SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: *HON. THOMAS P. PHELAN,* *Justice.*

TRIAL/IAS PART 5
NASSAU COUNTY

JOHN DENNIS DRISCOLL, JR., by his Guardian JOHN D. DRISCOLL and JOHN D. DRISCOLL, Individually,

Plaintiffs,

-against-

JAMES V. D'AMBROSIO, KEYSPAN GAS EAST CORPORATION d/b/a KEYSPAN ENERGY DELIVERY OF LONG ISLAND, HAWKEYE, LLC f/k/a HAWKEYE CONSTRUCTION, LLC and COUNTY OF NASSAU,

Defendants.

ORIGINAL RETURN DATE: 8/30/07
SUBMISSION DATE: 01/15/08
INDEX NO. 15862/05

MOTION SEQUENCE #S
006, 007, 008, 009

The following papers read on this motion:

Notices of Motion.....	1, 2, 3
Notice of Cross-Motion	4
Affirmation in Opposition.....	5
Reply Affirmation.....	6

All of the defendants move, pursuant to CPLR 3212, seeking an order granting summary judgment dismissing plaintiff's complaint. It is well settled that on a motion for summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If this initial burden is not met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*).

This action was brought by plaintiffs to recover damages for personal injuries allegedly sustained by the plaintiff, JOHN DENNIS DRISCOLL, JR., as a result of an accident which occurred on or about July 11, 2004, when his bicycle and the vehicle owned and operated by defendant, JAMES V. D'AMBROSIO ("D'Ambrosio") collided, causing the infant plaintiff to fall to the ground. It is claimed that the infant plaintiff swerved to avoid an excavation on a County roadway, to wit: Covert Avenue in New Hyde Park, New York.

MOTION SEQUENCE #006

Defendant, COUNTY OF NASSAU ("County"), seeks an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as asserted against it, as well as any and all cross-claims. The County alleges that it did not have prior written notice of the alleged dangerous or defective condition prior to the occurrence as required by Nassau County Administrative Code §12-4.0(e) and General Municipal Law § 50-e as a condition precedent for liability. In support of its position, the County has provided the testimony of Steven Anker, a Civil Engineer, of the Permit Division of the County.

Mr. Anker testified that upon a review of notices filed, he found no prior notice regarding the area where the subject incident took place (Ex. D). This is further supported by an affidavit of Mr. Anker attesting to the fact that a search was made of the Nassau County Department of Public Works that revealed no prior written notice (Ex. F). Also submitted is an affidavit of Veronica Cox of the Claims and Investigations Division in the County Attorney's Office (Ex. E). Ms. Cox avers that a search of the records was made for a period of seven (7) years prior to the accident to determine whether they received any prior written notice or any notices of claim regarding the location and that none was revealed.

The County has made its prima facie showing of entitlement to judgment as a matter of law by proffering sufficient evidence that it had not been provided with prior written notice of the alleged defective condition as required under Nassau County Administrative Code §12-4.0(e). (*See, Lopez v. Gonzalez,* 44 AD3d 101 [2d Dept. 2007]). Once this initial burden has been met by the County, the burden then shifts to the plaintiffs to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This the plaintiffs have failed to do in that they did not submit any papers in opposition to the motion. Accordingly, the County's motion is granted.

MOTION SEQUENCE #007

Defendant, JAMES V. D'AMBROSIO ("Mr. D'Ambrosio"), seeks an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint as asserted against him, as well as any and all cross-claims, on the grounds that plaintiffs cannot prove a prima facie case of negligence against him. In support of his application Mr. D'Ambrosio submits the deposition testimony of the plaintiffs. The plaintiff father ("Mr. Driscoll") testified that his son ("John, Jr.") was diagnosed with Down's Syndrome shortly after birth (Ex. H, p. 30). John Jr.'s testimony was, therefore, limited due to his disability. He testified that his mom and dad told him to ride on the sidewalk (Ex. G, p. 15). According to John Jr.'s testimony Mr. D'Ambrosio's vehicle hit both John, Jr.'s shoulder and his bicycle (Id., p. 31). It is not clear from his testimony how he came to leave the sidewalk and come into contact with Mr. D'Ambrosio's vehicle. Mr. D'Ambrosio's counsel states that "the only conclusion that can be drawn is that plaintiff entered the roadway from the sidewalk suddenly, thus preventing Mr. D'AMBROSIO from avoiding him" (Madonna Reply ¶ 5).

Mr. D'Ambrosio testified that he was traveling southbound in the right lane of travel on Covert Avenue at approximately 10 to 15 miles per hour at the time of the impact (Ex. I, p. 42). He further testified that from the time he first saw something to the time of the impact it was instantaneous and that his vehicle was impacted where the [passenger] side door opens and that sideview mirror was broken off (Id., p. 18). Movant has made a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, plaintiffs argue that "Defendant motorist failed to keep a proper lookout or otherwise failed to see that by with the proper use of his senses he was bound to see!" (Wallace Aff. ¶ 8). Plaintiffs further retort that "reasonable people could certainly reach a different conclusion than that which is proffered by the Defendant motorist" (Id. ¶ 9). Moreover, it is submitted that "the possibility that each of the parties may bear some responsibility for the accident is an issue which must be submitted to the trier of fact" (Id. ¶ 11). Counsel proffers the argument that the defendant had an unobstructed view but fails to acknowledge that the impact was to the side of the vehicle. Counsel's arguments are speculative and insufficient to defeat Mr. D'Ambrosio's motion for summary judgment. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Accordingly, Mr. D'Ambrosio's motion is granted.

MOTION SEQUENCE #008

Defendant, HAWKEYE, LLC f/k/a HAWKEYE CONSTRUCTION, LLC ("Hawkeye"), seeks an order pursuant to CPLR 3212 granting summary judgment dismissing all causes of action against it. In support of its application, Hawkeye submits the deposition testimony of Miguel Afanador, foreman of Hawkeye, who was employed in that capacity at the time of the accident. Referring to time sheets, Mr. Afanador testified that they showed that he was involved in a project on Convert Avenue (Ex. E, p. 17). He further testified in sum and substance that when a gas main is installed, the road needs to be opened up, the pipe put together and into the ground and then backfilled and cleaned up (Id., p. 23). Mr. Afanador testified that the notation on the field sketch indicated that the job was completed on June 17, 2004 (Id., p. 3). It was also Mr. Afanador's testimony that it is standard construction practice to put out cones and barrels, that "[a]ny opening that's made, after the work is done, at the end of the day, is temporarily restored" and that an excavated opening would not be left overnight (Id., p 51). Again referring to the papers that he looked at, Mr. Afanador testified that it appeared that some sidewalk panels had been pulled up and that in those situations, a temporary restoration is done with asphalt until a permanent restoration crew restores the concrete (Id., pp. 52 and 53). He further testified that the panels were never left in a non-restored condition (Id. p. 54).

As stated above (motion sequence #007), it is not clear from the testimony of John, Jr. just how he came to leave the sidewalk and come into contact with Mr. D'Ambrosio's vehicle. From the evidence submitted by Hawkeye, its job was completed prior to the date of the accident. "[U]nder the circumstances [Hawkeye] cannot be held liable for a condition that it concededly did not create [citation omitted]" (*Hernandez v. City of New York*, 251 AD2d 456 [2d Dept. 1998]. Hawkeye has, therefore, made its prima facie showing of entitlement to judgment as a matter of law . Once this initial burden has been met by defendant, Hawkeye, the burden then shifts to the plaintiffs

to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This the plaintiffs have failed to do in that they did not submit any papers in opposition to the motion. Accordingly, Hawkeye's motion is granted.

MOTION SEQUENCE #009

Defendant, KEYSPAN GAS EAST CORPORATION d/b/a KEYSPAN ENERGY DELIVERY OF LONG ISLAND ("Keyspan"), cross moves for an order, pursuant to CPLR 3212, dismissing all causes of action and cross claims against it.

At the outset the court notes that it is alleged that this motion is timely. That is not correct. The Certification Order dated April 2, 2007 (Phelan, J.) provides: "Motions for summary judgement must be filed within (60) days of the filing of the Note of Issue." The Note of Issue was filed on June 12, 2007, and this cross motion was served on August 13, 2007. CPLR 3212(a) permits a party to make a motion after the time has expired "with leave of the court on good cause shown." Thus, a trial court has discretion in determining whether to consider a cross motion made after the expiration of the time period. (*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 [2000]).

"An exception to the good cause requirement authorizes the court to consider a belated application for summary judgment when the same is made in response to still pending motions for summary judgment and when the belated cross-motion seeks relief on the very issues raised by the timely motions (citations omitted)" as is the case on the instant motion. *(Tray Wrap, Inc. v. Pacific Tomato Growers Ltd.*, 18 Misc.3d 1122(A) [Sup. Ct. Bronx Co. 2008]). "The threshold issue is not whether the same relief is sought, but whether the same arguments are made and more importantly whether the same issues are addressed. (citations omitted)." *Id.* All of the defendants have relied on deposition testimony. Defendants, D'Ambrosio and Hawkeye, as well as this defendant, also rely on the fact that it is not clear from the testimony of John, Jr. just how he came to leave the sidewalk and come into contact with Mr. D'Ambrosio's vehicle. This court, therefore, will consider the instant cross motion.

Keyspan asserts that its only involvement in this matter is "its contract with HAWKEYE to install gas mains on Covert Avenue and to restore a temporary patch to boring holes" (Hastings Aff. ¶ 13). Thomas Herrmann, Senior Field Supervisor of Keyspan, testified that based upon an invoice provided by Hawkeye, the work was finished the week ending June 20, 2004 (Hawkeye Ex. G, p. 12). Counsel for Keyspan contends that "there is no evidence to support a claim that a roadway defect existed at the time of the accident or that such defect was a substantial factor in the accident" (Hastings Aff. ¶ 19). Keyspan has demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it did not owe a duty of care to the plaintiffs by virtue of its contract with Hawkeye. (*Spano v. Northwood Tree Care, Inc.*, ___ NYS2d ___, 2008 WL 450499 [2d Dept. 2008]). Once this initial burden has been met by defendant, Keyspan, the burden then shifts to the plaintiffs to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This the plaintiffs have failed to do in that they did not submit any papers in opposition to the motion. Accordingly, Keyspan's motion is granted.

This decision constitutes the order of the court.

Dated: February 26, 2008

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

William G. Wallace, Esq.
FAVATA & WALLACE, LLP
Attorneys for Plaintiffs
229 Seventh Street, Suite 300
Garden City, New York 11530

Roseanne Madonna, Esq.
BAXTER, SMITH, TASSAN & SHAPIRO, P.C.
Attorneys for Defendant
JAMES V. D'AMBROSIO
99 North Broadway
Hicksville, New York 11801

John F. Hastings, Esq.
GEORGE D. ARGIRIOU, ESQ.
Attorney for Defendant
KEYSPAN GAS EAST CORPORATION
d/b/a KEYSPAN ENERGY
DELIVERY OF LONG ISLAND
175 East Old Country Road
Hicksville, New York 11801

SEIDEN WAYNE, LLC
Attorneys for Defendant
HAWKEYE, LLC f/k/a
HAWKEYE CONSTRUCTION, LLC
70 East 55th Street
New York, New York 10022

LORNA B.GOODMAN, ESQ.
Attorney for Defendant
COUNTY OF NASSAU
One West Street
Mineola, New York 11501