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

HON. PAUL G. FEINMAN

PRESENT: PART 52

Index Number : 113452/2000

AMAROSA, MARYLOU

VS

CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 113452/2000

MOTION DATE [redacted] 10/18/06

MOTION SEQ. NO. 004

MOTION CAL. NO. [redacted] 2

The following papers, numbered 1 to _____ were read on this motion to/for 65

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	3, 5
Replying Affidavits	4, 6, 7
Police M Cuss Motion	2

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed decision order.

FILED
FEB 15 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/7/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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MARYLOU AMAROSA,

Plaintiff,

against

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, TISHMAN CONSTRUCTION COMPANY, COLUMBUS CONSTRUCTION CORP., and STRUCTURE TONE, INC.,

Defendants.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

against

FELIX INDUSTRIES, INC. A/K/A FELIX EQUITIES,

Third-Party Defendant.

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Index Number	113452/2000
Submission Date	Oct. 18, 2006
Mot. Seq. Nos.	004 & 005
Calendar Nos.	1 & 2

DECISION AND ORDER

TP Index No. 590364/2006

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Papers considered in review of these motions and cross-motion for summary judgment:

Seq. #	Papers	Numbered
004	Notice of Motion and Affidavits Annexed.....	1
	Notice of Cross-Motion.....	2
	Affirmation (Felix).....	3
	Affirmation in Reply to Felix (Tishman).....	4
	Affirmation in Opposition (plaintiffs).....	5

Reply Affirmation (Tishman)..... 6
Reply Affirmation (Structure Tone)..... 7

005 Notice of Motion and Affidavits Annexed..... 1
Affirmation in Opposition (Con Edison)..... 2
Affirmation in Reply (Columbus)..... 3
Affirmation in Further Opposition (Con Ed)..... 4
Reply (Columbus)..... 5
Affirmation in Reply (Columbus)..... 6

PAUL GEORGE FEINMAN, J.:

In motion sequence number 004, defendant Tishman Construction Company moves for summary judgment and dismissal of the complaint and all claims and cross-claims as against it pursuant to CPLR 3212. Defendant Structure Tone, Inc. cross-moves for summary judgment and dismissal of the amended verified complaint and all claims and cross-claims as against it. Third-party defendant Felix Industries, Inc. seeks to have the motions held in abeyance pending completion of discovery. Plaintiffs oppose the motion and cross-motion and argue that there are issues of fact which preclude the granting of summary judgment.

In motion sequence number 005, Columbus Construction moves for summary judgment and dismissal of the complaint as against it with prejudice, together with all cross-claims, pursuant to CPLR 3212. Consolidated Edison Company of New York, Inc. opposes.[1]

For the reasons which follow, the motion for summary judgment and dismissal by Tishman Construction Company is denied. The cross-motion by Structure Tone, Inc. for summary judgment is granted. The motion by Columbus Construction for summary judgment and dismissal is granted.

Factual Allegations and Procedural Background

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[1]The City has not submitted papers in either motion sequence number 004 or 005.

Plaintiff was injured on September 9, 1999 at 9:50 a.m. when she fell in the street as she was crossing West 43rd Street near Eighth Avenue. According to her deposition testimony of February 16, 2006, her normal route to work was to exit the Port Authority building on Eighth Avenue and walk north on the west side up Eighth Avenue to buy her breakfast at a particular deli (Pl. Aff. in Opp. to Def.'s Mots., Ex. B [hereinafter Amarosa EBT] 32:22-25; 33:11-13). On the day of the accident, she did not need to buy breakfast and therefore crossed over to the east side of Eighth Avenue (Amarosa EBT 33:18-20). When she reached 43rd Street, she stopped to wait for the "walk" sign (Amarosa EBT 34:22-23). When it turned in her favor, she proceeded to walk about 10 feet east before starting across the street, because there was a car parked on the north side of the street, apparently at or near the crosswalk (Amarosa EBT 35: 3-4; 11-15). There were no signs indicating an alternate route for walking, nor was there a walkway or barricades (Amarosa EBT 42:7-11;124:5-7; 12). The roadway surface was "under construction" and "was all broken up" (Amarosa EBT 38:11-12). It was not paved, and there were "rocks all over the place," with the color of the surface area where she fell being "white-ish, like brown." (Amarosa EBT 38:17-22). She had noted, prior to her accident, that there was construction underway on a building on the south side of 43rd Street and Eighth Avenue, now the "Western [sic] Hotel," although she did not know when construction had begun (Amarosa EBT 38:23-25; 39:2-13). There were no construction activities in the roadway where the accident occurred prior to the date of her accident (Amarosa EBT 39:15-18). She walked about 15 feet into the street when she tripped in a pothole and then fell onto a raised manhole cover (Amarosa EBT 36:4:7). The pothole about five to six inches deep and about 15-20 inches wide (Amarosa EBT 36:16-17; 37:3-4, 20-21; 38:2-3). Her right shoulder came into contact with the manhole cover and it was

