

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

D32689
G/nl

_____AD3d_____

Argued - October 12, 2011

ANITA R. FLORIO, J.P.
RANDALL T. ENG
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2009-09671

DECISION & ORDER

John Scott, respondent, v City of New York, et al.,
defendants, Granite Halmar Construction Company,
Inc., et al., appellants.

(Index No. 46178/03)

Cozen O'Connor, New York, N.Y. (Vincent P. Pozzuto and Matthew D. Kohel of
counsel), for appellants.

Arkady Frekhtman, Brooklyn, N.Y. (Andrew Green of counsel), for respondent.

In a consolidated action to recover damages for personal injuries, the defendants Granite Halmar Construction Company, Inc., Granite Halmar/Schiavone J.V., Schiavone Construction, Inc., and Robert Schiavone appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated August 14, 2009, as denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly sustained personal injuries on the morning of October 26, 2002, when the car in which he was riding allegedly drove into a pothole in the roadway of McDonald Avenue in Brooklyn, causing the car's driver to lose control of the vehicle and the car to collide with a pillar which supported the overhead tracks of the elevated "F" subway line. The plaintiff subsequently commenced this action, alleging, inter alia, that the appellants created the

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subject roadway defect when they performed construction work in the area. The appellants moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, contending that they did not create the ruts in the roadway which the plaintiff assumed caused the accident. However, in support of their motion, the appellants submitted, among other things, a street opening permit which had been issued to the defendant Granite Halmar/Schiavone J.V. earlier in 2002, for the block where the accident occurred . Accordingly, the appellants failed to eliminate all triable issues of fact as to whether they created the roadway defect and, thus, failed to establish their prima facie entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Under these circumstances, it is not necessary to consider the sufficiency of the plaintiff's opposition papers (*see Tchjevskaja v Chase*, 15 AD3d 389). Accordingly, the Supreme Court properly denied the appellants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

FLORIO, J.P., ENG, CHAMBERS and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court