SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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INDEX NO. 152084/2012

DIANA LEWIS,

Plaintiff,

MOTION DATE 12/12/2018, 12/12/2018

- v -

MOTION SEQ. NO. 007 008

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., VERIZON NEW YORK, INC., TRIUMPH CONSTRUCTION CORP., EMPIRE CITY SUBWAY COMPANY, (LIMITED), RESTANI CONSTRUCTION CORP., ROADWAY CONTRACTING INC.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229

were read on this motion to/for JUDGMENT – SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 251, 252, 253, 256, 257, 258

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this personal injury action, defendant Triumph Construction Corp. (Triumph) moves for summary judgment dismissing the complaint and all cross-claims against it (SEQ 007). Both the plaintiff and defendants Verizon New York, Inc. and Empire City Subway Company (Limited) (ECS), oppose the motion. By separate motion, filed seven months after the Note of Issue, the plaintiff moves for leave to file a late summary judgment motion as against ECS and, upon the granting of such leave, for summary judgment on the complaint as against ECS upon the granting of such leave (SEQ 008). ECS opposes the motion. Both motions are denied.

On October 11, 2012, while crossing the street at East 47th Street and Madison Avenue in Manhattan, the plaintiff tripped and fell over the exposed lip of a metal construction plate in the crosswalk. The metal construction plate belongs to ECS. However, at the time of the

accident, Triumph was excavating East 47th Street immediately adjacent to the crosswalk. As part of the excavation, Triumph erected a perimeter of barrel-shaped orange cones and yellow tape that extended into the crosswalk to protect Triumph's excavation site. Triumph also stationed a flagman at the excavation site and its surrounding areas, including the crosswalk, to guide pedestrians and vehicles as necessary, and used the crosswalk as a means for trucks to access its excavation site.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra. However, if the movant fails to meet its burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Liability for an injury alleged to have been caused by a dangerous condition is generally predicated on ownership, control, or a special use of the location where the dangerous condition exists. See Colon v Corp. Bldg. Groups, Inc., 116 AD3d 414 (1st Dept. 2014); see also Keane v 85-87 Mercer St. Assocs., Inc., 304 AD2d 327 (1st Dept. 2003). A special use involves "the installation of some object in the sidewalk or street or some variance in the construction thereof." Granville v City of New York, 211 AD2d 195, 197 (1st Dept. 1995); see also Weiskopf v City of New York, 5 AD3d 202 (1st Dept. 2004). A defendant is liable for negligence when it

makes special use of a street or sidewalk abutting its property by placing an object therein, which, in effect, directs a pedestrian to the dangerous condition that causes a plaintiff's injury. See Curtis v City of New York, 179 AD2d 432 (1st Dept. 1992).

Triumph has failed to demonstrate the absence of any triable issues of fact. Triumph included in its own moving papers the deposition testimony of the plaintiff who states multiple times that the cones placed in the crosswalk by Triumph funneled her toward the metal plate that allegedly caused her to fall. In support of its motion, Triumph also submits the affidavit of John Vittorioso, Triumph's superintendent assigned to supervise the excavation. In his affidavit, Vittorioso concedes that the cones and tape protruded into the crosswalk. He merely denies that the placement of the cones were such that they directed her path toward the dangerous condition. The conflicting testimony of the plaintiff and the sworn statements of Vittorioso raise a triable issue of fact as to whether Triumph's placement of cones and tape constituted a special use of the crosswalk that directed the plaintiff to the alleged dangerous condition.

Additionally, Triumph's papers fail to eliminate a triable issue of fact as to whether Triumph created the dangerous condition. See Ortiz v Nunez; 32 AD3d 759 (1st Dept. 2006) [defendant performing work near public thoroughfare has nondelegable duty to avoid creating conditions dangerous to users of thoroughfare); see also Curtis v City of New York, supra. Triumph relies upon the deposition testimony of ECS's supervisor, Denis Donovan who testified that the metal plate was originally ramped with asphalt on all four sides to prevent a tripping hazard. Donovan further testified that the trucks servicing Triumph's excavation site were capable of causing the asphalt ramping to erode from the metal plate and create the alleged tripping hazard at issue in this action. The plaintiff also submits the deposition testimony of Vittorioso in which he states that trucks consistently serviced the excavation site. Whether or not Triumph's trucks caused the erosion of the asphalt ramping and created the dangerous condition is another issue of fact that must be resolved at trial. See Ortiz v Nunez, supra; Breger v City of New York,179 AD2d 432 (1st Dept. 1992).

The plaintiff's motion for leave to file a late summary judgment motion is denied. CPLR 3212(a) provides that "[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion

may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." This courts' Part Rules require any summary judgment motion to be made within 60 days from the Note of Issue filing. In status conference order dated June 29, 2017, this court set a final Note of Issue date as September 15, 2017. The plaintiff filed the Note of Issue on September 7, 2017. Thus, any summary judgment motion had to be filed on or about November 6, 2017. Defendant Triumph timely moved for summary judgment. However, the plaintiff did not move for summary judgment until July 16, 2018, more than ten months after the Note of Issue was filed. Even under the 120-day time limit in CPLR 3212(a), the plaintiff's motion was extremely untimely.

A court may only grant leave to serve a late summary judgment where the movant demonstrates "good cause shown" independent of the underlying merits of the summary judgment motion. In other words, the movant must demonstrate good cause as to why it was not feasible to move for summary judgment prior to the lapse of the period fixed by CPLR 3212(a) or by the court. See Brill v City of New York, 2 NY3d 648 (2004). The plaintiff claims that her good cause for filing this late motion is that on April 3, 2018 the Court of Appeals clarified that a personal injury plaintiff no longer bears the burden of establishing the absence of her own comparative negligence when successfully moving for summary judgment, thereby allowing her to make the motion for the first time. See Rodriguez v City of New York, 31 NY3d 312 (2018). However, the plaintiff offers no good cause for the additional three months she waited following the Court of Appeals decision in Rodriguez. Thus, the motion is still untimely.

Since that portion of the plaintiff's motion which sought leave to file a late summary judgment is denied, the court need not reach the merits of the summary judgment motion.

Accordingly, it is,

ORDERED that the motion of defendant Triumph Construction Corp. for summary judgment dismissing the complaint as against it and the cross-claims of Empire City Subway Company, (Limited) and Verizon New York Inc. (MOT SEQ 007) is denied; and it is further;

ORDERED the motion of the plaintiff, Diana Lewis, for leave to file a late summary judgment motion against Empire City Subway Company (MOT SEQ 008), is denied, and it is further,

ORDERED that the parties shall appear in the Early Settlement Conference Part on May 5, 2020, at 10:00 a.m. as previously scheduled.

This constitutes the Decision and Order of the court.

3/20/2020
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE