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| Guzman v City of New York |
| 2019 NY Slip Op 32591(U) |
| August 26, 2019 |
| Supreme Court, New York County |
| Docket Number: 161037/2015 |
| Judge: Gerald Lebovits |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

-----X

LEOMARIS GUZMAN,
Plaintiff,

- v -

THE CITY OF NEW YORK and CARLO LIZZA & SONS
PAVING, INC.,

Defendants.

-----X

INDEX NO. 161037/2015

MOTION DATE 04/26/2019,
04/26/2019

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 164, 169, 170, 171, 172, 173, 174, 181, 182, 183, 184, 185, 186

were read on this motion to/for JUDGMENT - SUMMARY

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were read on this motion to/for JUDGMENT - SUMMARY

Lipsig, Shapey, Manus & Moverman, P.C., New York, New York (Kardon Stolzman of counsel), for plaintiff.

Law Office of Kevin J. Philbin, New York, New York (Elan Raday of counsel), for defendant Carlo Lizza & Sons Paving, Inc.

Picciano & Scahill, P.C., Bethpage, New York (Aigul Sarvarova of counsel), for defendant City of New York.

Gerald Lebovits, J.:

Defendant Carlo Lizza & Sons Paving, Inc. (Carlo), moves for summary judgment dismissing the complaint (motion sequence No. 004). Defendant City of New York (City) moves for summary judgment dismissing the complaint (motion sequence No. 005). These motions are consolidated for disposition.

This is a personal injury action in which plaintiff allegedly sustained serious injuries as a result of a "trip and fall" accident which occurred in the southern crosswalk along Walker Street across Centre Street in New York City, on April 13, 2015. As part of a construction project in that area, Carlo was contracted by the City to mill the roadway. Carlo had milled the roadway several weeks prior to the accident in preparation for the resurfacing of the roadway

with new asphalt by the City. The complaint alleges that the accident occurred while plaintiff was walking on the milled surface of the roadway.

Milling is a procedure in which the top two inches of asphalt are scraped away and removed from the roadway in preparation of paving. After this procedure, the roadway surface is rough and uneven. A new coat of asphalt is able to bind to the surface left behind. In its motion papers, Carlo asserts that it performed its milling on the subject location on March 16 and 17, 2015 and was not contracted to perform any other paving or repair work there.

Plaintiff alleges that defendants each were negligent in creating a dangerous condition which caused her injuries and failing to warn or provide safeguards at the time of the accident. Carlo and the City move separately for summary judgment dismissing the complaint.

Carlo contends that it is not negligent in milling the roadway. It argues that the milling on the roadway was open and obvious at the time of the accident and not inherently dangerous. It also argues that plaintiff had failed to observe the roadway and was looking straight ahead before the fall. Carlo claims that this is confirmed in plaintiff's deposition testimony. Carlo contends that had plaintiff been more observant, she would have avoided her accident.

Regarding cross claims brought by the City which relate to its contract, Carlo argues that it had fully performed its contract and that on the date of the accident, it had no further duty to maintain a safe roadway. Pursuant to its contract with the City, Carlo cites section 6.70.11 (F) (2), which requires Carlo to safeguard the milling area for fifteen days after the completion of the milling process. Relying on the deposition testimony of its project manager, Robert D'Arpa, Carlo avers that its duties were confined to milling, with the City's Department of Transportation in charge of paving. A copy of a milling report submitted by Carlo indicates that the milling had been completed on March 17, 2015, and that its maintenance of the area ended on April 1, 2015. Carlo notes that on the time of the accident, the City's agency had failed to resurface the area, after the fifteen-day period.

Carlo relies on the decision of Supreme Court, New York County (Kotler, J.), in *Giorgio v City of New York*, Index No. 150604, 2018 Slip Op 32286 (U) (Sup Ct, NY County Sept. 21, 2018). In that case, the court found that Carlo had not breached its contract with the City because it was not required to perform any paving or repair work at the location of an accident and was therefore entitled to summary judgment. (*See id.* at *3-*4.) Carlo contends that it is similarly entitled to summary judgment here.

Plaintiff opposes the motion, arguing that whether a milled roadway can be deemed open and obvious and not inherently dangerous is ultimately an issue of fact, relying on *Balbes v City of New York*, 96 AD3d 478 [1st Dept 2012]. She also argues that Carlo admits that it milled the roadway prior to the accident and that the location remained unpaved for pedestrians on the day of the accident. Plaintiff argues that pursuant to its contract with the City, Carlo was under an absolute obligation to maintain the roadway until the substantial completion and final acceptance of the *project*, not merely for fifteen days after the completion of milling.

The City partially opposes the motion, agreeing with Carlo that the milled roadway was open and obvious as a matter of law and not inherently dangerous. In the event that the court denies Carlo's motion, City argues that it is entitled to its cross claim based on contractual indemnification on the ground that Carlo's duty to maintain the roadway continued beyond the fifteen-day provision. City refers to Article 7.1 of its Standard Contract, which provides that a contractor like Carlo has an absolute duty to protect its work against any injury up to the date of final acceptance by City. City argues that on the date of the accident, April 13, 2015, Carlo was still under a duty to safeguard the milled roadway, because final acceptance of its performance by City had not occurred. City moreover argues that it was not required to pave the milled roadway within any particular timeframe.

The City also argues that the deposition testimony of Carlo's project manager, D'Arpa has no probative value as evidence because he was not personally involved in the project. His predecessor, John Fleming, now deceased, was involved. The City contends that D'Arpa's lack of involvement at the time of the accident disqualifies his testimony, which should be disregarded by the court.

In reply, Carlo argues that based on the circumstances of this incident, the milled roadway was open and obvious as a matter of law. With respect to the contract with City, Carlo contends that the provision that allows it fifteen days to maintain the roadway, found in the standard highway specifications, overrides the provisions in the Standard Contract; otherwise, such a provision would make no contractual sense. Regarding D'Arpa's testimony, Carlo argues that there is no proof that this evidence lacks probative value. Carlo contends that D'Arpa was well-versed in examining and analyzing the documents related to the project and provided accurate and pertinent information, much of which City has not disputed. Carlo also argues that City's cross claims are untimely and severely prejudicial and should be dismissed.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor." (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial." (*id.* at 82).

This court shall first consider the motion to dismiss the complaint, then the cross claims. Carlo's main argument against plaintiff's claim is that the milled roadway was open and obvious at the time of the accident and Carlo was not liable for such a visibly apparent location.

The degree to which an allegedly dangerous condition is open and visible goes to the issue of comparative fault. (*See Centeno v Regine's Originals, Inc.*, 5 AD3d 210, 211 [1st Dept 2004]). A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured by crowds or the

plaintiff's attention is otherwise distracted. (*See Mauriello v Port Auth. of New York & New Jersey*, 8 AD3d 200, 200 [1st Dept 2004]).

Plaintiff argues that summary judgment here would be improper under the *Balbes* decision. There, the court ruled that the evidence at summary judgment raised triable issues of fact as to whether defendant created a dangerous condition in its milling work and whether plaintiff had a reasonable opportunity to observe and avoid that danger.

Carlo relies instead on *Baynes v City of New York*, 81 AD3d 423 (1st Dept 2011). In that case, the court affirmed the grant of summary judgment to defendant because the evidence showed that the milling of the roadway on which plaintiff fell was open and obvious; in that circumstance, the court held, defendant had no duty to protect or warn against such a condition.

This court concludes that *Baynes*, rather than *Balbes*, is the most analogous precedent. In *Balbes*, the plaintiff provided evidence that the accident occurred at midnight and that the area lacked adequate lighting at the time. The plaintiff in that case was also involved with other people, which purportedly blocked his vision, at least temporarily. Here, plaintiff was injured in the daytime, and she fails to provide evidence of specific distractions or any inference that such distractions had an effect on her. While plaintiff asserts that circumstances at the location where she fell raise an issue of fact, she fails to specifically identify them. The court also notes that plaintiff acknowledged that she was looking ahead while crossing the milled roadway, rather than watching her footing.

Thus, on this record, Carlo is entitled to summary judgment on plaintiff's claims against it.

With respect to the cross claims brought by the City, the court begins by considering the City's motion for summary judgment.

The City moves to dismiss plaintiff's claims against it, arguing, like Carlo, that the condition of the roadway was open and obvious and not inherently dangerous. An additional argument is that plaintiff failed to meet the prior written notice requirement of section 7-201 (c) (2) of the New York City Administrative Code. The City contends that plaintiff failed to provide the City with prior written notice of a defective condition at the subject location, a condition precedent to any action against the City. The only recognized exceptions to this rule involve situations in which either the City created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the City. The City argues that it is not subject to these exceptions, and that there is no proof that it created the condition which resulted in plaintiff's injuries.

The City also argues that if Carlo's motion is not granted, the City is entitled to its cross claim of contractual indemnification based on the terms of the Standard Contract, which makes Carlo liable for the maintenance of the milled roadway until final approval of the work by the City.

The partial opposition of this motion from Carlo repeats its position in its motion papers,

that the terms of the highway specifications expressly provide the fifteen day period in which Carlo is liable in safeguarding its work, and thereafter relieve Carlo from further liability, including contractual indemnification.

Plaintiff opposes the City's motion by citing the *Balbes* decision and arguing that the open and obvious condition is an issue of fact. Plaintiff also argues that, although the City did not receive prior written notice pursuant to the Administrative Code, the City had caused and created a defective condition at the roadway through its contract with Carlo. Apparently, plaintiff is asserting that the City is subject to one of the exceptions to the rule.

In opposition, the City argues that it did not create an affirmative act of negligence with respect to the roadway, and that Carlo was contracted to do the milling work. As for the claim that City failed to re-pave the roadway within a certain time after the milling was completed, City argues that the contract with Carlo had no provision requiring City to re-pave within a certain time.

As the City points out, section 7-201 (c) (2) expressly provides that no civil suit against The City or its agencies can be brought for negligence or personal injury involving an unsafe or defective condition on City's property unless a prior written notice of said condition is served on City. The parties agree that the lack of prior written notice can be waived if it is shown that a defective condition was the result of an affirmative act of negligence on the City's part. (*See San Marco v Village/Town of Mount Kisco*, 16 NY3d 111, 117 [2010]). Regarding this exception, an affirmative act is limited to work by the City that immediately results in the existence of a dangerous condition. (*See Oboler v City of New York*, 8 NY3d 888, 889 [2007]).

The court finds that there is no evidence that City committed an affirmative act of negligence in the subject area. All of the milling on the roadway was performed by Carlo, a contractor working for City prior to the accident. By employing Carlo as an independent contractor, City is not liable to plaintiff or other third parties for Carlo's acts or omissions during the course of Carlo's performance. (*See American Guar. & Liability Ins. Co. v Federico's Salon, Inc.*, 66 AD3d 521, 522 [1st Dept 2009]). As to whether City is liable for allegedly failing to re-pave the roadway in a timely manner, even if City was shown to be responsible, such action would not constitute an affirmative act of negligence. Thus, City cannot be sued in the absence of a written notice of a defective condition.

The court has already held that the roadway at the time of the accident was open and obvious in the absence of evidence indicating possible distractions to plaintiff. Both defendants are dismissed from this action. The matter as to whether Carlo has a contractual obligation to indemnify City in this action is therefore moot.

Accordingly, it is

ORDERED that defendant Carlo Lizza & Sons Paving, Inc.'s motion for summary judgment (Mot. Seq. No. 004) is granted and the complaint and cross claims are dismissed with costs and disbursements to said defendant as taxed by the Clerk upon a submission of an appropriate bill of costs; and it is further

ORDERED that defendant City of New York's motion for summary judgment (Mot. Seq. No. 005) is granted and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon a submission of an appropriate bill of costs; and it is further

ORDERED that defendant City of New York's cross claim against defendant Carlo is dismissed as academic; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

8/26/2019

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE