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| <b>Soon Ok Shim v Maspeth Supply Co., LLC</b>                                                                                                                                                                                    |
| 2012 NY Slip Op 30353(U)                                                                                                                                                                                                         |
| January 20, 2012                                                                                                                                                                                                                 |
| Supreme Court, Queens County                                                                                                                                                                                                     |
| Docket Number: 30525/08                                                                                                                                                                                                          |
| Judge: Kevin Kerrigan                                                                                                                                                                                                            |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

|                                             |                   |
|---------------------------------------------|-------------------|
| Present: HONORABLE <u>KEVIN J. KERRIGAN</u> | Part 10           |
| Justice                                     |                   |
| -----X                                      | Index             |
| Soon Ok Shim,                               | Number: 30525/08  |
| Plaintiff,                                  | Motion            |
|                                             | Date: 10/04/11    |
| -against-                                   | Motion            |
|                                             | Cal. Number: 15   |
| Maspeth Supply Co., LLC,                    | Motion Seq. No. 3 |
| Mark Jihong Kim, Village Group              |                   |
| Construction & Development, "John Doe",     |                   |
| Taemin Kim and The City of New York,        |                   |
| Defendants.                                 |                   |
| -----X                                      |                   |

The following papers numbered 1 to 19 read on this motion by defendant The City of New York (City) for summary judgment and motion by defendant Maspeth Supply Co., LLC (Maspeth) for summary judgment.

|                                                   | <u>Papers<br/>Numbered</u> |
|---------------------------------------------------|----------------------------|
| Notice of Motion - Affidavits - Exhibits.....     | 1-4                        |
| Notice of "Cross Motion" - Affidavits - Exhibit.. | 5-8                        |
| Answering Affidavits - Exhibits.....              | 9-14                       |
| Reply Affidavits.....                             | 15-19                      |

As a preliminary matter, Maspeth's notice of "cross-motion" is deemed a notice of motion, since plaintiff is not a moving party (see CPLR 2215). Indeed, Maspeth's counsel represents that the captioning of the motion as a "cross-motion" was a scrivener's error and that it was intended to be a motion in chief. Also, although summary judgment motions were required to be made returnable no later than August 22, 2011 and Maspeth's motion was made returnable on August 30, 2011, Maspeth has proffered a reasonable excuse for the late motion, in that a prior timely motion for the instant motion was made but denied without prejudice

upon the ground that the caption of the motion did not reflect the consolidated caption and therefore, the instant motion was served promptly thereafter on August 8, 2011.

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motion by the City for summary judgment dismissing the complaint and all cross-claims against it is granted.

Plaintiff allegedly sustained injuries as a result of a two-car motor vehicle collision on Northern Boulevard at the intersection of 150<sup>th</sup> Street in Queens County on January 19, 2008. Plaintiff was traveling eastbound on Northern Boulevard when the vehicle she was operating came into contact with the vehicle operated by Kim, who was also traveling eastbound on Northern Boulevard. The accident occurred just east of an area of construction being performed by Maspeth pursuant to a contract it had with the City to reconstruct collapsed and defective sewers.

Plaintiff testified in her deposition on September 11, 2009, and it is undisputed, that Northern Boulevard eastbound in the area of the accident has three lanes: a left traffic lane, a middle traffic lane and a parking lane on the right. Plaintiff testified that the middle traffic lane was occupied by a construction "tent" approximately the height of a bus and extending from the middle of the block to the corner of 150<sup>th</sup> Street. She testified that the tent also occupied the entire right lane and substantially extended into the left lane. She also indicated that the only lane of traffic that was open was the left lane and she stopped in the left lane at the corner of 150<sup>th</sup> Street for a red light behind two other vehicles. While stopped for the light, she observed that there was an available metered parking space in the right parking lane on the next block after the intersection. After the light turned green and she accelerated into the intersection a few feet past the end of the construction tent, she looked to her right but did not see any vehicle in either the middle lane or parking lane. She then immediately turned right, across the middle lane and into the right parking lane, "aiming" for the parking space. About one to two seconds thereafter, the front passenger side of her vehicle was impacted by the front of Kim's vehicle, which "suddenly appeared", proceeding in the right parking lane. She did not see Kim's vehicle traveling in the parking lane prior to the impact. She also testified that there were no construction signs, cones or barricades at the site. Also, when asked if she observed any vehicles traveling in the parking lane as she was stopped at the

traffic light, she responded, "There was no way for me to see that. It is not feasible." Plaintiff also testified that there were no signs in the area of the construction.

Plaintiff also avers in her affidavit in opposition that she could not see the parking lane or the shoulder of the road immediately to her right as she drove passed the intersection because her view was blocked by something that looked like a tent the size of a bus.

In his deposition, Kim testified that the construction was only 10-15 yards long and was only the height of his car, which was approximately five feet. In this regard, he stated, "The height did not block the view of the driver driving." He elaborated that the height of the construction was not greater than five feet "because it didn't block my view. It was a height where the driver - that I could see the other car over that." Thereupon he was asked, "As you were traveling in the first lane that ten or 15 yards with the construction next to you, that construction at no point blocked your view of the cars in the third lane [i.e. the parking lane]; is that correct?" he replied, "That is correct." He also testified, "I think the construction occupied about the second lane almost because the cars were able to go either the third lane [i.e. the parking lane] or the first lane [i.e. the left lane]." Moreover, when asked if the construction extended into the third lane, plaintiff responded, "I don't know because at that time I didn't go through the third lane, but I think I chose the first lane because to me the first lane seemed wider than the third lane." Kim also stated that he had traveled 5-10 yards into the intersection when he saw plaintiff's vehicle make a 90-degree turn towards him. He only saw plaintiff's vehicle for the first time when it was coming towards him and the impact occurred one to three seconds thereafter. Also, when asked if he saw any traffic signs on or near the construction directing traffic at the construction site, he replied that there was only a sign indicating that there was construction, but there was no sign directing any traffic.

Ms. Nalik Zeigler, record searcher for the City's Department of Transportation, testified in her deposition that permits were issued to Maspeth to open the street and replace a sewer after one collapsed at the subject location around the time of the incident.

Maspeth's construction supervisor, Greg Pelini, testified in his deposition that Maspeth was hired by the City to perform sewer repair work on Northern Boulevard between 150<sup>th</sup> Street and 150<sup>th</sup> Place. He was the construction supervisor for the subject project

and was responsible for overseeing it, and he was present at the construction site every day of the eight days it took to complete the job. At the start of the job, Maspeth dug a seven foot wide, twelve foot deep, forty foot long rectangular trench. The trench was west of the intersection of Northern Boulevard and 150<sup>th</sup> Street and did not extend into the intersection at any time. Solid board wood sheeting was then placed vertically inside the trench to contain the dirt. The sheeting extended approximately two feet above the surface of the roadway. The trench was then surrounded by a three foot tall, bright orange plastic caution fence, which was set on top of the roadway surface. Twenty caution barrels, measuring two feet wide by three and one-half feet tall, were placed in front of and on either side of the trench. In addition, a lit arrow board sign was placed at the beginning of the trench, which was placed there by Mr. Pelini and the job foreman. Mr. Pelini stated that, on the date of the accident, the lit arrow board sign was in place and that it was directing eastbound traffic approaching the work site into both the left driving lane as well as the right parking lane since parking on that block was prohibited during the construction. There was also a caution sign placed about 200-300 feet ahead of the site.

Harvey Blatt, Maspeth's general manager, testified in his deposition that Maspeth installed an electronically operated arrow board with arrows, electric arrows facing north and south warning drivers to go either north or south as they drove east on Northern Boulevard because there was a trench in the roadway. The device is mounted on wheels and it is towed to the location where it is going to be used. It is placed with blocks so that it cannot be accidentally moved and it used solar energy and a battery. The trench was located just beyond the arrow board. Blatt also indicated that a caution sign was placed in the approach to the work site.

A finding of negligence may only be based upon a breach of a duty and, therefore, the threshold inquiry in tort cases is whether the defendant owed the injured plaintiff a duty of care (see Espinal v Melville Snow Contractors, Inc., 98 NY 2d 136 [2002]). "If, in connection with the acts complained of, the defendant owes no duty to plaintiff, the action must fail" (see Darby v Compagnie National Air France, 96 NY 2d 343, 347 [2001]). Moreover, there must be a duty owed to plaintiff directly; the breach of a duty owed to others does not establish negligence, regardless of how careless the conduct or foreseeable the harm was (see Hamilton v Beretta U.S.A. Corp., 96 NY 2d 222 [2001]). Whether defendant owed plaintiff a duty of care is a question of law to be determined by

the Court (see id.).

