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

PRESENT: RAKOWER Justice PART 5

Index Number : 110145/2005
BAZIN, NADEGE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

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

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 7/28/09

HON. EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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NADEGE BAZIN,

Plaintiff,

- against -

THE CITY OF NEW YORK, ANABELLE GARGANIAN, SHEENA L. GARGANIAN, RICHARD WILLIAMS, and PETROCELLI ELECTRIC, CO. INC.,

Defendants.

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Index No. 110145/05
ORDER AND DECISION
Mot. Seq.: 006

EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when he was struck by a car at the intersection of Macdougal Street and West 3rd Street, New York New York on May 20, 2005. Defendant Petrocelli Electric, Co. Inc. ("Petrocelli")moves for summary judgment. Richard Williams opposes the motion. Plaintiff opposes and cross moves to strike the answer of Petrocelli pursuant to CPLR 3126. Petrocelli opposes the cross motion. The City of New York ("City")previously moved for summary judgment seeking dismissal as against it, but such motion was denied by this Court's Decision and Order dated July 31, 2007. City does not oppose the instant motions. No other party files papers.

A car owned by Annabelle Garganian and driven by her sister, Sheena Garganian, ("vehicle one") collided with a car driven by Mr. Williams ("vehicle two") on May 20, 2005. Vehicle one spun out of control and hit a parked car ("vehicle three"). Vehicle one then jumped the curb, struck plaintiff and crashed into the wall of Bens Pizza ("Ben's"), a restaurant located at 125 Macdougal Street. According to the police report, the drivers of both vehicle one and vehicle two claimed to have had a green light at the intersection. Plaintiff alleges that this malfunctioning traffic light was the cause of the accident.

Petrocelli, in support of its motion, submits: a supplemental summons and amended verified complaint; plaintiff's verified bill of particulars; the transcript of the deposition of David Ferguson, Project Director of outside installations for Petrocelli, taken on July 16, 2008; Petrocelli's signal maintenance agreement with City representing the period from August 31, 2003 through November 30, 2005; Petrocelli's traffic maintenance log for the period January 1, 2005 to June 15, 2005; and various compliance conference stipulations and orders.

Petrocelli argues that its obligations under the contract are only triggered upon notification of a defective or damaged traffic signal. It states that upon such notification, Petrocelli is obligated to reach the site within two to 48 hours after notification, depending on the nature of the defect reported. Petrocelli demonstrates that it received no notifications of a defective signal at the subject intersection for a period of 6 months prior to plaintiff's accident. Rather, it received a notification on May 31, 2005 for the subject intersection, 11 days after the accident. Petrocelli concludes that it had no notice of a malfunction at the subject intersection. Finally, Petrocelli urges that its duty is only to City under the provisions of its contract with the City, and it owed no duty to a third party.

Williams, in opposition, provides the deposition transcript of Sheena Garganian, taken November 21, 2006; the deposition transcript of Richard Williams, taken September 26, 2007; the deposition transcript of Nadege Bazin, taken June 8, 2006; the sworn affidavit of Michael Lipsky, employed at Ben's Pizza located at 123 MacDougal Street; Petrocelli's traffic maintenance log; the deposition testimony of David Ferguson taken July 16, 2008; and the prior decision of this Court dated July 31, 2007.

Williams argues that both Williams and Garganian, traveling along intersecting streets, both saw a green light in their direction. Additionally, Lipsky witnessed the accident and stated that both streets had a blinking green light at the intersection. Finally, Lipsky stated that the lights were not functioning properly on May 18, 2005, necessitating the presence of a traffic officer to direct traffic in person. Neither the May 18, 2005 malfunction nor the alleged May 20, 2005 malfunction appear on the Petrocelli log. Williams also argues that the log itself is not in admissible form as there is no foundation as to the log being a true and accurate representation of the electronic record maintained by the City. Thus, Williams concludes there is an issue of fact as to whether there was a malfunction on the date of this accident, and whether the malfunction was communicated to City and in turn to Petrocelli.

Plaintiff, in opposition and in support of her cross motion, submits a copy of this Court's decision and order dated February 10, 2009, granting plaintiff's motion to compel to the extent of ordering Petrocelli to produce records identifying which workers worked shifts assigned to the subject area during the six month period from January 1, 2005 through May 31, 2005 as well as Petrocelli's response delivered in accordance with the Court's order. Plaintiff argues that the discovery she received was unresponsive and failed to "show which worker was present in the subject area at the time of the accident with the distinct possibility that the defendant had actual notice of the defective light."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

Initially, the Court finds the documents provided to be responsive and satisfy the Court's Order. The "Foreman's Weekly Report Sheet" gives the classification, employee name and hours worked. The job address is listed as "Brooklyn, Manhattan, Staten Island." Petrocelli, by the affidavit of its Chief Financial Officer, Norman Fidelman, states:

> The records provided to plaintiff's counsel listed all of the employees that worked under the New York City Bureau of Traffic Signal Maintenance Agreements in the Boroughs of Brooklyn, Manhattan & Staten Island for the period set forth in the court order. The format in which the records were provided to plaintiff's counsel is the same format they are kept at Petrocelli. Petrocelli does not maintain a listing of employees who work at specific locations or in specific boroughs. The only records generated by Petrocelli responsive to the court order have been provided.

Petrocelli has provided the records in the manner in which they are maintained.

Plaintiff demands to know which Petrocelli workers responded to the subject intersection on the date of this accident; however, Petrocelli does not concede it did respond to the subject intersection on the date of the accident. Clearly, Petrocelli has stated that it has no record of any notification prior to May 31, 2005, and no evidence contradicts that.

Plaintiff establishes, through the Lipsky affidavit, that

> in January 2005, the traffic lights were not operating properly. The lights for both directions at the intersection were blinking green. As a result of this condition, two cars crashed in the intersection and one of the vehicles hit my store.
>
> I also recall that the traffic lights were not working properly on May 18, 2005. There was a traffic agent directing traffic. The lights were not operating at all. A repair truck finally arrived.

However, it is not established that the repair truck referred to was from Petrocelli, as opposed, for example, to Consolidated Edison responding to a power interruption. Indeed, Petrocelli denies it was there prior to May 31, 2005. Despite plaintiff's protestations, Petrocelli is not the only party in possession of records that could show otherwise. Therefore, it is not in exclusive possession of discovery necessary to the opposition of the motion (CPLR 3212[f]).

Although there is evidence to support plaintiff's contention that there was a malfunction of the traffic signal, there is no corresponding evidence to show that any witness notified City or that City notified Petrocelli. There is no evidence to show Petrocelli's obligations under the contract were ever triggered. Thus, Petrocelli claims it owed no duty to the public.

Neither plaintiff nor Williams respond to Petrocelli's argument that it owed no duty to the public where there was no proof it was notified by City to respond to the subject location prior to the instant accident. Plaintiff erroneously states that Petrocelli first raised this argument in its reply. The Court refers to page 6 of Petrocelli's Notice of Motion for Summary Judgment at paragraph 9, where it states: "A contractual obligation standing alone will not gernerally give rise to tort liability in favor of a third party," citing *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002).

It is well settled that no duty of care is owed to a non contracting third party except in three limited circumstances. Those circumstances are: first, where one engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk; second, where the plaintiff has suffered injury as a result of reasonable reliance upon defendant's continuing performance of a contractual obligation; and third, where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*Church v. Callanan Industries, Inc.*, 99 NY2d 104 [2002]).

Although the negligent repair of a traffic light may result in the launching of a force or instrument of harm (*see Davilmar v. City of New York*, 7 AD3d 559 (2nd Dept., 2004, where the movant was unable to establish the nature, extent and time of repair and maintenance work performed that allegedly launched a force or instrument of harm), that is not the case here. Indeed, here, there is no repair that is alleged to have been performed prior to the accident.

Justice Karen Smith, in *Kohn v. City of New York*, 19 Misc3d 1140(A) (NY Sup, May 22, 2008) similarly found the contractor not liable, noting that the

> Court of Appeals long ago held that a member of the public may not maintain an action against an entity who contracts with a municipality, unless the contract demonstrates an intention to make such a contractor answerable to individual members of the public. (*H. R. Moch Company, Inc. v. Rensselaer Water Company*, 247 NY 160 [1927]). To allow such an action to be maintained would extend an involuntary duty to 'an indefinite number of potential beneficiaries." (*H. R. Moch Company, Inc. v Rennsselaer Water Company, id.* at 168.

Here, Petrocelli, by David Ferguson's deposition, demonstrated that through data stored on a system supplied by the New York City Department of Transportation, Department of the Bureau of Traffic, it was unable to find any notification triggering its presence at the subject intersection for 6 months prior to the date of this accident. It provides its contract with the City to show it had no duty to fix a traffic control device absent notification. Absent a showing that Petrocelli repaired the traffic signal in a manner that "launched a force or instrument of harm," the instant action does not fall under the first exception to the well settled rule.

Nor can plaintiff claim that Petrocelli had entirely displaced City in its duty to maintain the traffic light in a safe manner. Indeed, Petrocelli was contractually obligated to maintain the lights only at City's direction. The court in *Ray v. Hertz Corp.*, 271 AD2d 374 (1st Dept., 2000), found that the signal maintenance contract between contractor and the City did not indicate an intention that the City's nondelegable duty to maintain its highways in a reasonably safe condition be supplemented with a comparable duty on the part of the contractor, or that contractor's orbit of duty be broadened to members of the general public, where City was required to notify it of a malfunction. (citing *Powell v. City of New York*, 250 AD2d 409; *Pizzaro v. City of New York*, 188 AD2d 591, 593-594 *lv denied* 82 NY2d 656). Finally, the reasonable reliance exception does not apply here as there is no factual allegation or indication that plaintiff relied upon work that Petrocelli began but did not complete.

This is not inconsistent with the Court's denial of City's motion. There is an issue of fact as to whether City should have known of the light malfunction, in light of the alleged presence of its traffic agent just two days prior to this accident. While there remain issues of fact as to City, there is no evidence adduced to show that there was an affirmative notification to Petrocelli triggering its contractual obligation to repair. Absent such evidence, there are no issues to be resolved regarding Petrocelli.

Wherefore it is hereby

ORDERED that Petrocelli's motion to dismiss is granted and the action is severed and dismissed as to Defendant Petrocelli Electric Co., Inc., and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion to strike is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 23, 2009

[redacted]EN A. RAKOWER, J.S.C.