

**Adhar v The City of New York**

2005 NY Slip Op 30032(U)

November 28, 2005

Supreme Court, Queens County

Docket Number:

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 10  
**Justice**

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TAPASIA ADHAR, No. 10112/02  
  
Plaintiff, Motion  
Date September 27, 2005  
-against-

THE CITY OF NEW YORK, GREEN Motion  
BUS LINES, INC., COOK & KRUPS, Cal. No.1  
INC., NEW YORK PLUMBING  
HEATING CORP., OUTDOOR SYSTEMS  
INC., ANTHONY D'AMICO & SONS,  
INC., KEYSpan ENERGY COMPANY  
AND CONSOLIDATED EDISON OF NEW  
YORK, INC.,  
Defendants.

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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained on May 8, 2001 when she fell after stepping off a bus owned by defendant Green Bus Lines, Inc. (Green Bus) in front of 96-21 Rockaway Boulevard, between 96<sup>th</sup> Street and 97<sup>th</sup> Street, Ozone Park, due to a hole in the middle of a public roadway in the County of Queens, City and State of New York. The fall occurred in the roadway between a manhole cover and the curb.

Defendant Keyspan Energy Company d/b/a Keyspan Energy Delivery New York (Keyspan) moves for summary judgment and

dismissal of plaintiff's complaint and all cross claims as against it.

By order dated December 3, 2004, this court denied defendant Keyspan's prior motion for summary judgment as premature with leave to renew after completion of discovery.

#### Contentions of the Parties

Defendant Keyspan asserts that plaintiff admits to falling at a depressed and sunken manhole cover at the subject location and not an excavation. Defendant Keyspan did not perform any work there nor did it maintain any facilities on or below the roadway at that location.

Defendant Keyspan submits the affidavit of Walter S. Stone submitted on the prior motion. He states that defendant Keyspan did not perform work at the accident location. A two year record search was conducted which revealed that no work was performed by defendant Keyspan or any of its contractors on the roadway in front of 96-21 Rockaway Boulevard. Defendant Keyspan did not own any facilities on the roadway at the subject location. The manhole cover reads "NY & QEL & PO" and is not owned by defendant Keyspan.

In a subsequent affidavit, Mr. Stone states that he performed an additional search with respect to certain permits issued to defendant Keyspan by defendant The City of New York (City) beyond his original two year records search. Three Job Control Reports were found but all related to work done by defendant Keyspan in 1994 seven years prior to plaintiff's accident. Such work was not performed at the accident site but rather was at the intersection of Rockaway Boulevard and 97<sup>th</sup> Street. It was on the next block between 97<sup>th</sup> and 98<sup>th</sup> Streets.

Defendant Keyspan also argues that even if plaintiff did fall at a Keyspan excavation, which she obviously did not, then defendant Keyspan is clearly not liable for an excavation which was restored many years prior to the plaintiff's fall. The Rules of The City of New York, Title 34, Department of Transportation (DOT), Section 2-13(d)(6) provide that a permittee shall remain responsible for

maintenance of the permanent restoration for three years from the completion thereof. DOT Rules and Regulations provide that a utility, contractor or permittee is responsible for maintenance of the permanent restoration for a period of two years from the completion of such permanent restoration. Here, plaintiff's accident occurred more than three years after the permits were issued and, in any event, defendant Keyspan did not do work at the accident site and plaintiff did not fall at an excavation.

Plaintiff opposes the motion on the ground that, in opposition to the original motion, plaintiff produced permits issued to defendant Keyspan in 1994. After the motion was denied due to discovery being outstanding, defendant Keyspan produced Mr. Stone for deposition. However, he had only done a two year search and, therefore, had no knowledge with respect to the permits. Plaintiff objects to defendant Keyspan's use of the results of Mr. Stone's subsequent search on this motion when there was no opportunity to depose him with respect thereto. In any event, the Job Control Reports indicate that defendant Keyspan performed work on the same block as the accident, Rockaway Boulevard between 96<sup>th</sup> and 97<sup>th</sup> Street in front of premises 96-25, 96-23 and 96-27 Rockaway Boulevard.

Defendant City adopts the argument set forth by plaintiff.

In reply defendant Keyspan asserts that plaintiff has failed to produce evidence to show that it performed work at the accident location. Pursuant to DOT, Bureau of Highway Operations, Rules and Regulations a utility is responsible for maintenance of the permanent restoration of an excavation for two years from the date of completion of the restoration and for three years under NYC Rules. But, in any event, plaintiff did not fall at an excavation.

#### Decision of the Court

The motion by defendant Keyspan for summary judgment is granted. The complaint and all cross-claims are hereby dismissed as against defendant Keyspan.

“A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant action, defendant Keyspan has established its entitlement to judgment as a matter of law. The proof submitted showed that the only work that defendant Keyspan performed with respect to the vicinity of plaintiff’s accident occurred pursuant to permits issued in 1994. The New York City Charter, Rules and Regulations of the City of New York, Title 34, Department of Transportation, Section 2-13(e)(16)(ii) provides that: “Guarantee Period. Permittees shall be responsible for permanent restoration and maintenance of street openings and excavations for a period of three years on unprotected streets, and up to five years on protected streets commencing on the restoration completion date. This period shall be the guarantee period.” It therefore appears that any statutory duty that defendant Keyspan may have had to maintain the area expired prior to plaintiff’s accident. Paladino v Time Warner Cable of New York City, 16 AD3d 646.

The opposition to the motion fails to raise any material triable issue of fact with respect to defendant Keyspan’s liability. Plaintiff raises no argument with respect to the expiration of the statutory duty to maintain the restoration of an excavation by defendant Keyspan.

Accordingly, the motion by defendant Keyspan for summary judgment is granted. The complaint and all cross-claims are hereby dismissed as against defendant Keyspan.

Dated: November 28, 2005

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HON. DAVID ELLIOT