

Camelio v Shady Glen Owners' Corp.

2020 NY Slip Op 34813(U)

October 22, 2020

Supreme Court, Westchester County

Docket Number: Index No. 60248/2018E

Judge: James W. Hubert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
KATHLEEN CAMELIO and JULIUS CAMELIO,

Plaintiffs,

-against-

SHADY GLEN OWNERS' CORP., LIBRETT ESTATE
GROUP INC., and DEBARTOLO LANDSCAPING, INC.,

Defendants.

-----X
DEBARTOLO LANDSCAPING, INC.,

Third-Party Plaintiff,

-against-

CITY of NEW ROCHELLE,

Third-Party Defendant.
-----X

Hubert, J.S.C.

Before the Court is the action commenced by the Plaintiffs, Kathleen Camelio and Julius Camelio (Camelios), to recover damages for personal injuries alleged to have been sustained on June 12, 2018 when Ms. Camelio's foot was caught by a raised lip (the alleged defect) causing her to trip and fall in a crosswalk adjoining a private roadway identified as Shady Glen Court located in the City of New Rochelle (CNR). Co-plaintiff Julius Camelio, Ms. Camelio's husband, seeks recovery for loss of his wife's care, comfort, consortium and services.

It is alleged in the complaint that the roadway and crosswalk where the accident occurred was leased or privately owned by the Defendants Shady Glen Owners' Corp. (Shady Glen) and

Librett Estate Group Inc. (Librett). It is alleged that they were responsible for the upkeep of both roadway and crosswalk.

Prior to the accident, on or about November of 2015, the Defendant/Third Party DeBartolo Landscaping, Inc. (DeBartolo) was contractually retained by Shady Glen and Librett to repair/resurface the roadway in question. In addition, DeBartolo was tasked with removing snow and ice in the winter months leading up to the year of the alleged accident.

Starting May of 2020, a series of motions and cross-motions for summary judgment, pursuant to CPLR §3212, were filed by the various litigants. Motion Seq. No. 1 was filed by the Defendant and Third-Party Plaintiff DeBartolo Landscaping, Inc. (DeBartolo) seeking an order and judgment dismissing Plaintiffs' complaint and unspecified cross-claims. Motion Seq. No. 2 was filed by the Shady Glen/Librett Defendants seeking an order and judgment dismissing Plaintiffs' complaint as well as unspecified cross-claims and counterclaims. Motion Seq. No. 3 was interposed by Third-Party Defendant City of New Rochelle (CNR) seeking dismissal of Third-Party Plaintiff DeBartolo's motion and complaint as well as unspecified counter claims against CNR. Motion Seq. No. 4 is a cross-motion by Plaintiffs Kathleen Camelio and Julius Camelio (Camelios) seeking, *inter alia*, an order and judgment granting summary judgment against DeBartolo. Motion Seq. No. 5 is a cross-motion by the Plaintiffs seeking an order and judgment against the Shady Glen/Librett Defendants as well as costs and sanctions. Motion Seq. No. 6 is a cross-motion filed by Defendant and Third-Party Plaintiff DeBartolo seeking an order and judgment granting summary judgment against the Plaintiffs and dismissal of unspecified cross-claims.

The standard for granting summary judgment is well established. The moving party must

make a *prima facie* showing of entitlement to judgment as a matter of law. To do so, sufficient admissible evidence, demonstrating the absence of any material issues of fact, must be tendered. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Competing contentions of the parties must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 A.D.3d 742,763, 27 N.Y.S.2d 468 (2016). If the moving party meets its burden, the burden shifts to the non-moving party to establish, by admissible evidence, that there are disputed issues of material fact for trial. CPLR §3212(b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or mere contentions. Nevertheless, if the moving party fails to sustain its burden, the Court need not address the adequacy or sufficiency of the opposing party's proof. *Grant v. 132 W. 125 Co., LLC*, 180 A.D.3d 1005, 120 N.Y.S.3D 345 (2d Dep't 2020). Furthermore, to the extent that the moving party relies upon weight of evidence considerations, it is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact. Rather it is the task of the Court to identify material triable issues of fact, or point to the lack thereof. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 505, 942 N.Y.S.2d 13 (2012).

In a trip and fall case, whether a defendant had notice of a dangerous condition, actual or constructive, or had created the dangerous condition, the issue must be resolved by the tender of admissible proofs. *See, Coelho v. S&A Neocronon, Inc.*, 178 A.D.3d 662, 115 N.Y.S.3d 91 (2d Dep't 2019); *Pryzywalney v. New York Tr. Auth.*, 69 A.D.3d 598, 892 N.Y.S.2d 181 (2d Dep't 2010); *Shehata v. City of New York*, 128 A.D.3d 944, 946, 10 N.Y.S.3d 265 (2d Dep't 2015). In a premises liability case, a defendant real property owner, or a party in possession or control of

real property, who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. *Gani v. Ave. R Sephardic Congregation*, 159 A.D.3d 873, 72 N.Y.S.3d 561 (2d Dep't 2018). A defendant has constructive notice of a dangerous condition when it is visible and apparent, and has existed for a sufficient length of time prior to the accident to permit the defendant (or its employees) the opportunity to discover and correct it. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." *Pryzywalney, supra* at 598. Mere reference to general practices, without any evidence about specific cleaning or inspection of the area in question is insufficient to establish lack of constructive notice. *See, Butts v. SJF, LLC*, 171 A.D.3d 688, 689 97 N.Y.S.3d 219 (2d Dep't 2019).

On the question of causation in a slip and fall case, a defendant may establish its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the injured party cannot identify the cause of his or her fall. However, should the moving defendant fail to adequately establish, *prima facie*, that the plaintiff could not identify the cause of his or her fall, the right to summary judgment against the plaintiff is not established. *Butts, supra*.

CNR's Motion for Summary Judgment (Seq. No. 3)

The Defendant City of New Rochelle was brought into the case on or about July 24, 2019, by DeBartolo's interpleader complaint under CPLR §3011. In its complaint, DeBartolo alleges that some time prior to June 12, 2018, CNR performed paving work at or near the crosswalk at issue. The complaint does not specifically assign liability to CNR, but nevertheless seeks

common law indemnity from CNR in the event liability is proven against DeBartolo.

CNR's answer to DeBartolo's third-party complaint denies DeBartolo's allegations, and asserts affirmative defenses under New Rochelle City Charter Article XII, section 127A, which section prevents CNR from being held liable for the Plaintiff's alleged injuries due to DeBartolo's failure to provide proof or existence of prior written notice.

On May 20, 2020, CNR moved for summary judgment against the Third-Party Plaintiff DeBartolo (Seq. No. 3). CNR seeks dismissal of DeBartolo's third-party complaint pursuant to CNR Charter Article XII, section 127A.

Scott Pickup, the Commissioner of Public Works for CNR, was deposed on January 13, 2020. He testified that he held that position since 2015. He further stated that he first learned about the June 12, 2018 accident when a FOIL request was made to CNR. In response, he personally made a search for street opening permits, utility cuts, excavations, construction, pot-hole repair permits and temporary patch permits within the location of the accident. No permits were found (deposition at pp. 54-56). Mr. Pickup also personally searched for any prior Article XII written notices and found none.

During questioning, he was shown a marked photograph of the Shady Glen roadway area at issue, and could see what appeared to be paving work done there. However, it was not the kind of work performed by CNR, and did not comport with CNR standards (deposition at p. 58). It "meandered" and was not a "milling pave" which would have had a "sharp delineated line." It was not "sealed" along the edge of the pavement and "elevation change" could be seen along the edge (deposition at pp. 54-56). Moreover, Mr. Pickup's search revealed no records of permits for the paving shown in the photograph. In all, he concluded that the work shown did not comport,

and would not have comported, with CNR contract standards, and was not performed by CNR.

The New Rochelle City Charter Article XII, section 127A, in relevant terms, clearly states that: “No civil action shall be maintained against the city for damages or injuries to a person . . . sustained in consequence of any street, . . . sidewalk or crosswalk . . . being defective, out of repair, unsafe, dangerous or obstructed . . . unless written notice thereof, specifying the particular place, had actually been given to the Commissioner of Public Works prior to the happening of the event . . . and there was a failure or neglect by the city to repair or remove the defect, danger or obstruction . . . within a reasonable time after receipt of notice relating to it.” *Id. See, also, Caramanica v. City of New Rochelle*, 268 A.D.2d 496, 702 N.Y.S.2d 351 (2d Dep’t 2000); *McCarthy v. City of White Plains*, 54 A.D.3d 828, 830, 863 N.Y.S.2d 500 (2d Dep’t 2008)(to the extent that the plaintiff contends that the City had actual notice of the alleged sidewalk defect due to the existence of the 2004 notice, neither actual notice (*see, Granderson v. City of White Plains*, 29 AD3d at 740; *Cename v. Town of Smithtown*, 303 AD2d 351, 352 [2003]) nor constructive notice (*see Amabile v. City of Buffalo*, 93 NY2d 471, 475-476 [1999]) obviate the need to comply with the prior written notice statute.

Upon the proofs submitted in support of its motion, CNR has made a *prima facie* showing of entitlement to summary judgment. Accordingly, the burden shifts to the DeBartolo Defendant to set forth admissible evidence establishing that there are disputed issues of material fact for trial.

There is no evidence that Third-Party Plaintiff DeBartolo (or the Camelio Plaintiffs) gave written notice to CNA in compliance with City Charter Article XII, section 127A. On May 21, 2020, DeBartolo filed a reply to counterclaim of CNR (NYSCEF Doc. No. 123) which states

only that it denies every allegation of CNR's counterclaim and demands judgment dismissing same. No proofs by DeBartolo in opposition to CNR's motion to dismiss is anywhere filed.

At his first deposition on June 24, 2019, John DeBartolo, the Company owner, gave testimony regarding the accident on June 12, 2018. He was asked whether he had ever seen CNR snow plows break up the road at issue, at any time prior to the accident. He responded that he had seen them plow there but had never gotten out of his car to see whether there was damage (deposition at pp. 52-53).

Mr. DeBartolo was further asked if his company plowed Shady Glen Court in the winter months. He responded affirmatively.

A second deposition of DeBartolo was taken on January 10, 2020. Counsel for CNR attended and questioned Mr. DeBartolo. As in the prior deposition, he was asked whether he ever saw the City of New Rochelle cause damage to the crosswalk area prior to the accident. Mr. DeBartolo replied no (deposition, pp. 15-16).

Mr. DeBartolo was also questioned regarding CNR work to install wheelchair ramps between the street curb and the street in the area where the accident occurred. The dates of the work were never established, though he stated he believed the ramps "were done last year" (2019). When asked if he ever observed any damage done to the crosswalk by the installation work, he stated he didn't look there (deposition at pp. 19-20).

Mr. DeBartolo was also asked about snow plowing by CNR in the area where the accident occurred. The dates of the plowing were never established. Mr. DeBartolo stated he had never seen actual damage caused by any of the plow trucks (deposition at p. 23).

Mr. DeBartolo was asked if he was aware of any person who notified CNR in writing as

to the condition alleged to have caused the accident. Mr. DeBartolo responded “no” (deposition at p. 23).

Later in the deposition, Mr. DeBartolo was again asked if prior to 2018 he had ever observed a city vehicle or equipment damage the crosswalk area. He again responded no (deposition at p.33). Mr. DeBartolo was again asked if he knew of anyone who had ever made a complaint about damage to the crosswalk by city vehicles. Again he answered no (deposition at p. 34).

