Zimmer v Felix Indus., Inc. Co.
2007 NY Slip Op 30067(U)
March 5, 2007
Supreme Court, New York County
Docket Number: 0107617
Judge: Paul G. Feinman
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SCANNED ON 3/13/2007

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

PRESENT: HON. PAUL G. FEINMAN, Justice — PART 52

Zimmer

-v-

Felix

INDEX NO. 107617/2002

MOTION DATE 11/1/06

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for SJ

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

FILED MAR 13 2007 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by defendant City of New York for summary judgment is granted for the reasons set forth in the annexed memorandum decision & order.

DCM CC set for 4/27/07 is cancelled.

Trial Support shall transfer this action to a non-City General IAS Part as City is no longer a party. See Annexed Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): Trial Support Reassign Non-City General IAS Part – City no longer a party.

Dated: 3/5/07

PGF, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

---X

ANNA ZIMMER,
Plaintiff,

against

FELIX INDUSTRIES, INC. and THE CITY OF NEW YORK,
Defendants.

---X

FELIX INDUSTRIES, INC.,
Third-Party Plaintiff,

against

EMPIRE CITY SUBWAY COMPANY (LIMITED),
Third-Party Defendant.

---X

Index Number 107617/2002
Submission Date Nov. 1, 2006
Mot. Seq. Nos. 002 & 003

T.P. Index No. 590583/2005

DECISION AND ORDER

For Plaintiff::
A. Vincent Buzzard, Esq.
Harris Beach, PLLC
99 Garnsey Road
Pittsford NY 14534

For Felix:
Jessica Tofi, Esq.
London Fischer LLP
59 Maiden Lane, 41st Fl.
New York NY 10038

For City:
Michael A. Cardozo, Esq.
Corporation Counsel of City of New York
By: Fei Yan Cheuk, Esq.
100 Church St.
New York NY 10007

For Empire City Subway:
Daniel Boriello, Esq.
Conway, Farrell, Curtin & Kelly, P.C.
48 Wall Street
New York NY 10007

FILED
MAR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

Papers considered in review of these motions for summary judgment and dismissal:

Seq. No.	Papers	Numbered
002	Order to Show Cause	1
	Plaintiff's Affidavit & Memo. of Law	2
003	Notice of Motion and Affidavits Annexed	1
	Memorandum of Law	2
	Affidavit in Partial Support & Memo. of Law	3, 4
	Plaintiff's Memo. of Law, Affidavits	5,6,7
	Reply to Third-Party Plaintiff's Opposition	8
	Reply to Plaintiff's Opposition	9

PAUL GEORGE FEINMAN, J.:

Defendant City of New York moves for summary judgment in its favor and the dismissal

of the complaint and any cross claims asserted against it. By interim order dated June 26, 2006, the court held the motion, which bears sequence number 002, in abeyance pending compliance with certain outstanding discovery requests. Subsequently, third-party defendant Empire City Subway Company (Limited) [hereinafter ECS], moved for summary judgment in its favor and dismissal of the plaintiff's complaint and the third-party complaint (motion bearing sequence number 003). The motions were consolidated for purposes of decision. For the reasons which follow, the City's motion for summary judgment is granted and ECS's motion for summary judgment is denied.

Factual and Procedural Background

Plaintiff suffered a skull fracture on January 13, 2001, when she was struck in the head by a piece of rock or piece of asphalt as she walked on the sidewalk on West 40th Street between Sixth and Fifth Avenue, New York, New York, at about 5:30 p.m. According to plaintiff's allegations, the rock or asphalt (hereinafter "rock") was propelled from a construction site located on the south side of West 40th Street between Fifth and Sixth Avenue, under the direction and control of defendants City of New York and Felix Industries whose workers were working onsite (Complaint ¶¶ 5-6).

Plaintiff commenced her action by filing a summons and complaint on April 15, 2002. She alleges that the defendants were negligent in causing or permitting her to be struck in the head, allowing construction work to be performed in a dangerous manner, failing to control the construction site, permitting the street to be open, exposing plaintiff to a defective and dangerous condition, failure to supervise, and failure to warn. Plaintiff has no memory of the events surrounding the accident, other than walking down the street toward Lord & Taylor on the

evening in question (ECS Not. of Mot. Ex. C., Zimmer EBT 10). She relies on the testimony of two witnesses, Kristin Rodriguez and Beverly Wheeler, to establish the allegations of her complaint (ECS Not. of Mot. Ex. D, EBT of Kristen Rodriguez, Dec. 2, 2005 [hereinafter Rodriguez EBT]; Ex. E, EBT of Beverly Wheeler, Aug. 30, 2005 [hereinafter Wheeler EBT]). Both women were near the plaintiff when she fell and stayed with her until an ambulance arrived to take her to the hospital.

The answers of both the City and Felix Industries deny the allegations set forth in the complaint, offer affirmative defenses including comparative negligence, assumption of risk, and failure to mitigate, and contain cross-claims against each other (ECS Not. of Mot. Ex. A., Answer [City]; Answer [Felix, July 3, 2002]. In addition, the City claims that it did not breach any duty owed to plaintiff as it was not involved in the construction work and had no notice of any defect.

Felix commenced a third-party action against ECS in May 2005, seeking common law indemnification and contribution. In its third-party complaint, Felix claims that ECS performed the work on January 13, 2001, and that the negligence of ECS resulted in injury to plaintiff (ECS Not. of Mot. Ex. A, Third-Party Complaint ¶¶ 12-18). The answer of third-party defendant ECS denies knowledge or information, offers affirmative defenses, and cross claims against the City and Felix (ECS Not. of Mot. Ex. A, Ver. Ans. to Third-Party Compl).

The City now moves for summary judgment in its favor. Plaintiff opposes the City's motion for summary judgment on the ground that discovery is incomplete (CPLR 3212[f]). Specifically, the plaintiff contends that based on the deposition testimony of the City's witness it appeared there are other documents that could show knowledge of a defect or active negligence

in repair of the pothole. ECS brings a separate motion for summary judgment and dismissal of the third-party complaint and all cross-claims on the ground that plaintiff has insufficiently established how the accident occurred or that any of the defendants created the object which struck her in the head or caused it to be propelled and to strike her. Defendant/third-party plaintiff Felix Industries, Inc. consents to the dismissal of the third-party complaint only if the court dismisses the plaintiff's complaint in its entirety as to them. Currently Felix does not have a motion for summary judgment in its favor *sub judice.* Plaintiff opposes ECS's motion, arguing, among other things, that her complaint is partially based on *res ipsa loquitur.*

Testimony of Non-Party Witness Kristin Rodriguez

Ms. Rodriguez testified that on January 13, 2001, there was ice and snow on the streets (Rodriguez EBT 18). There was about four inches of snow and ice piled along the curbside in the form of gray slush (Rodriguez EBT 19-20). She and her mother and cousin were walking east on 40th Street, having gotten out of their cab near the corner of Sixth Avenue and 40th Street to walk the final block toward Fifth Avenue, because the traffic on 40th Street was so congested (Rodriguez EBT 15). There was only one lane of traffic on 40th Street; cars were parked along the northern side of the street, and on the south side of the street there was a construction site as well as some parked cars (Rodriguez EBT 23-24). Rodriguez also heard a jack hammer (Rodriguez EBT 21). She could not remember whether there were barricades around the construction site (Rodriguez EBT 117-118). On the north sidewalk, there was "snow and sludge," which consisted of "[c]hunks of snow and ice just left over, gray." (Rodriguez EBT 28:13-14). She did not remember if there was debris on West 40th Street between Sixth and Fifth Avenue (Rodriguez EBT 28).

The construction was in one area in the middle of the block (Rodriguez EBT 74, 76). The construction site was about three car lengths long (Rodriguez EBT 75-76). The construction area included a barricade, a truck, and another vehicle (Rodriguez EBT 75). At least one vehicle had the name Felix Industries on its side (Rodriguez EBT 82). There were workers on site (Rodriguez EBT 85-86). There was at least one flag person who, according to Rodriguez was not doing a good job and causing the traffic to back up (Rodriguez EBT 87).

There came a moment as Rodriguez and her family walked east on 40th Street toward the restaurant, that Rodriguez heard the whine of spinning tires of a car trying to pull out from its parked position along the northern curb (Rodriguez EBT 32). The car was parked somewhat to the east, maybe 10-15 feet, of where Rodriguez was located on the sidewalk (Rodriguez EBT 33-34). "Immediately after the tires were spinning," Rodriguez's cousin called out, "Look out" (Rodriguez EBT 38:14-16). Rodriguez did not know what the danger was, and "just kind of crouched down," and "ran toward the curbside." (Rodriguez EBT 32:8-9). Her cousin and mother ran to the northern edge of the sidewalk (Rodriguez EBT 32:5-6). Then plaintiff, who had been walking several feet ahead of them, "grabbed her head," said, "'My head, my head,'" and "crouched down, held her head, then she fell back." (Rodriguez EBT 30; 32:12-14). Rodriguez had not noticed plaintiff until she fell several feet in front of her (Rodriguez EBT 30:25; 31:2). According to Rodriguez, the location where plaintiff fell was either west of the construction activity located across the street on 40th Street or directly opposite the construction site (*cf.*, Rodriguez EBT 151, 153). The car whose spinning tires apparently startled Rodriguez was, according to Rodriguez, parked nearly adjacent to or just east of where the plaintiff was

walking (Rodriguez EBT: 34-35).[1]

