[* 1]

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

PRESENT: Gische Justice PART ____

Index Number : 110705/2003

ALBA, MARIA

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, ____ this motion to/for ____

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: July 22, 2008

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: PART 10

----------x

Maria Alba,

Plaintiff,

-against-

The City of New York, Consolidated Edison Company of New York, Inc., Safeway Construction Enterprises, and Bovis Lend Lease LMB, Inc.,

Defendants.

----------x

Bovis Lend Lease LMB, Inc.,

3rd Party Plaintiff,

-against-

Atlantic-Heydt Corporation,

3rd Party Defendant.

----------x

DECISION/ ORDER
Index No.: 110705-03
Seq. No.: 003, 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.
590388-06

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
MOTION SEQ #3	
Con Ed/Safeway n/m 3212 w/JAD affirm	1
π's opp w/GAK affirm, exhs (incl JJM affid)	2
Bovis/Atlantic opp w/MJA, exh	3
Con Ed/Safeway reply to π opp w/JAD affirm	4
Con Ed/Safeway reply to Bovis/Atlantic opp w/JAD affirm	5
MOTION SEQ #4	
Bovis/Atlantic n/m 3212 w/MJA affirm, HM affid, DM affid, exhs on sep backs	6,7,8
π's opp w/GAK affirm, exhs (incl JJM affid)	9
Con Ed/Safeway opp to w/MC affirm, exh	10
Bovis/Atlantic reply to π's opp w/MJA affirm, exhs	11
Bovis/Atlantic reply to Con Ed/Safeway opp w/MJA affirm, exhs	12
CROSS MOTION TO BOVIS/ATLANTIC AND CON ED/SAFEWAY MOTIONS	
City's x/m 3212 w/MRP, exhs	13
π's opp w/GAK, exhs	14
City's reply w/MRP affirm	15

Upon the foregoing papers, the decision and order of the court is as follows:

This is personal injury action by Maria Alba ("plaintiff") against the City of New York ("City"), Consolidated Edison Company of New York, Inc. ("Con Ed"), Safeway Construction Enterprises ("Safeway") and Bovis Lend Lease LMB, Inc. ("Bovis"). Bovis commenced a third party action against Atlantic, which it subsequently withdrew. There are, however, remaining cross claims among Con Ed, Safeway and Atlantic.

Issue is joined, discovery is complete and plaintiff filed the note of issue on September 10, 2007. The motions before the court are each timely (brought within 120 days of the note of issue being filed); therefore, they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The motions are consolidated for consideration and disposition in one decision and order, which is as follows:

Arguments

Plaintiff alleges that on November 4, 2002 at 1:00 p.m. she sustained injuries to her foot and toes when steel plates in the roadway at the intersection of 42nd Street and 9th avenue in New York City trapped her foot. Plaintiff was deposed with the aid of an interpreter. At her examination before trial ("EBT"), plaintiff testified that she was in the process of walking to a bus stop in front of a bank located on the northwest corner of 9th avenue and 42nd Street when she encountered a detour that prevented from directly crossing the Street, but forced her to walk in the roadway on 9th avenue where the steel plates were located.

As she was walking on these plates, a bus passed over them. Though uncertain of exactly whether her foot slipped in between two plates, or under one of the plates, one or more to the plates moved, plaintiff's left foot was pinned by the plate(s), rendering her

incapable of movement. She was rescued when a nearby worker ran over with a crowbar and lifted up one of the plates, freeing her foot.

Bovis was the construction manager on a construction project at 356-360 West 43rd Street. As part of that project, Bovis applied for and obtained permits from the City that allowed it to partially close the sidewalk on the north east side of 42nd Street and 9th avenue. Atlantic, Bovis' subcontractor, constructed a sidewalk shed and erected scaffolding. A tunnel allowed pedestrians to walk alongside, and then partially through, the building being constructed. Henry Marina ("Marina"), Bovis' senior superintendent, was deposed and has provided his sworn affidavit in support of Bovis' motion. Marina testified he was only a few feet away from plaintiff when the accident occurred. He observed a bus pass by immediately before he heard plaintiff scream in pain. He believes one of the plates deflected (bent) under the weight of the passing bus. Marina testified that he was in charge of site safety for the project and the overall coordination of the trades' activities.

Safeway was hired by Con Ed to install utility lines and other equipment underground at the intersection where plaintiff was injured. The job required that the roadway be opened. When the roadway was not being worked in, it was covered with large steel plates which Safeway owned, and was responsible for removing, re-installing, and securing each day. Guido Dire ("Dire") was the secretary and operation's manager for Safeway at the time of the accident. Dire testified that Safeway was the only company working on the roadway in that intersection, and that Safeway owned the plates at issue.

Bovis and Atlantic (at times "Bovis/Atlantic") contend that they did not owe a duty of care to plaintiff, nor did they assume a duty of care towards her, because it did not

create the dangerous condition proximately causing plaintiff's injuries. Bovis and Atlantic alternatively argue that even were it determined they did assume such a duty to plaintiff, they were not negligent, and they did not have notice of a dangerous condition.

Bovis and Atlantic deny that they blocked off the northwest corner of 42nd Street and 9th Avenue. They contend plaintiff did not have to cross to the Northeast corner of 42nd Street to reach her ultimate destination on the northwest side of 9th Avenue, and that plaintiff walked in the roadway because it was a convenient short cut for her in light of her ultimate destination. Bovis and Atlantic alsoccontend Safeway's misplacement of its plates was the sole proximate cause of plaintiff's injuries. Bovis and Atlantic claim that Safeway improperly secured the plates, failed to take into account the medium to heavy traffic in that intersection, and that had the plates been properly secured, they would not have shifted or moved.

Con Ed and Safeway (at times "Con Ed/ Safeway") oppose Bovis/Atlantic's motion for summary judgment and separately move for summary judgment dismissing plaintiff's claims and the cross claims against them. Con Ed and Safeway contend that Bovis and Atlantic created a hazardous condition by closing off the corner, thereby diverting plaintiff into the flow of southbound traffic on 9th Avenue. Con Ed and Safeway contend that Bovis and Atlantic failed to take appropriate steps to protect pedestrians in that intersection, such as having flagmen to help them cross.

Con Ed and Safeway argue that Bovis has settled its claims with Atlantic and they are now longer in an adversarial stance. According to Con Ed and Safeway, now that Bovis and Atlantic are aligned in interest, Bovis is (inconsistently) defending the actions taken by its subcontractor. Earlier in this action, however, Bovis had alleged Atlantic's

negligence was the sole proximate cause of plaintiff's injuries.

The City opposes both motions for summary judgment and separately cross moves for summary judgment dismissing the complaint and all cross claims against it by the other defendants. The City contends that there is no record of any complaints about the alleged defect on 42nd Street and 9th Avenue and that, although it issued permits to the defendants in this case, the issuance of permits does not satisfy the statutory requirements of notice set forth in section 7-201 of the New York City Administrative Code. The City denies any special use by it, or that it created the dangerous condition. Only plaintiff opposes this motion. She contends the City improperly delegated its duty to inspect the intersection to make sure it was safe.

Plaintiff also opposes the motions by Bovis/Atlantic and also Con Ed/Safeway's motion. She contends that not only can there be more than one proximate cause of her accident, but neither Bovis/Atlantic nor Con Ed/Safeway have proved their defense, which is that they did not create a dangerous condition.

Plaintiff has retained an expert witness who is a professional engineer ("McHugh"). McHugh has prepared a report and provides his sworn affidavit in support of plaintiff's opposition to the two motions and cross motions before the court. McHugh opines that one of the steel road plates deflected, causing it to lift into the air and then land on plaintiff's foot. He contends the plates were not firmly placed and he attributes dangerous condition to a failure by Con Ed/Safeway to properly anchor and ramp the plates. "Ramping" entails the application of asphalt mounds around the perimeter of the plates. McHugh refers to an article published by a local pedestrian and bicycle advocates group for this proposition. He also references a New York City Department of Traffic

Response sheet which states that warning signs and safety devices have to be provided in connection with any City issued Street opening permit. Based upon photos that plaintiff testified about at her EBT, McHugh opines that the plates lacked such ramping.

McHugh also opines that Con Ed/Safeway should have, but failed to, take into account how heavily traveled this intersection was. Likewise, Bovis/Atlantic should have also taken into account that blocking the sidewalk and failing to provide a proper pedestrian detour would create a dangerous condition.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

The City's Cross Motion

By far the most direct and uncomplicated motion before the court is that by the City. Pursuant to the Administrative Code of the City of New York section 7-201 (c), commonly known as the "pothole law," "[n]o civil action shall be maintained against the city for damage to property or injury to person . . ." unless there is prior written notice to the city of such a defect, dangerous condition, or other condition on any Street, highway, sidewalk or crosswalk. The City has proved there it did not have prior written notice of a

dangerous condition at the intersection where plaintiff's accident occurred.

Although plaintiff claims the City had an obligation to inspect the intersection because it issued permits for that intersection, and therefore the City was negligent, the City's duty to inspect work for which it has issued a permit generally arises only where the permit authorizes "dangerous or imminently dangerous activities in city's thoroughfares. . ." Gillette Shoe Co., Inc. v. City of New York, 86 A.D.2d 522, 524 (1st Dept 1982). No such condition is alleged here.

While there are other recognized exceptions to the requirement of actual prior written notice to the City, including special use, and active negligence in issuing the permits in the first place, plaintiff has failed to furnish any facts to support these allegations of negligence. Acevedo v. City of New York, 128 AD2d 488 (2nd Dept 1987). The City's cross motion for summary judgment is granted. The plaintiff's claims and all the cross claims against the City are hereby severed from this action and dismissed.

Bovis and Atlantic's Motion For Summary Judgment

A necessary element of a negligence action is a legal duty to the injured party. "In the absence of a duty, there is no breach and without a breach, there is no liability." Pulka v. Edelman, 40 NY2d 781 *rearg den* 41 NY2d 901 (1977). Where, as here, a contractor has a contractual duty to provide services, that contractual duty does not give rise to a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 (2002).

Bovis and Atlantic both contend that because they are contractors, they owed no duty of care to the plaintiff, and therefore, they are not liable for plaintiff's accident. Pulka v. Edelman, supra. However, even were that true, there are three exceptions to this

broad rule of law that will expose a contractor to liability because it has "assumed" a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 NY2d at 139 (*citing* Palka v. Service Master Mgt. Svcs. Corp., 83 NY2d 579, 585-6 [1990]). These exceptions are where 1) the contractor "launches a force or instrument of harm," by first undertaking a task, but then negligently creating or exacerbating a dangerous condition resulting in an injury; 2) the performance of contractual obligations has induced detrimental reliance on continued performance of those obligations; and 3) the contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely. Espinal v. Melville Snow Contractors, Inc., *supra*.

Plaintiff and Con Ed/Safeway have raised issues of fact whether Bovis and Atlantic's actions, which included blocking off part of the intersection, denied plaintiff access to the northeast corner of 42nd Street and 9th Avenue, forced plaintiff to take an unsafe detour into the roadway over the steel plates. If so, this could be a force of harm launche by Bovis and Atlantic.

The court considers further that Bovis was the construction manager of this project. It maintained a daily presence at the site, and coordinated the various trades' activities. It also instructed supervised its subcontractor, Atlantic. Bovis' contractual obligations appear to be comprehensive for this project, possibly displacing and absorbing the owner's responsibility to maintain the premises safely.

Marina, Bovis' senior superintendent, was responsible for site safety and he maintained daily site safety logs. Marina was not only present on the day of plaintiff's accident, he was in close physical proximity to the plaintiff when it happened. There is an

issue of fact whether he observed a dangerous condition, whether he should have noticed it, and what, if anything, he should have done about it. Marina's presence at the construction site is evidence of constructive notice of a dangerous condition, even if no complaints were made about the blocked off corner.

It is well established law that "[s]everal acts may occur to produce a result; one or more being the proximate cause . . . " Foley v. State, 294 N.Y. 275 (1945). Furthermore, where the acts of a third party intervene between defendant's conduct and plaintiff's injury, the causal connection is not automatically severed, unless the intervening act is "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus." Derdiarian v. Felix Contractor Corp., 51 NY2d 308, 315 (1980). "Forseeability" is for the fact finder to decide. Derdiarian v. Felix Contractor Corp., *supra.* Bovis has failed to prove that it was not a proximate cause in the happening of plaintiff's accident or that Con Ed/Safeway was the sole proximate cause the accident. Other arguments, that there are inconsistencies in plaintiff's statements, only identifies issues of fact for the jury to decide at trial. Cuevas v. City of New York, 32 A.D.3d 372 (1st Dept 2006).

Having failed to prove their entitlement summary judgment, and there also being issues of fact that have to be decided at trial, the motion by Bovis and Atlantic for summary judgment is denied.

Con Ed and Safeway's Motion for Summary Judgment

Like Bovis and Atlantic, Con Ed and Safeway contend they owed no duty of care to plaintiff, and even if they did, that they were not negligent, and even if they were

negligent, their negligence was not the proximate cause of plaintiff's injuries. As with Bovis and Atlantic, these arguments are unavailing; Con Ed and Safeway have not proved their entitlement to summary judgment.

First, there is no dispute that Safeway was the only trade working in the roadway prior to plaintiff's accident. The plates belong to Safeway and Safeway was responsible for their removal and installation each day before and after work was done in the roadway. There is evidence that Safeway's obligation with respect to these plates, and the work in the roadway, was comprehensive and exclusive, and that Safeway assumed a duty of care. Espinal v. Melville Snow Contractors, Inc., *supra*.

Although Con Ed and Safeway argue that Bovis and Atlantic's creation of an unsafe detour forced the plaintiff to walk into the roadway, this does not absolve Con Ed and Safeway from liability for the reasons already discussed at greater length in connection with Bovis/Atlantic's motions for summary judgment (*see* discussion above about proximate cause). The steel plates were intended to allow vehicular and pedestrian traffic to traverse safely over the roadway area which had been excavated. There is an issue of fact whether Safeway took proper safeguards in making sure the plates did not shift or deflect under the weight of heavy traffic in that intersection. Therefore, it is for the jury to decide whether it was forseeable that plaintiff could be injured in the manner that she was. *See*: Derdiarian v. Felix Constractor Corp., supra.

Plaintiff's expert raises several other issues of fact, including whether Safeway should have employed additional safety devices like a saw horse over the area where the two plates met, and also taken into account the amount of vehicular and pedestrian traffic in the area. Woods, Con Ed's construction representative, testified that he inspected the

roadway area daily. He also testified at his EBT that he noticed the corner had been blocked off by Bovis/Atlantic. He also observed that traffic was medium to heavy traffic in that area, and there were numerous pedestrians. Notwithstanding these observations, Woods did not report a dangerous condition to anyone.

Only the City has proved its entitlement to summary judgment. All other moving defendants failed to meet their burden, not only of dismissing plaintiff's claims against them, but also the cross claims among them. There are issues of fact that have to be decided at trial. The Clerk shall enter judgment in favor of the City against the plaintiff and the cross-claiming defendants.

Conclusion

The motion for summary judgment by Bovis and Atlantic is denied for the reasons stated as is the motion by Con Ed and Safeway. The cross motion by the City, however, is granted. All claims against the City are hereby dismissed and the Clerk shall enter judgment in favor of the City against the plaintiff and the cross-claiming defendants.

This case is now ready for trial. Plaintiff shall serve a copy of this decision upon the Clerk in the Trial Support Office so it may be scheduled.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 22, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.