

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

D14476
Y/cb

_____AD3d_____

Argued - February 13, 2007

HOWARD MILLER, J.P.
ROBERT A. SPOLZINO
GLORIA GOLDSTEIN
WILLIAM E. McCARTHY, JJ.

2005-08939

DECISION & ORDER

Barbara Losito, plaintiff-respondent, et al.,
plaintiff, v City of New York, defendant-respondent,
Cobar Construction Corp., appellant.

(Index No. 3673/03)

John P. Humphreys, Melville, N.Y. (Scott W. Driver of counsel), for appellant.

Block & O'Toole, New York, N.Y. (David L. Scher of counsel), for plaintiff-respondent and plaintiff Lillian Mandelbaum.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Susan Choi-Hausman of counsel; Ira Stickler on the brief), for defendant-respondent.

In an action to recover damages for personal injuries, the defendant Cobar Construction Corp. appeals from an order of the Supreme Court, Queens County (Elliot, J.), dated July 27, 2005, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it by the plaintiff Barbara Losito.

ORDERED that the order is affirmed, with one bill of costs.

The plaintiff Barbara Losito was injured when she tripped over a two-inch metal object protruding from the roadway on Queens Boulevard at the intersection of 63rd Drive. Losito commenced this action against the City of New York and Cobar Construction Corp. (hereinafter Cobar) alleging that the latter caused or created the metal object to be imbedded in the roadway during construction work it undertook in the area.

March 27, 2007

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Losito's contention that Cobar failed to offer good cause for its untimely motion for summary judgment was not raised in opposition to the motion and, therefore, is not properly before this court (*see Charles v Jamaica Hosp.*, 30 AD3d 459; *LaBella v Allstate Ins. Co.*, 261 AD2d 367, 368).

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 (*see Brown v Welsbach Corp.*, 301 NY 202, 205; *Kleeberg v City of New York*, 305 AD2d 549, 550). Here, Cobar failed to satisfy its prima facie burden of demonstrating that it did not create or cause the allegedly dangerous condition over which Losito tripped and fell (*see Cabrera v City of New York*, 21 AD3d 1047, 1048; *Finegold v Brooklyn Union Gas Co.*, 202 AD2d 469, 470; *cf. Kruszka v City of New York*, 29 AD3d 742, 743-744). The failure to make such a showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Accordingly, the Supreme Court properly denied Cobar's motion for summary judgment dismissing the complaint insofar as asserted against it by Losito.

MILLER, J.P., SPOLZINO, GOLDSTEIN and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court