her shoulder and arm that suffered the main injuries (Amarosa EBT 47:6-8, et seq.). After she fell, she was helped up by several pedestrians and she decided to walk to her office on Broadway where she could go to the hospital with a co-worker (Amarosa EBT 47:19-25; 50:3-6). She therefore walked back to Eighth Avenue and up to 45th Street, turned east and saw two policemen who helped her to her office (Amarosa EBT 50:9-19).

Her husband took three photographs of the site, following her instruction as to the location, about two months after her accident (Amarosa EBT 57:18-25; 62:25; 63:2-3 [Def. Ex. A-C]). A lawyer on her behalf took a series of six photographs about one month after her accident (Amarosa EBT 63:21-22; 64:16-19 [Def. Ex. F-K]). The pictures show the street paved and without the pothole (Amarosa EBT 67:21-22). She was able to mark "approximately" where the pothole was located on one of the photographs taken by her attorney (Amarosa EBT 67:24; 68:5-9). However, she felt unable to identify the location of the pothole in the other photographs taken by the attorney (see, Amarosa EBT 65:3-8; 18-21;70:22-24; 71:6-8; 17-21; 72:2-8). According to the Verified Bill of Particulars, dated November 1, 2002, she fell near a manhole cover "across and toward the Ben & Jerry's Ice Cream Store" (Tishman Not. of Mot. Ex. B, Ver. Bill of Partic. ¶ 1, 2). Several of the photographs show the ice cream store.

Plaintiff was informed that her right humerous had broken in three locations and that her right shoulder had been dislocated (Amarosa EBT 73: 15-17). She has since undergone a partial shoulder replacement and nearly a year of physical therapy, continues to suffer pain and limitations to her movement and activities, and claims permanent injuries (Ver. Bill of Partic. ¶¶ 5, 6).

Plaintiff and her husband commenced an action against the City of New York sounding in

personal injury in June 2000. In May 2002, they served an amended verified complaint naming the other co-defendants.[2] As concerns Tishman, the amended complaint's fifth cause of action[3] alleges that Tishman was responsible for opening the sidewalk to install foundation at West 43rd Street, across from the Ben & Jerry Ice Cream store, and was responsible for maintaining the roadway in a reasonably safe manner but allowed the street to become broken and eroded with holes and made unsafe, and dangerous, and this unsafe and hazardous condition existed for an unreasonable length of time despite actual and constructive notice of it; failed to post signs, allowed work to proceed in a dangerous manner, failed to use proper and adequate materials. Tishman also allegedly failed to provide pedestrians with an unobstructed means to transverse West 43rd Street without having them walk across West 43rd Street near Eighth Avenue (Tishman Not. of Mot. Ex. B, Ver. Bill of Particulars ¶ 3). Plaintiff claims that Tishman had actual notice in that it applied for a permit to open the sidewalk to install foundation and applied for various permits on about August 5, 1999, and caused a condition that required her to cross the street due to work being performed on the sidewalk, and that its employees and foreman worked on and inspected the location (Tishman Not. of Mot. Ver. Bill of Particulars ¶ 4). She claims constructive notice in that the condition existed for months prior to her accident and the accident was more likely to occur by the work being performed by Tishman (Tishman Not. of Mot. Ver. Bill of Particulars ¶ 4).

The amended verified complaint sets forth similar allegations in the ninth cause of action

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[2]In 2006, defendant Con Edison commenced a third-party action against Felix Industries.