Rodriguez, her mother, and her cousin ran to plaintiff's aid. Rodriguez saw a rock lying nearby "that had fallen," and "guess[ed] that it had hit her on the head," as her head was bleeding (Rodriguez EBT 32:15-18). It was a heavy, broken piece of concrete about the size of a softball, with blood on it (Rodriguez EBT 114, 115). Rodriguez did not see the rock fall, as she was crouched with her head covered, but she heard it fall (Rodriguez EBT 42). She did not see the rock hit plaintiff (Rodriguez EBT 154).

According to Rodriguez, her cousin later explained that she had called out her warning because there was "something falling from the sky" (Rodriguez EBT 39:7-8). Rodriguez explained that "[w]e knew it was the rock, but we didn't know it at the time. Afterwards, we put it together that that is what fell, because that is what hit the woman on the head" (Rodriguez EBT 39:20-24). She did not see any debris kicked up when she heard the tires spinning, nor before or after (Rodriguez EBT 38). However, when questioned about a statement she had made in early March 2001 (Rodriguez EBT 127), that she was not certain where the rock came from and that it "may have come from the car whose wheels were spinning or one of the Felix construction vehicles," (Rodriguez EBT 135:15-17), she agreed that the rock could have come from either source (Rodriguez EBT:135). However, Rodriguez remembered that the traffic on West 40th Street was at a standstill up until the time of the accident (Rodriguez EBT 54, 57), and cleared

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[1]Rodriguez was cross-examined about a statement she had made in the summer following the accident to investigators (Rodriguez EBT 104). In that statement, she stated that the tires they heard were from a car that was "trying to go around the construction." (Rodriguez EBT 111:7-9). She is no longer clear what she was referring to in her 2001 statement; it is her belief that the sound was from the car pulling out from the parking spot (Rodriguez EBT 114).

only after the construction work stopped (Rodriguez EBT 57).

According to Rodriguez, another pedestrian (Ms. Wheeler), came to help them, and someone called an ambulance. One of the contractors also came over, she presumed from the construction site, to check on the plaintiff's condition and then headed back across the street (Rodriguez EBT 50, 52-53). She and the others waited about 20 minutes for an ambulance to arrive (Rodriguez EBT 57). The construction crew left within minutes of the accident, before the ambulance arrived, but one of the construction trucks bearing the name Felix drove by a bit later (Rodriguez EBT 61, 93, 94).

Testimony of Non-Party Witness Beverly Wheeler

Ms. Wheeler left the New York Public Library on Fifth Avenue, was walking westward on 40th Street on January 13, 2001 at the time of the accident (Wheeler EBT 94). She noticed a excavator or backhoe in the roadway on West 40th Street because "they were doing construction on 40th Street, the entire block," and were "digging up the ground" (Wheeler EBT 94:21-22; 95:4, 16-17). The construction work was causing gravel or asphalt to be kicked up, and some of it hit her left leg between her knee and her ankle (Wheeler Aff. 96, 97).[2] She and other pedestrians moved away from the curb of the street, closer to the Library's side, to avoid the gravel spray (Wheeler Aff. 96). The asphalt spray was coming from the backhoe which was traveling back and forth along the south side of 40th Street, carrying waste to a dumpster and then returning to the construction site (Wheeler 97, 98). The dumpster was sitting closer to Fifth

[2]According to an earlier, June 2003 statement, the gravel that had hit her came not only from the backhoe but by an impatient yellow cab trying to get around the backhoe by driving up onto the packed snow and ice (Rodriguez EBT 141, 143).

Avenue, about opposite the southern walls of the Library on 40th Street, and the construction hole was toward the middle of the block (Wheeler EBT101, 146-147). The excavator carried debris from the construction site in the middle of the block to the dumpster (Wheeler EBT105-106). There were workers jack-hammering near the dumpster (Wheeler EBT 104, 105). Asphalt was all over the street from the dumpster to the construction site (Wheeler EBT 102). Cars were kicking up a "gritty but not rocky" debris as they drove through (Wheeler EBT 109, 110; 111:10).

There was "all kinds of cars going by," in particular one taxicab that was "very impatient" and unwilling to wait for the backhoe to turn and make room for cars to pass; the cab partly drove up onto the icy snow embankment to get around it (Wheeler EBT 108:8-9; 10-13). This occurred right before Wheeler reached the plaintiff on the sidewalk ahead of her (Wheeler EBT 108). Wheeler saw plaintiff raise her hands during a time when the backhoe had backed up to make its turn to head east and was kicking up asphalt, and pedestrians were moving to the far side of the sidewalk (Wheeler EBT 151-152). Wheeler did not see plaintiff fall (Wheeler EBT 114). She did not see the backhoe kick up the rock that hit plaintiff (Wheeler EBT 118-119, 175). She presumed the rock "came from" the backhoe (Wheeler EBT 175), although "to be honest with you, I don't know how it hit [plaintiff]" (Wheeler EBT 179:15-16). The backhoe's "little shovel" was full and it was "dropping" dirt as it traveled (Wheeler EBT 118:11, 13).

While waiting for the ambulance and the police to arrive, Wheeler attempted, unsuccessfully, to speak to the construction workers (Wheeler EBT 126, 127, 128, 129). She noticed a trailer past the dumpster, closer to Fifth Avenue, and observed a Felix Industries sign on the barricade, although she found no one around with whom to speak (Wheeler EBT 124, 131,

132, 160).

Wheeler noticed the rock lying near the plaintiff after they helped her sit up and applied tissues to her head (Wheeler EBT 119-120). She stated it was not "asphalt because it came from the street," although she also described it as "a big piece of asphalt" and stated there were "pieces of asphalt, here and again, scattered because the traffic was moving." (Wheeler EBT: 121:7-8; 10; 16-18).[3]

Testimony of ECS's Dirk Rolff

Dirk Rolff testified on behalf of third-party defendant ECS, a wholly owned subsidiary of Verizion (ECS Not. of Mot. Ex. F [hereinafter Rolff EBT 21]). He has been the local manager of operations for ECS since May 2003, and his duties include conducting record searches connected with property damage and personal injury claims and testifying at depositions and trials (Rolff EBT 6, 7). In this matter, he had been asked to search the company's records for any excavation work, repaving, and permits concerning 40th Street between Fifth and Sixth Avenue for the two years prior to and including January 13, 2001 (Rolff EBT 10).

Job Order 088779SB concerned the construction and installation of two conduits by ECS on behalf of Bell Atlantic on 40th Street between Sixth and Fifth Avenue from a particular manhole to a subway station (Rolff EBT 19, 20, 21, 24).[4] The work entailed digging a trench in the street which generally would be no more than two feet wide and in this instance was

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[3]Wheeler gave the rock to the EMS attendant who put it in a plastic bag and took it, along with plaintiff and her other belonging, to the hospital (Wheeler EBT 137). The rock is apparently in plaintiff's possession.

[4]The contents of the Job Order are contained as Exhibit G to the initial motion papers of ECS.

approximately 42 feet long (Rolff EBT 31-32). The diagram shows that the work was performed on the north side of the street, near Sixth Avenue (ECS Not. of Mot. Ex. G, p. 2). The manhole is located approximately 70 feet east of the corner of West 40th Street and Sixth Avenue (Rolff EBT 51).[5] Although the diagram attached to the Job Order, created after the work was performed, contains "start" and "complete" dates of January 13, 2001, according to Rolff, the dates do not refer to the date the work was actually performed because no work records were found for that date (Rolff EBT 25-27). Rather, the labor costs for the Job Order show that the work was done on January 12, 2001; no records were found for January 13, 2001 pertaining to this Job Order (Rolff EBT 41, 42, 44).

According to Rolff, ECS has a paving contractor, Nico Asphalt Paving, Inc., which repaves the roadways (Rolff EBT 44). Although Rolff did not locate any records to show that Nico was hired (Rolff EBT 44-46), Nico billed ECS on January 26, 2001 for the job; Rolff's search for records did not extend beyond the date of the accident (Rolff EBT 54, 64).

Rolff stated that in order to do this kind of work, the workers would use a backhoe, shovels, and a saw to cut the asphalt (Rolff EBT 58). It does not use a dumpster to gather the materials, and Rolff did not know how the materials were discarded (Rolff EBT 58-59). Rolff has seen the workers clean a site but did not know if it was their custom and practice to clean before leaving (Rolff EBT 62-63).

Legal Analysis

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v*

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[5]Based on a diagram drawn to scale, Rolff testified that the distance between Fifth and Sixth Avenue on West 40th Street from curb to curb is approximately 950 feet (Rolff EBT 52).

Zeh, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial. (*Kosson v Algaze*, 84 NY2d 1019 [1995]). The party opposing summary judgment must lay bare its proofs so that the matters raised in the pleadings are shown to be real and capable of being established upon trial (*W.W. Norton & Co. v Roslyn Targ Literary Agency, Inc.*, 81 AD2d 798 [1st Dept. 1981]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*See, Thanasoulis v. National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1st Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer suspicions, surmises, and accusations (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Unsubstantiated allegations are also insufficient (*Id*).

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) that defendant owed her a duty of reasonable care, (2) it breached that duty, and (3) she suffered a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617

[1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 (2002). It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy" (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], *aff'd* 72 NY2d 888 [1988], citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 [1983]). The scope of any such duty of care varies with the foreseeability of the possible harm (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). Although foreseeability has been called "a critical factor" in defining an alleged tortfeasor's duty, it will not create a duty which does not otherwise exist (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d at 108, citing *Pulka v Edelman*, 40 NY2d 781, 785-786 [1976]).

City's Motion for Summary Judgment (Motion Sequence No. 002)

As noted above, this motion was held in abeyance so that the City could provide certain outstanding discovery. No further papers have been received from the parties related to the issues of outstanding discovery in the court's interim decision and order dated June 28, 2006. The motion appeared for a final control date on the court's calendar on November 1, 2006 at which time it was marked submitted. Therefore, the court has presumed that the outstanding discovery was provided and that nothing exchanged was relevant to the issues before it.

Pursuant to section 7-201(c)(2) of the New York City Administrative Code, only where the City has either received written notice of a defective, unsafe, or dangerous condition in a street, sidewalk or other passageway, or where a person was previously injured as the result of a defective and unsafe condition and a City agency was given written notice or there was written

acknowledgment from the City of the condition and there was a failure to repair within 15 days after the receipt of such notice, may a civil action be maintained against the City for personal injury due to the defective, unsafe, or dangerous condition. In other words, this prior written notice requirement limits the City's duty of care to only the hazardous conditions on streets and sidewalks for which the City has received notice. A plaintiff is required to plead and prove prior written notice; failure to do so will result in dismissal of the complaint (*Katz v City of New York,* 87 NY2d 241, 243 [1995]). The notice must have been for the specific defect involved (*Belmonte v Metro Life Ins. Co.*, 304 AD2d 471 [1st Dept. 2003]).

There is no question that the City lacked written notice concerning the street's condition. The City argues that there is also no evidence that its agencies were involved in the construction in question, and that without a showing of affirmative negligence, the complaint as against it must be dismissed, citing (*Poirier v City of Schenectedy*, 85 NY2d 310, 315 [1995]). The City's records witness, Cynthia Howard, testified that a search for applications for permits, repair forms, contracts, cut forms, and milling/resurfacing records at the location in question, found no permits involving the City of New York, and no complaints relating to any alleged defects on the sidewalk. Moreover, although there were two repair orders concerning potholes, the one that had been most recently reported to the City on January 4, 2001 had been repaired on January 5, 2001 (Ord. to Show Cause, Cheuk Aff. ¶ 10, Ex. D, pothole records).[6]

Plaintiff argues that the repair of a pothole just eight days prior to plaintiff's injuries,

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[6]The City's papers do not include a copy of Howard's deposition testimony, but do include copies of the records, without, however, providing any explanation or highlighting which are of importance to note (Ord. to Show Cause, Ex. D).

could provide an exception to the prior written notice rule, relying on *Bruni v City of New York*, 2 NY3d 319, 325 (2004), which held that where a City agency has internal documents which acknowledge the existence and dangerous nature of a condition, the documentation may qualify as an exception to the City's written notice. In *Bruni*, after the City was informed of a defective catch basin, a Bureau of Sewers supervisor investigated, set up a sawhorse and traffic cones, and filled out a report indicating that there was caving in the street due to missing bricks but that the area was now "safe" due to the presence of the cones and sawhorse; he forwarded a request for repairs work order to the appropriate department which made the repairs two months later. However, 39 days after the inspection, the plaintiff in *Bruni* fell in the area and sustained personal injuries. The Court held that given the internal documentation of the condition at the catch basin, the statute's alternative requirement that there be "written acknowledgment from the City" concerning the defect, had been satisfied (*Bruni*, 321-322, 325).

Here, however, plaintiff does not sufficiently establish that the pothole in question had anything to do with causing her injuries.[7] It is not even clear which pothole on West 40th Street between Fifth and Sixth Avenue is at issue (*see, Belmonte v Metro Life Ins. Co.*, 304 AD2d 471 [1st Dept. 2003] [repairs to a defect unrelated to the defect alleged by plaintiff are insufficient to comply with the requirements of the prior written notice law]). Additionally, unlike *Bruni*, the

[7]Plaintiff previously sought information as to whether the City scheduled a regular inspection of the job site when it hired an outside contractor to perform roadway construction, and documents that would show the work done, injuries, rules violations, standard procedures, etc. (Refermat Aff. ¶¶ 10-11). Most of these documents were referenced but not produced at the deposition of the City's DOT witness (Pl. Aff. ¶ 9, 10, Ex. E). Plaintiff had argued that the witness's deposition testimony suggested that there might be documentation about the City's work at the site including documentation of site conditions or information that would show active negligence in the performance of the work.

pothole repairs were apparently made prior to plaintiff's accident. She has not produced evidence of internal City documents that would support an allegation that the City was aware of a defective or dangerous condition of the roadway prior to plaintiff's accident. To the extent that plaintiff speculates her injuries were caused by a condition which the City repaired eight days earlier but which remained dangerous or defective, such is purely speculative and unsubstantiated.

Plaintiff also argues that the City should be held responsible for the manner in which Felix carried out its work. It is argued by the City that Felix was performing construction work for Consolidated Edison at the location and date of the accident, as shown by the permit issued to Consolidated Edison, valid from January 3-31, 2001, to open part of the roadway on West 40th Street between Fifth and Sixth Avenue, for the purpose of constructing or altering a manhole or casting permit (Ord. to Show Cause, Cheuk Aff. ¶ 13; Ex. D). Although plaintiff appears to suggest that the City bears ultimate responsibility for the work of contractors on the public streets, the NYC Administrative Code provides that "a permittee . . . for whose benefit any activity for which a permit is required . . . shall be liable with his or her . . . independent contractor for a violation of the provisions of this subchapter . . ." (NYC Admin. Code § 19-151[f]). The Court of Appeals in *Sobel v City of New York*, 9 NY2d 187 (1961), directly addressed the import of the statute, since renumbered. *Sobel* involved a trip and fall over a paving cobblestone which had been excavated on behalf of a utility company. The Court held that pursuant to then-section 82d-3.0 of the Code, because the utility company had obtained a permit from the City to excavate a public street, even though the utility did not itself perform any of the work, it remained subject to a nondelegable duty to plaintiff until the pavement was fully

restored (Sobel at 193). So too here, the permit holder to excavate the street owed a duty to plaintiff until the pavement was fully restored.

Plaintiff's position vis-à-vis the City, if adopted, would in essence convert the City into a general insurer of its street, even when it has no notice of a defect or role in creating the defect or hazardous condition. This is contrary to the statutory and case law. Here, plaintiff has offered nothing more than speculation and surmises as to the City's role in creating the defects and hazards at issue. It would be improper to allow a jury to speculate that negligence on behalf of the City caused the alleged injury (*Catlyn v Hotel & 33 Company,* 230 AD2d 655 [1st Dept. 1996]). As plaintiff has not raised any question of fact concerning the City's having had written notice, or that it created the dangerous condition or failed to maintain the area, and therefore that it breached a duty to plaintiff, defendant City's motion for summary judgment and dismissal pursuant to CPLR 3212 must be granted.

ECS's Motion for Summary Judgment (Motion Sequnece No. 003)

ECS seeks summary judgment and dismissal of the third-party complaint on the ground that plaintiff cannot establish her claim. A third-party defendant may assert against a plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim, pursuant to CPLR 1008, and it is of no significance that the third-party plaintiff does not raise a defense on its own behalf or that the third-party action seeks different relief from the main complaint (*see, Prigent v Friedman*, 264 AD2d 568, 569 [1st Dept. 1999]). Here, ECS's arguments focus on the circumstantial nature of plaintiff's claim.

