

**Valerio-Hernandez v City of New York**

2015 NY Slip Op 32158(U)

October 7, 2015

Supreme Court, Bronx County

Docket Number: 309102/08

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

Index No. **309107/08**  
Motion Calendar No. **22, 23**  
Motion Date: 7/6/15

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CLEMENTINA VALERIO-HERNANDEZ,  
Plaintiff,

**DECISION/ORDER**

-against-

**Present**  
**Hon. Wilma Guzman**  
Justice Supreme Court

THE CITY OF NEW YORK, C.A.C., INDUSTRIES  
INC., CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC., and STEP MAR CONTRACTING  
CORPORATION, TRI-MESSINE  
Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to  
dismiss the plaintiff's complaint

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion, Affirmation in Support, and Exhibits thereto.....</b>	<b>1</b>
<b>Affirmation in Opposition of Motion and Exhibits thereto .....</b>	<b>2</b>
<b>Reply Affirmation .....</b>	<b>3</b>

*Upon the foregoing papers and after due deliberation, following oral argument, the  
Decision/Order on this motion is as follows:*

Defendant C.A.C. Industries, Inc., move this Court for an Order granting summary judgment  
and dismissing the plaintiff's complaint and all cross-claims on the grounds that C.A.C. did not  
perform any work in the location of plaintiff's accident.

Defendant Tri-Messine moves this Court for an Order dismissing the plaintiff's complaint  
and all cross-claims on the grounds that Tri-Messine. did not perform any work in the location of  
plaintiff's accident.

For the purpose of disposition, both motions are consolidated and decided as follows:

Plaintiff commenced this action for injuries allegedly sustained as the result of the August 25, 2007 a fall in a hole in the intersection of Marcy Place and the Grand Concourse.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *See, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1<sup>st</sup> Dept., 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *See, Rose v. Da Ecib USA*, 259 A.D.2d 258 (1<sup>st</sup> Dept., 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *See, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Nicolo Michelli testified that he is the Project Manager for C.A.C. His job duties include requesting permits. C.A.C. bid on a yearly Contract in May 2005 which is a nonspecific location contract. He testified that he was familiar with the project taking place at the Grand Concourse & Marcy Place which was an emergency sewer repair contract with the D.E.P. (Department of Environmental Protection) and C.A.C. did receive a break sketch of the location from the D.E.P. Upon the receipt of the break sketch. The Street Opening Permits for the intersection of the Grand Concourse and Marcy Place (#X01-2006072-049, #X01-2006041-004, #X01-2006072-050 was applied for by C.A.C. by Michael Capasso, the owner of C.A.C. At no time was he notified of the need for services of any type at the location of the Grand Concourse and Marcy Place in the Bronx. If any permits were taken out in 2007, he did not know but such work is not reflected in project summary sheet. Mr. Michelli testified that he did not know a company named Tri-Messine.

Omar Codling testified that he is a record searcher for the New York City Department of Transportation (DOT). According to a search response sheet, for the area of Grand Concourse and Marcy place, an opening permit #S012006054014, valid from March 7, 2006 to April 6<sup>th</sup> 2006, was granted to Con Edison to open a roadway at 153 Marcy Place, between Grand Concourse and Walton Avenue for the purpose of a repair of a street light. He did not know if the work was done, but an

Inspection report indicates that an inspector went out on February 7, 2007 in relation to the project authorized by the permit. Another Permit #X012002297078, valid October 25, 2003 to November 7, 2002 issued to Con Edison to open roadway and/or sidewalk at 106 Walton Place between Grand Concourse and Walton Avenue for a maximum four feet to repair gas protective. Permit # X0120041145036, valid May 26<sup>th</sup> 2004 to June 23<sup>rd</sup>, 2004 authorized Con Edison to open roadway and/or sidewalk for a maximum length of four feet at 108 Marcy Place between Grand Concourse and Walton Avenue for the purpose of gas repair. There was an inspection report dated February 9, 2007 accompanying this permit. No corrective action requests (C.A.R) were found on either permit. Permit #X012006072049, valid March 13, 2006 to May 20, 2006, authorized C.A.C. Industries Incorporated to open the roadway and/or sidewalk at Grand Concourse between Clark Place and Marcy Place, for a maximum of 600 feet for D.E.P. contractor, major installation sewer. He did not know if the cut form for the permit was ineligible. Permit # X012006041004, valid February 10, 2006 to February 27, 2006 authorized C.A.C. to open the roadway and/or sidewalk at Grand Concourse and Marcy Place for a maximum length of 100 feet for the purpose of D.E.P. contractor, major installation sewer. He did not know if any work was performed under this permit. Permit # X012006072050, valid March 13, 2006 to May 28, 2006, granted to C.A.C. Industries to open the roadway and or/sidewalk for the intersection at Marcy Place and Grand Concourse for a maximum length of 100 feet for the purpose of D.E.P. Contractor, major installation sewer. He did not know if any work was done under this permit. A repair order with the defect number Dx2007227034 indicated a defect of a pothole located at Grand Concourse and Marcy Place reported on August 15, 2007 via Citizen complaint. On August 15, 2007, a crew was assigned to fix the defect. There was no Gang Sheet with the FITS report to indicate whether a DOT crew had gone out to repair the defect. Defect # Dx2006297007 indicated a pothole at Grand Concourse and Marcy Place, reported on October 24, 2006 and on October 26<sup>th</sup> 2006 a crew was assigned to fix the defect and closed. Repair Order Dx2005229009 reflected a pothole defect reported August 17, 2005 for the location of Grand Concourse and Marcy Place. On August 19, 2005, the FITS reports indicates there was a close defect duplicate location. Mr. Codling testified that no contracts were found for the intersection of Grand Concourse and Marcy Place as all the aforementioned were for the block location. Nor were there any contracts for the Marcy Place between Grand Concourse and Walton

Avenue. The searches encompassed records maintained by the Department of Transportation.

Alfonso Messina testified that he is the President of Tri-Messine, a company that performs permanent restoration to asphalt roadways. In August 2007, Tri-Messine had a contract with Con-Edison to perform work on Marcy Place between Grand Concourse and Walton Avenue. Mr. Messina testified a Street Opening Ticket PS470890 indicated opening and base dates of March 26, 2006. This work was performed by Step-Mar Contracting Corp. Tri-Messine did the pavement restoration on March 26, 2006, at 151 Marcy Place from Walton Avenue to Grand Concourse for this opening ticket. However, the backfill, which is done before the pavement restoration, indicates that it was filled on March 24, 2006. The restoration was signed off as satisfactory by Con-Ed on April 22, 2006.

Thomas Keogh is a Specialist for Con-Ed. His job duties include conducting record searches. His document review revealed contracts, permits, paving orders and repairs involving Con-Ed, Step Mar and Tri-Messine for work done at 151 Marcy Place from Walton Avenue to Grand Concourse, including the paving order for Tri-Messine's work done on March 24, 2006.

Mario Jacovino testified that he is the President of Step-Mar a sub contractor for Con-Ed tasked with excavation. Including the work which took place on March 23, 2006. Step-Mar did work at the intersection of Grand Concourse and Marcy Place near Walton Avenue. The paver was Tri-Messine.

A December 15, 2008 from the Farhi Husein, P.E., Supervising Resident Engineer for The City of New York, Department of Environmental Protection indicates that under Contract # 20050026578, Project SEx00201-P CAC did not perform any work at the location of Marcy Place and the Northwest side of Grand Concourse in the Borough of the Bronx.

Ronald Michael Huckemeyer testified that he is employed by Con Edison as an inspector. He inspected the work done by Step Mar on Marcy Place between Walton Avenue and Grand Concourse. The work passed the inspection.

Based upon the testimony herein, defendant C.A.C.'s motion for summary judgment is hereby granted. Although a street opening permit was issue, there has been no testimony that the work was actually performed by C.A.C. The mere fact of issuance of a street opening permit and the City's contract with C.A.C is insufficient to raise a question of fact where there is no other

testimony or proof that the work had been performed by C.A.C. Bermudez v. City of New York, 21 A.d3d 258 (1<sup>st</sup> Dept. 2005). Defendant Tri-Messine's motion for summary judgment is denied. There is no dispute that Tri-Messine performed work in this area. In fact, Mr. Messina himself testified that the work was done. Although Mr. Huckemeyer testified that he went out and inspected the work upon completion, he further testified that a depression was in the same area at the time of another viewing. As such, questions of fact remain as to whether the work was completed properly or whether Tri-Messine caused or created the defect through their work precluding the drastic remedy of summary judgment.

Accordingly, it is

ORDERED that defendant C.A.C. Industries, Inc.'s motion for summary judgment is hereby granted and the plaintiff's complaint and all cross-claims are dismissed as to defendant C.A.C. Industries, Inc. only. It is further

ORDERED that defendant Tri-Messine's motion for summary judgment is hereby denied. It is further

ORDERED that the Clerk of the Court mark the Court file accordingly. It is further

ORDERED that defendant C.A.C. Industries, Inc., serve a copy of Plaintiff is directed to this Order with Notice of Entry within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

10/7/15  
DATE

  
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HON. WILMA GUZMAN, J.S.C.