receive documents containing the essential facts of plaintiffs' claim; that defendant's counsel is bound by the admissions by prior counsel in NYCHA's responsive pleadings; and that this Court has the discretion to find that defendant had actual knowledge of the essential facts within ninety days of the incident and deem the Notice of Claim timely served *nunc pro tunc*. Plaintiffs further argue that CPLR§ 2001 affords this Court discretion to deny defendant's motion seeking dismissal as no prejudice exists. As exhibits, plaintiffs submits two affidavits from Sgt. Franklin Pineda; an affidavit from plaintiff Richard Keeney; a letter from Jacqueline Forbes, Esq., addressed to plaintiffs' counsel; an affidavit from Ms. Forbes; plaintiff Richard Keeney's 50-h hearing transcript; correspondence regarding Notice to Admit to plaintiffs from Krez & Flores, LLP; and a letter from plaintiffs' attorney to defendant's attorney regarding mediation.

CONCLUSION

This Court finds that the plaintiff's Notice of Claim was not timely served as it was served by certified mail dated stamped October 27, 2011, seven days late. Even assuming, *arguendo*, that

service by fax was effectuated on October 20, 2011, said service would only be valid if pursuant to said fax, NYCHA demanded that either or both claimants be examined in regard to it or if the fax was received by a proper person at NYCHA within the statutory 90 days and NYCHA failed to return the Notice, specifying the defect in the manner of service, within 30 days of October 20, 2011. See, General Municipal Law § 50(a); ( c ). While Defendant acknowledges receiving the Notice of Claim by certified mail on October 31, 2011, it vehemently denies receiving the fax on October 20, 2011. Additionally, plaintiffs have failed to provide any evidence, in admissible form, that a Notice of Claim was faxed to Defendant on October 20, 2011. The affidavit of Mr. Kevin Odell, Esq., submitted as Exhibit I of the cross motion, does not include a copy of the faxed transmission establishing it was faxed and received on October 20, 2011 nor does it mention the name of the person at defendant's office that acknowledged receipt of the alleged fax. Additionally, Mr. Odell states that the faxed transmission was lost. The Notice of Claim, served by certified mail on October 27, 2011, makes no mention of the allegedly faxed transmission of October 20, 2011. Notably, the Notice of Claim, served by certified mail on October 27, 2011, submitted as Exhibit J of the Cross Motion, has no date except for the Exhibit A, attached to said Notice, which is a letter dated October 20, 2011 addressed to Mr. O'Dell from Vincent Pici, P.E.. The notarized portion of plaintiff Richard Keeney's individual verification attached to said Notice also has no date.

Although defendant maintains it received the certified mail of the Notice of Claim on October 31, 2017, service of the Notice of Claim was deemed served on the date of deposit to the United States Postal Service on October 27, 2011. See, General Municipal Law § 50(b).

Plaintiffs' application to seek leave for an Order deeming the Notice of Claim timely served *nunc pro tunc* based on the facts of this case and service by the NYPD on Defendant of the NYPD/NYCHA investigative reports concerning the underlying incident on July 22, 2011 and thereafter can not be granted as said reports would not divest the claimant of having to serve Defendant with a Notice of Claim as mandated by General Municipal Law § 50-e and Public Housing Law §157 (1). Plaintiffs' alternate application to deem the plaintiffs' late Notice of Claim timely served *nunc pro tunc* on the defendant by plaintiff's former counsel on October 20, 2011 must also be denied. As mentioned above, there is no evidence that a Notice of Claim was served by fax on October 20, 2011. Plaintiffs failed to seek leave to deem the plaintiffs' late Notice of

Claim timely served *nunc pro tunc* on the defendant by plaintiff's former counsel on October 27, 2011 within the applicable statute of limitations of a year and 90 days. As such, this Court lacks the power to grant said relief and said application is hereby denied. *Young v New York City Health and Hospitals Corporation*, 147 AD 3d 509 (1st Dept 2017); *Tarquinio v City of New York*, 84 AD2d 265, 268 (1st Dept 1982); General Municipal Law § 50-e 95).

Contrary to plaintiffs' argument, there is no basis for applying the doctrine of equitable estoppel as the record is devoid of evidence of affirmative wrongdoing on behalf of defendant that would warrant the application of said doctrine against it. *Glasheen v Valera*, 116 AD3d 505, 984 NYS2d 25 (1st Dept 2014); *Walker v New York City Health & Hosps. Corp.*, 26 AD3d 509, 510, 828 NYS 2d 265 (1st Dept 2007). There is no merit to plaintiffs' argument that Defendant admitted in its Answer to receiving the Notice of Claim via fax on October 20, 2011. In its Answer, dated August 3, 2012 and submitted as Exhibit 2 of defendant's motion for summary judgment, defendant "denied each and every allegation contained in paragraph 2, except admitted to receiving what purported and/or styled to be a Notice of Claim and that 30 days have elapsed from the time of the receipt of what purported to be a Notice of Claim by Defendant; that adjustment and payment by defendant had not been made, and it reserved and referred all questions of law, fact and conclusions raised to the trial court." See, Exhibit 2 of Defendant's Notice of Motion. The fact that defendant continued litigating the matter without raising the issue of non-compliance does not preclude it from seeking the instant relief as Defendant is not obligated to promptly raise said issue. *Chinatown Apartments, Inc. V New York City Tr. Auth.*., 100 AD2d 824, 825 (1st Dept 1984). Moreover, defendant herein is under no obligation to raise the late filing as an affirmative defense. *Maxwell v City of New York*, 29 AD3d 540, 815 NYS 2d 133 (2006). Accordingly, the Court finds that defendant is not estopped from seeking dismissal of the complaint on this ground.

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 judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1986). A party moving for summary judgment is required to establish a *prima facie* entitlement to that relief regardless of the merits of the opposing papers. See, *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (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. See, *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. See, *Rose v DaEcib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. See, *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957). The Court finds that defendant has met its burden and the complaint is hereby dismissed pursuant to C.P.L.R. § 3212 .[1]

ORDERED, that defendant's motion to dismiss pursuant to C.P.L.R. § 3212 is hereby granted and plaintiff's complaint is dismissed; it is further

ORDERED, that plaintiff's cross motion is denied;

The Clerk of the Court is hereby directed to mark the file accordingly.

Defendant shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision and order of this Court.

Dated: September 26, 2017

**HON. LLINÉT M. ROSADO**
**A.J.S.C.**

[1] To the extent that the outcome in this case can be viewed as unfair, it is the outcome compelled by law.

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART ~~33~~ 17

| | |
|---|---|
| Case Disposed | ❑ |
| Settle Order | ❑ |
| Schedule Appearance | ❑ |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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**CARRERO, JUSTINA** Index №. **0301282/2016**

-against- Hon. **LARRY S. SCHACHNER,**

**NYCHA** Justice Supreme Court

----------X

The following papers numbered 1 to 2 Read on this motion, **DISMISSAL**
Noticed on **March 02 2017** and duly submitted as No. 63 on the Motion Calendar of April 10, 2017

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion - ~~Order to Show Cause~~ - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits Cross Motion | 2 | |
| Replying Affidavit and Exhibits | | |
| Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

Upon the foregoing papers this motion and cross motion are consolidated and decided as follows: The motion by the NYCHA to dismiss the complaint is granted. Plaintiff's Notice of Claim contains a description of the alleged incident which plaintiff later refuted. Thus, the Notice of Claim does not comply with GML Section 50-e(2) as it does not state the time, place and manner in which the claim arose. The court hereby rejects plaintiff's late errata sheet, as no good cause has been shown and it is essentially a total "do-over" of her sworn testimony.

According, the motion to dismiss is granted and the cross motion to amend is denied.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 4/28/17

Hon. _____
**LARRY S. SCHACHNER, J.S.C.**

NEW YORK SUPREME COURT - COUNTY OF BRONX

**PART 23**

**Case Disposed** ☐
**Settle Order** ☐
**Schedule Appearance** ☐

**SUPREME COURT OF THE STATE OF NEW YORK**
COUNTY OF BRONX

----------X

Index #: **300887/10**

**JOSE M. RODRIGUEZ,**

Plaintiff,

- against -

**EMPIRE CITY SUBWAY CO, VERIZON NEW YORK INC, and MATTHEW P. RIVERA,**

Defendants.

----------X

**DECISION/ORDER**

Present:
**Hon. Joseph E. Capella**
J.S.C.

The following papers numbered 1 to 3 read on this motion and cross-motion noticed on April 6, 2015, and duly submitted as no. _____ on the Motion Calendar of _____.

| PAPERS | NUMBERED |
|---|---|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED | 1 |
| ANSWERING AFFIDAVIT AND EXHIBITS | 2 |
| REPLY AFFIDAVIT AND EXHIBITS | 3 |
| CROSS-MOTION AND AFFIDAVITS ANNEXED | - - |

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS GRANTED AS FOLLOWS:

This personal injury action derives from a September 29, 2008-automobile accident, and now by notice of motion the defendants seek dismissal (CPLR 3212) based on an alleged failure to meet the serious injury threshold of Insurance Law § 5102(d).[1] According to the Bill of Particulars, the plaintiff sustained, *inter alia*, cervical disc herniations, left shoulder tendinosis, lumbar disc bulging and cervical radiculopathy. In support of the motion, the defendants' orthopedist, Dr. Glassman examined the plaintiff on January 23, 2012, and noted that plaintiff was involved in a prior motor vehicle accident in April 2005, sustaining injuries to his left shoulder, neck and back. Plaintiff

[1] This motion was transferred to Judge Capella on March 17, 2017.

also underwent left shoulder surgery in 2007. Dr. Glassman found restricted range of motion of the cervical spine, but noted voluntary guarding and suboptimal effort. He similarly found restricted range of motion of the lumbar spine and left shoulder.

Dr. Glassman noted that x-rays of the cervical and lumbar spine revealed osteoarthritic changes. According to Dr. Glassman, the plaintiff has pre-existing cervical spine degenerative disc disease, pre-existing lumbar spine degenerative diffuse disc bulging, and pre-existing left should tendinosis as per MRIs – all of which are not causally related to the September 2008 accident. Lastly, Dr. Glassman also noted that there is an issue of apportionment regarding the 2008 and 2005 accident, as well as the left shoulder surgery in 2007. The defendants' neurologist, Dr. Feuer, examined plaintiff on February 9, 2012, and found, *inter alia*, no objective neurological disability. The defendants' also seek dismissal of plaintiff's 90/180 claim, and they rely on plaintiff's testimony at his examination before trial ("EBT") to support same. At the EBT, the plaintiff testified that he was (and still is) unemployed at the time of the accident, and that as a result of the accident he was confined to his bed until October 2008. On the other hand, he testified that he was able to attend physical therapy for a period of 3 - 4 months after the accident. The defendants note that there is nothing in plaintiff's medical records to support the alleged need for bed rest. Based on the aforementioned, the court is satisfied that defendants have shifted the burden to the plaintiff to establish material issues of fact, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]), regarding permanent consequential, significant limitation and 90/180.

In opposition, the plaintiff submits, *inter alia*, a final narrative report from his treating physician, Dr. Armengol, who initially examined the plaintiff on October 13, 2008, and again on November 19 and December 18 of 2008, with one more final exam on April 8, 2015. According to Dr. Armengol, the plaintiff's continued pain and discomfort at the site of the injuries "are solely related and have a direct causal relationship to the accident on 9/29/08." However, Dr. Armengol does not address the degenerative

conditions raised by the defendants (*Cruz v Martinez*, 106 AD3d 482 [1st Dept 2013]), and more importantly, there is nothing in Dr. Armengol's report indicating that she reviewed any of plaintiff's medical records from the 2005 accident, and the 2007 left shoulder surgery. As such her opinion as to causation is purely speculative. (*Melendez v Feinberg*, 306 AD2d 98 [1st Dept 2003].) In addition, the plaintiff did not receive any treatment after 2009, and there is no adequate explanation by either the plaintiff or his treating physician for this cessation. (*Pommells v Perez*, 4 NY3d 566 [2005].) Based on the aforementioned, the defendants' motion is granted, and this action is dismissed accordingly.

The defendants are directed to serve a copy of this decision/order with notice of entry by first class mail upon plaintiff within 60 days of receipt of copy of same. This constitutes the decision and order of this court.

4/18/17
Dated

Hon. Joseph E. Capella J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x

ANDRE OSBORNE,

Plaintiff(s),

**DECISION AND ORDER**

Index No: 311193/11

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant(s).

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In this action for premises liability, defendant moves seeking an order (1) quashing a subpoena served upon it by plaintiff on grounds that, *inter alia*, the subpoena impermissibly seeks discovery from defendant - a party; and (2) precluding the use of a portion of a non-party's deposition testimony at trial insofar as the portion of the testimony sought to be read into evidence at trial is plaintiff's prior consistent statement, which absent conditions not present here, is inadmissible. Plaintiff opposes the instant motion only to the extent defendant seeks to preclude non-party deposition testimony at trial. Plaintiff contends that the portions of the transcript he will seek to use at trial and to which defendant objects, fall within well settled exceptions to the rule barring hearsay.

For the reasons that follow hereinafter, defendant's motion is granted.

According to the complaint, this action is for alleged

personal injuries as a result in the negligent maintenance of a premises. Plaintiff alleges that on September 4, 2011, while at or near 1551 University Avenue, Bronx, NY (1551), he tripped and fell while traversing the interior steps thereat. Plaintiff alleges that the steps were defective, that defendant was negligent in failing to maintain the premises in a reasonably safe condition; such negligence causing the accident and injuries resulting therefrom.

**Motion to Quash Subpoena**

Defendant's motion to quash plaintiff's subpoena dated February 18, 2016, which seeks production of non-party Ida Sierra Vasquez' (Vasquez) tenant file is granted. To the extent that defendant represents that Vasquez has died, plaintiff states that he no longer seeks Vasquez' tenant file.

**Motion to Preclude Testimony at Trial**

Defendant's motion to preclude the portion of Vasquez' deposition testimony wherein she testified that after the instant accident, plaintiff told her that he had fallen down the stairs located within 1551 is granted insofar as such testimony constitutes an inadmissible prior consistent statement.

It is well settled that "[a] witness' trial testimony ordinarily may not be bolstered with pretrial statements" (*People v McDaniel*, 81 NY2d 10, 16 [1993]; *see*, *People v McClean*, 69 NY2d 426, 428 [1987]). This is because an untrustworthy statement does

not become more credible by its repetition on another occasion (*McClean* at 428). However, and to the extent relevant here, a prior consistent statement is admissible to rebut a claim of recent fabrication (*McDaniel* at 270; *McClean* at 428). Thus,

> [i]f upon cross-examination a witness' testimony is assailed—either directly or inferentially—as a recent fabrication, the witness may be rehabilitated with prior consistent statements that predated the motive to falsify

(*McDaniel* at 270). Significantly, mere impeachment at trial with prior inconsistent statements does not constitute a recent fabrication warranting rehabilitation with a prior consistent statement (*McDaniel* at 270; *McClean* at 428). Instead, a prior consistent statement may only be used for purposes of rehabilitation when "the cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication" (*McClean* at 428). Thereafter, provided that the prior consistent statement predates the point where it is alleged there was motive to fabricate, a prior statement can be admitted for the limited purpose of rehabilitating the witness (*id.*). A prior consistent statement, however, is only admissible if "made at a time when there was no motive to falsify" (*People v Davis*, 44 NY2d 269, 277 [1978]). Thus, if the same motive to lie which exists at the time "the testimony is proffered existed at the time the prior consistent statement was made, the statement remains inadmissible" (*McClean* at 428). Where it is claimed that the testimony given at

trial constitutes long standing fabrication - a narrative proffered from the inception of the action - a prior statement, consistent with the alleged fabrication, is inadmissible because any inconsistent statement at trial is not recent as a matter of law (*Davis* at 278; *People v Harris*, 242 AD2d 866, 867 [4th Dept 1997] ["Here, the defense claim was that the witness's account was a fabrication from the outset, and thus the prior consistent statements were not admissible pursuant to that exception."]).

Here, the record establishes that when deposed, Vasquez testified that shortly after plaintiff's alleged accident, she had a conversation with him and he indicated that he "fell down the stairs" (Vasquez Deposition Transcript, Page 10, Lines 6-11). It is this exchange, which defendant seeks to preclude the jury from hearing at trial on grounds that it merely bolsters plaintiff's testimony at both at his deposition and presumably at trial regarding the cause of his fall. The record also establishes that at some point after his accident, plaintiff's medical records state that plaintiff attributed his fall to being pulled down the instant stairs by his dog.

Based on the foregoing, defendant's motion to preclude the reading of the foregoing portion of Vasquez' deposition transcript into evidence is granted. As noted above, prior consistent statements - those bolstering trial testimony - are generally inadmissible unless offered to rebut a claim of recent fabrication

(*McDaniel* at 16; *McClean* at 428). Mere impeachment at trial with prior inconsistent statements does not constitute a recent fabrication warranting rehabilitation with a prior consistent statement (*McDaniel* at 270; *McClean* at 428).

Here, where plaintiff's has, from the inception of this action, claimed a fall due to a defect in the stairs, any impeachment demonstrating otherwise - *e.g.*, the medical records evincing that factors unrelated to defendant's negligence caused the fall, such as his dog - will undoubtedly give rise to an inference of fabrication. The foregoing, however, will not constitute evidence of recent fabrication so as to allow admission of plaintiff's statement to Vasquez, which purportedly bolsters causation (*Davis* at 278; *Harris* at 867). Instead, the foregoing impeachment will merely be evidence of plaintiff's alleged fabrication from the inception. To the extent plaintiff argues that the foregoing statement falls within other hearsay exceptions and is, therefore, admissible, the Court need not address this contention. Insofar as bolstering, the forgoing statement is precluded even if it constitutes - as urged - an excited utterance and/or a presence sense impresion. It is hereby

**ORDERED** that plaintiff's subpoena dated February 18, 2016, be hereby quashed. It is further

**ORDERED** that at trial, plaintiff be precluded from reading into evidence any portions of Vasquez' deposition testimony

regarding statements made to her by plaintiff regarding the cause of his fall (Page 10, Lines 6-11). It is further

**ORDERED** that defendant serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

This constitutes this Court's decision and Order.

Dated : February 28, 2017
Bronx, New York

BEN BARBATO, ASCJ

NEW YORK SUPREME COURT - COUNTY OF BRONX

**PART 17**

| | |
|---|---|
| Case Disposed | ☐ |
| Settle Order | ☐ |
| Schedule Appearance | ☐ |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X

**SABRIEL M. MEDINA,**

Plaintiff,

- against -

**NEW YORK CITY HOUSING AUTHORITY,**

Defendant.

----------X

Index No.: **305312/13**

Hon. **BARRY SALMAN**
Justice

The following papers numbered 1 to __ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**, noticed on **January 14, 2016**, and duly submitted as no. ___ on the Motion Calendar of **1/14/16**.

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits | 2 | |
| Replying Affidavit and Exhibits | 3 | |
| Notice of Cross-Motion - Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memorandum of Law | 4,5 | |

In this action for premises liability arising from an alleged fall due to an allegedly slippery and wet condition within defendant's premises, defendant's motion for summary judgement is granted insofar as it establishes, beyond factual dispute, that it had no notice of the urine alleged to have caused plaintiff's fall nor of the inadequate lighting alleged to have contributed thereto.

Defendant's evidence - plaintiff's 50-h hearing and deposition transcripts - establish that on March 19, 2013, at 8:30PM, while within defendant's premises - within which plaintiff resided - he slipped and

fell while descending the B staircase between the 4th and 3rd floors. Specifically, plaintiff testified that he entered the forgoing staircase on the sixth floor, intending to exit the building and go to the store. On the foregoing date, plaintiff had not left the building al day. As he descended the steps between the fourth and third floors, he slipped and fell. While not seeing what caused his fall before he fell, after he fell, plaintiff noted that there was urine on the steps he had just descended. Plaintiff also testified that while there were lights above each landing, including those on third and fourth floors, it was nevertheless dim. Plaintiff could not recall when he had last used this particular staircase, speculated that it could have been three days prior to his accident, but did testify that people would, at times, urinate in the stairwells within the premises. At his deposition, plaintiff added that on the date of his accident he could not see very well as he descended the steps, that some of the lights, including the one above the fourth floor landing was flickering, and that prior to his accident - exactly when he couldn't be sure - he told one of defendant's employees that they should mop the stairs in the building.

Defendant also submits Louis Bevilacqua's (Bevilacqua) deposition transcript, wherein he testified that at the time of plaintiff's accident, he was employed by defendant as a Superintendent, and was responsible for overseeing the operation of Soundview Projects, a thirteen building complex, which included 515 Rosedale Avenue (515), the premises in which plaintiff alleges to have fallen. Bevilacqua testified that Mickey Albert (Albert) was the caretaker assigned to the instant premises at the time of the accident and was responsible for cleaning. Bevilacqua testified that he was unaware of any urine condition at the

premises and further discussed the maintenance schedule followed by defendant at the instant premises. The Janitorial Work Schedule, required that the stairs within 515 be inspected twice daily, once in the morning and another in the afternoon. As per the schedule, the afternoon walk-down, between 3:45-4:15PM, required the removal of any garbage and debris within stairs. The schedule further mandated that the stairs be deck brushed every Wednesday. While not indicated within the schedule, during the morning walk-downs, Albert was required to mop the stairs within 515. If he saw urine on the steps, he would have cleaned it and reflected it in the Daily Caretaker Checklist.

Defendant also submit an affidavit from Albert, wherein he incorporates by reference the Janitorial Work Schedule and Daily Caretaker Checklist about which Bevilacqua testified. Albert testified that on the March 19, 2013, as the caretaker assigned to 515, he followed the aforementioned schedule. Specifically, he performed the requisite walk-downs of the stairs in the building and did not see any urine or liquids on any of the steps. Had he seen Urine or liquid, he would have cleaned the same. He memorialized his walk-downs in the aforementioned checklist, and had he seen any urine or liquids on the stairs, he would have noted the same within the checklist. Albert also states that he did not see any problems with any of the lights within the stairwells within 515.

Based on the foregoing, defendant establishes prima facie entitlement to summary judgment inasmuch as it demonstrates that it had no notice of the defective conditions alleged by plaintiff - namely urine on the steps and broken or inadequate lighting thereat.

Liability for a dangerous condition within a premises

requires proof that either the owner created the dangerous condition or, that he had actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317, 318 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]). Thus, generally, on a motion for summary judgment a defendant establishes *prima facie* entitlement to summary judgment when the evidence establishes the absence of notice, actual or constructive (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803, 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790, 790 [3d Dept 1998]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how

long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group,* 269 AD2d 575, 575 [2000]). "[W]here the hazardous condition is transitory, a defendant may establish its entitlement to summary judgment by demonstrating that the condition could have arisen shortly before the accident" (*Betances v 185-189 Audubon Realty, LLC*, 139 AD3d 404, 405 [1st Dept 2016]; *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838 [2005]; *Brooks-Torrence v Twin Parks Southwest*, 133 AD3d 536, 536 [1st Dept 2015]). In *Brooks-Torrence*, where plaintiff alleges to have tripped and fallen on a plastic bag located on steps, the court granted defendant summary judgment finding, in part, no constructive notice because "plaintiff testified that she did not see the plastic bag or any other debris on the staircase when she arrived at defendant's building, only seeing the bag after she fell" (*id.* at 536).

Notably, in addition to the foregoing, a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Green v Albemarle, LLC,* 966, 966 [2d Dept 2013]). If

defendant meets his burden it is then incumbent upon plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 [1st Dept 1998]).

Here, defendant establishes the absence of actual notice inasmuch as plaintiff testified that he had *never* complained about the inadequacy of the light within the instant stairwell and could not say how long prior to his accident he had complained about the urine alleged to have caused his fall. Moreover, Bevilacqua testified that he had no notice of the urine alleged and Albert stated that he did not observe any urine on the relevant stairs on the date of the instant accident nor did he observe any issue with the lights thereat. To the extent that plaintiff testified that had asked defendant's employee to mop the stair within 515 prior to this accident, plaintiff's failure to specify when he in fact complained to defendants and his failure to apprise defendant of the exact condition alleged to have caused his fall is fatal. Significantly, any prior notice must be of the accident-causing condition and where, as here, the condition alleged is transitory, the notice required is that which is temporally close to the accident alleged. Defendants also establish the absence of constructive notice inasmuch as plaintiff testified that he saw the condition alleged to cause his fall - urine - for the first time after he fell. Thus, not only does plaintiff's own testimony fail to establish that on the date in question, the condition was longstanding but, here, where defendant established, through Albert's affidavit, that there was no urine on the steps as late as 4:30PM on the date of this accident, the evidence establishes entitlement to

summary judgment by demonstrating that the condition could have arisen shortly before the accident (*Betances* at 405; *Rivera* at 838; *Brooks-Torrence* at 536). The same is, thus, true with the claimed inadequacy of the light (*cf. Green v New York City Hous. Auth.*, 7 AD3d 287, 288 [1st Dept 2004] ["Assuming a prima facie showing of lack of notice was made out by defendant's evidence that its caretakers were required to replace burnt-out bulbs as part of their regular maintenance of the staircases and that it had received no complaints of burnt-out bulbs, plaintiff's testimony that the lights were out simultaneously on three floors permits inferences that the lights had been out for an extended period of time and that defendant's routine maintenance practices were not being followed" (internal citations omitted).]). In other words, the defect alleged - a flickering light - on this record, could have manifested itself moments before the accident.

Nothing submitted by plaintiff raises an issue of fact sufficient to preclude summary judgment. Saliently, plaintiff seeks to controvert the absence of notice with two affidavits from purported notice witnesses which allegedly establish a history of complaints to defendant about the urine alleged to have caused this accident. However, it is alleged and never refuted, that the witnesses whose affidavits are proffered were never disclosed prior to the filing of the Note of Issue. It is well settled that notice witnesses must be disclosed during the course of discovery and the failure to do so precludes such witnesses from testifying at trial and from being used to oppose a motion for summary judgment (*Muniz v New York City Hous. Auth.*, 38 AD3d 628 [2d Dept 2007] ["In opposition to the defendant's showing, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. The

affidavit of the plaintiff's wife could not be considered in determining this motion because the plaintiff failed to properly disclose his wife as a notice witness in his discovery responses."]; *Williams v ATA Hous. Corp.*, 19 AD3d 406, 407 [2d Dept 2005]; *Concetto v Pedalino*, 308 AD2d 470, 470 [2d Dept 2003]). Thus, here, the Court cannot consider the foregoing affidavits. It is hereby

**ORDERED** that the complaint be dismissed with prejudice. It is further

**ORDERED** that defendant serve a copy of this Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated: 11/21/16

Hon. _____

**BARRY SALMAN** J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

DELORES CANTEEN,

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendants.

X

Index No: **300215/2013**

**DECISION AND ORDER**

**Present:**
**HON. KENNETH L. THOMPSON, JR.**

The following papers numbered 1 to **3** read on this **motion for summary judgment**

| No On Calendar of **October 7, 2016** | PAPERS NUMBER |
|---|---|
| Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed | 1 |
| Answering Affidavit and Exhibits | 2 |
| Replying Affidavit and Exhibits | 3 |
| Affidavit | |
| Pleadings -- Exhibit | |
| Memorandum of Law | |
| Stipulation -- Referee's Report --Minutes | |
| Filed papers | |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. This action arose as a result of personal injuries sustained by plaintiff when she slipped and fell on urine on a staircase in one of defendant's apartment buildings on July 3, 2012 at about 7:30 AM.

Defendant submits proof that it did not have notice of the hazard upon which plaintiff slipped. In the affidavit of Roosevelt Lane, (Lane), a caretaker who worked on July 2, 2012, the day before plaintiff slipped and fell, avers that during the month of February in July of 2012, he would do a safety inspection in the morning and at approximately 3:30 PM. He avers that during his inspections he would mop up any urine and/or slippery conditions that he observed. Lane further avers that between his afternoon inspection of the subject staircase and the end of

his shift on July 2, 2012, no one complained to him about urine on the staircase.

Plaintiff submitted affidavits of residents who aver that the staircase is poorly maintained and has urine and feces on the staircase. Plaintiff argues that the urine is a recurring condition which gives defendant notice of the condition upon which plaintiff slipped and fell.

> A defendant cannot be expected to "patrol its staircases 24 hours a day" (*Love v New York City Hous. Auth.*, 82 AD3d 588 [2011]). Even if the problem was recurring, the record reflects that NYCHA addressed it by cleaning up garbage and spills daily and inspecting the stairs twice a day thereby establishing that summary judgment should have been granted (*see e.g. Torres v New York City Hous. Auth.*, 85 AD3d 469 [2011] [summary judgment granted to defendant because the janitorial schedule for the building included cleaning the subject stairs an hour before plaintiff fell]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410 [2008], *affd* 11 NY3d 889 [2008] [summary judgment granted to defendant because caretaker testified that he removed any improperly discarded garbage and cleaned the area twice a day]). As we observed in *DeJesus*, this is not a case where "defendant negligently failed to take any measures to avoid the creation of a dangerous condition" (53 AD3d at 411).
>
> *Pfeuffer v. N.Y. City Hous. Auth.*, 93 A.D.3d 470, 472–73 [1st Dept 2012]).

In a case cited by plaintiff, *Weisenthal v. Pickman,* 153 A.D.2d 849 [2nd Dept 1989], an indoor stairwell "could have been swept clean effectively on a [mere] daily basis." Id. at 851.

Accordingly, defendant's summary judgment motion is granted and the complaint is hereby dismissed.

The foregoing constitutes the decision, order and of the Court.

Dated: 11/25/2016

**KENNETH L. THOMPSON JR. J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

DELORES CANTEEN,

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendants.

X

Index No: **300215/2013**

**DECISION AND ORDER**

**Present:**
**HON. KENNETH L. THOMPSON, JR.**

The following papers numbered 1 to **3** read on this **motion for summary judgment**

| No On Calendar of **October 7, 2016** | PAPERS NUMBER |
|---|---|
| Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed | 1 |
| Answering Affidavit and Exhibits | 2 |
| Replying Affidavit and Exhibits | 3 |
| Affidavit | |
| Pleadings -- Exhibit | |
| Memorandum of Law | |
| Stipulation -- Referee's Report --Minutes | |
| Filed papers | |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. This action arose as a result of personal injuries sustained by plaintiff when she slipped and fell on urine on a staircase in one of defendant's apartment buildings on July 3, 2012 at about 7:30 AM.

Defendant submits proof that it did not have notice of the hazard upon which plaintiff slipped. In the affidavit of Roosevelt Lane, (Lane), a caretaker who worked on July 2, 2012, the day before plaintiff slipped and fell, avers that during the month of February in July of 2012, he would do a safety inspection in the morning and at approximately 3:30 PM. He avers that during his inspections he would mop up any urine and/or slippery conditions that he observed. Lane further avers that between his afternoon inspection of the subject staircase and the end of

his shift on July 2, 2012, no one complained to him about urine on the staircase.

Plaintiff submitted affidavits of residents who aver that the staircase is poorly maintained and has urine and feces on the staircase. Plaintiff argues that the urine is a recurring condition which gives defendant notice of the condition upon which plaintiff slipped and fell.

> A defendant cannot be expected to "patrol its staircases 24 hours a day" (*Love v New York City Hous. Auth.*, 82 AD3d 588 [2011]). Even if the problem was recurring, the record reflects that NYCHA addressed it by cleaning up garbage and spills daily and inspecting the stairs twice a day thereby establishing that summary judgment should have been granted (*see e.g. Torres v New York City Hous. Auth.*, 85 AD3d 469 [2011] [summary judgment granted to defendant because the janitorial schedule for the building included cleaning the subject stairs an hour before plaintiff fell]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410 [2008], *affd* 11 NY3d 889 [2008] [summary judgment granted to defendant because caretaker testified that he removed any improperly discarded garbage and cleaned the area twice a day]). As we observed in *DeJesus*, this is not a case where "defendant negligently failed to take any measures to avoid the creation of a dangerous condition" (53 AD3d at 411).
>
> *Pfeuffer v. N.Y. City Hous. Auth.*, 93 A.D.3d 470, 472–73 [1st Dept 2012]).

In a case cited by plaintiff, *Weisenthal v. Pickman,* 153 A.D.2d 849 [2nd Dept 1989], an indoor stairwell "could have been swept clean effectively on a [mere] daily basis." Id. at 851.

Accordingly, defendant's summary judgment motion is granted and the complaint is hereby dismissed.

The foregoing constitutes the decision, order and of the Court.

Dated: 11/25/2016

**KENNETH L. THOMPSON JR. J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

----------x

RAFAEL RIVERA,

Index No.: 23719/2006

Plaintiff(s),

-against-

**DECISION/ORDER**
**Present:**
**HON. MITCHELL J. DANZIGER**

METROPOLITAN TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, JB ELECTRIC/VERTEX, LLC, and JUDLAU CONTRACTING CORP.,

Defendant(s).

----------x

| Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment | Papers Numbered |
|---|---|
| Notice of Motion, Affirmation, and Affidavits in Support with Exhibits ..... | 1 |
| Affirmation in Opposition ..... | 2 |
| Reply Affirmation in Support of Motion ..... | 3 |

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants METROPOLITAN TRANSIT AUTHORITY (hereinafter, "MTA") and NEW YORK CITY TRANSIT AUTHORITY (hereinafter "NYCTA") move for summary judgment dismissing the complaint and all cross claims against it pursuant to CPLR §3212[1]. Plaintiff commenced this action seeking damages for injuries allegedly sustained by him on May 4, 2006 when he allegedly tripped and fell over raised screws and pipes protruding from the median located at the intersection of White Plains Road and 213th Street in the Bronx. Plaintiff alleges that the raised defect was located on the median where the pole of a street light apparently had been removed leaving a base plate, screws, and pipes protruding upward from the concrete.

MTA and NYCTA assert that summary judgment is warranted because there is no evidence

[1]All other named defendants move separately for summary judgment, which are resolved pursuant to separate orders of the Court.

to establish that they owned or operated the street light or the median where plaintiff's accident occurred and that there is no evidence to establish that they caused or created the alleged defect.

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 [ 1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [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 non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [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 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

MTA and NYCTA have submitted evidence to establish the following. MTA and NYCTA did not own the street light and accouterments at issue. Prior to and at the time of plaintiff's accident, a renovation project was being performed on the subway line that runs along and above White Plains Road. The MTA acting through the NYCTA contracted with defendant JUDLAU CONTRACTING CORP. to perform renovations of ten (10) train stations along White Plains Road and to do structural repairs to the elevated structure along White Plains Road. However, according to the contract and multiple witnesses produced on behalf of NYCTA and defendant Judlau Contracting Corp., electrical work on street level lighting was not included in the renovation project. Further, the record establishes that no such work was actually performed on street level lights by, or at the behest of the MTA and NYCTA. In opposition to the motion and in an attempt to raise an issue of fact as to whether the renovation project called for work to be performed on street level poles, plaintiff references the testimony of Randolph Harris, an administrative inspector for the Bronx, employed

by the New York City Department of Transportation. Plaintiff generally describes Mr. Harris' testimony as an admission that it was, "possible" that streetlights on White Plains Road may have been removed and not put back during the renovation project. However, Mr. Harris testified later in his deposition that he went to the location to inspect the site, and that he did not observe any missing poles that had not been replaced. Plaintiff also references a handwritten note by Margie Jackson, a court activity coordinator at the New York City Department of Transportation, wherein Ms. Jackson wrote:

> "Pole was removed due to construction by TA at White Plains Road and E. 213th street. What is known as Donofrio Square is where the pole is missing. The T.A. responsible [sic] to put the panel back up..."

However, the record establishes that the note was based upon speculation by a Mr. George Bermudez, Deputy Chief Electrical Engineer for the Department of Transportation. When questioned about the above note Mr. Bermudez indicated that in explaining to Ms. Jackson why records might not be found in the event a pole was removed, he informed Ms. Jackson that the NYCTA might have needed to remove a pole in order to complete certain work. However, Mr. Bermudez did not state that the NYCTA actually did remove any pole. Mr. Bermudez further testified that he has no knowledge as to whether the NYCTA was doing any work in the area of plaintiff's accident. Therefore, the note does not raise and issue of fact that would warrant denial of the instant motion.

Based on the forgoing, the plaintiff has failed to raise an issue of fact, by presenting admissible evidence to rebut movants' prima facie showing that it did not own or operate the missing pole or that it caused or created the defect that caused plaintiff's injuries. Consequently the motion is granted and the complaint and all cross claims are hereby dismissed against defendant METROPOLITAN TRANSIT AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY. Movants are hereby directed to serve a copy of this order with notice of entry upon all parties within thirty (30) days of the entry date.

This constitutes the decision and order of the court.

Dated: 9/20/16
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr. IAS PART 32
Justice

----------x

CHAITRAM PERSAUD,

Plaintiff,

- against -

SUKDAI MANGRU, MAKERAM R. MANGRU, MTA & MTA BUS COMPANY and CHRISTOPHER D. LENNON,

Defendants.

----------x

702064/14

Index No.: ~~702604/2014~~

Motion Date: July 7, 2016
Seq. No.: 3
Cal. No.: 136

FILED
SEP - 1 2016
COUNTY CLERK
QUEENS COUNTY

The following papers numbered E45 to E60 read on this motion by defendants MTA Bus Company and Christopher D. Lennon for an order pursuant to CPLR 3042 and 3043 dismissing the supplemental bill of particulars dated March 11, 2016 for failure to obtain leave, or in the alternative for defective verification pursuant to CPLR §3020.

| | Papers Numbered |
|---|---|
| Notice of Motion, Affirmations, Exhibits | E45-E54 |
| Affirmation in Opposition | E57 |
| Reply, Exhibit | E58-E60 |

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

This is a personal injury that was commenced on or about March 27, 2014. Plaintiff served a verified bill of particulars ("bp") in response to defendants' demand on October 7, 2014, then a supplemental verified bp on November 6, 2014 and an amended bp on March 19, 2015. He then filed a note of issue on November 25, 2015.[1] Thereafter, on March 11, 2016 plaintiff served what he deemed another supplemental bp and it is this pleading that moving defendants seek to strike asserting that same is an amended version rather than a supplemental version. Plaintiff argues to the contrary.

CPLR 3042(b) allows for one amendment of a bill of particulars as a matter of course prior to filing the note of issue. CPLR 3043(b) enables a party to supplement their bp with respect to claims of continuing special damages without leave of the court at any time, provided however that no new injury may be claimed (*id.*) Accordingly, in order to determine the instant motion the Court must determine if the bp plaintiff filed is a supplement as titled or an amendment as moving defendants claim. If it is the former this motion must be denied, and if the latter granted.

[1] A motion to vacate such note of issue and compel discovery was interposed. At the time this motion was submitted same still pending. It has now been decided and denied thus, this matter remains on the trial calendar.

In doing so, the Court compared the original bp[2] that alleges injuries including lumbar facet syndrome to the bp at issue that alleges lumbar disc herniation, radiculopathy and myofacial pain. The Court finds that those injuries offered in the second supplemental bp are new injuries rather than a more detailed overview or continuing consequences of injuries already put forth as plaintiff argues. The Court need only look to the original bp again to make this decision since within same plaintiff alleges as separate and distinct injuries cervical disc herniation, radiculopathy and myofacial pain, as well as cervical facet syndrome. If the former injuries existed at the time of the original bp with respect to the lumbar spine then plaintiff would have listed them in addition to facet syndrome as he did with the cervical spine.

In light of the above finding that plaintiff is attempting to assert new injuries in his second supplemental bp which is prohibited, (*see* CPLR 3043[b]), the instant motion is granted.

Dated: Aug. 22, 2016

Rudolph E. Greco, Jr.
J.S.C.



[2]The supplemental bp dated November 6 2014 and the amended bp dated March 19, 2015 do not effect or add to the injuries raised by the original bp.

D48928
N/hu

AD3d

Argued - March 11, 2016

WILLIAM F. MASTRO, J.P.
JOHN M. LEVENTHAL
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

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2014-07977 DECISION & ORDER

Michael Tisdell, etc., et al., respondents, v Metropolitan Transportation Authority, et al., appellants, et al., defendants.

(Index No. 776/09)

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Krez & Flores, LLP, New York, NY (Paul A. Krez of counsel), for appellants.

Herzfeld & Rubin, P.C., New York, NY (Miriam Skolnik, Howard Edinburgh, and Sharyn Rootenberg of counsel), for respondents.

In an action to recover damages for personal injuries and wrongful death, etc., the defendants Metropolitan Transportation Authority and Long Island Rail Road appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Gavrin, J.), entered June 17, 2014, as, upon reargument, denied their motion for summary judgment dismissing the complaint insofar as asserted against them on the merits, which had previously been denied as untimely in an order of the same court dated July 24, 2013.

ORDERED that the order entered June 17, 2014, is reversed insofar as appealed from, on the law, with costs, and, upon reargument, the motion of the defendants Metropolitan Transportation Authority and Long Island Rail Road for summary judgment dismissing the complaint insofar as asserted against them is granted.

Mitchel A. Tisdell (hereinafter the decedent) was struck and killed by an eastbound train operated by the defendant Long Island Rail Road (hereinafter the LIRR) and owned by the defendant Metropolitan Transportation Authority (hereinafter the MTA) while attempting to walk across train tracks at the Stewart Avenue grade crossing located just east of the train station in Bethpage. The decedent, who had been drinking shortly before the incident,

had walked to the south side of the crossing to meet his sister. He greeted his sister and then, 14 seconds after a westbound train passed through the crossing, he ducked under or around a lowered pedestrian safety gate and proceeded to walk north across the tracks. He did not first look to see if another train was coming, and proceeded to cross the tracks despite a number of warnings that it was not yet safe to do so, including the lowered pedestrian safety gates, ringing bells, flashing lights, and an announcement repeatedly stating, "Warning, second train coming." The decedent's sister, who had begun to cross the tracks with the decedent moments earlier, saw the eastbound train approaching the crossing and was able to step back out of the way. The decedent was struck by the train. Toxicological testing revealed that the decedent had a blood alcohol level of 0.12% at the time of his death.

The decedent's mother and sister, and his brother individually and on behalf of the decedent's estate, commenced this action against the MTA and the LIRR (hereinafter together the MTA defendants), among others, seeking damages for the decedent's injuries and death, their loss of the decedent's society and guidance, and the emotional injuries that the decedent's sister suffered from having witnessed the accident. Following discovery, the MTA defendants moved for summary judgment dismissing the complaint insofar as asserted against them, arguing that they were not negligent and that the decedent's own reckless conduct in crossing the tracks was the sole proximate cause of the accident and his resulting death. The Supreme Court initially denied the motion as untimely. Upon reargument, the court, in effect, vacated its prior determination and, thereupon, denied the motion on the merits.

The MTA defendants correctly contend that they established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that they were not negligent (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The plaintiffs' speculative assertions in opposition to the motion were insufficient to raise a triable issue of fact. In any event, the MTA defendants also succeeded in demonstrating, as a matter of law, that the decedent's own reckless conduct constituted the sole proximate cause of his death. Indeed, an injured party's own reckless and extraordinary conduct can constitute "an intervening and superseding event which severs any causal nexus between the occurrence of the accident and any alleged negligence on the part of the defendants" (*Lynch v Metropolitan Transp. Auth.*, 82 AD3d 716, 717; *see Kush v City of Buffalo*, 59 NY2d 26, 33; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315; *Dumbadze v Schwatt*, 291 AD2d 529, 529). To qualify as the type of intervening or superseding event sufficient to break the causal nexus, the conduct or activity engaged in by the injured party must be "so obviously fraught with danger" that its very nature evidences "a wanton disregard for the actor's own personal safety or well-being" (*Lynch v Metropolitan Transp. Auth.*, 82 AD3d at 717; *see Soto v New York City Tr. Auth.*, 6 NY3d 487, 492). Whether the conduct of an injured party "is a superseding cause or whether it is a normal consequence of the situation created by the defendant are typically questions to be determined by the trier of fact" (*Dumbadze v Schwatt*, 291 AD2d at 529; *see Derdiarian v Felix Contr. Corp.*, 51 NY2d at 315; *Sang Woon Lee v Il Mook Choi*, 132 AD3d 969, 970; *Riccio v Kid Fit, Inc.*, 126 AD3d 873, 873). "'However, the issue of proximate cause may be decided as matter of law where only one conclusion may be drawn from the established facts'" (*Sang Woon Lee v Il Mook Choi*, 132 AD3d at 970, quoting *Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889).

Here, the decedent's conduct in bypassing the pedestrian safety gates to traverse the crossing seconds after the westbound train passed through, despite the numerous warnings in

place that it was not yet safe to do so and without first looking to see if another train was approaching, was an action so obviously fraught with danger that, by its very nature, it evidenced a wanton disregard for the decedent's own personal safety or well-being (*see Lynch v Metropolitan Transp. Auth.,* 82 AD3d at 717; *Mooney v Long Is. R.R.,* 305 AD2d 560; *Gai Yi Feng v Metropolitan Transp. Auth.,* 285 AD2d 447; *cf. Soto v New York City Tr. Auth.,* 6 NY3d 487). Under the circumstances of this case, and as a matter of law, the decedent's conduct was a superseding event which severed any causal connection between this tragic accident and any alleged negligence on the part of the MTA defendants (*see Derdiarian v Felix Contr. Corp.,* 51 NY2d at 315). Since the plaintiffs failed to raise a triable issue of fact in this regard, the Supreme Court, upon reargument, should have granted the MTA defendants' motion for summary judgment dismissing the complaint insofar as asserted against them.

In light of the foregoing determination, we do not reach the parties' remaining contentions.

MASTRO, J.P., LEVENTHAL, SGROI and MILLER, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------x,

DONNA GALLOWAY,

DECISION & ORDER
Index No.: 305908/12

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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HON. BARRY SALMAN:

Motion decided as follows: Upon deliberation of the application duly made by defendant, NEW YORK CITY HOUSING AUTHORITY (hereinafter "NYCHA"), by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, granting summary judgement to NYCHA and dismissing the plaintiff's Complaint, is heretofore granted.

This is a motion for summary judgement brought by the defendant alleging that the NYCHA did not have notice of the defect that caused the plaintiff to slip and fall.

Plaintiff claims she slipped and fell on urine on the 6th floor elevator grille located at 416 East 137th Street, on September 19, 2011 at approximately 1:30 a.m. Plaintiff testified that she did not know how long the urine was on the elevator grille or how it got there. Plaintiff is not sure what time she first observed the urine.

NYCHA has made a *prima facie* showing of entitlement to summary judgement. NYCHA Supervisor of Caretakers, Edwin Ramos, testified that he received no complaints of urine in the elevators. Furthermore, Mr. Ramos testified that there was a maintenance schedule in effect on the day before and the day of the accident, that is was followed, and that there were no reports of urine in the elevator.

Moreover, there was a janitorial schedule in effect whereby the caretaker cleaned each public area of the building. Cleaning included mopping and sweeping on a daily basis. The janitorial schedule included cleaning the 6th floor hallway and allotted 45 minutes to clean the elevator and lobby. The affidavit by Luis Cruz, the maintenance worker scheduled on September 18, 2011, indicates that the area in question was last cleaned and inspected at 1:00 p.m. on September 18, 2011 and the area was free and clear of urine and was dry by the end of his shift. Luis Cruz also swears that he was not aware of urine in the buildings elevator.

As a matter of law, the plaintiff has failed to demonstrate an issue of fact that NYCHA had notice, actual or constructive, of the defect in question. As such, defendant's application for summary

judgement must be granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 14, 2016

BARRY SALMAN
J.S.C.

# Supreme Court of the State of New York
# Appellate Division: Second Judicial Department

D47313
O/hu

_____AD3d_____ Argued - October 22, 2015

JOHN M. LEVENTHAL, J.P.
SHERI S. ROMAN
SYLVIA O. HINDS-RADIX
COLLEEN D. DUFFY, JJ.

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2014-02121 DECISION & ORDER
2014-04721

Robert Latchman, appellant, v Nicole K. Peterson, et al., defendants, New York City Transit Authority, et al., respondents.

(Index No. 501017/12)

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Olga Pavlakos, Brooklyn, N.Y., for appellant.

Krez & Flores, LLP, New York, N.Y. (Edwin H. Knauer and Paul A. Krez of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from (1) so much of an order of the Supreme Court, Kings County (Rothenberg, J.), dated December 5, 2013, as granted that branch of the motion of the defendants New York City Transit Authority, MTA New York City Transit, Metropolitan Transit Authority, MTA Capital Construction Company, and Citywide Building Restoration, Inc., which was for summary judgment dismissing the complaint insofar as asserted against them, and (2) so much of an order of the same court dated March 20, 2014, as, upon granting that branch of his motion which was for leave to reargue his opposition to that branch of the motion of those defendants which was for summary judgment dismissing the complaint insofar as asserted against them, adhered to the prior determination.

ORDERED that the appeal from the order dated December 5, 2013, is dismissed, as that order was superseded by the order dated March 20, 2014, made upon reargument; and it is further,

ORDERED that the order dated March 20, 2014, is affirmed insofar as appealed from;

and it is further,

ORDERED that one bill of costs is awarded to the defendants New York City Transit Authority, MTA New York City Transit, Metropolitan Transit Authority, MTA Capital Construction Company, and Citywide Building Restoration, Inc.

The plaintiff allegedly was struck by a motor vehicle as he was crossing the street, and he commenced this action against, among others, the defendants New York City Transit Authority, MTA New York City Transit, Metropolitan Transit Authority, MTA Capital Construction Company, and Citywide Building Restoration, Inc. (hereinafter collectively the defendants). At the time of the accident, the defendants were performing construction work on the staircase of an elevated subway station which led to the southwestern corner of an intersection. At his deposition, the plaintiff testified that he generally used this staircase when he exited from this subway station. Due to the closure caused by the construction work, he used the staircase that exited on the northeast side of the intersection. The plaintiff crossed from the northeast side of the intersection to the southeast side of the intersection without incident. The plaintiff then moved from the southeast side to the southwest side of the intersection when he allegedly was struck by a vehicle traveling in a northerly direction. The defendants moved for summary judgment dismissing the complaint insofar as asserted against them, contending that they did not proximately cause the accident. The Supreme Court granted the motion. The plaintiff moved for leave to reargue his opposition to the motion, and upon reargument, the Supreme Court adhered to its prior determination.

The defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that, under the circumstances of this case, any negligence on their part with respect to the construction work merely furnished the condition or occasion for the accident and was not a proximate cause of the accident (*see generally Sheehan v City of New York,* 40 NY2d 496, 502; *Batista v City of New York,* 101 AD3d 773, 778; *Akinola v Palmer,* 98 AD3d 928, 929). In opposition, the plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York,* 49 NY2d 557, 562).

Accordingly, upon reargument, the Supreme Court properly adhered to its prior determination granting that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.

LEVENTHAL, J.P., ROMAN, HINDS-RADIX and DUFFY, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

25 N.Y.3d 945
Court of Appeals of New York.

Rosemond BARNEY–YEBOAH, Respondent,
v.
METRO–NORTH COMMUTER RAILROAD, Appellant.

April 2, 2015.

**Attorneys and Law Firms**

Krez & Flores, LLP, New York City (Paul A. Krez of counsel), for appellant.

Buttafuoco & Associates PLLC, Woodbury (Jason M. Murphy of counsel), for respondent.

**Opinion**

MEMORANDUM:

***946** The order of the Appellate Division should be reversed, with costs, Supreme Court's order reinstated, and the certified question answered in the negative. This is not the type of rare case in which the circumstantial proof presented by plaintiff "is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 209, 818 N.Y.S.2d 792, 851 N.E.2d 1143 [2006] ).

Chief Judge LIPPMAN and Judges READ, RIVERA, ABDUS–SALAAM, STEIN and FAHEY concur. Judge PIGOTT dissents and votes to affirm for reasons stated in the memorandum at the Appellate Division (120 A.D.3d 1023, 992 N.Y.S.2d 215 [2014] ).

On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed, with costs, order of Supreme Court, New York County, reinstated, and certified question answered in the negative, in a memorandum.

**All Citations**

25 N.Y.3d 945, 29 N.E.3d 896, 6 N.Y.S.3d 549 (Mem), 2015 N.Y. Slip Op. 02803

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WE REPRESENTED VERIZON

**SUPREME COURT STATE OF NEW YORK**
**COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti

---X

DAVID RHEE,

Plaintiffs,

-against-

**DECISION / ORDER**
Index No. 301222/10

HOLT CONSTRUCTION CORP., ACC CONSTRUCTION CORPORATION, MONROE COLLEGE LTD., VERIZON NEW YORK, INC., and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

---X

The following papers numbered 1 to 18 read on the below motions noticed on **January 16, 2015, and February 11, 2015,** and duly submitted on the Part IA15 Motion calendar of **March 27, 2015**:

| Papers Submitted | Numbered |
|---|---|
| ACC's Notice of Motion, Memo. of Law, Exhibits | 1,2 |
| Monroe's Notice of Motion, Exhibits | 3,4 |
| Verizon's Notice of Motion, Exhibits | 5,6 |
| Con. Ed.'s Cross-Motion, Exhibits | 7,8 |
| Pl.'s Aff. In Opposition, Exhibits | 9,10 |
| Pl.'s Aff. In Opp. To Cross-Motion, Exhibits | 11,12 |
| ACC's Reply Aff., Exhibits | 13,14 |
| Monroe's Reply Aff., Exhibits | 15,16 |
| Verizon's Reply Aff., Exhibits | 17,18 |

Upon the foregoing papers, defendants Monroe College, Ltd ("Monroe"), ACC Construction Corporation ("ACC"), Verizon New York, Inc. ("Verizon"), and Consolidated Edison of New York, Inc. ("Con. Ed."), move and cross-move for summary judgment, dismissing the complaint of the plaintiff David Rhee ("Plaintiff"), pursuant to CPLR 3212. Plaintiff opposes the motion. In the interest of judicial economy, the above motions are consolidated and disposed of in the following Decision and Order.

I. Background

On July 3, 2009, Plaintiff was allegedly injured after the bicycle he was riding struck a

depression or hole in the roadway in front of the Monroe College campus located at 370 Main Street, New Rochelle, New York. Plaintiff claimed that his bicycle tire became caught in a steel or metal pipe that was not completely removed from a square or rectangular depression in the roadway in front of 370 Main Street.

Defendant Monroe has owned the building located at 370 Main Street in New Rochelle since 2001. Monroe contends that it is entitled to summary judgment because it did not create the allegedly hazardous condition encountered by defendant, and none of the construction/ renovation contractors, or other entities retained by Monroe in the years prior to this accident, performed any work that created this condition. Even if they had, Monroe argues that it is nevertheless entitled to dismissal because it exercised no supervisory control over the contractors' work.

At his deposition, Plaintiff testified that he was thrown from his bicycle when its dront wheel went into a depression in the roadway. Some time after his fall, Plaintiff returned to the scene and determined that one particular hole amongst three he saw in the right lane of the roadway was the depression that must have caused the accident. He later returned with his engineering expert, professional engineer Daniel Berkenfeld. Mr. Berkenfeld took photos of the defect and inspected the accident location. In an affidavit, Mr. Berkenfeld states that the defect measured fourteen inches by fourteen inches, and was approximately one inch deep. The depression was located approximately 9 ½ feet west of the westerly curb of Main Street, and the center of the depression was approximately twenty feet north of the northwest corner of 370 Main Street. Mr. Berkenfeld noted that the patch was a square cut-out that he opines were made by a construction saw. In the center of the patch was a visible remnant of a cut-off metal pipe, whose edges were hammered over.

In support of its motion, Monroe provides a history of construction permits that have been issued in and around the accident location. Since Monroe took ownership of the premises in 2001, the following entities secured roadway opening/obstructing permits:

(1) to defendant Con. Ed., to open the street and obstruct the sidewalk to install gas service for 370 Main Street (issued 9/27/2002);

(2) to defendant Verizon, to open the street and sidewalk obstruction at 370-374 Main

Street (issued 10/11/2002);

(3) to defendant ACC, for scaffolding/obstruction of street and sidewalk and placement of a container in the street, (issued 12/6/2002);

(4) Holt Construction, (3/4/2009), for work to be performed on 384 Main Street, which is one block away from the location of this accident.

Monroe argues that Plaintiff has not formally identified which, if any, of the above entities was the one that created the condition in the public roadway. Moreover, Monroe provides permits and documentation for roadway openings at the accident location for the time before Monroe College owned the premises: (1) a May 5, 1983 permit issued to Charles Librett Hardware, Inc., prior owner of the building at the accident location, for the construction of an office building and warehouse; and (2) a November 1, 1988, Charles Librett Hardware, Inc., for the renovation of existing entrance and exit doors at 370 Main Street. Monroe alleges that, to date, Plaintiff has not produced any documentation reflecting that they performed an investigation whatsoever as to whether a party performing work in connection with construction of a two-story addition at the front of the existing office and warehouse at 370 Main Street or subsequent renovation had a role in creating the allegedly defective condition in the roadway. As a part of their motion papers, Monroe also submits a copy of an uncertified police accident report, which allegedly contains an admission from Plaintiff that this accident occurred when his "front tire locked up causing him to flip face first over the front of his bicycle." Monroe also provides a portion of the Plaintiff's certified Jacobi Hospital Record that contains the following accident description: "35 RHD male s/p fall from bicycle going down hill in which rear brakes failed as he slammed on brakes fall forward."

A representative of Monroe, Robert Errico, presented for an examination before trial. Mr. Errico is a long time Monroe employee, and his current position is Chief Safety Officer. Mr. Errico confirmed that Monroe's New Rochelle campus includes the building at 370 Main Street known as "Milavec Hall." Since undertaking the position of Chief Safety Officer, Mr. Errico has been present at the New Rochelle Campus once every other week. He testified that it wouldn't be the function of anyone at Monroe College to oversee the work of contractors insofar as their construction practices were concerned When presented with photographs of the roadway

depression that allegedly caused this accident, Mr. Errico had no knowledge as to how this condition came to be, and didn't believe it had anything to do with Monroe College. Mr. Errico also conceded that he had no knowledge of any construction work performed in the area in 2002, and he did not know the names of any contractors hired by Monroe to perform that work.

Included in the moving papers are affidavits from Lance Bogart, a former construction manager for co-defendant ACC. He states that in 2002, ACC commenced a renovation project at Monroe College in New Rochelle. The nature of the work included exterior renovation of the building located at 370 Main Street. The work on that building was completed by December 2003. Mr. Bogart states that at no time did ACC place, store, manage, control, or maintain materials or equipment in the roadway of 370 Main Street. Further, ACC had no shanty, dumpster, or any other facility parked at or near the accident location. Although ACC used a scaffold to work on the front elevation of the building, it was never erected or placed in the roadway, at or near 370 Main Street. Moreover, when in use, the scaffold was set up on the sidewalk with room for pedestrians to walk around it. Mr. Bogart states that ACC performed no excavation or opening in the roadway at any time that might have left a depression. ACC completed its work in 2003, some six years before this accident. Mr. Bogart reviewed photographs of the alleged defect, and states that ACC did not make this cut or create the hole/depression/indentation in the roadway. ACC did not install any steel piping depicted in the square depression. In another affidavit, Mr. Bogart reviewed the permits secured by ACC in 2002. He states that the sidewalk shed/ scaffold permits pertained to pieces of equipment that were only used on the sidewalk, and never in the street. While ACC obtained a permit to place a container in the street, no containers were ever placed in the street. Instead, ACC used a nearby paved parking lot to store a roll off container and materials.

Aldo Medaglia testified on behalf of ACC, as its founder and former president. Mr. Medaglia was aware that ACC was the general contractor for a project at Monroe in the early 2000's. As part of the project, work was done at the building located at 370 Main Street/ Milavec Hall. He testified that, since Milavec Hall was an existing structure, there would be very little external construction. There was no roadway work performed in connection with this project. Part of the work required ACC to get HVAC units onto the roof. He did not recall if any

scaffolding was placed on the building. Any boarding or barricades put into place to perform this work was designed to protect the facade of the building, and did not extend into the street.

Monroe notes that Plaintiff discontinued his action against co-defendant Holt Construction. Still, Monroe submits an affidavit of its project manager, Bob Blum, who states that none of the work it performed in or around the accident location was in the vicinity of Plaintiff's alleged fall. Monroe also submits an affidavit from Susan Doban, an architect. Ms. Doban was involved in the design of the rehabilitation project along Main Street in New Rochelle, including 370 Main Street. As a part of her involvement, she was periodically present in the area during February 2002 and going into the Fall of 2003, and intermittently thereafter. Ms. Doban states that she has no knowledge of any object, items, equipment, machinery, construction trailers, or the like located in the roadway area of the claimed depression in question, and has no knowledge or information regarding the presence of a metal circular object in or about the depression area.

Nathan Hoyt testified at an examination before trial on behalf of defendant Con. Ed. Mr. Hoyt was a Con Ed operating supervisor in 2008, and supervised a gas installation job that Con Ed performed for the building at 368 Main Street in December 2008. Con. Ed. made a series of linear cuts and trench work going across Main Street between Harrison Avenue and Echo Avenue in New Rochelle. The cuts and trench work went across Main Street as opposed to lengthwise. Mr. Hoyt testified that the 2008 gas line work was performed approximately 38 feet away from the claimed location of Plaintiff's accident. Mr. Hoyt added that Con Ed doesn't use scaffolding in their gas installation service. The witness, however, could not speak to any work performed by Con. Ed. pursuant to the street opening permits it was issued for the location in 2002. He was not employed by Con. Ed. at that time.

Robert Simms testified on behalf of defendant Verizon. Mr. Simms, however, did not participate in the designing or providing of network services to Monroe College. He only reviewed photographs of the accident location, and opined that Verizon's installation of a conduit in the area in 2002 was not near the location of the alleged defect.

Monroe submits an affidavit from their expert engineer, Dr. Iving Ojalvo. He reviewed the documentation, conducted a site inspection, and opined that there is no evidence that the

claimed road cutout is what caused Plaintiff's fall. He states that no one investigated the cause of this occurrence, and the police report noted that there were no roadway defects in the area where plaintiff was found in the roadway. Plaintiff only presumed that the defect caused his accident upon returning to the area at a later date. Mr. Ojalvo notes that Plaintiff's expert, Mr. Berkenfeld, did not find that Monroe or any of its contractors created the depression in the roadway. The center of the alleged roadway depression hazard was located 9 ½ feet into the Main Street roadway, some 20 feet north of the northeast corner of the building at 370 Main Street. Mr. Ojalvo disputes Mr. Berkenfeld's assessment linking the depression to Monroe's ownership of the location. He noted that there were two documented instances of major construction in the 1980's, prior to the time that Monroe took ownership. This work included a 1983 construction of a two-story addition to the existing office/warehouse building at 370 Main Street, owned by "Librett Hardware." The next project was a 1988 renovation of the existing entrance/vestibule. Upon review of the documentation and construction permits for the 2002-2003 project at Monroe College, Mr. Ojalvo determined that there was nothing in the record to link that work to the purported location of this accident. He also mentions that Plaintiff's actions in riding a bicycle in a roadway has inherent risks associated with it.

Monroe now argues that it is entitled to summary judgment because (1) plaintiff cannot say with absolute certainty that the condition identified by the plaintiff's expert was the actual cause of this accident, and (2) plaintiff cannot identify the entity that created this hazardous condition. Even if plaintiff could identify that entity, Monroe did not exercise any supervisory control over it, and therefore cannot be held liable for any defect the entity allegedly created.

ACC also moves for summary judgment, relying on the Bogart affidavits and the testimony of Mr. Medaglia. ACC notes that Mr. Medaglia identified "DiMatteo Contracting Corp" ("DiMatteo") as its mason subcontractor for the 2002 project. However, he did not recall all of the subcontractors or the work each performed. The DiMatteo subcontract called for a sidewalk and curb to be removed and replaced. If DiMatteo performed this work, Mr. Medaglia explained that as a matter of custom and practice, this would include cutting blacktop approximately 16 inches out from the curb. This was not the type of cut that plaintiff alleges caused his accident, which was located several feet into the roadway. ACC argues that, even if it

was, this cut was not made by ACC, but by an independent contractor. ACC cannot be held liable for the alleged negligence of its contractor (to this point, citing (To this point, *Perry v. Hudson Val. Pavement, Inc.*, 78 A.D.3d 1145 [2nd Dept. 2010]; *Miller v. Infohighway Comm. Corp.*, 115 A.D.3d 713 [2nd Dept. 2014]).

Verizon also moves for summary judgment. Verizon submits an affidavit from Michael P. Connelly, who has been employed with the company for over 25 years. His job titles included an installer/repairman for phone lines and cables, a field foreman supervising installation and repair and cable maintenance, and from 2005-present, he has been a project manager in the engineering department. He examined certain documents, including Verizon's 2002 street opening permit application, and photographs. He conducted a search for additional records to see if any work was performed in the accident area. He found no additional records, and has no reason to believe that Verizon performed any work delineated in the drawing or permit. Mr. Connelly also personally inspected the accident location. He used a measuring wheel and measured the distance from the Verizon conduit excavation to the location of the accident. He confirms that the work performed pursuant to a permit was an "inverted L shaped run of conduit" that eventually comes out of the ground and inserts into 370 Main Street. He annexes copies of photographs of this conduit. Mr. Connelly states that it was approximately 118 feet from the nearest point of excavation for this L-shaped conduit run to the defect location. The excavation trench for such a conduit would have been approximately 24 inches wide. Final asphalt restoration would extend the excavated area by 12 inches on each side of the actual trench. All of this work was done at the opposite end of Milavic Hall from the area where Plaintiff allegedly had his accident. There would have been no equipment used in conjunction with the excavation for or placement of such a Verizon conduit run, or the backfilling or asphalting of the roadway following backfilling, that would have produced this condition.

Con Ed cross-moves for summary judgment. Con. Ed. relies on the testimony of Nathan Hoyt, who indicated that its gas related work in 2008 was not at the location of Plaintiff's accident. The gas service to 368 Main Street was approximately 38 feet away from the accident location. Mr. Hoyt identified Con Ed's work records and a field sketch of the defect in relation to Con Ed's work, at his deposition

In opposition to the motions, Plaintiff argues that the construction permits issued by the City of New Rochelle prove that the defendants' work was performed directly in the area of these "man made, square cuts in the roadway" and "the cut off metal pipe which caught the plaintiff's bicycle tire ..." Plaintiff's expert opined that the footings left in the roadway, which include metal tubing in square cuts, are the remainder of footings that would support scaffolds, fences, or function as bollards to block pedestrian and vehicular traffic. He opined that these asphalt cuts were not restored and re-paved, as the applicable permits required. At his deposition, Plaintiff adequately identified the defect that caused his injuries as a two-foot by two-foot cut, with remnants of a metal pipe inside. Plaintiff notes that there is no inconsistency as to the accident location or how this incident took place. He identified and encircled the roadway defect that allegedly caused this incident. He circled four different patches or indentations in the roadway. When asked "do you know which one your front tire actually went into?" he answered "I think its this one." Plaintiff contends that the defendants' various arguments that this work was done by "someone else" is based on speculation.

With respect to Verizon, years before this accident, they were issued a permit that includes as a description of the work, "provide new service to 370-374 Main Street (Monroe College)." The type of work was described as "asphalt, 55 feet plus or minus two feet." Plaintiff states that this particular permit was not included in the moving papers. Further, Plaintiff notes that Robert Simms, produced for deposition on behalf of Verizon, did not have personal knowledge as to Verizon's work actually performed in the area pursuant to the street permit. His testimony that the work was actually performed "far away" from Plaintiff's accident location was not based on personal knowledge. He had no prior experience in determining whether the defects in the photographs matched up to the drawings in the street permits.

Regarding ACC, Plaintiff highlights the deposition testimony of Mr. Medaglia where he identified a permit application made by ACC for sidewalk obstruction and scaffolding. The application indicated that the size of the area that was to be obstructed by scaffolding was "103 feet long by four feet wide," and the scaffolding was to be placed on the facade side of Main Street. Plaintiff contends that this testimony conflicts with the affidavit of Lance Bogart, who stated that a scaffold was used, but it was never erected or stored on the roadway at or near 370

Main Street. Plaintiff asserts that "someone is mistaken" and contends that Mr. Bogart's assertion that the scaffold was erected each morning and dismantled each evening doesn't make sense. Further, ACC hasn't submitted any photographs of this scaffolding. Plaintiff argues that, as opined by Mr. Berkenfeld, the square cuts in the roadway were asphalt saw cuts. ACC confirmed that they performed saw cuts, but allege that the cuts that were performed were not near the defect encountered by Plaintiff. Mr. Medaglia was confronted with a subcontract between ACC and DiMatteo, that called for certain saw cuts into the asphalt along Main Street. He reviewed a "site plan" phase diagram, but he couldn't tell if it depicted the work performed by DiMatteo. Plaintiff argues that this testimony establishes that ACC's subcontractor performed roadway asphalt cuts. While ACC asserts that its cuts would only extend 16 inches from the curb, Plaintiff argues that there is no evidence that the cuts actually complied with that custom or practice. ACC submitted no progress photos of work performed. Further, this was contradictory to Mr. Madaglia's testimony earlier in the deposition when he was unequivocal that there was no work in the roadway, only to later look at the site plan and testify that there was some roadway work and asphalt cuts.

Mr. Errico's testimony was not probative, since he had absolutely no involvement with the relevant construction project, and he has never worked at the 370 Main Street campus. Plaintiff notes that Mr. Errico did not even know that facade work was being done on the premises, and was unfamiliar with any of the contractors Monroe retained to perform this work.

With respect to Con Ed, Plaintiff argues that the motion is untimely. Note of Issue was filed on September 10, 2014, and the cross-motion was not served until March 17, 2015. Moreover, the motion was short-served in violation of CPLR 2214(b). The cross-motion should nevertheless be denied because the Con Ed witness confused a 2008 gas project at an adjacent building with a totally different job, performed some six years before, in 2002. Con. Ed did not produce a witness familiar with the 2002 gas line install work done at Milavec Hall, 370 Main Street. Instead, they produced an operating manager on a gas install done six years later, at a totally different building at the college.

Plaintiff contends that the moving defendants have, therefore, failed to meet their initial burdens of proof. Further, the municipal code of New Rochelle imposes upon the permitees a

legal responsibility to restore the surface of a roadway surface to a pre-construction condition.

Monroe, Verizon, and ACC submit various arguments in reply. Notably, Verizon asserts that Plaintiff failed to consider the affidavit of Mr. Connelly in his opposition papers, and has failed to raise an issue of fact as to whether its work created this alleged defect. ACC argues, *inter alia*, that did not concede that saw cuts were made in the roadway. Mr. Medaglia recalled DiMatteo, among other subcontractors, but could not recall specifically what they did on the site. He believed that they may have replaced some of the curb, but assuming this was true, no work would be performed beyond sixteen inches into the road. Further, ACC would not be responsible for the work of its subcontractors. Monroe again argues that Plaintiff has not sufficiently identified the cause of his fall, and has not addressed the fact that work was performed in the accident location years before Monroe even took ownership of the premises. Further, Monroe argues that there is no evidence that it exercised any supervisory control over the contractors, and therefore it is entitled to summary judgment.

II Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can

reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Generally, a contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk (*Sands v. City of New York*, 83 A.D.3d 923 [2nd Dept. 2011], citing, among other cases, *Brown v. Welsbach Corp.*, 301 N.Y. 202, 205 [1950]).

In this matter, Verizon has satisfied its initial burden of proving that the work it performed in or around 2002 did not result in the defective condition that allegedly caused Plaintiff's 2009 accident. Verizon provided the affidavit of Mr. Connelly, an individual with personal knowledge of its service installation work. Mr. Connelly reviewed the relevant permits and performed a site inspection. He explained that any work performed pursuant to the 2002 permit concerned the installation of a conduit that ran out of the ground and into the building. Any excavation that was performed for the "L-shaped" conduit was located at the opposite end of 370 Main Street and approximately 118 feet from the alleged defect location. Further, any work performed by Verizon, or equipment used to perform that work, would not have produced any roadway depression with a metal circular remnant inside, like the one encountered by Plaintiff. Plaintiff argues that the deposition testimony of Mr. Simms lacked probative value since the deponent did not have personal knowledge of relevant facts or circumstances. Plaintiff, however, does not address the Connelly affidavit in his opposition papers, and therefore has not disputed his testimony. Plaintiff has, therefore, failed to raise an issue of fact as to whether Verizon's work, performed some 118 feet away from the accident location, created the defect at issue (*see Garcia v. City of New York*, 53 A.D.3d 644 [2nd Dept. 2008]; *Cendales v. City of New York*, 25 A.D.3d 579 [2nd Dept. 2006]). The mere fact that Verizon applied for, and received, street opening permits for an area large enough to encompass the accident location, is not enough to raise a question of fact where undisputed evidence shows that the work was performed some distance away (*see Amini v. Arena Constr. Co., Inc.*, 110 A.D.3d 414 [1st Dept. 2013]). The affidavit of Mr. Berkenfeld does not dispute the location of Verizon's work and therefore cannot

defeat Verizon's prima facie showing (*see generally Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]).

Defendant ACC also satisfied its initial burden of demonstrating entitlement to summary judgment. ACC produced affidavit from its project manager for the 2002 Monroe College project, Mr. Bogart. He explained that the scope of ACC's work included an interior and exterior renovation of the building at 370 Main Street. At no time did ACC place or manage any equipment in the roadway in front of that address. He states that although a scaffold was used to work on the front elevation of the building, the scaffold was never erected, placed, or affixed to the roadway at 370 Main Street. Instead, this scaffold was always set up on the sidewalk with ample room for pedestrians to walk around it. Mr. Bogart states that ACC did not perform any excavation in the roadway that might have left a depression like the one allegedly encountered by Plaintiff. He notes that ACC did not install steel piping inside of any asphalt cuts like the one depicted in Plaintiff's photographs of the defect. In a supplemental affidavit, Mr. Bogart reviewed the street opening permits obtained by ACC, and explained that the scaffold and sidewalk shed permits, again, only permitted ACC to erect those structures on the sidewalk and not on the street itself. Further, although there was a permit to do so, ACC never placed a container on the roadway. Mr. Madaglia confirmed at his deposition that ACC would put up a barricade on the sidewalk during their facade work to allow pedestrians to pass (Madaglia EBT at 51:4-13). Mr. Madaglia testified that the issuec permits allowed for a sidewalk obstruction measuring 103 feet long by four-feet wide on the facade side of the building. Plaintiff argues essentially that Mr. Madaglia's testimony "conflicts" with that of Mr. Bogart. However, both of the witnesses testified that ACC did not place anything in the roadway during this project.

The above evidence therefore established that, although ACC was present and performed work in the area some seven years before this accident, it did not order or perform any work in the area of this alleged defect, located some 9 ½ feet from the curb in the middle of Main Street (*see Robinson v. City of New York*, 18 A.D.3d 255 [1st Dept. 2005] ["absent some evidence connecting defendants' work to the situs of plaintiff's injury, these defendants are entitled to summary judgment"]; *see also Amarosa v. City of New York*, 51 A.D.3d 596 [1st Dept. 2008]). The absence of actual photographs of the scaffold allegedly used during this 2002 construction

project does not render ACC's prima facie showing defective.

Plaintiff's burden in opposition was to come forward with evidence to establish the existence of "facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Flores v. City of New York*, 29 A.D.3d 356 [1st Dept. 2006], citing *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]). Moreover, that evidence must permit a finding of proximate cause "based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Id., citing Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744 [1986]).

Plaintiff contends in opposition that Mr. Madaglia testified that one of its subcontractors, in fact, performed roadway asphalt cuts, although he denied that those cuts would have been made where this defect was located. Upon careful review of the testimony, however, Mr. Madaglia only identified an ACC subcontract with DiMatteo, a masonry subcontractor. He did not have personal knowledge of what work DiMatteo actually performed in relation to this 2002 project, and a site plan produced at his deposition did not provide that information. Instead, he only testified as to what DiMatteo would have done, had they in fact worked in the area (Madaglia EBT at 74:1-19). The existence of this subcontract, alone, does not raise an issue of fact as to whether any work was actually performed, and moreover, whether that work produced the alleged defect at issue (*see Amini v. Arena Constr. Co., Inc.*, 110 A.D.3d 414). Under these circumstances, Plaintiff has only posited a speculative basis for denying summary judgment to ACC (*see Siegel v. City of New York*, 86 A.D.3d 452 [1st Dept. 2011]). Plaintiff's expert does not provide an evidentiary basis for his conclusion that ACC may have created this defect by virtue of the permits it secured for sidewalk scaffolding, and a container (*see Grullon v. City of New York*, 297 A.D.2d 261 [1st Dept. 2002]; *see also Ortner v. City of New York*, 50 A.D.3d 475 [1st Dept. 2008]). The expert further states that "the City of New Rochelle reportedly issued no permits for that location for any other construction activity other than for this project." ACC and other defendants here, however, have provided evidence that construction work, including roadway openings, was performed by the previous owners of the property in 1983 and 1988.

Defendant Con. Ed's cross-motion, seeking dismissal of all claims asserted against it, must be denied as untimely. An untimely cross-motion may properly be considered where it is

based on nearly identical grounds as a timely motion (*see Das v Sun Wah Restaurant*, 99 A.D.3d 752 [2nd Dept. 2012]). The issues raised on Con. Ed's cross-motion, however, are not "nearly identical" to the issues raised in the timely motions for summary judgment (*see Teitelbaum v. Crown Heights Ass'n for Betterment*, 84 A.D.3d 935 [2nd Dept. 2011]). In any event, Con. Ed failed to meet its prima facie burden of demonstrating entitlement to judgment as a matter of law. Con. Ed provided no evidence addressing the work it allegedly performed in connection with street opening permits it obtained in 2002. Con. Ed's witness, Mr. Hoyt, could only speak to gas related work performed in 2008. The cross-motion is therefore denied.

The remaining issue is the liability of Monroe College, owner of the premises abutting the alleged roadway defect. "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*see Hausser v. Giuuta*, 88 N.Y.2d 449, 452-453 [1996]). "An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty" (*Heva v Smithtown Auto Body of Long Is., Ltd.*, 91 AD3d 822, 822-823 [2012]; see *Dalder v Incorporated Vil. of Rockville Ctr.*, 116 AD3d 908 [2014]).

Here, even assuming that Monroe has established that it did not, itself, create the allegedly hazardous condition, the next issue to consider is whether it caused the condition to occur because of its "special use" of the accident location. While Monroe argues that it did not supervise or control any work on the premises, an owner nevertheless has a non-delegable duty to ensure that work performed on an abutting public highway does not create conditions dangerous for users of that thoroughfare (*see Batts v. City of New York*, 93 A.D.3d 425 [1st Dept. 2012]; *Ortiz v. Nunez*, 32 A.D.3d 759 [1st Dept. 2006]; *Tyree v. Battery Beer Distrib.*, 202 A.D.2d 226 [1st Dept. 1994]). The cases relied on by Monroe in their reply papers concern an owner's liability in the context of an injured worker who sues for injuries sustained on a construction site, not a public street. Monroe can therefore be held vicariously liable for defects that may have

been created by co-defendant Con. Ed (*see, e.g., Eliassan v. Consolidated Edison of New York, Inc.*, 300 A.D.2d 51 [1st Dept. 2002]; *Sheehy v. City of New York*, 43 A.D.3d 336, 337 [1st Dept. 2007]).

Here, Monroe, as well as Con. Ed as noted *infra*, did not provide sufficient proof that any work performed in the accident location by Con. Ed did not cause this alleged defect, or that Monroe had no involvement with this work. Mr. Errico had no personal knowledge of the construction and renovation work that occurred in 2002 at the location, and was not aware of the names of any contractors or the nature of the work they performed at the time. Again, as noted above, Con. Ed's representative only testified as to certain gas line work performed in 2008 and had no knowledge of Con. Ed's alleged work performed at the accident location in 2002. The affidavit of architect Susan Doban, moreover, provides no further information regarding this work. Without probative, admissible evidence addressing this issue, Monroe failed to meet its burden of proof that it did not make special use of that portion of the roadway where this accident occurred (*see, e.g., Montalio v Negev LLC.*, 86 A.D.3d 483 [1st Dept 2011]). The fact that certain work may have been performed in the area prior to Monroe's ownership of the premises does not serve to satisfy its initial burden on summary judgment (*see Demilio v Demico Brothers, Inc.*, 294 A.D.2d 264 [1st Dept. 2002] [pointing out deficiencies or gaps in a plaintiff's proof is insufficient to make out a prima facie entitlement to judgment as a matter of law]).

Monroe also argues that it is entitled to dismissal of Plaintiff's complaint because he did not identify the defective roadway condition that caused his accident, and needed to have an expert go back to the scene more than a month later to make a supposition that the depression at issued caused his fall. At his deposition, however, Plaintiff testified that he saw "pothole-type" "patches" in the street around the accident location before he fell, and circled these defects on photographs of street that were presented to him. This testimony, coupled with the affidavit of Plaintiff's expert regarding the dangerous nature of the defective condition in the street, is sufficient to raise an issue of fact as to whether Plaintiff's fall was caused by the identified depression in the asphalt (*see Pion v. New York City Housing Authority*, 125 A.D.3d 462 [1st Dept. 2015]; *Rodriguez v. Leggett*, 96 A.D.3d 555 [1st Dept. 2012])

The statements allegedly attributable to Plaintiff in his Jacobi Hospital medical records

are inadmissible since Monroe has not established that the statements were germane to the treatment or diagnosis of Plaintiff's injuries (*see Benavides v City of New York*, 115 A.D.3d 518, 519 [1st Dept. 2014]). The statements apparently contained in the uncertified police report, even if they are considered as admissions against interest, only raise an issue of Plaintiff's credibility that cannot be resolved on a motion for summary judgment (see *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the motions for summary judgment filed by defendants ACC and Verizon are granted, and any claims and cross-claims asserted against those defendants are dismissed with prejudice, and it is further,

ORDERED, that Monroe's motion, and Con. Ed.'s cross-motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: June 30, 2015

Hon. MaryAnn Brigantti, J.S.C.

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

IRVIN LIBURD,

Plaintiff,

- against-

NEW YORK CITY TRANSIT AUTHORITY, MTA BUS and DAPHNE MORALES-NELSON,

Defendants.

Index No. 20450/12

Motion Date March 4, 20134

Motion Cal. No. 100

Motion Seq. No. 2



The following papers numbered 1 to 10 read on this motion by plaintiff for summary judgment on the issue of liability, pursuant to CPLR 3212.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affirmation - Exhibits..... | 1-4 |
| Affirmation in Opposition - Exhibits..... | 5-8 |
| Reply Affirmation..... | 9-10 |

Upon the foregoing papers, it is ordered that plaintiff's motion is decoded as follows:.

Plaintiff in this negligence action seeks damages for personal injuries sustained on January 15, 2012, when a bus owned by the New York City Transit Authority (Transit), and operated by employee Daphne Morales-Nelson, struck the rear of a vehicle owned and operated by plaintiff. Plaintiff moves for summary judgment on the issue of liability. Defendants oppose the motion.

Plaintiff testified that he was traveling in the vicinity of East 87th Street and 23rd Avenue, Queens, when he stopped in the roadway to make an inquiry and an MTA bus operated by Daphne Morales-Nelson struck the rear of plaintiff's stopped vehicle. It is undisputed that plaintiff stopped in an active, middle lane of traffic and did not have his hazard signals on at the time. Based upon the rear-end collision with a stopped vehicle, plaintiff moves for summary judgment. Defendant operator testified at a deposition that plaintiff's vehicle moved from the right-hand curb into the moving lane in front of her bus, and she was unable to avoid contact with the rear of plaintiff's vehicle.

It is well-settled that a rear-end collision with a stopped vehicle creates *prima facie* liability with respect to the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle (*see Colonna v Suarez,* 278 AD2d 355 [2d Dept 2000]; *Maschka v Newman,* 262 AD2d 615 [2d Dept 1999]; *Niemiec v Jones,* 237 AD2d 267 [2d Dept 1997]). Defendants' opposition presents a non-negligent excuse for the happening of the accident (*see Vlachos v Saueracker*, 10 AD3d 683 [2d Dept 2004]). Defendants' testimony, coupled with plaintiff's description of the accident, creates a triable issue of fact as to causation warranting a denial of summary judgment (*see Jaramillo vTorres* 60 AD3d 734 [2d Dept 2009]; *Earl v Chapple*, 37 AD3d 520 [2d Dept 2007]).

Further, a driver also has a duty "not to stop suddenly or slow down without proper signaling so as to avoid a collision" (*Colonna v Suarez, supra,* at 355; *Maschka v Newman, supra; Niemiec v Jones, supra).* Here, although plaintiff came forward with evidence that defendant struck the rear of plaintiff's stopped vehicle, defendant submitted evidence that plaintiff contributed to the accident by stopping in the middle of the roadway without giving a proper signal. It cannot be said that there is no rational process by which a jury could find that plaintiff was also partially at fault for failing to avoid the rear-end collision (*see Cohen v Hallmark Cards,* 45 NY2d 493, 498-499 [1978]). In view of the evidence that plaintiff suddenly stopped his car in the middle of the roadway without pulling over and activating warning lights as required by Vehicle and Traffic Law § 1163 (e) and § 1203 (a), the issue of whether his negligence contributed to the accident is for the jury to decide (*see, Colonna v Suarez, supra; Maschka v Newman, supra*).

Accordingly, plaintiff's motion for summary judgment on the issue of liability, is denied.

Dated: July 21, 2014

DARRELL L. GANJI S.C.

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: PAUL WOOTEN J.S.C. PART 7

Justice

AKEA ROYAL,

Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

INDEX NO. 100082/12

MOTION SEQ. NO. 001



The following papers, numbered 1 to _____, were read on this motion for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits— Exhibits _____ | No(s). _____

Replying Affidavits — Exhibits _____ | No(s). _____

Cross-Motion: ☐ Yes ■ No

Before the Court is a pre-answer motion by the New York City Housing Authority (defendant or NYCHA) to dismiss Akea Royal's (plaintiff) complaint in its entirety, pursuant to CPLR 3211(a)(3), (5) and (7) and to convert the motion pursuant to CPLR 3211(c) to one for summary judgment. Plaintiff is in opposition to the herein motion.

BACKGROUND

In her complaint, plaintiff asserts causes of action against the defendant for, *inter alia*, negligence, false arrest, false imprisonment and malicious prosecution stemming from personal injuries allegedly sustained by her on October 7, 2010. She alleges that after spending the night, she was present in Apartment 8E at 27 Warren Street, in Staten Island, New York at 9:30 a.m. with her friend Jonathan Dunn (Dunn) visiting Dunn's friend Vonta Santiago (Santiago), who allegedly lived in 8E. 27 Warren Street is a NYCHA housing project. Plaintiff alleges that she was awakened by the

police banging on the door. Plaintiff testified at her 50-H hearing that she had spent the night in 8E approximately ten times previously (Affirmation in Support of Motion to Dismiss, exhibit 2, p. 39). Plaintiff avers that personnel of the New York Police Department (NYPD), under the direction of NYCHA, forced open the door of the apartment. Subsequently, Dunn allegedly climbed out of the eighth floor bathroom window, onto an exposed cable affixed to the structure of 27 Warren Street, and climbed down that cable. Plaintiff, who was almost 20 years old at the time of the accident, followed Dunn because she claims she was afraid of being arrested. However, when plaintiff climbed out of the window she lost her grip and fell multiple stories, and landed on construction scaffolding. Plaintiff was almost 20 years old at the time of the accident and she suffers from cerebral palsy.

NYCHA states that Santiago was a squatter in apartment 8E and was living in the apartment without NYCHA's knowledge after the prior tenant vacated on July 29, 2010 (*see* Affirmation in Support of Motion to Dismiss, Ravelo Affidavit at 2). NYCHA argues that its motion to dismiss must be granted as plaintiff's intentional act was the cause of her injuries. Specifically, plaintiff did not fall out of the window, she intentionally went out of the window of apartment 8E in an attempt to flee the NYPD officers that had entered the apartment and lost her grip while trying to climb down the cable wire. Moreover, NYCHA argues that plaintiff's causes of action for false arrest and false imprisonment are time-barred.

STANDARDS

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

A motion to dismiss, pursuant to CPLR 3211(a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. "The issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]). The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court" (*id.* at 279). A motion to dismiss, pursuant to CPLR 3211(a)(5), will granted when "the cause of action may not be maintained because of statutes of limitations."

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64).

DISCUSSION

As the Appellate Division, First Department, noted in *Shah v Shah* (215 AD2d 287, 289 [1st Dept 1995]), CPLR 3211(c) permits the court to treat a pre-answer dismissal motion as one for summary judgment; "1) where the action in question involves no issues of fact but only issues of law which are fully appreciated and argued by both sides; 2) where a request for summary judgment

pursuant to CPLR 3211(c) is specifically made by both sides; and 3) where both sides deliberately lay bare their proof and make it clear they are charting a summary judgment course." None of these three considerations have been met herein and as such, defendant's request to convert its motion to dismiss into one for summary judgment is denied. However the Court will consider the remaining portions of defendant's motion to dismiss.

"To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury" (*Howard v Poseiden Pools*, 72 NY2d 972, 974 [1988]), quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). "When an intervening act also contributes to the plaintiff's injuries liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*Boltax v Joy Day Camp*, 67 NY2d 617, 619 [1986] [internal citations and quotations omitted]). "Although it is ordinarily for the trier of fact to determine legal cause, 'where only one conclusion may be drawn from the established facts * * * the question of legal cause may be decided as a matter of law'" (*Howard*, 72 NY2d at 974, quoting *Derdiarian*, 51 NY2d at 315). Assuming for purposes of this motion to dismiss that NYCHA's alleged negligence of a non-working front door lock on the entrance of the building, in failing to properly secure the unrented apartment thereby allowing a squatter to inhabit a vacant apartment in failing to have a window guard on the bathroom window in 8E and in having a cable wire affixed to the outside of the building were causative factors in plaintiff's injuries, the reckless conduct of plaintiff, an adult, who climbed out of the window in order to avoid being arrested, was an unforeseeable superceding event that absolves defendant of liability (*Boltax*, 67 NY2d at 620; *see* Prosser and Keeton, Torts § 44, at 313-314 [5th ed 1984]). Thus, it is plaintiff's conduct of deliberately climbing out of the eighth story window, rather than any negligence by the defendant in entering the abandoned apartment with NYPD officers, that was the sole proximate cause of her injuries (*see Howard*, 72 NY2d at 974; *Boltax*, 67 NY2d at 620; *Smith v Stark*, 67 NY2d 693). As such, plaintiff's claim against NYCHA for negligence must be dismissed.

The Court now turns to plaintiff's claims for false arrest and false imprisonment. NYCHA, with a NYPD escort, was taking over an apartment that should have been vacant for several months and plaintiff was unlawfully trespassing in the apartment. "A plaintiff alleging a claim for false arrest or false imprisonment must show that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged" (*Hernandez v City of New York*, 100 AD3d 433, 433 [1st Dept 2013]. Probable cause was long ago "defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offence with which he is charged" (*Carl v Ayers*, 53 NY 14, 17 [1873]). Defendant's probable cause is self-evident from plaintiff's unlawful presence in 8E, and probable cause is complete defense to a claim for false arrest and false imprisonment (*see Hernandez*, 100 AD3d at 433; *Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006]). Additionally, plaintiff was never arrested, confined or imprisoned as a result of the incident, she only was issued a desk appearance ticket to appear in criminal court. As such, those claims must be dismissed.

To prevail on a claim for malicious prosecution, a party is required to prove four elements: (1) initiation of a criminal proceeding, (2) termination of the proceeding in favor of the accused, (3) lack of probable cause, and (4) the proceeding was brought out of malice (*see Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007]; *Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208 [1st Dept 2002]). Plaintiff's claim for malicious prosecution also fails because of the existence of probable cause, as discussed above, as well as the absence of actual malice (*Arzeno v Mack*, 72 AD3d 341 [1st Dept 2007]; *see also Maskantz*, 39 AD3d at 213 ["Failure to establish any one of these elements (for malicious prosecution) defeats the entire claim"]). In light of the foregoing, the Court need not address the parties' remaining contentions.

CONCLUSION

Upon the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint, pursuant to CPLR 3211(a) is granted and the complaint is dismissed in its entirety without costs or disbursements to defendant; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 12/18/13

PAUL WOOTEN J.S.C.

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

At an I.A.S. Trial Term, Part 55 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 5th day of December 2013

P R E S E N T :
Hon. Karen B. Rothenberg
Justice

Robert LATCHMAN
Plaintiff(s)

Cal. No. 40
Index No. 501017/12

-against-

Nicole K. Peterson, Juan F. Riviere, The City of New York, NYC Transit Authority MTA, MTACC + Citywide Building
Defendant(s)

The following papers numbered 1 to read on this motion

| | Papers Numbered |
|---|---|
| Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed | 1 |
| Answering Affidavit (Affirmation) | 2 |
| Reply Affidavit (Affirmation) | 3 |
| Affidavit (Affirmation) | |
| Pleadings - Exhibits | |
| Stipulations - Minutes | |
| Filed Papers | |

After argument the motion for summary judgment of defendant New York City Transit Authority sued as New York City Transit, MTA New York City Transit, Metropolitan Transit Authority, MTA Capital Construction Company and Citywide Building Restoration, Inc.) is granted. There is no proximate causal connection as to the foregoing defendants.

For Clerks use only
MG
MD
Motion Seq. #

E N T E R

J.S.C.
Karen B. Rothenberg
Justice, Supreme Court

EJV-rev 11-04

NEW YORK SUPREME COURT - COUNTY OF BRONX

(2)

PART 24

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

**COHEN,MICHELE**

Index №. **0304936/2009**

-against-

Hon. **SHARON A. M. AARONS** .

**FELIX INDUSTRIES,INC., et.al.**

Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **September 24 2012** and duly submitted as No. ____ on the Motion Calendar of _____

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits | 2,3 | |
| Replying Affidavit and Exhibits | 4 | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

Upon the foregoing papers this Defendants Empire City Subway Company and Verizon Communication's motion for Summary Judgment is decided in accordance with the annexed Decision and Order of the same date.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 9/12/13

Hon. _____
**SHARON A. M. AARONS, J.S.C.**

----------X

**Hon.**

as

the same relief arguing that they did not create or cause the condition that allegedly caused plaintiff's injuries and that any work presumptively performed by Tri-Messine near the accident location was proper. Tri-Messine also moves to dismiss the cross claims against it. Plaintiff and co-defendant Con Edison oppose the motion. Defendants Verizon and Cablevision Systems New York City Corp., did not submit an opposition to the motion.

In the interest of judicial economy, both defendants' motions are decided in accordance with the below decision and order.

Plaintiff commenced this action against the defendants alleging that on June 29, 2006 she sustained injuries when she tripped and fell over an uneven pavement on the northern side of Mount Eden Parkway between Grand Concourse and Selwyn Avenue at or near Sheridan Street adjacent to Bronx Lebanon Hospital.

Defendants Verizon/ECS through their witness, Calvin Gordon, testified that ECS, a subsidiary of Verizon, is an entity that owns and maintains the underground system in Manhattan and the Bronx which third-parties utilize for telecommunication purposes. Mr. Gordon stated that ECS owns a conduit system in the south side of Mount Eden between Grand Concourse and Selwyn Avenue and that his review of ECS records of the accident location from June 2004 to June of 2006 did not reveal that work was performed by Verizon/ECS. He further testified that although ECS performs backfilling and placement of concrete, the paving of the road is performed by third-party vendors which he was unable to identify. He stated that a document called Duct Utilization System would reveal the tenants

that rented the location of Mount Eden Parkway between Grand Concourse and Selwyn Avenue but he had to search for said record. Defendants Verizon and ECS also produced a search record from Pearl Sheppard, a former employee of ECS that indicated that no excavation was conducted in or around Mount Eden Parkway and Sheridan Avenue during the three years prior up to the date of the accident.

In opposition, plaintiff first argues that defendants Verizon and ECS' motion is defective as they failed to include the answers of co-defendants Con Edison, Tri-Messine and Cablevision; however, movants have provided a reasonable explanation for their inability to submit co-defendants' answer[1]. Plaintiff next argues that Mr. Gordon testimony is inadmissible as his deposition transcript was not sworn. Again, movants have provided a reasonable explanation for failing to attached the signed transcript in its initial motion and attributes the same to administrative error[2].

Now, turning to plaintiff's main argument opposing the motion for summary judgment, plaintiff argues that defendants Verizon/ECS movants or their authorized third-party vendors created a work trench in the location at issue to access their underground

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[1] By decision and Order dated May 25, 2011 this action was consolidated with another similar action commenced against the defendants Tri-Messine Construction Co, Inc.,Verizon Communications Inc., Cablevision Systems New York City Corp.,and Cablevision Systems Corporation. Defendant Verizon and ECS contends that they were not able to attach the co-defendants' answers as they have failed to respond to the movant's discovery request for the same.

[2]Movants indicate that they attached a copy of the signed errata sheet instead of the transcript execution signature page.

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in the location where plaintiff allegedly fell; thus defendants Verizon and ECS demonstrated that, on the merits, it is entitled to judgment as a matter of law.

To defeat this motion, plaintiff has to establish the existence of "facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" ( *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7[1938] ). However, such proof must permit a finding of proximate cause "based not upon speculation, but upon the logical inferences to be drawn from the evidence" ( *Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744 [1986] ). Plaintiff asserts that even if Verizon or ECS did not perform any work on the roadway above their underground systems, they allowed third-parties to perform such work for defendants' benefit or that defendants had reason to believe that the excavation, repaving and back fill work involved special danger; however, such assertions are unsubstantiated. A plaintiff's "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a defendant's motion for summary judgment. (*Zuckerman v City of New York*, 49 NY2d 557,562.) Here, the record contained no evidence that Verizon/ECS ordered or performed any excavation or road work where plaintiff fell and absent some evidence connecting defendants movant's work to the situs of plaintiff's injury, Verizon/ECS are entitled to summary judgment. *(Flores v City of New York*, 29 AD3d 356 [1st Dept 2006]; *Robinson v City of New York,* 18 AD3d 255 [2005].) Accordingly, defendants' Verizon and ECS' motion for summary judgment is granted.

This Court will now address defendant Tri-Messine motion for summary judgment

which seeks to dismiss plaintiff's complaint and the cross claims against it. In support of the motion, defendant Tri-Messine submits a copy of the pleadings, verified bill of particulars, photographs of the accident location, copies of street opening reports from Con Edison from 2006 to 2009, plaintiff's 50-h transcript and deposition transcript, deposition transcripts of Robert O'Brien and Patrick Keogh on behalf of Con Edison, the affidavit and deposition transcript of Alfonso Messina on behalf of Tri-Messine and the affidavit of Mark R. Cipolone, an engineer.

Robert O'Brien a witness for Con Edison, testified that he initially conducted a search of construction records for the accident location during the period of June 24, 2004 through June 29, 2006 and found one open ticket but no excavation was performed during that time. Subsequently, another search was conducted that revealed that during the years 2000 to 2002, work tickets were generated for the area at issue. Patrick Keogh testified that on November 5, 2000, an open ticket was issued to Felix Equities to perform excavation and backfill compaction on Mt. Eden Parkway between Grand Concourse and Selwyn Avenue. He stated that Tri-Messine was in charge of the final paving restoration which was completed on November 13, 2000. He noted that although Con Edison does not have a procedure to inspect the integrity of the work performed by its contractors, Con Edison construction's inspector would have to approve the work in order for the contractor to be compensated. Alfonso Messina who is the sole proprietor and president of Tri-Messine testified that his company performs permanent restoration of asphalt roadway. He stated that back in 2000

the company was hired to perform restoration in the vicinity of Mt. Eden Parkway between Grand Concourse and Selwyn Avenue. He stated that Con Edison hired Felix Equities back in 2000 to do the excavation work and perform all concrete base course and backfill work and that Tri-Messine performed the wearing/paving work pursuant to Con Edison specifications. The work was inspected and approved by Con Edison and Tri-Messine used paving material in good condition.

Mr. Keogh further testified that on December 14, 2001 a work ticket was generated to correct a sunken trench on Mt Eden Parkway between Grand Concourse and Sheridan Street. He testified that Con Edison did not do any cuts on the road but simply referred the matter to Tri-Messine who completed the paving work on February 14, 2002. He stated that Con Edison would not have paid Tri-Messine if they did not perform the work to Con Edison specifications. This was corroborated by Mr. Messina who stated that Tri-Messine was retained by Con Edison to perform restoration work after receiving a corrective request from the City of a sunken trench. Mr. Messina claims that the order request did not indicate with specificity the exact area that was restored or where the accident occurred or if it was the same area worked back in 2000. However, Mr. Messina opined that based on his professional experience in roadway restoration and construction and an examination of the photos, the gradual depression in the accident location was the result of negligent backfill work and not the result of Tri-Messine work of wearing course and paving the road. In further support of Tri-Messine's contention that their work did not cause the condition of a

sunken trench, defendant submits the affidavit of Mark R. Cipolone, an engineer, who opined that the initial street opening performed by Felix Equities on Mt Eden Parkway was filled with compacted backfill and base course within 3 inches of the surface to which Tri-Messine installed a 3 inch wearing course in the openings. He stated that Tri-Messine's work was approved by the City and Con- Edison. He stated that in 2001 a corrective work ticket was generated as the wearing course had settled 2 inches in the openings near Grand Concourse and Tri-Messine performed the repairs which were approved by Con Edison. Mr. Cipolone argues that according to New York City Department of Transportation (DOT) 34 RCNY 2-11 (12) (ii) a settlement of 2 inches is deemed a failure of the compacted backfill and not of the wearing surface. He claims that Felix Equities is responsible for the settlement of the wearing surface due to improper soil compaction. Furthermore, he claims that based on an inspection of Mt Eden Parkway, he concluded that Tri-Messine repair in 2001 was over 100 ft away from the accident location and there was no indication that repair was needed or performed at the accident location. However, since he did not measure the 73 ft along Mt Eden Parkway, he cannot precisely locate the end of the corrective repair performed by Tri-Messine. He also opined that the depth of the trench of one inch was trivial and not hazardous since it was not excessive for a road designed for vehicles.

In opposition[3] plaintiff submits the affidavit of Paul J. Angelides[4], an engineer expert who examined the accident location and opined that the presence of change elevation in the roadway pavement is consistent with a defect in the pavement restoration work as the contractors failed to flush the surrounding pavement. He stated that according with DOT 34 RCNY 2-11(e)(12) (ii) following excavation of pavement, the finished grade of the restored pavement shall be flush with surrounding pavement on all sides of the cut; however, his inspection revealed that the restored wearing course at the location at issue was not flushed which posed a tripping hazard. The pavement restoration work would have required proper and complete sealing of the restored cuts to prevent entry underneath the asphalt of water which contributes to the settlement and sinking of the surrounding pavement; however no proof has been presented by movant that they did appropriate sealing and the photos do not reflect presence of the sealing material. Mr. Angelides concluded that accident would have

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[3] Plaintiff's contention that defendant tri-Messine motion is defective since it failed to include the answer of co-defendant Verizon and the signed deposition transcript of Mr. Messina is rejected as movant has provided a reasonable explanation for the same.

[4]Defendant in its reply argues that plaintiff's expert report should be precluded as it was not timely disclose. However, whether expert disclosure is so late as to warrant preclusion "is left to the sound discretion of the trial court" ( *McGlauflin v. Wadhwa,* 265 A.D.2d 534 [2nd Dept 1999]). A party should not be precluded from proffering expert testimony "merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Hernandez–Vega v. Zwanger–Pesiri Radiology Group,* 39 A.D.3d 710, 710–711, 833 N.Y.S.2d 627 [2007] [internal quotations and citations omitted]). Here, there is no indication either that plaintiff's failure to disclose was intentional or that defendant was prejudiced by the late disclosure; thus, this Court rejects defendant's Tri-Messine request to preclude. (*Green v. William Penn Life Ins. Co. of New York,* 74 A.D.3d 570 [1 Dept 2010].)

been preventable had the trench been properly excavated, filled, compacted, paved, re-paved and sealed.

After examining the records, this court finds that triable issues of material facts exists as to whether defendant Tri-Messine caused the roadway depression at the accident location, where plaintiff was caused to trip and fall. Defendant Tri-Messine admitted that it did perform certain re-paving work near the accident location and although its president, Mr. Messina and expert, Mr. Cipolone, attempt to cast doubt as to the exact location of the repair, they could not rule out the accident location. Mr. Messina stated that the order request did not indicate with specificity the exact area that was restored or if it was the same area worked back in 2000. Also, defendant's expert did not measure the 2001 repair area so he could not locate the end of the corrective repair. Furthermore, based on the testimony of Con Edison's witnesses together with plaintiff's testimony, Messina's testimony and affidavit and the parties' expert conclusive reports, a question of fact exists as to whether Tri-Messine's work caused the sunken trench. On one hand, defendant's expert opined that the sunken trench where plaintiff allegedly fell was solely due to defendant Felix Equities' improper soil compaction; however, plaintiff's expert disagreed and concluded that the restored wearing course at the accident location which was performed by defendant Tri-Messine, was not flushed which posed a hazard and that there was no evidence that Tri-Messine properly seal the road cuts while performing the pavement restoration which would prevent the sinking of the trench. Hence, a triable of issue of fact exists as to whether defendant's Tri-Messine

work caused or contributed to the defect that caused plaintiff's fall and as a result defendant Tri-Messine's motion for summary judgment is denied.

The remaining branch of defendant Tri-Messine's request for dismissal of cross claims is denied as dismissal of such cross claims is unwarranted at this time because of the existence of triable issues of fact concerning the degree of fault, if any, attributable to Con Edison, and remaining co-defendants. It is hereby

**ORDERED**, that plaintiffs' complaint is dismissed only as to defendants Verizon Communications Inc. f/k/a Bell Atlantic Corporation f/k/a NYNEX Corporation and Empire City Subway Company Ltd.; and it is further

**ORDERED**, that movants are to serve a copy of this Decision and Order with notice of entry upon all parties.

Dated: 9/12/13

SHARON A.M. AARONS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT PART 62
*Justice*

RAHEIM GRIER,
Plaintiff/Petitioner
-v-
THE CITY OF NEW YORK, CON EDISON, EMPIRE CITY SUBWAY, TIME WARNER ENTERTAINMENT and TEN WEST END AVENUE HOLDINGS, LLC d/b/a The 10 West End Avenue Condominium,
Defendant/Respondent(s)

INDEX #114582/07
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.
DECISION

TIME WARNER ENTERTAINMENT COMPANY, L.P., d/b/a Time Warner Cable Through Its New York City Division, s/h/a Time Warner Cable Of NYC,
Third-Party Plaintiff,
-v-
HYLAN DATACOM & ELECTRICAL, INC.,
Third-Party Defendant.

TP Index #83794/11

The following papers, numbered 1 to 5 were read on this motion to/for dismiss all claims against Empire City Subway

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2,3,5 |
| Replying Affidavits | 5 |
| Other | |

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion/petition by Defendant Empire City Subway, to dismiss all claims and cross-claims against it is granted, a/p/o.

July 29, 2013,

GEOFFREY D. WRIGHT
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 62

----------X

RAHEIM GRIER,

Plaintiff-Petitioner(s),

-against-

THE CITY OF NEW YORK, CON EDISON, EMPIRE CITY SUBWAY, TIME WARNER ENTRERTAINMENT and TEN WEST END AVENUE HOLIDNGS, LLC, d/b/a The 10 West End Avenue Condominium,

Defendant-Respondent(s),

----------X

TIME WARNER ENTERTAINMENT COMPANY, L.P., d/b/a Time Warner Cable Through Its New York City Division, s/h/a Time Warner Cable Of NYC,

Third-Party Plaintiff,

-against-

HYLAN DATACOM & ELECTRICAL, INC.,

Third-Party Defendant.

----------X

Index #114582/07
Motion Cal. #
Motion Seq. #
**DECISION/ORDER**
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

TP Index #-83794/11

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the complaint against Empire City Subway

| PAPERS | NUMBERED |
|---|---|
| Notice of Petition/Motion, Affidavits & Exhibits Annexed | 1 |
| Order to Show Cause, Affidavits & Exhibits | |
| Answering Affidavits & Exhibits Annex | 2,3,4 |
| Replying Affidavits & Exhibits Annexed | 5 |
| Other (Cross-motion) & Exhibits Annexed | |
| Supporting Affirmation | |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiff was inured when the vehicle he was driving along West End Avenue between 59th and 60th Streets, struck a raised manhole cover. Defendant Empire City Subway now moves for the dismissal of all claims against it on the theory that any work that it did in the general area was ten yards from the scene of the accident.

None of the opposing papers challenges this position, except by innuendo and suggestion. This case is now in its sixth year, and presumably any specifications associated with the work done by Empire have or should have been discovered. No opposing papers argue that the nature of the work could or would leave the manhole exposed or raised. No opposing papers move the site of Empire's work closer to the point of the accident than ten yards. The motion to dismiss all claims against Empire City Subway is granted. This constitutes the decision and order of the court.

GEOFFREY D. WRIGHT
AJSC

Dated: July 30, 2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-19A

----------X

LYNNECE L. ACOSTA and VICTORIANO ACOSTA,

Plaintiffs,

- against -

INDEX NO. 304677/10

CONSOLIDATE EDISON COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY and MASPETH SUPPLY COMPANY,

DECISION/ORDER

Defendants.

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**HON. DOUGLAS E. MCKEON**

Plaintiff Lynnece Acosta (the injured plaintiff) and her husband commenced this negligence action to recover damages, among other things, for personal injuries the injured plaintiff sustained when she was struck by an automobile driven by a non-party, Reyes-Lopez. In a prior action, plaintiffs settled their claims against the driver and his employer. The defendants in the present action are two contractors that performed work in the vicinity of the accident site (Empire City Subway and Maspeth Supply Company), and Consolidated Edison, which maintained certain underground equipment and hardware where the work was performed.

On the day of the accident, Mespath was performing work in the intersection of 110th Street and 1st Avenue in New York County; the work did not extend beyond the middle of that intersection. Mespath erected barriers on the south portion of the intersection and the crosswalk on the south portion of the intersection was closed. The effect of the work and the placement of the barriers was to reduce the number of lanes open to north-bound vehicular traffic on 1st Avenue from four to two and to require all vehicles traveling on 110th Street to turn left onto 1st Avenue; the effect of the closed crosswalk on the south portion of the intersection was to

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the

of others; it was present on the site to ensure that contractors' work did not damage Con Edison's underground equipment and hardware. Empire City Subway cross-moves for summary judgment dismissing the complaint and all cross-claims as asserted against it on the ground that, as a matter of law, it was not negligent because it had completed its work at the construction site approximately three months prior to the accident.

Plaintiffs oppose the motions, arguing that, because of the traffic pattern created by the construction work and pedestrians' increased dependance on the crosswalk on the north portion of the intersection, defendants, who created those conditions, were required but failed to "secure the area in such a way as to make th[e] intersection and [northern] crosswalk safe. Though they would seek to state that their work ended at 110th Street, it should be noted that their work extended into the intersection and, as such, created a condition that dictated their creating a safe crosswalk environment for pedestrians and specifically, [the injured plaintiff]."

Con Edison made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint and all cross-claims as asserted against it. The deposition testimony of a Con Edison employee with firsthand knowledge of the construction project demonstrates that Con Edison did not perform work at the construction site and did not control the work of others; its role was to protect the integrity of its underground equipment and hardware. Notably, too, Con Edison did not place any barricades in the intersection. In opposition to Con Edison's prima facie showing, plaintiffs (and the co-defendants) failed to raise a triable issue of fact. Plaintiffs' did not submit any evidence suggesting that Con Edison performed the work in the intersection, controlled the work of others or obstructed the intersection or crosswalks.

Similarly, Empire City Subway is entitled to summary judgment dismissing the complaint and all cross-claims as asserted against it. The affidavit of one of its employees, as well as the

deposition testimony of another employee, demonstrates that Empire City Subway had performed work on or near the intersection, but that work terminated approximately three months before the accident. The affidavit and deposition testimony also demonstrate that no materials belonging to Empire City Subway contributed to the accident. In opposition, plaintiffs (and co-defendants) failed to raise a triable issue of fact. No evidence was submitted refuting Empire City Subway's showing that its work had terminated months before the accident and that its materials did not contribute to the accident.

Mespath, however, is not entitled to summary judgment dismissing the complaint as against it. Although Mespath's evidence demonstrates that the construction equipment on or near the sidewalk of the northwest corner of the intersection did not belong to Mespath, plaintiffs assert that Mespath was negligent because it created a dangerous condition for pedestrians by obstructing the intersection, closing the crosswalk on the south portion of it and failing to take reasonable measures to make the crosswalk on the north portion of it safe for pedestrians. The evidence submitted by the various movants establishes that Mespath was performing work in the intersection and, in connection with that work, had (1) obstructed part of the intersection, making 1st Avenue a two-lane road (instead of four), and forcing all traffic traveling on 110th Street to turn left onto 1st Avenue, and (2) closed the crosswalk on the south portion of the intersection. The conditions in and around the intersection, which were at least partially Mespath's making, increased both the concentration of traffic on 1st Avenue north of the intersection and pedestrians' dependence on the crosswalk on the north portion of it. According to plaintiffs' expert engineer, these conditions, as well as the permits issued by the City of New York allowing the construction project, dictated that Mespath comply with the Federal Manual of Uniform Traffic Control Devices, part 6, governing temporary traffic controls. The expert opines that

Mespath did not comply with part 6 of the Manual because it did not utilize on the north portion of the intersection warning signs, traffic cones, barrels or barricades, channelization devices, beacons or arrow boards to protect pedestrians. This failure to comply with the Manual, says the expert, caused, along with the actions of the driver, the accident. Plaintiffs therefore raised a triable issue of fact regarding whether Mespath was negligent and whether that negligence was a proximate cause of plaintiffs' injuries. The conduct of the driver was at least *a* proximate cause of plaintiffs' injuries and perhaps a jury will determine that the driver bears complete fault for those injuries, but that determination cannot be made at this juncture.[1]

Accordingly, it is hereby ordered that: (1) the motion of defendant Mespath Supply Company is denied; (2) the motion of defendant Consolidated Edison Company of New York, Inc., is granted and the complaint and all cross-claims asserted against it are dismissed; and (3) the motion of defendant Empire City Subway is granted and the complaint and all cross-claims asserted against it are dismissed. The Clerk is directed to enter judgment in favor of defendants Consolidated Edison Company of New York, Inc., and Empire City Subway dismissing the complaint and all cross-claims asserted against those defendants.

This constitutes the decision and order of the court.

Dated: ~~July 10, 2013~~ July 19, 2013 J.S.C.

DOUGLAS E. MCKEON, J.S.C.

[1]In light of the settlement between plaintiffs and the driver and owner of the vehicle, Mespath may benefit from GOL § 15-108.

**SUPREME COURT STATE OF NEW YORK**
**COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti-Hughes

----------X

JATORI MALDONADO, an infant by her mother and natural guardian, LETTICE MALDONADO and LETTICE MALDONADO, individually,

Plaintiffs,

-against-

**DECISION / ORDER**
Index No. 350146/11

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

----------X

The following papers numbered 1 to 5 read on the below motion noticed on November 28, 2012 and duly submitted on the Part IA15 Motion calendar of **March 22, 2013**:

| Papers Submitted | Numbered |
|---|---|
| Def.'s Notice of Motion, Exhibits | 1,2 |
| Pl.'s Aff. In Opposition, Exhibits | 3,4 |
| Def.'s Aff. In Reply, Exhibits | 5,6 |

In an action seeking damages for personal injuries arising out of an alleged slip and fall accident, the defendant New York City Housing Authority ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiffs Jatori Maldonado ("Plaintiff Jatori"), an infant by her mother and natural guardian Lettice Maldonado, and Lettice Maldonado ("Plaintiff Lettice"), individually, pursuant to CPLR 3212. The plaintiffs opposes the motion.

I. Background

According to the complaint, Plaintiff Jatori slipped and fell while descending an interior staircase in a building owned by Defendant and located at 730 East 163rd Street, Bronx, New York. Plaintiff Jatori alleges that on July 2, 2010, at approximately 6:00PM, she was in the "B" stairwell between the 4th and 3rd floors of the building. Plaintiff Jatori had been visiting her grandmother, who lives in apartment 4H. At her 50-h hearing, Plaintiff Jatori testified that she was descending the stairs holding her sister's hand with her right hand, and her left hand was holding a bag. Plaintiff Jatori testified that she slipped on the third step from the fourth floor

landing. At her deposition, Plaintiff Jatori testified that she had taken two to three steps down from the fourth to third floors when she slipped and fell. She did not look at the steps before falling, nor did she notice any liquid or debris on the steps. After she fell, Plaintiff Jatori noticed that the floor was wet because her pants were wet with dirt. Plaintiff Jatori also noticed candy wrappers and "nasty stuff" on the floor. At her hearing, Plaintiff Jatori testified that she discovered a candy wrapper on the bottom of her right shoe after she fell. At deposition, Plaintiff Jatori testified that she noticed a condom on the bottom of her right shoe after she fell. At the hearing, Plaintiff Jaotri believed that the liquid on the step caused her to fall. At her deposition, Plaintiff Jatori testified that she believed the urine and the condom caused her to fall. Plaintiff Jatori had not used the "B" staircase at any time that day before her alleged accident. She did not know how long the substance was on the steps. She testified that although the lights were "flickering," the lighting was adequate and the stairs were not unsafe in any other way. Plaintiff Jatori never made any complaints to anyone about the condition of the "B" staircase before her alleged incident.

In support, Defendant submits, *inter alia*, maintenance records for the subject building, as well as the deposition transcript from its Supervisor of Caretakers Jimmy Ruano, who was responsible for maintaining the subject building. At deposition, Mr. Ruano testified that the every day, caretakers are required to sweep and mop the stairwells for any urine stains and hazardous condition. Caretakers begin their shifts at 8:00AM and do a "walk down" of the buildings, and their shifts end at 4:30PM. If there is any hazardous condition, the caretakers are to address it immediately. Mr. Ruano identified a janitorial schedule for the building, which is annexed to the moving papers. At the end of the day, caretakers perform a final walk down of the staircases for any hazardous conditions. On Fridays, the day of this alleged incident, the final walk down is performed between 3:45PM and 4:15PM. Mr. Ruano testified that he had no knowledge of residents leaving trash in stairwells, and had never received any reports concerning debris in the stairwells before this incident. He did not receive any complaints from tenants regarding the condition of the stairwells. On a monthly basis, Mr. Ruano himself would inspect the building and stairwells. He testified that he observed no condition on the staircases upon these inspections.

Defendant also submits an affidavit from Tyrone Coaxum, the caretaker who was

assigned to the building at the time of this accident. Mr. Coaxum states that he follows the janitorial schedule that was outlined at Mr. Ruano's deposition. He states that on July 2, 2010, when he left work at 4:30PM, the staircase "B" was clean, dry, and free of debris.

Defendant now moves for summary judgment, arguing that, in light of the foregoing, they did not create, or have actual or constructive notice of the allegedly hazardous condition.

In opposition, the plaintiffs submit the affidavit of Plaintiff Jatori. In it, she states that at the time of the accident, she was descending from the fourth floor to the third floor when she slipped and fell on a "combination of sticky urine smelling liquid and debris that was on the stairs" including food or candy wrappers and a condom. She states that urine odor was in the staircase and had been present for "long enough to partially dry and become somewhat tacky." She did not know how long the other debris was present before her fall. She also stated that, whenever she used the staircase the odor or urine would be present and there would almost always be some debris or liquid on the staircase.

Plaintiff also submits an affidavit from Plaintiff Lettice. She asserted that the "B" staircase "had a reputation for being poorly lit and a handout [sic] for addicts and other unsavory elements..." and she would most often take the A staircase. On occasion when she took the B staircase, "inevitably there would be urine and other liquids as well as trash, debris, and worse on the stairs." She was not with her daughter at the time of the fall, but "the debris and conditions testified to its consistent with what I had observed numerous times (my mother had lived there over three decades)."

Plaintiffs argues that, in light of the foregoing, Defendant has on constructive notice of a dangerous recurring condition on the staircase "B".

In reply, Defendant argues that Plaintiff Jatori's affidavit submitted in opposition contradicts her deposition testimony and must be disregarded. At deposition, Plaintiff was specifically asked if she had noticed "any liquid, urine, garbage, or anything else" on the stairway between the third and fourth floors before this accident, and she answered "no." Moreover, the affidavit of Plaintiff Lettice is insufficient to create an issue of fact as to whether the condition was "recurring" and "routinely left unadressed." Plaintiff Lettice's affidavit only states that staircase "B" has a poor "reputation" but admits in the affidavit that she only took the "B" staircase "about once a month."

## II. Standard of Review

"[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. (*Muniz v. Bacchus*, 282 A.D.2d 387 [1st Dept. 2001]). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. (*Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 [2nd Dept. 1964]; *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 [3rd Dept. 1988]).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. (*Knepka v. Tallman*, 278 A.D.2d 811 [4th Dept. 2000]).

If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]; *Bronx County Public Adm'r v. New York City Housing Authority*, 182 A.D.2d 517 [1st Dept. 1992]).

## III. Applicable Law and Analysis

To impose liability upon a landowner in a fall-related action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition *(Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it. *( see Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986] *)*. The notice required must be more than general notice of

any defective condition. *(Id.)* The law requires notice of the specific condition alleged at the specific location alleged *(Id.)*.

Plaintiff's burden may, however, be met by evidence of an ongoing and recurring dangerous condition in the area of the slip and fall, which routinely was left unaddressed by the landowner. *Megally v. 440 W.34th St. Co.*, 246 A.D.2d 346 (1st Dept. 1998). Such evidence will be viewed in a light most favorable to the plaintiff. *Id.*, citing *Anderson v. Klein's Foods*, 139 A.D.2d 904, *aff'd* 73 N.Y.2d 835. For example, in *Morchano v. Columbia University*, the plaintiff slipped and fell on discarded newspaper on the floor of the lobby in one of the defendant's buildings. The plaintiff testified that he had previously seen newspapers scattered around the same lobby, and another security guard averred that newspapers would be strewn over the lobby's floor. The First Department affirmed denial of the defendant's motion for summary judgment, finding that there was a triable issue as to whether the presence of newspapers in the lobby constituted a recurring hazard (6 A.D.3d 355 [1st Dept. 2004]; *see e.g. O'Grady v. N.Y.C.H.A.*, 259 A.D.2d 442 [1st Dept. 1999]; *Lopez v. New York City Housing Auth.*, 255 A.D.2d 160 [1st Dept. 1998]).

Here, the movant's submissions establish prima facie entitlement to judgment as a matter of law, as Defendant has established that it did not have actual or constructive notice of a urine or other garbage condition on the subject staircase (*Raposo v. New York City Housing Auth.*, 94 A.D.3d 533 [1st Dept. 2012]). Defendant's submissions established that it had a janitorial schedule in place at the time of the incident, and that staircase "B" had been inspected, and was deemed dry and free of debris within 1 ½ hours before Plaintiff's alleged fall.

Plaintiff's submissions in opposition fail to raise a genuine issue of fact as to whether the allegedly dangerous condition was ongoing and routinely left unaddressed (*O'Grady v. N.Y.C.H.A.*, 259 A.D.2d 442 [1st Dept. 1999]). First, the affidavit of Plaintiff Jatori, that the stairwell would almost always contain garbage or debris, directly contradicts her deposition testimony, wherein she testified that she never noticed garbage, debris, or urine on that location of the stairway before her accident. Moreover, at her 50-h hearing, when asked if she had ever seen garbage or other liquids on the stairs before her accident, she responded "I don't remember" (Def. Ex.4, at 36:4-8). The affidavit, which does not explain this disparity in testimony, must therefore be disregarded since it only creates a "feigned issue of fact." (*Telfeyan v. City of New*

*York*, 40 A.D.3d 372 [1st Dept. 2007]). Further, Plaintiff Jantori never complained to anyone about the condition of the staircase, and did not know of anyone else who did so.

Next, the affidavit of plaintiff Lettice is insufficient to establish that this staircase had routinely accumulated garbage or debris. Plaintiff Lettice only avers that the staircase had a "reputation for being poorly lit and a hangout for addicts and other unsavory elements". Moreover, she would only take the B staircase "about once a month." At best, Plaintiff Lettice's affidavit only demonstrates a general awareness of a dangerous condition *(Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). The testimony of the Defendant's supervisor of caretakers and the specific caretaker in charge of this staircase confirmed that it was routinely inspected and cleaned on Fridays within 1 ½ - 2 hours of Plaintiff's alleged fall. It has been held that "[a] defendant cannot be expected to 'patrol its staircases 24 hours a day'" (*Pfeuffer v. New York City Housing Authority*, 93 A.D.3d 470 [1st Dept. 2012]; citing *Love v. New York City Housing Authority*, 82 A.D.3 588 [1st Dept. 2011]). Upon the evidence presented here, even if the condition was recurring, Defendant would routinely address it and there is evidence that the specific location was clean within a short time before the alleged fall (*see Torres v. New York City Housing Authority*, 85 A.D.3d 469 [1st Dept. 2011]). This is not, therefore, a case where "defendant negligently failed to take any measures to avoid the creation of a dangerous condition." (*Pfeuffer v. New York City Housing Auth., supra, citing DeJesus v. New York City Housing Authority*, 53 A.D.3d 410 [1st Dept. 2008], *aff'd*, 11 N.Y.3d 889 [2008]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is granted, and the complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 6/21/13

Hon. Mary Ann Brigantti-Hughes, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
MILLGAROS BONILLA,

Plaintiff,

-against-

VERIZON COMMUNICATIONS, INC, et. al.,

Defendant.

Index No. 302451/10

**DECISION/ORDER**

**Present:**

**HON. KENNETH L. THOMPSON, Jr.**

The following papers numbered 1 to 8 read on this motion, for summary judgment and dismissal

No On Calendar of 01/24/13

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed | 1,7 |
| Answering Affidavit and Exhibits | 3,5,6,8 |
| Replying Affidavit andExhibits | 4 |
| Affidavit | |
| Cross-Motion | 2 |
| Stipulation -- Referee's Report --Minutes | |
| Filed papers | |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants, Verizon Communications, Inc. and Empire City Subway Company (Limited), (collectively, Verizon), move pursuant to CPLR 3212 dismissing all claims as against Verizon, and seeking costs of this motion. Plaintiff cross-moves to strike Verizon's answer for failure to attend an EBT. Defendants, Tele Tech, Inc., Tele Tech of CT Corp. and Katherine Ringwood, (collectively, Ringwood), move pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims as against it. The motions and cross-motion are hereby consolidated for decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff in a trip and fall on what appears to be a remnant of a bolt from a removed exterior telephone booth. There had been a public telephone in that location in prior years. Verizon has submitted two affidavits indicating that Verizon did not install nor remove the subject telephone. Moreover, defendant, Katherine

Ringwood,, the owner of co-defendant, Tele Tech, avers that Tele Tech operated and removed the subject payphone prior to plaintiff's trip and fall. Plaintiff has failed to produce any fact connecting Verizon to the site of plaintiff's fall. "While the area of sidewalk where plaintiff fell is deteriorated, there is nothing to connect [defendant] to the condition which caused the plaintiff's fall. Thus, there is no legal basis for imposing liability on [defendant], and the complaint against it must be dismissed." (*Pignatoro v Coen*, 150 A.D.2d 222, 223 [1st Dept1989]). On a motion for summary judgment "both parties are required to assemble and lay bare evidentiary facts as to the existence of genuine triable issues of fact." *(Tonkonogy v Seidenberg*, 63 AD2d 587 [1st Dept 1978]).

Plaintiff argues that Verizon's motion should be denied because there is outstanding discovery. There is not a shred of evidence connecting Verizon with the site of plaintiff's fall, and a co-defendant has admitted to operating and removing the subject payphone.

> Although a motion for summary judgment may be denied if the facts essential to establish opposition 'may exist but cannot then be stated' (CPLR 3212 [f]), '[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis...for postponing a decision on a summary judgment motion' (*Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*, 133 AD2d 669, 670 [1987]).
>
> *(Fulton v Allstate Insurance Co.*, 14 AD3d 380, 381 [1st Dept 2005]).

Ringwood moves for summary judgment on the basis that there was a two year lapse between the removal of the payphones and plaintiff's trip and fall. Ringwood cites to cases that hold that the general rule is that liability for dangerous conditions does not extend to a prior owner. However, Ringwood is not a prior owner, but admittedly her company removed the pay phone creating an issue of fact as to whether the payphone was negligently removed leaving behind a tripping hazard. "It is settled that the function of a court on a motion for summary

JAN 3 1

KENNETH L. THOMPSON, JR.

SHORT FORM ORDER

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

----------X

SALIM TALAMAS,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY and LONG ISLAND RAILROAD,

Defendants.

----------X

Index No.: 15419/2011

Motion Date: December 5, 2012

Cal. No.: 7
Seq. No.: 1

QUEENS COUNTY CLERK
FILED
2013 JAN 31 PM 2:00

The following papers numbered 1 to 6 were read on the motion by the defendants, seeking an order pursuant to CPLR 3211 and 3212, granting them summary judgment and dismissing plaintiff's complaint as asserted against them.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion - Affirmation - Exhibits..... | 1 - 3 |
| Opposition Affirmation - Exhibits..... | 4 - 5 |
| Reply Affirmation..... | 6 |

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on January 26, 2011, at approximately 5:50p.m., as a result of a slip and fall due to the presence of snow and ice on the eastbound platform of the LIRR station located at Hollis Avenue, Queens, New York.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate an material issues of fact from the case." (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985].) Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which requires a jury trial. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].)

In support of the motion, the defendants submit, inter alia, certified weather data as well

as an affidavit from James V. Bria, III, a meteorologist, demonstrating that on the date of plaintiff's accident, January 26, 2011, snow and ice began to fall around 7:15 a.m., continuing through to the early morning hours of January 27, 2011. Between 7:30 a.m. and 6:00 p.m. on the date in question, there was an accumulation of approximately 3 inches of snow and ice, with a total accumulation of approximately 6 inches for the entire day. This is sufficient to establish the defendants' prima facie entitlement to judgment on the ground that there was an insufficient amount of time for them to remedy the alleged snow and ice condition that caused plaintiff's accident. (See, *Smith v Christ's First Presbyterian Church of Hempstead*, 93 AD3d 839 [2d Dept. 2012]; *Ali v Village of Pleasantville*, 95 AD3d 796 [2d Dept. 2012]; *Dowden v Long Is. R. R.*, 305 AD2d 631 [2d Dept. 2003]; *Sanders v Wal-Mart Stores, Inc.*, 9 AD3d 595 [3d Dept. 2004]; *Fuks v New York City Transit Auth.*, 243 AD2d 678 [2d Dept. 1997]; see also, *Myrow v City of Poughkeepsie*, 3 AD3d 480 [2d Dept. 2004]; *Saitta v City of New York*, 281 AD2d 333 [1st Dept. 2001].)

Plaintiff's deposition testimony and his expert's meteorological report which attempts to confirm plaintiff's speculation that there was black ice beneath the wet snow due to the slippery condition of the platform, fail to raise a triable issue of fact in opposition. (See, *DeVito v Harrison House Assoc.*, 41 AD3d 420 [2d Dept. 2007]; *Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741 [2d Dept. 2006] "Where there is meteorological evidence of precipitation prior to the day of a storm in progress slip and fall incident, speculation that the ice upon which plaintiff fell was preexisting ice is insufficient to defeat a motion for summary judgment." (*Parker v Rust Plant Servs.*, 9 A.D.3d 671 [3d Dept. 2004]; see also, *Meyers v Big Six Towers, Inc.*, 85 AD3d 877 [2d Dept. 2011].)

Accordingly, defendants' motion for summary judgment is granted, in its entirety, and plaintiff's complaint is dismissed.

January 23, 2013

SIDNEY F. STRAUSS, J.S.C.

Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE Justice

IA Part 24

FILED

APR 18 2013

COUNTY CLERK QUEENS COUNTY

ANITA PERRINO,

Plaintiff,

-against-

McDONALD'S CORPORATION, ET AL.

Index Number 11027

Motion Date December 18, 2012

Motion Seq. Nos. 1-3

The following papers numbered 1 to 29 read on this motion by defendants McDonald's Corporation and Richard R. Cisneros d/b/a JHC Corp. for summary judgment dismissing all claims, cross claims and counterclaims asserted against them, to strike the note of issue and to compel discovery; a separate motion by defendants E.E. Cruz & Tully Construction Co. and E.E. Cruz & Company, Inc. (jointly Cruz), and third-party defendants New York City Department of Transportation and MTA Capital Construction (DOT and MTA) for summary judgment dismissing the complaint and all claims asserted against them; a separate motion by defendant/third-party plaintiff 80th Street Realty Company, LLC, for summary judgment dismissing the complaint and all cross claims asserted against it or, in the alternative, for a further deposition of plaintiff or to strike the case from the trial calendar; and a cross motion by Cruz, DOT and MTA for further discovery or, in the alternative, to strike the case from the trial calendar.

| | Papers Numbered |
|---|---|
| Notices of Motion - Affidavits - Exhibits..... | 1-12 |
| Notice of Cross Motion - Affidavits - Exhibits.. | 13-16 |
| Answering Affidavits - Exhibits..... | 17-25 |
| Reply Affidavits..... | 20-33 |

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated for the purpose of disposition and are determined as follows:

At the outset, the court notes the apparent confusion during the clerical processing of these applications regarding the proper caption in the main action herein. The proper caption is the one

on the amended summons filed with the Clerk of the Court on April 8, 2011, and utilized by the moving parties. In addition, the cross motion and those branches of the motions that seek to compel further discovery and/or to strike the case from the trial calendar have been withdrawn pursuant to a stipulation entered into at the calendar call in the centralized motion part.

Plaintiff alleges that she was injured when she lost her balance and fell on a nine-inch square, one-quarter-inch deep depression on the sidewalk outside a McDonald's restaurant located on Second Avenue, between 96th and 97th Streets, in Manhattan. In her deposition testimony, plaintiff explained that when the accident occurred she knew only that she had lost her balance and then fell, so after she got up she looked back to determine where, and why, she had fallen. She did not see any objects on the sidewalk but noticed a "dent" in the sidewalk which she had not seen before she fell. Plaintiff testified that while it was not a deep dent or the kind of thing that you would describe to yourself as a hole that you do not want to walk through if you saw it beforehand, she concluded that the area with the dent was where she fell. Plaintiff specified that she did not slip or trip or feel herself stepping into a depression, and did not know which foot caused her to lose balance or whether either foot was all or even partially in the depression when she lost her balance. She did not know if she twisted an ankle. She stated that she could not believe at the time she first saw the dent, or thereafter, that such a small dent could make her fall. Due to the presence of the dent and the fact that she lost her balance and fell, plaintiff admitted, she just assumed that her foot went into the dent and her ankle twisted, causing the loss of balance and the fall.

The subject accident occurred in the area of the ongoing construction for the Second Avenue subway, but plaintiff asserted that there was no construction activity on the sidewalk at the time of the accident. Nor were there any construction signs, cones or barricades on the sidewalk. The incident happened at about 8:45 A.M. on a clear day. The square depression was darker in color than the surrounding sidewalk. There were other pedestrians on the sidewalk but plaintiff distinguished the scene from a heavy traffic area like Fifth Avenue and 42nd Street. Plaintiff did not indicate that the surface of the depression was rough or jagged.

Upon consideration of the facts presented in this case, including the dimensions, depth, shape, condition and appearance of the sidewalk defect together with the time, place and circumstance of plaintiff's accident, as well as plaintiff's photographs depicting the depression at the time of the accident, the court concludes that the one-quarter-inch deep square depression alleged

to have caused plaintiff to fall is of a trivial nature and does not have the characteristics of a trap or nuisance. (*See Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Das v Sun Wah Rest.*, 99 AD3d 752 [2012]; *Sokolovskaya v Zemnovitsch*, 89 AD3d 918 [2011]; *Schenpanski v Promise Deli, Inc.*, 86 AD3d 982 [2011]; *Fisher v JRMR Realty Corp.*, 63 AD3d 677 [2009].) Thus, the alleged defect is not actionable. (*Id.*)

Moreover, even if there were an issue of fact as to the trivial nature of the alleged defect, the evidence demonstrates that plaintiff is merely speculating as to the cause of her loss of balance and fall. There is no proof that plaintiff stepped into or on the edge of the depression. Plaintiff's assumptions as to the cause of her accident when she cannot actually identify the cause are an insufficient basis on which to find that the negligence of any defendant proximately caused her injuries. (*See Harrison v New York City Tr. Auth.*, 94 AD3d 512, 513 [2012]; *Smith v Maloney*, 91 AD3d 1259 [2012]; *Bosser v Bay Restoration Corp.*, 79 AD3d 1086 [2010]; *Slattery v O'Shea*, 46 AD3d 669 [2007]; *Karwowski v New York City Tr. Auth.*, 44 AD3d 826 [2007]; *Oettinger v Amerada Hess Corp.*, 15 AD3d 638 [2005].)

Accordingly, the branches of the motions that are for summary judgment are granted.

Dated: April 15, 2013

AUGUSTUS C. AGATE, J.S.C.

FILED
APR 18 2013
COUNTY CLERK
QUEENS COUNTY

No. 103 SSM 6
Rosemond Barney-Yeboah,
Respondent,
v.
Metro-North Commuter Railroad,
Appellant.

Submitted by Paul A. Krez, for appellant.
Submitted by Jason M. Murphy, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed, with costs, Supreme Court's order reinstated, and the certified question answered in the negative. This is not the type of rare

case in which the circumstantial proof presented by plaintiff "is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (Morejon v Rais Constr. Co., 7 NY3d 203, 209 [2006]).

* * * * * * * * * * * * *

On review of submissions pursuant to section 500.11 of the Rules, order reversed, with costs, order of Supreme Court, New York County, reinstated, and certified question answered in the negative, in a memorandum. Chief Judge Lippman and Judges Read, Rivera, Abdus-Salaam, Stein and Fahey concur. Judge Pigott dissents and votes to affirm for reasons stated in the memorandum at the Appellate Division (120 AD3d 1023 [2014]).

Decided April 2, 2015

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 25

RICHARD KEENEY and MARYANNE P. KEENEY, INDEX NUMBER:21315/2012E

Plaintiff,

-against-

Present:
HON. LLINÉT M. ROSADO

NEW YORK CITY HOUSING AUTHORITY,
Defendant.

Defendant move this Court for an Order pursuant to C.P.L.R. §3212, Public Housing Law §157 and General Municipal Law § 50-e, dismissing the plaintiffs' complaint as against them for failure to file a timely Notice of Claim on it; and dismissing any and all claims brought by plaintiff, Maryanne Keeney, on the basis that they were not alleged in the Notice of Claim. Plaintiff cross-moves this Court for an Order pursuant to General Municipal Law § 50-e and C.P.L.R. §2001, deeming the plaintiffs' Notice of Claim timely served *nunc pro tunc*, or alternatively, deeming the plaintiffs' late Notice of Claim timely served *nunc pro tunc* on the defendant by plaintiff's former counsel on October 20, 2011, and October 27, 2011. For the purposes of this decision, said motions are hereby consolidated.

The within personal injury action arises out of an incident that occurred on July 22, 2011 whereby plaintiff Richard Keeney, a lieutenant with the City of New York Police Department at the time, was allegedly caused to trip and fall on a broken concrete step while on duty performing a vertical search and descending the interior stairwell between the second floor and basement at the Jacob Riis House located at 1141 FDR Drive South, New York, New York.

Defendant herein now moves for an order pursuant to C.P.L.R. §3212, Public Housing Law §157, and General Municipal Law § 50-e dismissing the plaintiffs' complaint as against them for failure to file a timely Notice of Claim; and dismissing any and all claims brought by plaintiff, Maryanne Keeney, Richard Keeney's wife, on the basis that they were not alleged in the Notice of Claim. Specifically, defendant argues that it was served with the Notice of Claim on October 27, 2011, via certified mail, and received it on October 31, 2011. Defendant also argues that said Notice

of Claim did not allege any cause of action on behalf of plaintiff Maryanne Keeney and she never testified at a 50-h hearing. Finally, the defendant argues that the cause of action for personal injuries accrued on July 22, 2011 and the year and ninety days where plaintiffs could have sought leave of the Court to serve a late Notice of Claim expired on October 20, 2012. As such, defendants maintain that the action should be dismissed for plaintiffs' failure to comply with C.P.L.R. §3212, Public Housing Law §157 and General Municipal Law § 50-e. In support of the motion, defendant submit a copies of the pleadings and a copy of plaintiff's Notice of Claim and Envelope depicting the date of October 27, 2011. Notably, plaintiff Maryanne P. Keeney is not named in said Notice of Claim.

Plaintiffs oppose the motion and cross move this Court for an Order pursuant to General Municipal Law § 50-e and C.P.L.R. §2001, deeming the plaintiffs' Notice of Claim timely served *nunc pro tunc* based upon the facts of this case and service by the New York Police Department (hereinafter "NYPD") upon the defendant of the NYPD/NYCHA investigative reports concerning the underlying incident involving plaintiff Richard Keeney on July 22, 2011, and the following week thereafter by plaintiff Richard Keeney himself, or alternatively, deeming the plaintiffs' late Notice of Claim timely served *nunc pro tunc* on the defendant by plaintiffs former counsel on October 20, 2011 and October 27, 2011. Specifically, plaintiffs argue that defendant's motion should be denied because within 90 days of the claim's accrual, defendant received actual and written notice of the claim by NYPD particularly Sgt. Franklin Pineda and by plaintiff Richard Keeney himself; that on July 22, 2011, the date of the alleged incident, the NYPD, pursuant to NYPD /NYCHA protocol, the NYPD provided Defendant with four (4) investigative reports concerning the alleged incident; that plaintiff Richard Keeney affirmed that he hand delivered copies of all the NYPD investigative reports to defendant personally; that Defendant was on the distribution list for the NYPD/NYCHA investigative reports and acquired actual written knowledge of the essential facts constituting the claim within the 90-day period; that pursuant to plaintiff Richard Keeney's affidavit, Mr. Keeney personally confirmed with his department that defendant received the NYPD/NYCHA Field Report and copies of the NYPD Aided Report, Line of Duty Report, and the NYPD Witness Statement; that on October 20, 2011, a Notice of Claim was served timely upon the defendant's law department via facsimile transmission by plaintiff's former counsel, MacCarteny, MacCartney, Kerrigan and MacCartney, and verbal confirmation of receipt of same by defendant's law department was

obtained; that on October 27, 2011, the administrative staff of former counsel, MacCarteny, MacCartney, Kerrigan and MacCartney, placed the original Notice of Claim to defendant's law department; that after receipt of said notices from plaintiff's former counsel, the defendant's law department, on November 19, 2011, provided written correspondence acknowledging receipt of the claim and notified plaintiff's counsel that defendant had reviewed the claim, assigned a file number to the claim, and advised plaintiff's counsel and plaintiff Richard Keeney, that the defendant's law department was placing the claim into the Early Settlement Unit of the defendant's law department based upon the facts of the claim and no rejection, objection, nor statement regarding any deficiency or defect in the Notice of Claim nor the manner that it was served upon the defendant was ever sent by the law department; that after receipt of the Notice of Claim and review of the claim by the Defendant Law Department, a 50-h deposition was scheduled and conducted without objection to the Notice of Claim; that following service of plaintiff's Notice of Claim on October 20, 2011, a summons and Complaint dated June 26, 2012, was then served upon the defendant on June 28, 2012, explicitly stating in paragraph two of the Complaint, that the Notice of Claim had been served on defendant on October 20, 2011; that in defendant's Answer, dated August 3, 2012, admitted receipt of said notice; that defendant never raised any objection or specific denial as to timely service of Notice of Claim; that in the interest of justice, this Court deem the Notices of Claim timely; that pursuant to NY General Oblg. Law § 50-e(3) ( c ), the Notice of Claim served via facsimile transmission and the October 27, 2011 mailing of said Notice be deemed timely because it was sent timely and movant did not object and requested a 50-h examination of plaintiff; that the facts reveal Defendant received actual notice of the essential facts of this claim by the four NYPD/NYCHA investigative reports in July 2011, and as no prejudice can be shown, plaintiff's Notices of Claim should be deemed timely Nunc Pro Tunc; that plaintiffs have relied on defendant's actions and documents sent to plaintiff's counsel; and that defendant's allegation of an administrative delay in a mailing is without merit. Plaintiffs argue that for all the aforementioned reasons defendant's motion to dismiss should be denied and plaintiffs' cross motion seeking this Court to deem its Notice of Claim timely nunc pro tunc be granted. In support, plaintiff submits, as exhibits, plaintiff Richard Keeney's affidavit; the plaintiff Richard Keeney's 50-h hearing transcript; a copy of the NYPD/NYCHA Field Report; a copy of the NYPD Line of Duty Report; a copy of the NYPD

Witness Report; a copy of the NYPD Aided Report; copies of medical records for plaintiff Richard Keeney's right knee; copies of findings of NYPD regarding plaintiff Richard Keeney's inability to continue working; affidavit of plaintiff Richard Keeney's prior counsel Kevin D. O'Dell; copies of the Notice of Claim with attached cover letter; defendant law department's letter dated November 9, 2011; copies of the pleadings; correspondence from defendant dated February 11, 2015 and September 9, 2016; defendant's correspondence to plaintiff's prior counsel; copy of a decision in the Matter of Cianna Brown v Roosevelt Union Free School District, and a affidavit of Sgt. Pineda.

In reply to its motion and opposition to plaintiff's motion, defendant argues that plaintiff has failed to prove that a Notice of Claim was faxed to Defendant on October 20, 2011, the 90th and final day to have served said notice timely. Defendant argues that the affidavit of plaintiff's prior counsel proffered to establish that the Notice of Claim was faxed on October 20, 2011 is not only self-serving but void of any fax confirmation transmission evidencing the alleged faxed Notice of Claim. Additionally, defendant argues that said attorney does not provide a fax cover sheet or fax number to which the alleged notice was allegedly faxed to; does not disclose whom he allegedly spoke to at defendant's law department to confirm the Notice of Claim was received via fax on October 20, 2011; does not provide any affirmation or affidavit of service executed contemporaneously with the alleged fax, soon after the alleged fax, or at any time prior to defendant filing the instant motion. Moreover, defendant argues that in the alleged self-serving affidavit, plaintiff alleges that the fax transmission confirmation sheet was lost due to the case being moved from one office to another and the years of litigation conducted in the instant matter. Defendant finds it curious that the only thing missing from the file is said fax transmission confirmation sheet. Defendant also argues that plaintiff did not make any mention of or reference to the allegedly previously faxed October 20th Notice of Claim in its letter date stamped October 27, 2011. Further, defendant argues that the receipt of police records by defendant is not a substitute for a Notice of Claim and under Municipal Law §50-e and Public Housing Law 157(1), a Notice of Claim should have been served on defendant. Defendant also contests plaintiff's estoppel arguments on the ground that defendant never made an admission on receiving a timely Notice of Claim in its Answer and defendant's participation in discovery and settlement negotiations is immaterial under the standard for estoppel. Defendant vehemently denies receiving a faxed Notice of Claim and submits an affidavit of Mercedes Arazoza,

defendant's Principle Administrative Associate, and an affidavit of Jacqueline Forbes, Esq., defendant's Agency Attorney who was assigned to this matter beginning on November 2, 2011, to support said denial. Defendant argues that an application to file a late Notice of Claim must be made before the expiration of the applicable statute of limitations and plaintiff did not serve a timely Notice of Claim nor seek leave from the Court for an extension of time to which to do so until the instant cross-motion, four and a half years after said statute of limitations expired. As such, defendant argues that that the Court lacks the power to grant plaintiff's motion. Finally, defendant argues that the doctrine of equitable estoppel does not apply in the case at bar because defendant did not make any false representation to plaintiffs; there was no material concealment of facts; and defendant did not in any way mislead plaintiffs or stop or delay them from filing a timely motion with the Court to seek leave to serve a late Notice of Claim.

In reply to its motion and in support of the cross motion, plaintiffs argue that this Court has the discretion to deny defendant's motion seeking dismissal and find that defendant received notice of the essential facts of Lt. Keeney's claim within ninety days after the claim arose and that defendant's Answer admitted timely receipt of Notice of Claim on October 20, 2011. Plaintiffs argue that defendant has not alleged that it did not receive documents containing the essential facts of plaintiffs' claim; that defendant's counsel is bound by the admissions by prior counsel in NYCHA's responsive pleadings; and that this Court has the discretion to find that defendant had actual knowledge of the essential facts within ninety days of the incident and deem the Notice of Claim timely served *nunc pro tunc*. Plaintiffs further argue that CPLR§ 2001 affords this Court discretion to deny defendant's motion seeking dismissal as no prejudice exists. As exhibits, plaintiffs submits two affidavits from Sgt. Franklin Pineda; an affidavit from plaintiff Richard Keeney; a letter from Jacqueline Forbes, Esq., addressed to plaintiffs' counsel; an affidavit from Ms. Forbes; plaintiff Richard Keeney's 50-h hearing transcript; correspondence regarding Notice to Admit to plaintiffs from Krez & Flores, LLP; and a letter from plaintiffs' attorney to defendant's attorney regarding mediation.

CONCLUSION

This Court finds that the plaintiff's Notice of Claim was not timely served as it was served by certified mail dated stamped October 27, 2011, seven days late. Even assuming, *arguendo*, that

service by fax was effectuated on October 20, 2011, said service would only be valid if pursuant to said fax, NYCHA demanded that either or both claimants be examined in regard to it or if the fax was received by a proper person at NYCHA within the statutory 90 days and NYCHA failed to return the Notice, specifying the defect in the manner of service, within 30 days of October 20, 2011. See, General Municipal Law § 50(a); ( c ). While Defendant acknowledges receiving the Notice of Claim by certified mail on October 31, 2011, it vehemently denies receiving the fax on October 20, 2011. Additionally, plaintiffs have failed to provide any evidence, in admissible form, that a Notice of Claim was faxed to Defendant on October 20, 2011. The affidavit of Mr. Kevin Odell, Esq., submitted as Exhibit I of the cross motion, does not include a copy of the faxed transmission establishing it was faxed and received on October 20, 2011 nor does it mention the name of the person at defendant's office that acknowledged receipt of the alleged fax. Additionally, Mr. Odell states that the faxed transmission was lost. The Notice of Claim, served by certified mail on October 27, 2011, makes no mention of the allegedly faxed transmission of October 20, 2011. Notably, the Notice of Claim, served by certified mail on October 27, 2011, submitted as Exhibit J of the Cross Motion, has no date except for the Exhibit A, attached to said Notice, which is a letter dated October 20, 2011 addressed to Mr. O'Dell from Vincent Pici, P.E.. The notarized portion of plaintiff Richard Keeney's individual verification attached to said Notice also has no date.

Although defendant maintains it received the certified mail of the Notice of Claim on October 31, 2017, service of the Notice of Claim was deemed served on the date of deposit to the United States Postal Service on October 27, 2011. See, General Municipal Law § 50(b).

Plaintiffs' application to seek leave for an Order deeming the Notice of Claim timely served *nunc pro tunc* based on the facts of this case and service by the NYPD on Defendant of the NYPD/NYCHA investigative reports concerning the underlying incident on July 22, 2011 and thereafter can not be granted as said reports would not divest the claimant of having to serve Defendant with a Notice of Claim as mandated by General Municipal Law § 50-e and Public Housing Law §157 (1). Plaintiffs' alternate application to deem the plaintiffs' late Notice of Claim timely served *nunc pro tunc* on the defendant by plaintiff's former counsel on October 20, 2011 must also be denied. As mentioned above, there is no evidence that a Notice of Claim was served by fax on October 20, 2011. Plaintiffs failed to seek leave to deem the plaintiffs' late Notice of

Claim timely served *nunc pro tunc* on the defendant by plaintiff's former counsel on October 27, 2011 within the applicable statute of limitations of a year and 90 days. As such, this Court lacks the power to grant said relief and said application is hereby denied. *Young v New York City Health and Hospitals Corporation*, 147 AD 3d 509 (1st Dept 2017); *Tarquinio v City of New York*, 84 AD2d 265, 268 (1st Dept 1982); General Municipal Law § 50-e 95).

Contrary to plaintiffs' argument, there is no basis for applying the doctrine of equitable estoppel as the record is devoid of evidence of affirmative wrongdoing on behalf of defendant that would warrant the application of said doctrine against it. *Glasheen v Valera*, 116 AD3d 505, 984 NYS2d 25 (1st Dept 2014); *Walker v New York City Health & Hosps. Corp.*, 26 AD3d 509, 510, 828 NYS 2d 265 (1st Dept 2007). There is no merit to plaintiffs' argument that Defendant admitted in its Answer to receiving the Notice of Claim via fax on October 20, 2011. In its Answer, dated August 3, 2012 and submitted as Exhibit 2 of defendant's motion for summary judgment, defendant "denied each and every allegation contained in paragraph 2, except admitted to receiving what purported and/or styled to be a Notice of Claim and that 30 days have elapsed from the time of the receipt of what purported to be a Notice of Claim by Defendant; that adjustment and payment by defendant had not been made, and it reserved and referred all questions of law, fact and conclusions raised to the trial court." See, Exhibit 2 of Defendant's Notice of Motion. The fact that defendant continued litigating the matter without raising the issue of non-compliance does not preclude it from seeking the instant relief as Defendant is not obligated to promptly raise said issue. *Chinatown Apartments, Inc. V New York City Tr. Auth..*, 100 AD2d 824, 825 (1st Dept 1984). Moreover, defendant herein is under no obligation to raise the late filing as an affirmative defense. *Maxwell v City of New York*, 29 AD3d 540, 815 NYS 2d 133 (2006). Accordingly, the Court finds that defendant is not estopped from seeking dismissal of the complaint on this ground.

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 judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1986). A party moving for summary judgment is required to establish a *prima facie* entitlement to that relief regardless of the merits of the opposing papers. See, *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (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. See, *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. See, *Rose v DaEcib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. See, *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957). The Court finds that defendant has met its burden and the complaint is hereby dismissed pursuant to C.P.L.R. § 3212 .[1]

ORDERED, that defendant's motion to dismiss pursuant to C.P.L.R. § 3212 is hereby granted and plaintiff's complaint is dismissed; it is further

ORDERED, that plaintiff's cross motion is denied;

The Clerk of the Court is hereby directed to mark the file accordingly.

Defendant shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision and order of this Court.

Dated: September 26, 2017

**HON. LLINET M. ROSADO**
**A.J.S.C.**

[1] To the extent that the outcome in this case can be viewed as unfair, it is the outcome compelled by law.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 25

ELINE LAMBERT MONTERO,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY.
Defendant.

INDEX NUMBER:24146/2016E

Present:
HON. **LLINÉT M. ROSADO**

Defendant moves this Court for an Order pursuant to C.P.L.R. §3211(7) and C.P.L.R. §3212 granting it partial summary judgment and dismissing all claims of liability with respect to the elevators; and to strike the theory of a failure to add sand to the paint for the stairways, for failure to state the cause of action in the notice of claim pursuant to PAL § 50-e via Notice of Motion dated May 19, 2017 and the affirmation, exhibits submitted in support thereof. Plaintiff opposes the motion in an Affirmation of Opposition dated July 10, 2017. The defendant submitted an Affirmation in Reply dated July 13, 2017.

The within action arises out of an incident that occurred on October 16, 2015. at approximately 8:00 pm, when plaintiff slipped and fell on a slippery foreign substance on stairwell "B" between the fourteenth and fifteenth floors of the New York City Housing Authority property located at 355 East 143rd Street in the Bronx, New York.

Defendant herein now moves for an order pursuant to C.P.L.R. §3211(7) and C.P.L.R. §3212 granting it partial summary judgment and dismissing all claims of liability with respect to the elevators; and to strike the theory of a failure to add sand to the paint for the stairways, for failure to state the cause of action in the notice of claim pursuant to PAL § 50-e. Defendant argues that plaintiff failed to state a cause of action based upon defective or inoperable elevators as the condition of the elevators was not the proximate cause of the accident. Defendant also argues that plaintiff can not maintain a theory of liability of failure to add paint to the stairway as this theory was not pled in the Notice of Claim and the statute of limitations has expired with respect to such claim. In support of the motion, defendant submits the Notice of Claim served on the defendant on December

22, 2015; a copy of the 50-h hearing transcript of the plaintiff; copies of the pleadings collectively; and plaintiff's Verified Bill of Particulars.

In opposition, plaintiff argues that the branch of defendant's motion seeking partial summary judgment in regards to the inoperable elevators should be denied because it is premature as minimal discovery has been conducted to date. Plaintiff argues that further discovery might uncover facts in defendant's exclusive knowledge that may raise issues of fact to defeat the instant motion. Specifically, plaintiff argues that there can be more than one proximate cause of an accident. Plaintiff contends that further discovery may reveal the causes of both the inoperable elevators and the dangerous and defective condition of the stairwell and if the two are related in any manner. Additionally, plaintiff argues that there remains an issue of fact as to whether it was foreseeable that plaintiff would use the stairs as a result of the inoperable elevators. Plaintiff argues that nothing would prevent the defendant from moving this Court for the same relief herein after discovery is complete. Plaintiff also opposes the branch of defendant's motion seeking to strike the theory of a failure to add sand to the paint for the stairways for failure to state the cause of action in the notice of claim. Plaintiff argues that the original notice of claim gave the defendant the means to explore the merits of the claim at the outset and the bill of particulars amplified and particularized plaintiff's negligence theory. Plaintiff argues that the notice of claim does not turn on whether the allegations of negligence are particularized in it, instead it is whether said notice is sufficient to place defendant on notice of that part of plaintiff's theory.

In reply, defendant argues that it has met its initial burden of proof for partial summary judgment with respect to liability issues involving the elevators. Defendant argues that further discovery will not change the location of the accident and the proximate cause of the accident has nothing to do with the condition of the elevators. Defendant argues that plaintiff has failed to cite any cases or facts that would defeat its motion and pure speculation is insufficient to create and issue of fact. Defendant also argues that the new claim plaintiff alleged in the bill of particulars of the addition of sand to the paint to add traction to the walking surface was not pled in the notice of claim. Defendant maintains that contrary to plaintiff's assertion, a bill of particulars does not amplify a notice of claim. As such, defendant argues that if a theory of negligence is not pled in the notice of claim and that notice is not amended to add other theories, they can not be asserted in the

litigation.

CPLR §3211(a)(7) allows a party to move to dismiss a cause of action asserted against them on the ground that . . . the pleading fails to state a cause of action.

Generally, on a motion to dismiss made pursuant to CPLR §3211, the court must "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 into any cognizable legal theory". *Leon v. Martinez*, 84 NY2d 83 (1994). As such, the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. *Rovello v Orofino Realty Co., Inc.* 40 N.Y.2d 633 (1976); *Underpinning & Foundation Construction v. Chase Manhattan Bank*. 46 N.Y.2d 459 (1979). Therefore, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977).

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 judgment as a matter of law. *See* C.P.L.R. §3212; *Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1986). A party moving for summary judgment is required to establish a *prima facie* entitlement to that relief regardless of the merits of the opposing papers. See *Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 N.E.2d 642 (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. See *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. See *Rose v. DaEcib USA*, 259 A.D.2d 258, 686 NYS2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *See. Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

The Court finds that the defendant met its burden of proof in establishing that the inoperable elevators were not the proximate cause of plaintiff's accident. While plaintiff testified she took the stairway on the day of the accident because the elevators were not working, she did not testify that

the inoperable elevators was the proximate cause of her fall. According to the Notice of Claim and her testimony at the 50-h hearing, plaintiff alleges she fell on a slippery substance on the stairway. Accordingly, defendant's motion seeking partial summary judgment and dismissal of all liability claims with respect to the elevators is granted. See *Ortiz v Rose Nederlander Assoc., Inc.*, 103 AD3d 525, 962NYS2d 45 (1st Dept 2013); Stark v R & L Carriers, 134 AD3d 500, 20 NYS3d 527 (1st Dept 2015).

The Court finds that the allegation of failure to add sand to the paint to add traction to the walking surface can not be fairly inferred from plaintiff's Notice of claim. A party can not add a new theory of liability that was not included in the notice of claim in its bill of particulars. Accordingly, defendant's motion to strike the theory of failure to add sand to the paint to add traction to the walking surface is granted. See *DeJesus v New York City Hous. Auth.*, 46 AD3d 474 (1st Dept 2007) *affd* 11 NY3d 889(2008); *Lewis v New York City Hous. Auth.*, 135 AD3d 444 (1st Dept 2016).

Accordingly, it is

ORDERED, that defendant NYCHA's motion for an Order pursuant to C.P.L.R. §3211(7) and C.P.L.R. §3212 granting it partial summary judgment and dismissing all claims of liability with respect to the elevators; and to strike the theory of a failure to add sand to the paint for the stairways, for failure to state the cause of action in the notice of claim pursuant to PAL § 50-e is hereby granted.

The Clerk of the Court is hereby directed to mark the file accordingly.

Defendant shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision and order of this Court.

Dated: October 5, 2017

HON. LUINÉT M. ROSADO
A.J.S.C.

**SUPREME COURT - STATE OF NEW YORK**

**PRESENT:**

***Honorable James P. McCormack***
**Justice**

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**LEONEL ESCOBAR,**

**Plaintiff(s),**

**-against-**

**REITHOFFER EQUIPMENT COMPANY, INC., and JAMES SPERANO,**

**Defendant(s).**

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**REITHOFFER EQUIPMENT COMPANY, INC., and JAMES SPERANO,**

**Third-Party Plaintiff(s),**

**-against-**

**TRIBOROUGH AND TUNNEL AUTHORITY and CITY OF NEW YORK,**

**Third-Party Defendant(s).**

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**TRIAL/IAS, PART 27**
**NASSAU COUNTY**

**Index No.: 603275/15**

**Motions Seq. No.: 001, 002 & 003**
**Motions Submitted: 6/20/17**

**Motion Seq. No. 004**
**Motion Submitted: 8/8/17**

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XXX
Notice of Cross/Supporting Exhibits.....X
Affirmations in Opposition.....XX
Reply Affirmation.....X

Third-Party Defendant, Triborough Bridge and Tunnel Authority (TBTA), moves (Motion Seq. 001) this court for an order, pursuant to CPLR §3211(a)(7), dismissing the third-party complaint against it. In the alternative, TBTA seeks to dismiss the complaint based upon laches, or seeks to sever the third-party action from the first-party action. Reithoffer and Sperano oppose the motion. Reithoffer and Sperano separately move (Motion Seq. 002) for an order vacating the note of issue. Plaintiff, Leonel Escobar (Escobar), opposes the motion to vacate the note of issue and supports TBTA's motion to sever. Escobar also cross moves (Motion Seq. 003) for summary judgment on liability against Reithoffer and Sperano, who oppose the motion. Third-Party Defendant the City of New York (the City) moves (Motion Seq. 004) this court for an order pursuant to CPLR §3212, for leave to file a late motion for summary judgment and then dismissing the complaint against. In the alternative, the City moves to dismiss the complaint on the ground of laches. The City's motion is unopposed.

Escobar commenced the first-party action by service of summons and complaint dated May 21, 2015. Issue was joined by service of an answer by Reithoffer and Sperano dated July 17, 2015, and then an amended answer dated August 6, 2015. Reithoffer and Sperano commenced the third-party action by third-party summons and complaint dated March 29, 2017. The City interposed a third-party answer with cross claims dated April, 2017. TBTA brought a motion to dismiss in lieu of the third-party answer. The case was certified ready for trial on January 12, 2017, and a note of issue was filed on April 7, 2017.

As per the complaint and Escobar's deposition testimony, on June 3, 2013, Escobar was riding a motorcycle from New Jersey to New York. At approximately 1:30 a.m. he was crossing the Throgs Neck Bridge from The Bronx into Queens. When he approached the bridge he paid the toll and was in the far right of the three lanes. After going through the toll, he moved into the middle lane, but he saw a large truck coming up behind him, so he moved back into the right lane. He testified he was traveling approximately 25 miles per hour, and just before he reached the bridge, it started to rain lightly.

After moving back into the right lane, he continued to drive and came up to a curve. When he came out of the curve, he saw a large object in his lane in front of him. The object, he would find out later, was a large gate that had fallen out of truck driven by Sperano and owned by Reithoffer. Escobar estimated the gate was 500 feet in front of him when he first saw it. He quickly checked his mirrors and saw there was a truck to his left. He could not turn right as he was in the right-hand lane, and he did not want to jam on the brakes due to the wet road surface. Instead, he chose to ride over the object in the hope he would be able to do so without incident. However, upon hitting the object, he and the motorcycle fell to the ground and slid into the middle lane. Escobar claims he suffered injuries as a result of the fall.

**TBTA's MOTION TO DISMISS (MOTION SEQ. 001)**

TBTA moves to dismiss, alleging the third-party complaint fails to state a claim

against it. On a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept. 2010]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" *(Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010], *supra*; *see Leon v Martinez*, 84 NY2d 83, 87 [1994], *supra*; *Sokol v Leader*, 74 AD3d 1180,1181 [2d Dept 2010], *supra*; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Delbene v. Estes*, 52 AD3d 647 [2d Dept. 2008]; *see also 511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed (*see Leon v. Martinez*, 84 NY2d at 83). It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations (*see Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2d Dept 2008]; *see also EBC I,*

*Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005]).

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

Herein, the third-party complaint contains two causes of action against TBTA, to wit: 1) indemnification and 2) contribution. TBTA claims it cannot be liable, because it did not have actual or constructive notice of the defective condition. (*Cassidy v. City of New York*, 121 A.D.3d 735 [2nd Dept. 2014]). For there to be constructive notice, the defective condition must have been in existence for a long enough period of time to allow a defendant to become aware of it and remedy it. *Id.*

In support of its arguments, TBTA submits log entries of the incident. These log entries indicate they were made aware of a disabled vehicle on the bridge, by a police

officer, at 1:22 a.m., but that they were not given an exact location. Three minutes later, the log entry reads: "COMMAND NOTIFIED SAMARON- 211 DISPACTED [sic][1]". (Capitals in original). At 1:27 a.m, two different entries related communication from two different sources. "211" reported that a motorcyclist was hurt and "209" reported that 10 cars had suffered flats. A later entry from "209" indicates that the "debris" on the road caused the "incident". It is TBTA's position that, with Escobar' accident having occurred in less than five minutes from time they were informed of disabled vehicle, and before being informed of debris on the road,, it could not be argued they had enough time to become aware of the condition and remedy it.

In opposition, Reithoffer and Sperano argue the log entries are inaccurate, and support this assertion by referring to Escobar's deposition transcript where he testifies that workers were already present at the scene at the time of his accident. The court disagrees with their interpretation of Escobar's testimony. Escobar does claim that a person with a flashlight helped him by stopping a truck that was driving in the middle lane, and he described this person as "a worker", but he gave no indication of what kind of worker. He did not remember if the person was wearing a uniform. He stated that the person must have been there before the accident and "Must have been police or I don't remember". What is clear from Escobar's testimony is, he had no idea who the man was who helped him. Nothing else in his testimony supports the claim that TBTA knew of there being a problem on the bridge prior to 1:22 a.m.

[1]The court accepts that this is typographical error and is meant to read "DISPATCHED".

In the third-party complaint, Reithoffer and Sperano allege TBTA failed to "secure" the bridge, failed to secure the area where the gate had fallen off of the truck, failed to shut down the lane in which the gate had landed, failed to warn oncoming drivers, failed to redirect drivers and failed to follow proper procedures. While the court is to assume each of these allegations are true, the court has considered evidentiary material, meaning the court must determine if these alleged facts are not facts at all, or if no significant dispute exists. (*Guggenheimer v. Ginzburg, supra*). The court finds that TBTA has refuted each of the allegations in the complaint to the extent that the alleged facts in the complaint are not facts at all. There is no significant dispute that TBTA lacked notice of the defective condition. Further, upon being made aware of it, there is no evidence that TBTA failed to act quickly enough to remedy it. To the contrary, they acted in less than five minutes.

The court also notes that the third-party complaint was not timely. While the court addresses the history of delay in this matter, *infra*, of which Reithoffer and Sperano played a significant role, the relevant event in terms of filing the third-party complaint was the deposition of Escobar. The preliminary conference order in this matter states that impleaders are to occur within 30 days of the last deposition. Reithoffer and Sperano argue the court should ignore the directives in the preliminary conference order because the parties felt free to do so during the life of the case. They specifically point the finger at Plaintiff and argue that Escobar was not made available for his deposition for over a year. Regardless of who was at fault for the delay, it is undisputed that Escobar was

deposed on October 5, 2016. It is further undisputed that the third-party complaint was not filed until March 29, 2017, nearly six months later. While complaining that Plaintiff caused all the delay in this matter, Reithoffer and Sperano offer no explanation for why it took six months to do that which was supposed to be done within one month. They simply state that the terms of the preliminary conference order should be ignored. Even if the court were to allow some leeway on the 30-day time period, six months would fall far beyond the confines of "leeway", particularly absent an excuse. For these reasons, the third party complaint will be dismissed against TBTA.

**REITHOFFER'S AND SPERANO'S MOTION TO VACATE THE NOTE OF ISSUE (MOTION SEQ. 002)**

Reithoffer and Sperano bemoan having the case certified ready for trial over their objection, and argue that there is still much discovery to perform and that they have only recently learned some new information, which requires even further discovery. The history of this case is relevant in addressing why the case was certified, and why the current motion is without merit, aside from it being defective.

The preliminary conference in ths matter occurred on November 24, 2015, and the resultant preliminary conference order directed a compliance conference occur on March 3, 2016. On March 3, 2016, the parties appeared and informed the court that depositions had not yet occurred, despite the preliminary conference order directing them to take place on January 27, 2016. The case was adjourned until April 7, 2016, on which date the court was informed the depositions of all parties would take place on April 18, 2016. The

case was adjourned to May 10, 2016. On May 10, the parties informed the court the depositions were still not done as some authorizations were only recently received and there were some outstanding demands. The parties had rescheduled the depositions to June 20, 2016. The case was adjourned to July 14, 2016, and the parties were directed to complete the depositions, and respond to all outstanding demands by that date. The parties then adjourned the July 14, 2016 date by letter, on consent, to August 11, 2016. On August 11, 2016, the court was informed that the depositions had still not occurred, despite its directive, and the new date was October 20, 2016. Further, Plaintiff had not responded to all of the outstanding demands. The case was adjourned until October 25, 2016. The parties once again by letter sought, and were granted, an adjournment on consent, and the October 25, 2016 date was adjourned until November 22, 2016. On November 22, 2016, the court was informed that the depositions of the parties were complete, that and independent medical examination (IME) needed to be scheduled and that some demands were still outstanding. The court directed Defendants to respond to outstanding demands within 30 days. The case was adjourned until January 12, 2017. On January 12, 2017, the parties appeared and reported that the IME was still not done, and there was still outstanding discovery. The court, frustrated by the parties repeated, unjustified delays in completing discovery and inability or refusal to abide by this court's orders and directives, certified the case, but allowed the parties to enter into a stipulation to allow certain post-certification discovery to occur. It is relevant to note that the stipulation which was signed three months after Escobar's deposition, mentions nothing

about filing a third party complaint, or extending its time to do so.

Reithoffer and Sperano complain that Plaintiff caused all the delays, particularly in his refusal to appear for a deposition. The court's notes and files do not indicate that all the delay was caused by Plaintiff, but even if that were true, Reithoffer and Sperano took absolutely no action to address this alleged problem except for having written two letters, one in August, 2015 and one in October 2015. Each letter threatens motion practice, yet no motion was ever brought. At the very least, this renders Reithoffer and Sperano complicit in the delay. While it is allegedly Escobar's deposition that makes up the basis for the need to perform further discovery, the within motion was not brought until almost seven months after that deposition. This is yet another delay in this case, one the court would not countenance had the motion not been defective

Before a motion relating to discovery or a bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...," unless it would have been futile to do so. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]).

Herein, the moving Defendants' counsel submits an affirmation of good faith which merely states "This office attempted to amicably resolve the issues raised in the instant motion at the Certification Conference without success...". This affirmation is woefully inadequate, and other than alleging an attempt to resolve it at a court conference, it does not address any other efforts, much less diligent efforts made, to resolve these disputes. The rule requires that the parties confer, and that the affirmation describe such conferral. There is no indication that any such conferral has taken place. For those reasons, the motion to vacate the note of issue will be denied as defective.

**ESCOBAR'S CROSS MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 003)**

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he/she is entitled to summary judgment as a matter of law, by submitting sufficient evidence to demonstrate the absence of a material issue of fact *(see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2D 395 [1957]; *Friends of Animals, Inc. v Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v New York University Medical Center,* 64 NY2d 851 [1985]). 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 (*see Zuckerman, supra*).

The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept. 1992], and it should only be granted when there are no triable issues of fact (*see Andre v Pomeroy*, 35 NY2d 361 [1974]).

Herein, Escobar argues he should be granted summary judgment as there is no question of fact regarding Reithoffer's and Sperano's liability. In support of the motion, Escobar relies on, *inter alia*, his deposition testimony. The court finds the deposition testimony raises a question of fact as to whether or not Escobar was at all negligent. Escobar testified that, upon seeing, the gate, he chose not to apply his breaks because of the weather conditions. The court finds the failure to not apply the brakes at all, and instead to choose to run over the object at his current speed could, for the purposes of summary judgment only, be seen as potentially negligent. Also, Escobar's testimony is unclear as to whether, at the time he first saw the gate, there was a truck right next to him in the middle lane, or behind him in the middle lane. This lack of clarity raises an issue of fact as to whether Escobar could have changed lanes to avoid missing the gate. (*Canales v. Arichabala*, 123 A.D.3d 869 [2nd Dept. 2014]).

Further, there is a potential inconsistency in his testimony in that he states he could not go into the middle lane when he saw the gate because of the presence of a truck that was either next to him or behind him, yet when he hit the gate and then fell to the ground,

he ended up in the middle lane. His testimony does not address what happened to the truck that was either next to him or behind him, and how come he did not come into contact with it when he fell. He does state the person with the flashlight stopped a truck, but this implies that this particular truck was far enough behind him to be able to stop without hitting him. If it is the same truck that he saw in his mirror, then he should have had enough time to move into the middle lane and avoid the gate. As such, Escobar has failed to establish entitlement to summary judgment as a matter of law. Plaintiff having failed to meet his burden, the court need not consider the opposition papers. (*Winegard v New York University Medical Center*, *supra*).

Further, Escobar's support for severing the third party action is rendered moot by this order.

**THE CITY'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQUENCE 004)**

The City moves for leave to file a late summary judgment motion, and then to be granted summary judgment dismissing the third-party complaint. Leave to file the motion is granted as unopposed. The court will therefore consider the summary judgment motion on its merits.

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established. (*Ruggiero v. City School District of New Rochelle*, 109 A.D.3d 894 [2nd Dept 2013]; *Soto v. City of New York*, 244 A.D.2d 544 [2nd Dept. 1997], *James v. Stark*, 183 A.D.2d 873

[2nd Dept. 1982]).

In support of its motion, the City annexes the affidavit of Kevin McAnulty, the Director of Bridge Management in the Bridges Unit of the New York City Department of Transportation (NYC DOT). Mr. McAnulty performed a search to determine ownership of the Throgs Neck Bridge. The New York State DOT provides a list of all bridges and tunnels located in NYC, which list contains the ownership and maintenance responsibilities of each bridge and tunnel. Based upon Mr. McAnulty's search of the Bridge Data System, which contains information provided by NYS DOT, the Throgs Neck Bridge is owned by TBTA and not the City. Further, Mr. McAnulty states that TBTA is responsible for maintaining the Throgs Neck Bridge.

Based upon Mr. McAnulty's affidavit, the court finds the City has established entitlement to summary judgment as matter of law. The burden shifts to Reithoffer and Sperano to raise a material issue of fact requiring a trial of the action. As they do not oppose the motion, they are unable to raise a material issue of fact. As such, the City's motion will be granted.

Accordingly, it is hereby,

**ORDERED**, the TBTA's motion to dismiss the third-party complaint as against it is GRANTED. The third-party complaint and any cross claims are dismissed against TBTA: and it is further

**ORDERED**, that Reithoffer's and Sperano's motion to vacate the note of issue is DENIED; and it is further

**ORDERED**, that Escobar's motion for summary judgment on liability is DENIED; and it is further

**ORDERED**, that the City's motion for summary judgment is GRANTED. The third-party complaint is dismissed against the City, and any cross claims against the City, or brought by the City, are also dismissed; and it is further

**ORDERED**, that the third-party complaint is dismissed in its entirety; and it is further.

**ORDERED**, that TBTA's motion to sever is DENIED as moot.

This constitutes the decision and order of the court.

Dated: August 22, 2017
Mincola, New York

HON. JAMES P. McCORMACK, J.S.C.

ENTERED

AUG 25 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE