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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 109105/2009

HUTTON, ROBIN

VS

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

CALENDAR

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to/for summary judgment

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

OCT 29 2010

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 10/25/10

OCT 25 2010

BARBARA JAFFE J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

----------x

ROBIN HUTTON,

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF TRANSPORTATION, NEW YORK CITY POLICE DEPARTMENT and DOUGLAS C. KAY and SPINE WAVE, INC.,

Defendants.

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Index No. 109105/09

Motion Date: 9/7/10
Motion Seq. No.: 002
Calendar No.: 64

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Tobi R. Salottolo, Esq.
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For City defendants:
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For defendant Spine Wave, Inc.:
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For defendant Kay:
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Kay & Gray
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By notice of motion dated April 29, 2010, defendants City of New York, Department of Transportation, and the New York City Police Department (collectively, City defendants) move pursuant to CPLR 3212 for an order granting summary dismissal of the complaint and any cross-claims against them. Plaintiff, defendant Douglas C. Kay, and defendant Spine Wave, Inc. (Spine Wave) oppose the motion.

I. BACKGROUND

On February 6, 2009, as plaintiff crossed the intersection at East 72nd Street and Second

Avenue in Manhattan, she was struck by a motor vehicle owned and operated by Kay, and incurred physical injuries. (Affirmation of Lynn Leopold, ACC, dated Apr. 29, 2010 [Leopold Aff.], Exh. A). The roadway at the intersection was under construction, and a traffic agent employed by the City defendants allegedly directed Kay to turn left onto Second Avenue, who thereupon struck plaintiff with his vehicle. (*Id.*).

On or about February 27, 2009, plaintiff served her notice of claim on the City defendants, alleging that they were negligent in causing, permitting, and directing Kay to turn when it was unsafe to do so, failing to give plaintiff the right of way, and failing to maintain a proper lookout for pedestrians. (*Id.*). She also asserted that defendants were negligent in failing to provide clear traffic signs, controls, barriers, signals, or lanes, thereby creating confusion for motor vehicle traffic. (*Id.*).

On or about June 26, 2009, plaintiff served her summons and complaint, and on or about July 15, 2009, the City defendants served their answers. (*Id.*, Exhs. B, C). On or about August 6, 2009, Kay served his answer and cross-claim against the City defendants for contribution and/or indemnification. (*Id.*, Exh. D).

On or about April 16, 2010, plaintiff served a supplemental summons and amended complaint adding Spine Wave as an additional defendant (*id.*, Exh. F), and on or about July 27, 2010, Spine Wave served its answer with cross-claims against City and Kay (Affirmation of Louis C. Annunziata, Esq., dated Aug. 24, 2010, Exh. A [Annunziata Aff.]).

On May 15, 2009, plaintiff testified at a 50-h hearing that on the day of her accident, she was walking on 72nd Street toward its intersection with Second Avenue where there was construction which may have been related to the Second Avenue subway line. A traffic agent

was directing traffic, and as she began to cross Second Avenue in the crosswalk with the signal in her favor, she saw a motor vehicle approach but was unable to move out of its way because construction blocked her path. The motor vehicle then hit her and the driver stopped and told her that he had not seen her. (*Id.*, Exh. E).

II. CONTENTIONS

City argues that the traffic agent's direction of traffic constituted a governmental function for which City may not be held liable absent a special relationship between it and plaintiff, and that plaintiff has neither pleaded nor established a special relationship absent any allegation that the traffic agent assumed a duty, through promises or actions, to act on plaintiff's behalf, that there was any direct contact between the agent or plaintiff before her accident, or that she justifiably relied on any promise made by the agent. City also asserts that Kay's actions were the proximate cause of plaintiff's injuries or a superseding or intervening cause, thus relieving it of any liability. (Leopold Aff.).

Plaintiff argues that City's motion is premature as City has not provided any discovery, that City's motion does not address her allegation that it was negligent in creating or permitting a dangerous condition on the roadway, and that a special relationship is not required if the traffic agent was acting in furtherance of City's duty to provide safe roadways. She also contends that absent depositions of the traffic agent and Kay, it is unclear whether the agent's actions were a result of misfeasance or nonfeasance, and that she need not establish a special relationship if the agent was guilty of misfeasance. While Kay may have been negligent, plaintiff asserts that his negligence was not the sole proximate cause of her injuries. (Affirmation of Tobi R. Salottolo, Esq., dated July 27, 2010).

Spine Wave and Kay both oppose the motion as premature as City has not provided any written discovery, nor has the traffic agent been deposed. (Annunziata Aff.; Affirmation of Lynn Golder, Esq., dated Aug. 3, 2010).

In reply, City contends that there is no need for discovery in the absence of a special relationship between it and plaintiff, that plaintiff's testimony shows that the construction was related to the subway system and thus undertaken by the Metropolitan Transit Authority, an entity separate from City, and that it may not be held liable for the traffic agent's discretionary acts. (Reply Affirmation, dated Aug. 16, 2010).

III. ANALYSIS

"The proponent of a summary judgment motion 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 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

Before liability for negligence may be imposed, a plaintiff must demonstrate that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached the duty; and (3) the plaintiff was injured as a result of the breach. (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). It is well-settled that City has a duty to keep its streets in a reasonably safe condition (*Stiuso v City of New York*, 87 NY2d 889, 891 [1995]; *Kohn v City of New York*, 69 AD3d 463 [1st Dept 2010]), which duty is breached when City permits a dangerous or potentially dangerous condition to exist and cause injury (*Nowlin v City of New York*, 81 NY2d 81 [1993]).

Here, plaintiff alleges that the intersection was unsafe because the construction prevented her from avoiding Kay's collision with her and created an unsafe condition for motor vehicle traffic, allegations which establish a claim against City related to its duty to provide safe roadways. (*See eg Gutelle v City of New York*, 55 NY2d 794 [1981] [plaintiff was injured after her vehicle was struck from behind by other vehicle, causing her to leave roadway and strike abutment; that allegedly defectively designed abutments did not cause vehicle to leave roadway was irrelevant; "as long as it can be demonstrated that the abutments were a substantial factor in aggravating plaintiff's injuries, a cause of action may be upheld"]; *Beaumont v Smyth*, 16 AD3d 1106 [4th Dept 2005] [plaintiff injured when his motorcycle hit by other vehicle, and driver of other vehicle alleged that he failed to see stop sign as it was obscured by abutment markers; summary judgment properly denied as to claim that Town permitted sign to be obstructed by markers, raising triable issues as to whether it breached duty to maintain highway in reasonably safe condition]; *cf Blasi v Occhione*, 200 AD2d 700 [2d Dept 1994] [complaint properly dismissed against Town where no evidence that dangerous condition existed at intersection which contributed to accident]).

As City does not address plaintiff's allegation that the intersection was unsafe, it has failed to establish, *prima facie*, that it did not breach its duty to maintain the intersection in a reasonably safe condition. That plaintiff testified that the construction may have been related to the subway system does not prove, as a matter of law, that the construction was not undertaken by City or that it had no responsibility for it.

In light of this result, there is no need to address City's denial of liability for the traffic agent's conduct or the existence of a special duty or relationship between it and plaintiff

(*Thompson v City of New York*, 78 NY2d 682, 685 n [1991] [plaintiff injured after she was hit by automobile in intersection where streetlight bulb had burned out, "plaintiff could have been entitled to damages from the resulting injuries had she proved the street was not reasonably safe without having to establish a 'special relationship' between the plaintiff and the City"]).

Similarly, whether Kay's actions were the proximate, superseding, and/or intervening cause of the accident is a factual issue which must be determined by the fact-finder. (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980] [whether act of third-party intervened to extent that defendant would not be liable is question for fact-finder to resolve]; *Sweeney v Bruckner Plaza Assocs.*, 57 AD3d 347 [1st Dept 2008], *app dism* 12 NY3d 832 [2009] [same]; *see also Petty v Dumont*, 2010 WL 4008159, 2010 NY Slip Op 07256 [1st Dept] [court properly granted summary judgment on liability in favor of passengers in taxi who were injured when taxi driver hit concrete barriers on street and against City as it had installed barriers but never warned of their danger; while issues of proximate cause are generally referred to fact-finder, "a municipality's negligence in failing to provide adequate warning of a known roadway hazard has been held to be a concurrent cause, not superseded by the negligence of a careless driver."]).

In any event, absent the depositions of the traffic agent and Kay, the nature and extent of their responsibility for the accident have not yet been established.

IV. CONCLUSION

Accordingly, it is hereby ORDERED that the City defendants' motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

DATED: October 25, 2010
New York, New York