Plaintiff alleges that the City has a nondelegable duty to maintain its streets and that it breached that duty by negligently supervising Maspeth's work and not requiring Maspeth to put up a traffic control device, and by allowing the placement of a construction site in the middle of the roadway which blocked traffic and obstructed the view of motorists.

This case has nothing to do with a failure of the municipality to maintain its streets. Plaintiff's injuries were not caused by a roadway defect which the City neglected to correct. Rather, plaintiff alleges that her accident was caused, in part, by the negligent manner of placement of the construction site which blocked her view of Kim's vehicle. In this regard, the City did not erect and maintain the construction site and, therefore, did not create the allegedly dangerous condition. The construction was performed entirely by Maspeth, a independent contractor hired by the City to repair a sewer line. Thus, there is no issue as to whether the City breached a duty of care to plaintiff to maintain its roadway, and there is no issue as to whether it breached a duty of care by creating a dangerous condition.

A party who hires an independent contractor is not liable for the negligence of the independent contractor unless it is shown that the one who employed the independent contractor controlled the manner in which the work was done (see McSorley v. Tripoli, 284 AD 2d 900 [4<sup>th</sup> Dept 2001]). Plaintiff's counsel contends that the City may be held liable for Maspeth's construction work because it actually inspected, supervised and controlled Maspeth's work. However, there is no evidence, on this record, that the City actually supervised, controlled or inspected Maspeth's work. Since counsel fails to proffer any evidence in support of his contention that the City controlled or directed the manner in which Maspeth performed its construction work or erected and maintained the construction site, the City is entitled to summary judgment as a matter of law (see Bennett v Commercial Flooring Specialists, Ltd., 77 AD 3d 696 [2<sup>nd</sup> Dept 2010]).

The Court notes that a property owner or other hirer may also be held liable for the negligence of its independent contractor in creating a dangerous condition where "the contractor creates a special danger ... in the course of its work that is inherent in the work" (see Gamer v. Ross, 49 AD 3d 598, 600 [2<sup>nd</sup> Dept 2008]; see also Thomassen v. J&L Diner, Inc., 152 AD 2d 421 [2<sup>nd</sup> Dept 1989]). Plaintiff does not raise this argument and the Court can find no

controlling case law holding that street excavation to repair a sewer line constitutes an inherently dangerous activity, and that the construction set-up in this case was a special danger. In fact, it has been held that the excavation of a street to repair a City water main is not an inherently dangerous activity triggering any duty of care on the part of the City to inspect (see De Witt Props. v City of New York, 44 NY 2d 417 [1978]; Colon v City of New York, 29 AD 3d 724 [2<sup>nd</sup> Dept 2006][citing De Witt]). Thus, not only is there no evidence that the City directed, controlled, supervised and inspected Maspeth's work, but it had no duty to do so. In addition, it is well-established that the City may not be held liable for the alleged omissions of its inspectors in the absence of a special relationship with the plaintiff (see O'Connor v City of New York, 58 NY 2d 184 [1983]). Here, the alleged omissions of the City inspectors do not relate to any duty owed to plaintiff or to a special class to which plaintiff belongs, but to the general public.

Counsel's contention that the City's non-compliance with his discovery requests regarding the issue of the City's inspections and supervision of the construction site requires denial of its summary judgment motion is without merit. The mere hope that future discovery might yield evidence beneficial to plaintiff is not grounds for denial of summary judgment (see JP Morgan Chase Bank v Agnello, 62 AD 3d 662 [2<sup>nd</sup> Dept 2009]).

Without merit and unworthy of refutation is counsel's additional argument that the City caused a dangerous condition through a special use of the parking lane which traffic was forced to use to get around the construction.

Finally, even if the construction site constituted a dangerous condition of the street, in the absence of any evidence that the City actually created the condition, pursuant to Administrative Code §7-201(c)(2), prior written notice was a condition precedent to maintaining an action against the City for damages relating to the street defect (see Katz v. City of New York, 87 NY 2d 241 [1995]; Quinn v. City of New York, 305 AD 2d 570 [2<sup>nd</sup> Dept 2003]); Campisi v. Bronx Water & Sewer Service, Inc., 1 AD 3d 166 [1st Dept 2003]). Plaintiff was required to both plead and prove that the City had prior written notice of the condition, otherwise no liability may be imposed upon the municipality (see Estrada v. City of New York, 273 AD 2d 194 [2<sup>nd</sup> Dept 2000]; Quinn v. City of New York, *supra*). Plaintiff failed to plead compliance with the prior written notice requirement in her pleadings and failed to show that the City had prior written notice of the specific dangerous

condition complained of. Indeed, the evidence proffered by the City established that no prior written notice of the alleged defect or condition at the subject location was given. Moreover, even if the City had been given prior written notice of the condition, it could not have been provided prior to January 14, 2008, the undisputed date when the construction work and, therefore, the alleged dangerous condition arose. Since the accident occurred five days later, on January 19, 2008, within the 15-day grace period provided under §7-201 for the City to correct the allegedly dangerous condition, no cause of action arises against the City as a matter of law (see Silva v City of New York, 17 AD 3d 566 [2<sup>nd</sup> Dept 2005]).

Motion by Maspeth for summary judgment dismissing the complaint and all cross-claims against it is denied. The evidence, on this record, raises a question of fact as to whether Maspeth created a dangerous condition in the manner in which it set up its construction site. Plaintiff testified that she was unable to see whether there were any vehicles traveling in the parking lane while she was stopped at the traffic light, that there were no traffic signs at the construction site, that the construction "tent" occupied not only the middle lane, but the right parking lane as well and that her only way around the construction was via the left lane. Therefore, there is, at least, a question of fact as to whether Maspeth created a dangerous condition by making it appear that no vehicular traffic could proceed in the parking lane, and, therefore, that plaintiff, after passing the construction, could turn right into the parking lane without the expectation that there might be oncoming vehicles in that lane.

Although, contrary to plaintiff's testimony, Kim testified that the construction was only five feet high so that he could see the traffic in the left lane, that he had a choice to proceed either to the left or to the right around the construction, and chose to use the parking lane, and although Maspeth's witnesses testified that there was an arrow board in front of the construction directing traffic to proceed either to the left or to the right, such conflicting testimony raises a question for the trier of fact to determine.

Moreover, without merit is the argument of Maspeth's counsel that even if the site presented a dangerous condition and constituted a breach of a duty of care, such breach could not be a proximate cause of the accident because plaintiff testified that she looked to her right and was able to see the right lane and was able to see the metered parking spaces in the parking lane. Counsel speculates and theorizes that since plaintiff's view of the parking

lane was not obstructed, the only explanation as to why she was unable to see Kim's vehicle approaching in the right parking lane when she turned into it is because Kim was in her blind spot.

Contrary to counsel's characterization of plaintiff's testimony, plaintiff did not testify that she could see the right parking lane while she was stopped at the traffic light with the construction "tent" to her right. Rather, she clearly testified that she was able to see the right lane only after the traffic light had turned green and after she proceeded into the intersection, passed the construction site. Moreover, the metered parking in the parking lane to which she was referring was the parking lane on the following block after the intersection, the metered parking where she was headed after clearing the construction area. Plaintiff testified that while she was stopped at the light, with the construction tent the height of a bus to her right, there was no way that she could see whether there were vehicles traveling in the parking lane. Consistent with her testimony is her affidavit in opposition in which she avers that her view was blocked by a bus-sized tent. Moreover, her averment that the presence of an arrow board or sign directing traffic into the parking lane would have warned her of the presence of possible oncoming cars from that lane is not inconsistent with her testimony. The Court also notes that although Kim testified that he could see over the construction structure and his view of traffic proceeding in the left lane was not blocked, he also testified that he did not see plaintiff's vehicle until it was in the intersection approximately ten yards after the end of the construction structure and only after it had made a 90-degree turn towards him.

Therefore, the evidence on this record raises a question of fact as to whether Maspeth breached a duty of care to plaintiff and whether that breach was a substantial factor in causing the accident.

Accordingly, the City's motion is granted, the complaint and all cross-claims are dismissed as against the City, and Maspeth's motion for summary judgment is denied.

Dated: January 20, 2012

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J.S.C.