To establish a prima facie case of negligence based only on circumstantial evidence, a plaintiff must show "'facts and conditions from which the negligence of the defendant and the

causation of the accident by that negligence may be reasonably inferred'" (*Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744 (1986), quoting *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]). A plaintiff need not disprove every other possible cause of her or his accident, but the proof must render those other causes sufficiently "remote" or "technical" so that a fact finder can reach a verdict based not upon mere speculation, but upon logical inference drawn from the evidence (*Gayle v City of New York*, 92 NY2d 936, 937 [1998], *remand* 256 AD2d 541 [2d Dept. 1998] [citations omitted]). A plaintiff need only prove that it was "'more likely'"or "'more reasonable'" that the injuries were caused by the defendant's negligence rather than by another's agency (*Gayle*, at 937, citations omitted).

An action based on circumstantial evidence must link a defendant's acts to the cause of injury by a reasonable and logical flow of inferences (*Tower Ins. Co. v M.G.B., Inc.*, 288 AD2d 69 [1st Dept. 2001]; *Gomes v Courtesy Bus Co., Inc.*, 251 AD2d 625 [2d Dept. 1998]). Thus, in *Kane v Estia Greek Rest., Inc.*, 4 AD3d 189 (1st Dept. 2004), the Appellate Division reversed the lower court and granted summary judgment to the defendants, where the plaintiff could not remember how his accident occurred because he was intoxicated at the time, and was unable to present a theory of liability and facts in support of his claim. Similarly, in *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228-229 (1st Dept. 2006), where the plaintiff was walking on the plaza abutting defendant's building, and was warned of a tractor backing up on the sidewalk and altered her direction, but fell after three or four steps, it was held that she failed to establish a prima facie claim of negligence against any of the defendants where she did not testify that she was frightened or that the tractor made contact with her body, but only that she did not know why she fell. In *Tower Ins. Co. of New York v M.B.G. Inc.*, 288 AD2d 69, the

complaint was dismissed as being based on "unwarranted speculation" where plaintiff alleged only that the fire was started in a back room of a store under defendants' exclusive control and where the individual defendant admittedly smoked a pack of cigarettes on a daily basis and the Police Department concluded that while the cause of the fire could not be determined, it could have been caused by an errant cigarette left on the shelf in the back room. So too, in *Gomes v Courtesy Bus Co., Inc.*, 251 AD2d 625 (2d Dept. 1998), the complaint was dismissed where the plaintiff could not establish that the defendant's bus, in the area, actually struck the nearby wooden plank forms, causing them to injure him; witnesses did not see the bus actually strike the planks and there were other vehicles in the area, thereby improperly leaving the fact finder to speculate how the accident occurred (*see also, Fishman v Westminster House Owners, Inc.*, 24 AD3d 394 [1st Dept. 2005] [plaintiff alleged that he slipped and fell on a wet ramp but testified that he did not recollect any slippery or wet conditions on the ramp as he walked down it and did not know what caused him to fall; his testimony that an hour earlier he saw water being sprayed from a hose going down the ramp did not permit an inference that water was present when and where he fell]).

ECS argues, and Felix adds its support, that plaintiff cannot sufficiently allege the occurrence of events that led to her injury. Defendants note that neither witness saw plaintiff hit by the rock, and while both saw a chunk of rock or asphalt on the ground near plaintiff, with blood on it, neither saw how it was propelled nor do they establish that any of the defendants were responsible for its presence simply because they were or had been performing work in the roadway near the location of her accident. They argue that there were other equally plausible causes for the accident, including that the chunk was on the street for some period of time prior

to the accident and propelled by the spinning wheels of the car attempting to pull out of its parking place adjacent to plaintiff immediately prior to the accident.

Plaintiff argues in opposition that whether the rock was actually propelled by the excavator or by passing traffic is inconsequential, as the issue is the defendants' negligence in permitting construction debris to lie in the traveled portion of West 40th Street, without barricades or warnings posted. She points to Wheeler's testimony that the excavator or backhoe kicked up gravel onto pedestrians on the sidewalk, itself giving rise to a question of negligence. Plaintiff contends that during the course of their construction work, defendants not only violated the permits issued to them, but also several safety statutes and regulations concerning maintenance of streets and sidewalks (Pl. Memo of Law Opp. Mot. to Dism. pp. 5-6, citing as examples, NYC Admin. Code § 19-121[b][2],[3],[6], and VTL § 1219[b]). She also argues that the jury should be allowed to draw the reasonable inference that the projectile that struck plaintiff came from the construction site and was likely propelled by Felix's excavator.

