SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
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MICHAEL BORDINO,

Plaintiff,

PART C-2
Present:
Hon. Thomas P. Aliotta

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION AND IVANI CONTRACTING CORP., COURY AND COURY, PLUMBING & HEATING & MECHANICAL CORP., BRIAR CONSTRUCTION CORP., KEYSPAN ENERGY DELIVERY, KEYSPAN CORPORATION AND KEYSPAN CORPORATION d/b/a KEYSPAN,

Defendant(s).

Decision and Order
Index No. 12165/00
Motion Nos. 2448-006
3054-007

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The following papers numbered 1 to 10 were used on these motions on the 10th day of January, 2007:

	Pages Numbered
Notice of Cross Motion for Summary Judgment by Defendant Ivani Contracting Corp., with Supporting Papers and Exhibits (dated July 24, 2006)	1
Notice of Cross Motion for Summary Judgment by Defendant Briar Construction Corp., with Supporting Papers and Exhibits (dated September 18, 2006)	2
Affirmation in Reply (dated October 22, 2006)	3
Affirmation in Opposition to Briar's Motion for Summary Judgment, with Exhibits (dated November 10, 2006)	4
Affirmation in Opposition to Ivani's Motion for Summary Judgment (dated November 10, 2006)	5

Upon the foregoing papers, the respective cross motions for summary judgment of defendants Ivani Contracting Corp. (hereinafter "Ivani") and Briar Construction Corp. (hereinafter "Briar") are granted in accordance with the following[1].

This is an action for personal injuries allegedly sustained by plaintiff on July 3, 1999, when he tripped and fell into an uneven depression or hole while exiting his car in front of 378 Ridgewood Avenue, Staten Island, New York.

In support of its motion for summary judgment, defendant Ivani has submitted a copy of the Examination Before Trial of Joseph Ivani, who testified that his company had performed sewer work for the City of New York at the site of plaintiff's accident in March 1995. According to the witness, the City conducted a final inspection of Ivani's work and co-defendant Briar's repaving on October 9, 1997, and found both to be satisfactory (see Ivani's Exhibit "H"). It is undisputed that in November and December of 1997, the owner of the neighboring premises at 375 Ridgewood Avenue demolished the existing structure and was granted work permits for curb cuts and the installation of plumbing to serve the two new buildings that were to be erected at the site. Thereafter, numerous other work permits were issued to various contractors, between January 1998 and August 1998. Among them were co-defendants Keyspan, the New York City Department of Transportation, Coury Plumbing & Heating & Mechanical Corp., and non-party Royal R & D Development Corp. In

addition, a Records Searcher with the New York City Department of Transportation testified at her deposition that on October 8, 1998 and November 2, 1998, repair orders were issued for potholes located at 339 Ridgewood Avenue . It is movants' position that they cannot be held liable for defects in the workmanship of subsequent contractors in the same area (*cf.* Steel v. City of New York,271 AD2d 435).

In opposition to Briar's motion, plaintiff asserts that the EBT testimony of its vice president, William Cummings, is inconsistent with that of Mr. Ivani to the extent that the former claims to be unable to remember the performance of any paving work at the Ridgewood Avenue location (see Plaintiff's Exhibit "C", p11). Since Mr. Ivani testified that Cummings had supervised the repaving by Briar (*id*., p21), plaintiff asserts that the resulting conflict presents a question of fact as to Briar's involvement with the allegedly defective roadway.

In opposition to Ivani's motion, plaintiff merely asserts that the Rules of the City of New York make a general contractor liable for defects in the condition of a work area for three years after the construction is complete. In this regard, 34 RCNY §2-11 (e) (16)(ii) provides that " 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 complete date. This period shall be the guarantee period".

The cross motions for summary judgment are granted.

On these papers, plaintiff has failed to raise a triable issue of fact as to whether the accident in question was proximately caused by any of the work performed by either movant, as opposed to the subsequent road work performed by various other contractors. On this issue, plaintiff has failed to direct this Court to any competent authority for the proposition that the cited section of the City's Rules imposes strict liability upon "permitees" for any and all injuries sustained by third parties during the designated periods of time. Clearly, the Appellate Division did not so hold in Ingles v. City of New York (309 AD2d 835). Rather, the Court concluded that this section of the Rules did not limit a contractor's common-law liability for affirmative acts of negligence to injuries that occur within the stated periods.

Moreover, the lack of memory reported by Briar's vice president does not contradict the testimony offered on behalf of Ivani, nor does it rebut the documentary evidence offered to show that the repaving performed by or on behalf of Ivani did not create the allegedly dangerous condition

which caused plaintiff's injury (see Zuckerman v. City of New York 49 NY2d 557)[2]. In opposition, plaintiff has failed to produce any admissible evidence sufficient to raise a material question of fact. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*id* at 562).

Here, the simple fact that the accident occurred within the three-year time period set forth in the City's Rules is not a sufficient basis upon which to impose liability on either Ivani and its purported subcontractor, Briar. Plaintiff has not been able to demonstrate any legal basis to hold either movant strictly liable for his injuries, nor has he offered a scintilla of proof of affirmative negligence on the part of either. In fact, the only evidence relative to the quality of the work performed by either is (1) the City's determination upon final inspection that it was in all respects "satisfactory" (see Ivani's Exhibit "H"), and (2) the affidavit of a resident at 372 Ridgewood Avenue asserting that upon the completion of the major renovation work in 1998, "the roadway in front of 373 and 377 Ridgewood Avenue was left pristine, flat and level. There were no

cracks, bumps or holes in the roadway". He also stated that cuts in the roadway were made and repaired approximately one year later when duplexes were erected across the street (see Ivani's Exhibit "J"). Under these circumstances, the mere fact that Ivani may have installed sewer lines in or about and between 1995 and 1997, or that Briar may have repaved the roadway in 1997 is legally insufficient to raise a material issue of fact as to whether such repair work was performed negligently (see Maloney v. Consolidated Edison Co., of N.Y., 290 AD2d 540). Speculative assertions and/or unsubstantiated allegations cannot defeat summary judgment.

Accordingly, it is

ORDERED that the motions for summary judgment of defendants Ivani Contracting Corp. and Briar Construction Corp. are granted; and it is further

ORDERED that the complaint and any counter - or cross claims against said defendants are hereby severed and dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

The foregoing constitutes the Decision and Order of the Court.

Law Clerk to notify all parties.

DATED: 3/13/07 ENTER:

/s/_____
HON. THOMAS P. ALIOTTA, J.S.C.

ASN BY EVE/pt on 3/13/07

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[1]The motion for summary judgment by defendant the City of New York was previously disposed.

[2]Naturally, any mistake by Ivani about the identity of its paving subcontractor would exonerate Briar. In any event, the name of said entity is irrelevant if the work was properly done or plaintiff has failed to raise a triable issue of fact with regard thereto.