Espada v City of New York
2015 NY Slip Op 32402(U)
November 30, 2015
Supreme Court, Bronx County
Docket Number: 305902/10
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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JOSE ESPADA AND YUDERKA ESPADA,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND STEP-MAR CONTRACTING CORPORATION,

Defendant(s).
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DECISION AND ORDER

Index No: 305902/10

In this action for the alleged negligent maintenance of the public roadway defendant STEP-MAR CONTRACTING CORPORATION (Step-Mar) moves seeking an order granting it summary judgment thereby dismissing the complaint and all cross-claims on grounds that it bears no liability for plaintiffs' alleged accident. Specifically, Step-Mar avers that it insofar as it performed no work at the location of the accident alleged, prior to plaintiffs' accident, it cannot be liable as a matter of law. Defendant THE CITY OF NEW YORK (the City), opposes the instant motion pursuant to CPLR § 3212(f), alleging that because Step-Mar has yet to appear for depositions, the instant motion is premature.

For the reasons that follow hereinafter, Step-Mar's motion is granted.

The instant action is for alleged personal injuries as a result of the alleged negligent maintenance of the public roadway.

Plaintiffs' complaints[1] allege that on April 27, 2009, plaintiff JOSE ESPADA (Jose) was operating his motor vehicle on the public roadway located on Exterior Street a/k/a 135th Street, Bronx, NY, when his vehicle came into contact with a defective condition existing thereat. As a result of the aforementioned condition, Jose was caused to crash and sustain injuries. Plaintiffs allege that defendants were negligent in failing to maintain the roadway in a reasonably safe condition, such negligence causing the instant accident. Plaintiff YUDERKA ESPADA, as Jose's wife asserts a derivative loss services claim.

Plaintiffs' Bill of Particulars more specifically identifies the location the alleged accident, to wit: on Exterior Street, 657 feet south of East 138th Street, underneath the Metro North train trestle.

Step-Mar's motion is granted inasmuch as on this record, its liability can only be premised on Step-Mar's creation of the defective condition alleged to have caused Jose's accident and the evidence submitted conclusively establishes that Step-Mar had performed no work at the situs of the instant accident prior to Jose's accident. As such, Step-Mar could not and did not create

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[1] This action was initially two separate actions, the first solely against the City and the second against defendant CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Con Ed) and Step-Mar. However, by order dated September 24, 2012, the Court consolidated those actions into one action - the instant action.

the defective condition alleged.

Preliminarily the Court notes that the City's sole opposition to the instant motion is that the same is precluded by CPLR § 3212(f) insofar as Step-Mar has not yet produced a witness for a deposition. The City's argument is specious and without merit.

A party claiming ignorance of facts critical to the defeat a motion for summary judgment is only entitled to further discovery and denial of a motion for summary judgment if he or she demonstrates that reasonable attempts were made to discover facts which, as the opposing party claims, would give rise to a triable issue of fact (*Sasson v Setina Manufacturing Company, Inc.*, 26 A.D.3d 487, 488 [2d Dept 2006]; *Cruz v Otis Elevator Company*, 238 AD2d 540, 540 [2d Dept 1997]). Implicit in this rationale is that the proponent of further discovery must identify facts, which would give rise to triable issues of fact. This is because, a court cannot condone fishing expeditions and as such "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson* at 501). Thus, additional discovery, should not be ordered, where the proponent of the additional discovery has failed to demonstrate that the discovery sought would produce relevant evidence (*Frith v Affordable Homes of America, Inc.*, 253 AD2d 536, 537 [2d Dept 1998]).

Notwithstanding the foregoing, CPLR § 3212(f) mandates denial

of a motion for summary judgment when a motion for summary judgment is patently premature, meaning when it is made prior to the preliminary conference, if no discovery has been exchanged (*Gao v City of New York*, 29 AD3d 449, 449 [1st Dept 2006]; *Bradley v Ibex Construction, LLC*, 22 AD3d 380, 380-381 [1st Dept 2005]; *McGlynn v. Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]). Under these circumstances, the proponent seeking denial of a motion as premature, need not demonstrate what discovery is sought, that the same will lead to discovery of triable issues of fact or the efforts to obtain the same have been undertaken (*id.*). In *Bradley*, the court denied plaintiff's motion for summary judgment as premature, when the same was made prior to the preliminary conference (*Bradley* at 380). In *McGlynn*, the court denied plaintiff's motion seeking summary judgment, when the same was made after the preliminary conference but before defendant had obtained any discovery whatsoever (*McGlynn* at 117).

Here, insofar as there has been substantial discovery between the parties, including a Preliminary and Compliance Conference, Step-Mar's motion is not premature as a matter of law (*Gao* at 449; *Bradley* at 380-381; *McGlynn* at 117). Moreover, the City's attempt to establish ignorance of facts critical to the defeat Step-Mar's motion fails because not only has it failed to demonstrate that reasonable attempts were made to discover facts which would give rise to a triable issue (*Sasson* at 488; *Cruz* at 540), but it also

fails to identify facts, which would, upon Step-Mar's deposition, raise to material and triable issue of fact (*Frith* at 537). To be sure, as will be discussed below, Step-Mar's evidence - the affidavit from its own witness and evidence proffered by Con Ed - establishes that prior to Jose's accident, Step-Mar did not perform work at the location at issue, such that it could not have caused nor created the condition alleged. The foregoing is also corroborated by the deposition testimony of the City's witness and the documents produced by her. Accordingly, the City fails to establish how Step-Mar's deposition would produce facts sufficient to impute liability upon Step-Mar.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v*

Bacchus, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly,

generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). When the proponent of a motion for summary judgment fails to establish prima facie entititlment to summary judgment, denial of the motion is required "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Self serving affidavits, meaning those which contradict previous deposition testimony, will not be considered by the court

in deciding summary judgment and cannot raise a triable issue of fact sufficient to defeat summary judgment (*Gloth v Brusco Equities*, 1 AD3d 294, 294 [1st Dept 2003]; *Lupinsky v Windham Construction Corp.*, 293 AD2d 317, 318 [1st Dept 2002]; *Joe v Orbit Industries, Ltd.*, 269 AD2d 121, 122 [1st Dept 2000]; *Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]). While it is clear that self serving affidavits from plaintiff him/herself, contradicting prior testimony shall be summarily disregarded, it is equally clear, that third-party affidavits, from witnesses, which contradict plaintiff's prior testimony shall be disregarded as well (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 324 1st Dept 2006] [Court discounted affidavit from an eyewitness when the same "was so completely at odds with plaintiff's deposition testimony."]; *Gomez v City of New York*, 304 AD2d 374, 375 [1st Dept 2003]; *Perez v South Park South Associates*, 285 AD2d 402, 404 [1st Dept 2001]; *Philips v Bronx Lebanon Hospital*, 268 AD2d 318, 320 [1st Dept 2000]). The rationale for disregarding self serving affidavits was best articulated in *Glick & Dolleck, Inc. v Tri-Pac Export Corp.* (22 NY2d 439, 441 [1968]) wherein the court stated that while the court is generally proscribed from weighing credibility, it is free to do so when it is clear that the "issues [proffered] are not genuine, but feigned."

Pursuant to section 7-201(c)(2) of the New York City Administrative Code,

> [n]o civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Accordingly, generally, a municipal defendant bears no liability under a defect falling within the ambit of section 7-201(c) "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice" (*Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]). Even when there is evidence that the municipality had prior written notice of a defective condition, liability for the same is obviated upon evidence that the same was repaired prior to a plaintiff's accident (*Lopez v Gonzalez*, 44 AD3d 1012, 1013 [2d

Dept. 2007] [Municipal defendant granted summary judgment because, *inter alia*, while it had prior written notice of the condition alleged, it had repaired it and no further written notice existed at least 15 days prior to plaintiff's accident]). An exception to the foregoing exists, however, where it is claimed that the municipal defendant affirmatively created the condition alleged to have caused plaintiff's accident, in which case, the absence of prior written notice is no barrier to liability (*Elstein v City of New York*, 209 AD2d 186, 186-187 [1st Dept 1994]; *Bisulco v City of New York*, 186 AD2d 85, 85 [1st Dept 1992]). A plaintiff seeking to proceed on a theory that the municipality created the defect alleged, however, must establish that the defective condition was improperly installed so as to bring the defect out of the ambit of ordinary wear and tear (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]). Stated differently, the proponent of a claim that a municipal defendant created a dangerous condition must establish that work performed by the municipal defendant was negligently performed such that it "immediately result[ed] in the existence of [the] dangerous condition" alleged (*Yarborough* at 728 [internal quotation marks omitted]).

Notwithstanding the foregoing, on September 14, 2003, with the passage of § 7-210 of the New York City Administrative Code, maintenance and repair of public sidewalks and any liability for a

failure to perform the same, was shifted, with certain exceptions, to owners whose property abutted the sidewalk (*Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009], *revd on other grounds* 14 NY3d 779 [2009]; *Klotz v City of New York*, 884 AD3d 392, 393 [1st Dept 2004]); *Wu v Korea Shuttle Express Corporation*, 23 AD3d 376, 377 [2d Dept 2005]).

Specifically, §7-210 states, in pertinent part, that

> [i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition. . . [, that] the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. . . [, that][f]ailure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. . . [,and that] [t]his subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

As noted above, because of § 7-201, prior to that the passage of § 7-210, the duty to repair and maintain the public sidewalks in a reasonably safe condition rested with the municipality within

which the sidewalks were located (*Ortiz* at 24; *Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004]; *Belmonte v Metropolitan Life Insurance Company*, 304 AD2d 471, 474 [1st Dept 2003]). Accordingly, before § 7-210, an abutting landowner had no duty to maintain the public sidewalk and was not liable for an accident occurring thereon unless he/she created the dangerous condition alleged or derived a special use from the sidewalk (*Weiskopf* at 203; *Belmonte* at 474). Accordingly, whereas tort liability for an accident involving a defective condition on a public sidewalk was once premised only upon the abutting owner's affirmative acts in making the sidewalk more hazardous, i.e., causing or creating a dangerous condition (*Ortiz* at 24), with the enactment of § 7-210, it is now well settled that an owner of property abutting a public sidewalk is liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*id.* at 25; *Martinez v. City of New York*, 20 A.D.3d 513, 515 [2d Dept 2005]). Despite the enactment of § 7-210, the City nevertheless remains responsible to maintain certain sidewalks such as those abutting "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (New York City Administrative Code § 7-210[c]), and is liable for defects existing on the sidewalks abutting exempt properties (*id.*). Additionally, the City remains liable to maintain the curbs abutting public sidewalks because § 7-210 only

shifted the responsibility of sidewalk maintenance to an abutting landowner, which is defined as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians" (New York City Administrative Code § 19-101(d); *see also Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010] [Defendant, abutting property owner granted summary judgment in an action arising from an accident on a defective portion of the sidewalk when the evidence established that the accident occurred on the curb.]; *Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009]). For this reason, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" (*Vucetovic v Espom Downs*, 10 NY3d 517, 521 [2008]), and, provided there is prior written notice of a defect existing thereon, the City remains liable (*id.* ["Here, sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. Significantly, tree wells are not mentioned in sections 19-152, 16-123 or 7-210. And while section 7-210 employs the phrase 'shall include, but not be limited to,' this clause applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk. Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems

evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210. If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal."]). The City also remains responsible for the maintenance of the sidewalk within 12 inches of any covers or gratings upon a sidewalk, such as a fire hydrant's gate box (*Flynn v City of New York*, 84 AD3d 1018, 1019 [2d Dept 2011], *lv denied* 17 NY3d 709 [2011]) ["Accordingly, the responsibility for maintaining the condition of the area where Flynn fell lies with the City, and not the Estate. We agree with the Appellate Division, First Department, that there is nothing in Section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner."]). In such case, of course, meaning cases where the City remains responsible for the maintenance of the sidewalks despite § 7-210, liability against the City requires evidence that the City had prior written notice of the condition alleged or that the City caused or created the defect alleged (*Adamson v City of New York*, 104 AD3d 533, 533 [1st Dept 2013]; *Batts v City of New York*, 93 AD3d 425, 427 [1st Dept 2012]; *Tucker v City of New York*, 84 AD3d

640, 644-645 [1st Dept 2011]).

Despite the advent of § 7-210, owners of exempt property remain liable for injuries caused by defective sidewalks if they caused or created a dangerous condition thereon or derived a special use from the public sidewalk (*Meyer v City of New York*, 114 AD3d 734, 734-735 [2d Dept 2014] [Court granted motion by defendants for summary judgment on grounds that the property was exempt under § 7-210 and because they established that they neither created the condition alleged to have caused plaintiff's accident nor did they derive a special use from the public sidewalk.])

Thus, as is the case with any action sounding in premises liability, an owner of real property abutting a public sidewalk is now liable if it is proven that he or she created the dangerous condition, had prior actual or constructive notice of its existence (*Weinberg v 2345 Ocean Associates, LLC*, 108 AD3d 524, 525 [2d Dept 2013]; *Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809 [2d Dept 2011]), or enjoyed a special use of the public sidewalk (*Terilli v Peluso*, 114 AD3d 523, 523 [1st Dept 2014]; *Rodriguez v City of Yonkers*, 106 AD3d 802, 803 [2d Dept 2013]). As in any case premised on the negligent maintenance of real property, it is well settled that a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of the premises (*Balsam v Delma Engineering Corporation*, 139 AD2d 292, 296-297 [1st

Dept. 1998]; *Hilliard v Roc-Newark Assoc.*, 287 AD2d 691, 693 [2d Dept 2001]). Absent evidence of ownership, occupancy, control, or special use, liability cannot be imposed (*Balsam* at 297).

Despite § 7-210, the City also remains liable to maintain all public roadways. This is abundantly clear because by its very terms, § 7-210 only abrogated a portion of § 7-201 in that it only shifted the maintenance responsibility prescribed by § 7-201 with respect to public sidewalks. Moreover, decisional case law, after the enactment of § 7-210 has continued to apply § 7-201 for purposes of the City's liability in actions alleging injuries due to roadway defects (*Cendales v City of New York*, 25 AD3d 579, 580 [1st Dept 2006] ["Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies."]; *Wilkie v Town of Huntington*, 29 AD3d 898, 898 [2d Dept 2006] [same]). Thus, the City remains liable for a defective condition on a roadway that causes injury if it has prior written notice of the same or upon proof that a cognizable exception applies (*Cendales* at 580; *Wilkie* at 898).

Liability for a dangerous condition upon the public sidewalk caused by a third-party is governed by an altogether different standard. A contractor hired to perform work is generally not

liable in tort to a non-contracting third-party when he/she/it breaches a contract and said breach causes injury to a third-party (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257 [2007]; *Church v Callanan Industries, Inc.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]; *H.R. Moch Co. v Rensselaer Water Co.*, 247 N.Y. 160, 164 [1928]; *Bugiada v Iko*, 274 AD2d 368, 369 [2d Dept 2000]). This is because, contractors are generally hired to perform work pursuant to contract and "[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal* at 139). Thus, when there is a breach, such contractors are generally only liable to the person who hired them, the promisee, and are not liable to third parties for any injuries resulting from a breach of their contractual obligation. Consequently, if a contractor is to be held liable for injury to a third-party occasioned by their work, one of three scenarios must exist. First, a contractor is liable for injury to a third-party if

> the putative [contractor] has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good

(*id.* at 139, *quoting*, *H.R. Moch, Co.*, at 168). Stated differently, a contractor is liable to an injured third-party when said contractor causes or creates the condition alleged to have caused

injury (*id.* at 140; *Church* at 111). Second, a contractor is responsible for a non contracting third-party's injury when the third-party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and actively, causes injury (*id.* at 11-112; *Espinal* at 140; *Eaves Brooks Costume Company, Inc. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226 [1990]; *Bugiada* at 369). Lastly, when the contract is comprehensive and exclusive as to maintenance, so that due to its breath the contractor displaces, and in fact assumes the owner or possessor's duty to safely maintain the premises, said contractor is liable to an injured third-party resulting from a breach of the services undertaken - such as the failure to maintain the premises in a safe condition (*Church* at 112; *Espinal* at 140; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 589 [1994]; *Bugiada* at 369).

In *Espinal*, for example, the Court concluded that defendant, a contractor, was not liable to plaintiff for her alleged slip and fall on ice. Specifically, plaintiff slipped and fell on an icy condition, which defendant, as per a contract with the owner of the premises, was charged with abating (*id.* at 137-138, 142). Specifically, plaintiff alleged that the snow within the parking lot of the premises she was traversing had not been properly removed and that, thus, the contractor created the condition which caused her fall. (*id.*). In granting defendant's motion for

summary judgment, the court reiterated the well settled rule that "[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*id.* at 138). In discussing the exceptions to the foregoing rule, the court nevertheless held that by clearing snow as the contract required, the contractor had not created a dangerous condition, and as such was not liable under plaintiff's theory that the contractor created the condition alleged (*id.* at 142). Further, the court held that defendant was not liable under the exclusive control exception to the general rule, since as per the contract between the contractor and the owner, the owner retained its duty to maintain and inspect the premises (*id.* at 141).

Similarly, in *Church*, the court granted a subcontractor's motion for summary judgment, after concluding that it was not liable to the plaintiff for any breaches of its contract with the State, the entity who hired the contractor. In that action, the subcontractor was hired to install guide rails along a portion of the state thruway by a contractor who was initially hired by the State (*id.* at 109, 114). In that case, plaintiff was an occupant of a vehicle whose driver fell asleep at the wheel, causing said vehicle to careen down an embankment accessible through an area which was slotted for guide rail installation, but upon which the subcontractor had yet to begin work (*id.*). The court held that the

subcontractor was not liable to the plaintiff under any of the exceptions cited above (*id.* at 109-110). In holding for the subcontractor, the Court held that the subcontractor's failure to install guide rails at the location of the accident therein, did not cause or create a dangerous condition, since the subcontractor's failure to install guiderails thereat did not make the are therein any more dangerous than it was without the guide rails (*id.* at 112). Specifically, the court noted that had the subcontractor created the dangerous condition alleged, liability would have been extant but that in that case,

> the breach of contract consist[ed] merely in withholding a benefit where inaction is at most a refusal to become an instrument for good. [Specifically,] San Juan's [the subcontractor] failure to install the additional length of guiderail did nothing more than neglect to make the highway at Thruway milepost marker 132.7 safer--as opposed to less safe--than it was before the repaving and safety improvement project began

(*id.* at 112 [internal citations and quotation marks omitted]; *see H.R. Moch Co.* at 168 ["The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."]; *Bono v Halben's Tire City, Inc.*, 84 AD3d 1137, 1139 [2d Dept 2011] [Defendant automobile repair shop's failure to warn a party that his vehicle brakes could fail if he did not replace the master cylinder on his car did not

constitute the launching of a force or instrument of harm.]; *Altinma v East 72nd Garage Corp.*, 54 AD3d 978, 980 [3d Dept 2008] [a defendant's alleged negligent failure to warn the decedent's employers regarding man-lift or elevator inspection requirements amounted to a finding that the defendant merely may have failed to become an instrument for good, which was insufficient to impose a duty of care."]).

Thus, because at best, in *Church* the omission alleged was nonfeasance as opposed to malfeasance, which failure merely failed to make the highway safer, the court concluded that such inaction was not tantamount to causing and creating a dangerous condition (*id.* at 112). The court further concluded that there was no detrimental reliance by plaintiff upon the subcontractor's and that the contract between the subcontractor and the State was not one whereby the contractor assumed all safety related obligations with regard to the guiderail system so as displace the State's obligation to safely maintain the guiderails (*id.* at 113). More specifically, the court noted that the contract therein was not comprehensive and exclusive with respect to inspection and supervision vis a vis the installation of the guiderails, and as such, the contractor did not displace or assume the State's duty to safely maintain the guiderails (*id.*).

Thus, generally, the failure to establish that a third-party caused or created the accident causing condition existing on the

public roadway bars liability against that party (*Cendales* at 580-581 ["Keyspan established its entitlement to judgment as a matter of law by submitting evidence that it had not created the roadway defect that caused the plaintiff's fall."]; *Scott v City of New York*, 88 AD3d 985, 985 [2d Dept 2011] ["Accordingly, the appellants failed to eliminate all triable issues of fact as to whether they created the roadway defect and, thus, failed to establish their prima facie entitlement to judgment as a matter of law."]; *Adler v Suffolk County Water Authority*, 306 AD2d 229, 230 [2d Dept 2003] ["The SCWA did not submit any evidence with its moving papers to establish that it did not install the water valve box or that it did not create the alleged defect in the roadway by installing the water valve box in a negligent manner."])

In support of the instant motion Step-Mar submits the transcript of Jose's deposition, wherein he testified, in pertinent part, as follows. On April 27, 2009, Jose was involved in an accident while he rode his motorcycle. Specifically, as he rode his motorcycle on the service road abutting the southbound Major Deegan Expressway, his motorcycle came into contact with a hole, causing him to lose control and crash. With respect to the specific location of his accident, Jose testified that it was past the Major Deegan Expressway's 138th Street exit, in the right lane of the southbound service road, as the same went under an elevated train trestle, and near 135th Street. While Jose did not see what

caused his accident on that date, he returned to the scene months later and saw that there were several holes at the location where he had his accident. Prior to his accident, Jose had been by the area and had never seen any construction at that location.

Step-Mar submits photographs identified by Jose at his deposition, which Jose indicated depict the hole which caused his accident, and which photographs were taken by his attorney. The photographs depict a portion of roadway under a trestle which Jose identified as the southbound service road of the Major Deegan Expressway. At or about where the trestle and the roadway intersect the photographs depict several holes, on of which Jose identified as the hole that caused his accident.

Step-Mar submits Jennifer Kim's (Kim) deposition transcript, wherein she testified, in pertinent part, as follows. As a Specialist with Con Ed, her duties were to perform searches of Con Ed's records for any excavation work performed by them on the City's roadways, and to testify at depositions. Kim searched Con Ed's records, maintained in two separate databases, for, *inter alia*, permits issued by the City, opening tickets created by Con Ed and paving orders created by one of Con Ed's contractors. Generally when Con Ed did excavation work on the public roadways, it would apply for a permit from the City and once permit was granted, and assuming the work was actually started, Con Ed would then create an opening ticket. While normally excavation work

would yield all three of the foregoing documents, there were exceptions. At times, no permit was necessary for certain excavation work, while at others there was no paving contractor required for a particular excavation. Kim testified that a search of Con Ed's records was performed for the roadway on Exterior Street between Third Avenue and East 138th Street for a period of two years prior to and including April 27, 2009. The search yielded no documents. Kim was nevertheless questioned about three permits and an opening ticket issued to Con Ed for work on the roadway located on the roadway of the northbound Major Deegan Expressway from Exit 3 to the Metro North Railroad. Kim testified that while a permit was originally obtained for work set to begin on April 22, 2009, the work was actually done, as evinced by the opening ticket shown to Kim - with Step-Mar doing the excavation - on June 11, 2009.

Step-Mar submits an affidavit from Mario Jacovino (Jacovino), who states, in pertinent, part as follows. Jacovino is sole owner of Step-Mar, a utility excavation company who primarily works for Con Ed. Jacovino searched Step-Mar's records for any work it performed on Exterior Street, 657 feet from East 138th Street, at any time prior to April 27, 2009. The search yielded no records. Thus, Jacovino states that Step-Mar performed no work at the location of the alleges accident at anytime prior thereto.

Step-Mar also submits the deposition transcript of Cynthia

Howard (Howard), employed by the City's Department of transportation, who to the extent relevant, testified about searches conducted by the City for records evincing work performed at the location of Jose's accident for two years prior to April 27, 2009. The search, to the extent relevant, yielded a permit issued to Con Ed authorizing work by Step-Mar on the roadway located on the roadway of the northbound Major Deegan Expressway from Exit 3 to the Metro North Railroad. The permit was valid from April 22 - May 21, 2009.

Based on the foregoing, since it is well settled that despite § 7-210, the City remains liable to maintain all public roadways (*see* New York City Administrative Code § 7210 [only abrogating the portion of § 7-201 requiring that the City maintain the public sidewalk]; *Cendales* at 580; *Wilkie* at 898), Step-Mar, a contractor not retained by the City, is only liable for an accident caused by a defect in the public roadway if, *inter alia*, it created the dangerous condition alleged (*Cendales* at 580-581; *Scott* at 985; *Adler* at 230). This, of course, is because a contractor hired to perform work is generally not liable in tort to a non-contracting third-party when he/she/it breaches a contract and said breach causes injury to a third-party (*Stiver* at 257; *Church* at 111; *Espinal* at 138; *H.R. Moch Co.* at 164; *Bugiada* at 369). Consequently, if a contractor is to be held liable for injury to a third-party occasioned by their work, it must be shown, *inter alia*,

that the contractor caused or created the condition alleged to have caused injury (*Espinal* at 140; *Church* at 111).

Step-Mar's evidence establishes that Jose's accident occurred when he hit a hole located on the portion of Exterior Street abutting the southbound Major Deegan Expressway that intersected with the Metro North train trestle. Step-Mar's evidence further establishes that it is normally hired as Con Ed's excavation contractor and that a search of its records yielded no records for any worked performed by it at the location of Jose's accident at anytime prior to the instant accident. Lastly, Step-Mar establishes that Con-Ed's records also establish that neither Con Ed nor Step-Mar performed any work at the aforementioned location prior to Jose's accident. Accordingly, Step-Mar establishes that it could not have created the condition alleged and that thus, it cannot be liable to the plaintiffs. To the extent that the City issued a permit to Con Ed authorizing Step-Mar to work on Exterior Street in April 2009, this does not avail the City. First, insofar as the location listed on the permit is the northbound exit of the Major Deegan Expressway, the permit was for work on the other side of the Major Deegan Expressway and not for the location of this accident. Second, Kim testified that no work was performed pursuant to this permit until June, when Step-Mar filed its street opening ticket memorializing the work.

Nothing submitted by the City raises an issue of fact

sufficient to preclude summary judgment. It is hereby

ORDERED that the complaint and all cross-claims against Step-Mar be hereby dismissed, with prejudice. It is further

ORDERED that the Step-Mar serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : November 23, 2015
Bronx, New York

Mitchell J. Danziger, ASCJ