Unlike the plaintiffs in *Tower Ins. Co., Kane, Mazurek,* and *Gomes,* cited by the parties as examples of cases which were dismissed for insufficient specificity as to the nature of the negligence, plaintiff presents sufficient eyewitness evidence and circumstantial evidence to raise questions of fact that survive this summary judgment motion. Here, a reasonable trier of fact, could conclude, without resorting to speculation, that the construction work being performed by Felix and/or ECS was the source of the rock or asphalt projectile that struck the plaintiff.

Moreover, plaintiff argues that her claims can be established on the basis of *res ipsa loquitur*. *Res ipsa loquitur* requires a showing that the event was of a kind that ordinarily would not occur absent negligence; was caused by an instrumentality within the exclusive control of the

defendant, and was not due to any voluntary action or contribution on the part of the plaintiff (*DiRoma v Mutual of Am. Life Ins. Co.*, 17 AD3d 119, 120 [1st Dept. 2005]). ECS's argument that she does not offer any evidence is overbroad, as it overlooks the testimony of the two eyewitnesses.

Plaintiff sets forth sufficient allegations to circumstantially establish that the rock likely came from the construction site at which defendant Felix had workers working, and that defendant may have been negligent in the manner in which it barricaded the construction site and provided safe passageway for pedestrians and passing vehicles. Although defendants argue that a car would likely kick up a heavy softball-sized piece of rock high enough to hit a woman in the head, such an argument strains credulity when the witness on the street at the time of the accident, Beverly Wheeler, stated under oath that the cars were kicking up sprays of dirt and grit, and that she saw the Felix excavator's "little shovel" drop dirt and kick dirt as it turned to drive back toward the dumpster, causing the pedestrians to move away and plaintiff to raise her arms. There is a role for the "logic of common experience" which raises a question of fact for the jury as to whether Felix's negligence, at the very least, led to plaintiff's injury (*see Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d at 745). Accordingly, the motion to dismiss the plaintiff's complaint against Felix and the third-party complaint against ECS is denied.

ECS raises a separate argument as against both plaintiff and Felix, which is that the ECS witness establishes that its construction project was 400 feet west of the area where plaintiff's accident occurred, in the roadway close to the north side 40th Street, and that no work was done on the date of the accident. Although ECS is a third-party defendant, brought in by Felix on claims of common law indemnification and contribution, it must be pointed out that Rolff's

testimony is clear that the construction job itself was not completed until about January 26, 2001, when Nico billed ECS for its work in repaving the street that ECS had excavated on January 12, 2001. There is a nondelegable duty as concerns work on a public roadway (*Ortiz v Empire City Subway Co.*, 32 AD3d 759 [1st Dept. 2006] ["anyone undertaking work on a public highway is under a nondelegable duty to avoid creating conditions dangerous to the users of that thoroughfare]"). As noted above, ECS is subject to New York City Administrative Code § 19-151(f) and *Sobel v City of New York*, 9 NY2d 187, requiring the permit holder to remain subject to a nondelegable duty until the pavement was fully restored. It is

ORDERED that defendant **City of New York's** motion for summary judgment bearing motion sequence number **002** is **granted**; and it is further

ORDERED that third-party defendant **Empire City Subway Company (Limited)**'s motion for summary judgment bearing motion sequence number **003** is **denied**; and it is further

ORDERED that upon proof of service of a copy of this decision and order with notice of its entry upon all parties, the Clerk of the Court is to enter judgment dismissing the complaint and any cross claims as against the defendant City of New York only, together with costs and disbursements to this defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued under this index number as to the remaining defendant, Felix Industries, Inc.; and it is further

ORDERED that the Trial Support Office shall, upon service on it of a copy of this order with notice of its entry having been served upon all parties, transfer this action to a non-City General IAS Part inasmuch as the City is no longer a party; and it is further

ORDERED that the DCM Office shall, upon service on it of a copy of this order with notice of its entry having been served upon all parties, remove this action from the April 27, 2007 Partt 52 DCM Compliance Conference Calendar; and it is further

ORDERED that upon transfer of this case to a non-City General IAS Part, the plaintiff shall promptly notify the newly-assigned Part Clerk to schedule a Compliance Conference; and it is further

ORDERED that movants shall serve a copy of this order upon all parties to the action and the third-party action, the Clerk of the Court (60 Centre, Basement), the Trial Support Office (60 Centre, Room 158) and the DCM Office (80 Centre Street, Room 102).

This constitutes the decision and order of the court.

Dated: March 5, 2007
New York, New York

J.S.C.

FILED
MAR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK