

<b>Reynolds v City of New York</b>
2020 NY Slip Op 30088(U)
January 2, 2020
Supreme Court, New York County
Docket Number: Index No. 150574/2015
Judge: James Edward d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM**

*Justice*

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**INDEX NO. 150574/2015**

JOSEPHINE REYNOLDS, HAROLD REYNOLDS,

06/26/2017,

Plaintiff,

07/07/2017,

**MOTION DATE 07/11/2017**

- v -

**MOTION SEQ. NO. 002 003 004**

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION, KS ENGINEERS,  
P.C., CARLO LIZZA & SONS PAVING, INC.

**DECISION + ORDER  
ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 71, 72, 74, 76, 77, 81, 83, 89, 94, 100

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 73, 78, 80, 84, 88, 90, 91, 93, 95, 96, 101

were read on this motion to/for

SUMMARY JUDGMENT / INDEMNIFICATION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 67, 68, 69, 70, 75, 79, 82, 85, 87, 92, 102

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is decided as follows:

Motion sequence nos. 002, 003 and 004 are consolidated for disposition herein.

In Motion Sequence No. 002, defendant KS Engineers, P.C. ("KS") moves pursuant to CPLR §3212 for summary judgment dismissing all claims filed against KS by plaintiff and also to dismiss all cross-claims against KS by defendants The City of New York and The New York City Department of Transportation (collectively, the "City") seeking contractual indemnification from co-defendant KS.

In Motion Sequence No. 003, defendant City moves for an order seeking contractual indemnification from defendants KS and Carlo Lizza (collectively, the "contractor defendants").

Although the City also mentions generally in its notice of motion that it also seeking dismissal of “each and every cause of action, along with the complaint in its entirety, and all cross-claims,” the City’s papers appear to address only the contractual indemnification claims.

In Motion Sequence No. 004, defendant Carlo Lizza & Sons Paving, Inc. (“Carlo Lizza”) moves pursuant to CPLR §3212 for summary judgment dismissing all claims filed against Carlo Lizza by plaintiff and also to dismiss all cross-claims against Carlo Lizza by defendant City seeking contractual indemnification from co-defendant Carlo Lizza.

Defendant KS’s and defendant Carlo Lizza’s motions for summary judgement dismissing plaintiff’s complaint is denied, but their motion to dismiss the City’s cross-claims for contractual indemnification is granted. Conversely, the City’s motion for an order of contractual indemnification against defendants KS and Carlo Lizza is denied.

This is an action for personal injuries allegedly sustained by the plaintiff on April 11,2014, when Plaintiff tripped and fell due to a "dangerous, hazardous, unsafe, uneven, defective, unleveled and broken condition of the roadway" as she crossed from the southwest to the northwest corner of East 9th Street and Second Avenue, in the County, City, and State of New York. The subject roadway was and is owned by the City.

On March 24 and 25, 2014, defendant Carlo Lizza, a contractor retained by the City, “milled” the subject roadway, which is a process in which the top layer of pavement is scraped and hauled away in preparation for repaving. After the milling, the road remains in a rough and uneven condition until the road is repaved.

Defendant KS was contracted by the City to perform inspection services during the milling operations and to submit reports on progress. KS also undertook certain site safety related responsibilities under the contract, including, *inter alia*, responsibilities related to the safety of

pedestrians and the general public. The City repaved the subject roadway "in-house" (i.e., did not use an outside paving contractor) on April 16 and 17, 2014.

The contractor defendants assert that they cannot be held liable for plaintiff's injuries because they had no duty of care to plaintiff as a result of the alleged completion of their contractual obligations to the City related to the milling project. Specifically, the contractor defendants point to the "Specifications" under the applicable contract, which states in pertinent part: "[i]mmediately after milling, the contractor shall construct temporary ramps...and, the contractor shall maintain said ramps until they have been removed by others...but not beyond a period of 15 days after completion of all his/her work within that city block....After this period of 15 days, maintenance on those ramps shall be the responsibility of others." It is not disputed that the "others" referred to in the contract is the City. It is also not disputed that the City did not repave the subject roadway until after the 15 days referred to in the aforementioned contract provision and that the accident occurred after the 15 days had elapsed. The contractor defendants assert that this provision absolves them of both liability to the plaintiff as well as precluding contractual indemnification obligations for the City.

While the applicable contract provisions make clear the extent of liability between and among the parties to the contract for claims under a contract theory between those parties (such as claims for contractual indemnification), it cannot serve to automatically preclude liability to the plaintiff for her injuries under a negligence theory against all of the defendants. The defendants created an alleged defect in the subject roadway that is purported to have caused the plaintiff to trip and fall causing injury. While there might be certain defenses available to the defendant contractors related to liability and/or damages, the contractor defendants are not entitled to judgment as a matter of law dismissing plaintiff's negligence claims against them. On the other

hand, based on the clear and unambiguous language of the applicable contract provisions, and the undisputed facts regarding the expiration of the 15 days, the contractor defendants cannot be held liable to the City for contractual indemnification.

ORDERED, that KS's Motion Seq. No. 002 seeking dismissal of plaintiff's claims is denied; and it is further

ORDERED, that KS's Motion Seq. No. 002 seeking dismissal of the City's cross-claims for contractual indemnification is granted; and it is further

ORDERED, that the City's Motion Seq. No. 003 seeking an order for contractual indemnification from defendants KS and Carlo Lizza is denied; and it is further

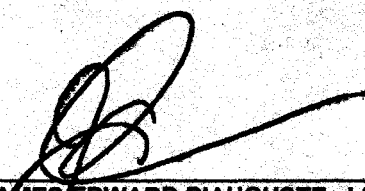
ORDERED, that Carlo Lizza's Motion Seq. No. 004 seeking dismissal of plaintiff's claims is denied.

ORDERED, that Carlo Lizza's Motion Seq. No. 004 seeking dismissal of the City's cross-claims for contractual indemnification is granted.

All other requests for relief not expressly addressed above have been considered and are denied.

This is the decision and order of this Court.

1/2/2020  
DATE

  
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JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE