

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

CARMEN SANCHEZ and DINA AMPARO OTERO,
as Administratrix of the Estate of
MARIA DEL CARMEN PEREZ

Plaintiff

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,
MOHAMMAD RIZWAN, PENNEY HACKING CORP.,
JORGE CEVALLOS, NELLY M. VERAS,
WELSBACH ELECTRIC CORP., and PETROCELLI
ELECTRIC CO., INC.

Defendants.

Index No. 9010/05

Motion Date: 11/7/07

Motion Cal. No.: 25

Motion Seq. No.: 2

The following papers numbered 1 to 24 read on this motion by defendants, THE CITY OF NEW YORK, THE NEW YORK CITY, DEPARTMENT OF TRANSPORTATION and WELSBACH ELECTRIC CORP. (hereinafter collectively the City) and cross-motion by defendant, PETROCELLI ELECTRIC CO., INC., for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against them

PAPERS
NUMBERED

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Upon the foregoing papers it is ordered that this motion and cross-motion are denied.

This is a consolidated action in which the plaintiff, Sanchez, seeks to recover damages for personal injuries and the plaintiff, Otero, as Administratrix of the Estate of Maria Del Carmen Perez seeks to recover damages for wrongful death. These actions arise out of an automobile accident which occurred on September 16, 2004 at approximately 7:40 a.m. in the intersection of 70th Street and Northern Blvd. when the vehicle, a taxi, owned by the defendant, Penney Hacking Corp., and operated by the defendant, Rizwan, and the vehicle owned by defendant, Cevallos, and operated by Veras, collided. As a result of the impact the taxi went up onto the curb and struck the plaintiff's decedent, Maria Del Carmen Perez. The plaintiff, Sanchez was a passenger in the taxi. The intersection of 70th Street and Northern Blvd. is controlled by a traffic light, which, at the time of the accident, had malfunctioned. Instead of displaying, alternately, red, yellow and green signals the traffic on 70th Street was facing a flashing red signal and the traffic on Northern Blvd. was facing a flashing yellow signal.

The plaintiffs commenced an action against the drivers and owners of the two vehicles for negligence in the ownership and operation of their respective vehicles and against the City defendants for, inter alia, failure to properly maintain the traffic light. Plaintiff, Sanchez also sued Petrocelli Electric Co., Inc. (hereinafter Petrocelli) for failure to properly maintain the traffic light. The City defendants, and defendant Petrocelli by cross-motion, now move for summary judgment dismissing the complaint and all cross-claims asserted against them.

The City defendants' motion for summary judgment is denied. In support of their motion, the defendants submitted, inter alia, the deposition testimony of the plaintiff, Sanchez, and the defendant, Rizwan and contend that although the traffic light had malfunctioned, the sole proximate cause of the accident was the negligence of the drivers of the two vehicles in, inter alia, entering the intersection without stopping in violation of Vehicle and Traffic Law (VTL) § 1117, in failing to see what was there to be seen and operating their vehicles at an excessive rate of speed.

First, it is noted that VTL § 1117 (as added by L. 2004, c.302 § 1) does not apply in this case as it became effective on November 1, 2004, after the date of the subject accident.

A municipality has a non-delegable duty to maintain its streets in a reasonably safe condition (see, Stiuso v. City of New York, 87 NY2d 889 [1995] and the municipality breaches such duty if it knows of the dangerous condition and permits a dangerous or potentially dangerous condition to exist and cause injury (see Nowlin v. City of New York, 81 NY2d 81 [1993]; Thompson v. City of New York, 78 NY2d 682, 684-685 [1991]).

In this case, the evidence established that the light at this intersection had malfunctioned on five previous occasions within the 60 days immediately preceding the date of the subject accident and that, despite attempts to repair, it continued to malfunction. Such evidence is sufficient to raise a triable issue of fact as to whether the City defendants were negligent in permitting a dangerous or potentially dangerous condition to exist (see Prager v. Motor Vehicle Acc. Ind. Corp., 74 AD2d 844, 845 [1980] aff'd 53 NY2d 854 [1981]; Meyer v. State, 51 AD2d 828 [1976]).

The City defendants have failed to establish their entitlement to summary judgment by demonstrating that their negligence was not a proximate cause of the accident (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v. City of New York, 49 NY2d 557, 562 [1980]). Even if, as the City defendants claim, the drivers were negligent, their negligence alone is insufficient to relieve the City defendants of liability as it is well settled that there can be more than one proximate cause of an accident (see Lopes v. Adams, 30 NY2d 499, 500 [1972] aff'g 37 AD2d 610 [1971]; Forte v Albany, 279 NY 416, 422 [1939]; Cox v. Nunez, 23 AD3d 427, 427 [2005]). Whether the acts of third persons are intervening or superceding acts which sever the causal connection between the defendant's conduct and plaintiff's injury depends upon whether the acts are a normal or foreseeable consequence of the situation created by the defendant's conduct or independent of or far removed from the defendant's conduct (Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 315 [1980]). However, "...questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences, ..., these issues generally are for the fact finder to resolve." (Derdiarian v. Felix Contr. Corp., supra at 315; see also Lynch v. Bay Ridge Obstetrical and Gynecological, 72 NY2d 632, 636 [1988]). The defendants have failed to establish, as a matter of law, that any negligence of the drivers was not a foreseeable consequence of the City defendants' alleged negligence severing the causal connection between their alleged negligence and the accident (see Nowlin v. City of New York, 81 NY2d 81 [1993]).

The defendant's Petrocelli's cross-motion is denied as untimely and without considering the merits of the motion (Brill v. City of New York, 2 NY3d 648 [2004]; Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]). Pursuant to the So Ordered stipulation of Judge Ritholtz, all dispositive motions had to be made returnable no later than July 2, 2007. The cross-motion is untimely as it was made returnable on August 29, 2007. The defendant neither moved for leave to make a late summary judgment motion nor submitted any cause, much less "good cause" for its failure to timely move by notice of motion instead of a cross-motion (see Rivers v. City of New York, 37 AD3d 804 [2007]; Gaines v. Shell-Mar Foods, Inc., 21 AD3d 986 [2005]; Gonzalez v. Zam Apartment Corp., 11 AD3d 657[2004]). "No excuse at all, or a perfunctory excuse cannot be 'good cause.'" (Brill v. City of New York, supra at 652 [2004]). In the absence of such a "good cause" showing, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment (Brill v. City of New York, supra; Thompson v. New York City Bd. of Educ., 10 AD3d 650[2004]).

Dated: November 26, 2007
D# 32

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J.S.C.