[3]The sixth cause of action claims loss of consortium as to co-plaintiff Gerald Amarosa.

against Structure Tone.[4] It alleges that Structure Tone was responsible for constructing new sidewalk building pavement at West 43rd Street near Eighth Avenue and was responsible for maintaining the roadway in a reasonable safe manner, but they allowed the street to become broken and eroded with holes and made unsafe, and dangerous, they failed to post signs, and allowed work to proceed in a dangerous manner. It also failed to provide pedestrians with an unobstructed means to transverse West 43rd Street without having them walk across West 43rd near Eighth Avenue (Cross-Mot. Ex. B, Ver. Bill of Particulars ¶ 6). She claims they had actual and constructive notice in that they had applied for permits on or about August 18, 1999, and that there were cut forms and inspection reports relating to such permits, and that its employees would have worked and inspected the area (Cross-Mot. Ex. B, Ver. Bill of Particulars ¶ 8).

Similar allegations are claimed in the seventh and eighth causes of action of the amended verified complaint as against Columbus Construction, the latter a loss of consortium claim. Plaintiffs claim that Columbus had actual notice of the condition based on its having applied for a permit to repave the roadway where the accident occurred, and its various applications for permits, as well as through the various cut forms and inspection reports relating to the permits, milling reports, and the knowledge of its workers onsite (Columbus Not. of Mot. Ex. C, Ver. Bill of Partic. ¶ 8).

Tishman Construction, Columbus Construction, and Structure Tone move for summary judgment and dismissal of the complaint and all cross-claims as against each of them.

Legal Analysis

[4]The tenth cause of action claims loss of consortium by Gerald Amarosa.

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). 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]). Where a movant has demonstrated its entitlement to summary judgment, the burden of opposing such a motion is to demonstrate by admissible evidence the existence of a material issue of fact requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). 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 surmises, unsubstantiated allegations, and accusations (*Zuckerman v City of New York, supra,* at 557).

In order to establish a prima facie case of negligence, a plaintiff must demonstrate (1) that

defendant owed him or her a duty of reasonable care, (2) a breach of that duty, and (3) 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]).

1. Tishman's Motion for Summary Judgment

Tishman moves for summary judgment and dismissal on two grounds. First is that it is not a proper party to the litigation. Its attorney states that Tishman Construction Corporation of New York was the construction manager for the two buildings, but that plaintiffs served process on Tishman Realty & Construction Company, Inc., a separate and distinct entity as shown by their certificates of incorporation (Tishman Not. of Mot., Burkhoff Aff. ¶¶ 16-18, Ex. N [Certif. of Inc., Tishman Realty]; Ex. O [Applic. for Auth., Tishman Construction]). Tishman insufficiently establishes its claim. It is not clear, for one thing, what entity was listed on the envelope served to Tishman. Notably, according to the entities' Certificate of Incorporation and

Application for Authority, their address for service of process is the same for both the corporation and the company. In addition, although the captain of the verified amended complaint reads "Tishman Construction Company," the version served on Tishman was marked by hand to read "s/h/a Tishman Construction Company, n/k/a Tishman Realty & Construction Co., Inc." (Tishman Not. of Mot. Ex. A). Furthermore, as pointed out by plaintiffs, the permits taken out by Tishman for the 43rd Street location were taken out by "Tishman Construction Company" (Pl. Aff. in Opp. Ex. F).

Tishman also argues that summary judgment is appropriate because the plaintiffs have not established that it had any duty toward the plaintiff. In support of its argument, it submits two affidavits by employees who oversaw work on the two buildings under construction in the area in that general time frame.[5] Roger Cettina was project superintendent, employed from January 1999 through April 2001, at the building located at Seventh Avenue between 42nd and 43rd Street, called "3 Times Square," for which Tishman was the construction manager (Tishman Not. of Mot. Ex. K, Cettina Aff. [hereinafter Cettina Aff.] ¶ 5). Based on his personal knowledge as part of his job responsibilities, and after reviewing the list of permits issued by the City to Tishman for the two years preceding plaintiff's accident, as well as the available daily reports for the month preceding the accident, Cettina "confirm[s] that none of the work conducted by Tishman on the 3 Times Square project before September 9, 1999 was near the vicinity of the alleged accident." (Cettina Aff. ¶ 6). According to Cettina, the permits issued by

[5]The depositions of Tishman's and Structure Tone's witnesses were deemed waived after plaintiffs' attorney failed to appear or respond to repeated calls to his office on the date of the scheduled depositions, and after the time agreed upon for payment of a bust fee and rescheduling the depositions had passed (Tishman Not. of Mot. Ex. I, J).

the City were for work to be "performed for a maximum of 164 feet west of 43rd Street and 7th Avenue," that is to say, closer to Seventh Avenue than to Eighth Avenue when understood that the West 43rd Street between Seventh and Eighth is about 600 feet long (Cettina Aff. ¶ 8, emphasis in original). In addition, Joseph Ross, Tishman's project executive from June 1999 through April 2003 for the construction of the Westin hotel located at the southeast corner of West 43rd Street and Eighth Avenue, avers that Tishman's work did not begin on the site until June 2000 (Tishman Not. of Mot. Ex. L, Ross Aff. [hereinafter Ross Aff.] ¶ 6).

According to Tishman's attorney, the daily reports for August 3, 1999 through September 9, 1999, are not available, and thus Cettina's determination concerning where the work was done in the weeks immediately before plaintiff's accident is not based on actual work records (Tishman Not. of Mot. Ex. H, Burkhoff Response to Court Ord. ¶ 1). Moreover, although Cettina states that none of the permits concern work that occurred a distance greater than164 feet west of Seventh Avenue, he does not explain how he knows this particular fact and the permits themselves do not establish this conclusion. Specifically, several of the permits allow the placement or storage of materials, or occupancy of the sidewalk in front of "266-268 West 43rd Street" and "264-76 West 43rd Street," while others state that the "specific location" for the materials or sidewalk occupancy is "On Street: West 43 Street/ From Street: 7 Avenue/ To Street 8 Avenue / Specific Location: aka 1485 B'way- (3 Times Square)." Although Cettina avers that based on his personal knowledge, none of permits concerned the area where plaintiff fell, the evidence submitted by the parties has not established the size of 3 Times Square and the amount of ground space used to erect it. In addition, the contact name on these 1999 permits is "Joe Ross," presumably the same Joseph Ross whose affidavit concerning the construction of the

Westin hotel located on Eighth Avenue, states that construction did not begin until June 2000. Without additional documentation, it is not established that there was absolutely no involvement of Tishman at the Westin hotel site in September 1999. In other words, Tishman has not made a prima facie showing of its right to judgment as a matter of law and the burden of proof did not shift to plaintiff to show a material question of fact. Accordingly, Tishman's motion for summary judgment in its favor and dismissal of the complaint and cross-claims is denied.

2. Structure Tones' Cross-Motion for Summary Judgment

Structure Tone moves for summary judgment and dismissal of the complaint and cross-claims arguing that it did not owe a duty to plaintiff and did not create the hazard that caused the plaintiff's injury. It includes an affidavit from its insurance manager, Veronica Lewis (Cross-Mot. Ex. E [hereinafter Lewis Aff.]). Lewis avers that based on her personal knowledge as a part of her job responsibilities and as a result of a search for records of work performed during the time period and in the vicinity of the accident, the only work Structure Tone was contracted to perform in the vicinity of West 43rd and Eighth Avenue ended in about April 1998 and was performed at the other end of 43rd Street closer to Seventh Avenue (Lewis Aff. ¶¶ 3-4). Lewis also states that Structure Tone performs "interior fit out work which is performed inside of a building." (Lewis Aff. ¶ 4). This is sufficient to shift the burden to rebut the defendant's showing to the plaintiff.

Plaintiffs oppose Structure's motion, but argue only that its papers are insufficient and raise a material issue of fact, without identifying the fact. A 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]). Conclusory arguments are insufficient to raise an issue of fact (*Zuckerman v City of New York,* at 557). Furthermore, where a plaintiff offers mere guesses or speculation in opposition to a defendant's motion for summary judgment, it is insufficient to raise an issue of fact and it would be improper for a court to allow a jury to speculate that negligence on behalf of a defendant caused the alleged injury and (*Catlyn v Hotel & 33 Company,* 230 AD2d 655 [1st Dept. 1996]).

Third-party defendant Felix Industries seeks to delay decision on the motions until the completion of discovery. However, determination of a summary judgment motion will not be held in abeyance based on a claimed need for discovery unless at least some "evidentiary basis" is offered "to suggest" that discovery may lead to relevant evidence (*Harris v Alcan Aluminum Corp.*, 91 AD2d 830 [4th Dept 1982], *aff'd* 58 NY2d 1036 *for reasons stated below*). Here, although Felix argues that it had only recently received some of the motion papers and not received others, and was only in the litigation for a few short months at the time the motions were made, it does not suggest that there are triable issues of fact as concerns Structure Tone that warrants a delay of the determination of the motion; it does not offer an evidentiary basis suggesting that discovery may lead to relevant evidence which warrant denial of the motion as to Structure Tone (*Lambert v Bracco*, 18 AD3d 619, 620 [2d Dept. 2005]).

For the above reasons, Structure Tone's cross-motion for summary judgment is granted and the complaint and all cross-claims are dismissed as against it.

3. Columbus Construction's Motion for Summary Judgment

Columbus moves for summary judgment and dismissal of the compliant and all cross-claims against it based on plaintiffs' failure to establish that it owed a duty to Marylou Amarosa.

Columbus provides an affidavit from its Risk Manager, Howard Bass, who conducted a search of "records of any work in the alleged area" and he affirms that no records were found "going back to 1999" (Columbus Not. of Mot. Ex. G, Bass Aff. ¶¶ 1, 4). He concludes that Columbus did not perform any work on West 43rd Street between Seventh and Eighth Avenues prior to or including September 9, 1999 and did not have any employees working at the alleged site who would have created the condition or had notice of it (Columbus Not. of Mot. Ex. G, Bass Aff. ¶¶ 5-6). Columbus also attaches copies of its time sheets for the month prior to the accident which, according to its attorney, shows that it was working entirely in the Bronx (Not. of Mot. Kazansky Aff. ¶ 7). However, without a first-person affidavit attesting to the contents and veracity of these time sheets, the court cannot make such a determination. An attorney's affirmation, unless he or she actually has first hand knowledge, has no probative force in a motion for summary judgment (*South Bay Center, Inc. v Butler, Herrick & Marshall*, 43 Misc. 2d 269, 272 [Sup. Ct., Nassau County 1964]).

In opposition to the motion, plaintiff points to the existence of a permit issued on July 7, 1999, taken out for the purpose of paving and milling on West 43rd Street between Seventh and Eighth Avenues for a maximum of 300 feet (Pl. Aff. in Opp. Ex. D). However, pursuant to *Bermudez v City of New York*, 21 AD3d 258 (1st Dept. 2005), the mere existence of a street opening permit is insufficient to raise a question of fact as to whether such work was actually performed without some additional evidence. Here, where Columbus proffered the affidavit of its risk manager that a search of its records found no records and that he determined that the company had not worked in the area in question, the fact that a permit was issued is insufficient.

Con Edison also opposes the motion by Columbus. It argues that the Bass affidavit

insufficiently sets forth his responsibilities, the exact nature of his search, whether he is qualified to conduct a records search, and whether the time frame of "back to 1999" is sufficiently clear (Con Ed Aff in Opp.[Burke] ¶ 3). Con Ed also contends that plaintiff's testimony described a milled street surface, and attaches the permit and copies of milling records that post-date the accident, none of which indicate the contractor's name (Con Ed. Aff. in Opp. Ex. B). It also argues that Columbus has never been deposed and that the motion should be denied until discovery is completed.

Columbus responds by providing copies of Felix Equities Street Opening Reports for the area in question showing that it had worked in the area on September 3, 1999 and again on September 9, 1999 (Columbus Aff. in Reply Ex. C, D), and argues that it could not have done milling or resurfacing while Felix was working.

Felix also opposes the motion based on the fact that discovery has never been completed among the main litigants, although the parties have been joined in the main action since 2002. However, as stated above, Felix does not offer any evidentiary basis to suggest that discovery may lead to relevant evidence (*Lambert v Bracco*, 18 AD3d at 620). Therefore, Columbus's motion for summary judgment on the basis of the Bass affidavit and dismissal of the complaint and cross-claims as against it is granted.

It is

ORDERED that the motion by Tishman bearing motion sequence number 004 for summary judgment is denied; and it is further

ORDERED that the cross-motion by Structure Tone, Inc. for summary judgment is granted and the Clerk of Court is directed to enter judgment dismissing the complaint and all

cross-claims as against Structure Tone, Inc., with costs and disbursements to 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 motion for summary judgment by Columbus Construction Corporation bearing motion sequence number 005 is granted and the Clerk of Court is directed to enter judgment dismissing the complaint and all cross-claims as against Columbus Construction Corporation, with costs and disbursements to 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 parties, who are to appear for their previously scheduled compliance conference on February 21, 2007, at 2:00 p.m., in Supreme Court, 80 Centre Street, room 103.

This constitutes the decision and order of the court.

Dated: February 8, 2007
New York, New York

J.S.C.