Given Third-Party Defendant CNR’s *prima facie* showing of entitlement summary judgment on its motion, given the evidence elicited in response by the non-moving Third-Party Plaintiff DeBartolo during his depositions, given that the burden to set forth admissible evidence showing disputed issues of material fact for trial, had shifted to the Third-Party Plaintiff DeBartolo, given that the Third-Party Plaintiff DeBartolo filed no opposition to the motion of Third-Party Defendant CNR, the Court finds that dismissal of DeBartolo’s Third-Party action against CNR is warranted.

**DeBartolo’s Motion and Plaintiffs’ Crossmotion for Summary Judgment
(Seq. Nos. 1 & 4)**

The DeBartolo Motion

Motion sequence No. 1, filed on May 4, 2020 by DeBartolo, seeks summary judgment against the Plaintiffs and dismissal of the Plaintiffs’ complaint as against DeBartolo. The Defendant’s motion carries with it the burden of demonstrating the absence of any material issues of fact, not simple assertions thereof. See, *Zuckerman, supra* at 560. In furtherance of its motion, the DeBartolo Defendant cites cases and rulings by the courts that, as a matter of law (it

is claimed), absolve it of liability.

As stated previously, the case at bar alleges a trip and fall injury sustained by Plaintiff Kathleen Camelio on June 12, 2018. The cause of the injury is attributed to a defect in an area of the private walkway leased or owned by the Shady Glen/Librett Defendants. The complaint alleges that the defect was created as a result of resurfacing of the pavement by Defendant DeBartolo in November of 2015.

The deposition of John DeBartolo, owner of DeBartolo Landscaping, Inc., establishes that at the time of the resurfacing, Mr. DeBartolo was a resident of Shady Glen and was a member of its Board of Directors (the Board) serving as treasurer (deposition at p.11).

His company (DeBartolo Landscaping, Inc.) was hired by the Board to resurface part of the road called Shady Glen Court.¹ The job was to be done by applying a layer of asphalt over the roadway, rather than “milling” (or removing) the existing asphalt and laying asphalt over the milled area (deposition at pp. 13-15). The work was completed in two days. Mr. DeBartolo was part of the active work crew and operated the roller machine.

The asphalt used to resurface was not “sealed” after it was rolled out. Mr. DeBartolo testified that he advised the Board that sealing and periodic resealing of the asphalt would extend its life. However, this was not approved by the Board (deposition at p.23-24). Thus, on the evidence adduced, DeBartolo conducted no additional servicing of the Shady Glen Court road, other than snow removal, between 2015 and June 12, 2018, the date of the accident.

At his deposition, Mr. DeBartolo was shown photographs of the area where the accident allegedly happened (Plaintiff's Ex. 3) and was asked if the pavement shown in the picture looked

¹ Mr. DeBartolo participated in the vote by the Board on the contract (deposition at p.16).

higher on the right side than the pavement to the left. He responded affirmatively but said it was very limited, “maybe an eighth of an inch” (deposition at pp. 39-40).

Relying heavily on the Court of Appeals case, *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002), the moving Defendant DeBartolo asserts that the evidence shows DeBartolo owed no duty to the Plaintiff, and did not “launch a force or instrument of harm.” DeBartolo further asserts that the Plaintiff “did not rely on DeBartolo’s performance, and that “the verbal contract between DeBartolo and Shady Glen did not entirely displace the Shady Glen. . . duty to maintain the premises safely” (DeBartolo memorandum of law, p. 3).

The Court of Appeals, in *Espinal*, *supra* at 139, readily acknowledged that “. . . a contractual obligation, standing alone, will generally not give rise to tort liability to a third party.” *Id.* It is undisputed that DeBartolo was hired as an independent contractor, despite being a resident at Shady Glen and treasurer on the Board of Directors (*see*, Shady Glen/Librett motion for summary judgment, Seq. No. 2, affirmation in support at ¶¶ 51-52). The pavement work contracted between Shady Glen/Librett and DeBartolo (the Contract) was a one-shot agreement and did not include or direct periodic maintenance by DeBartolo after completion of the resurfacing.²

There is no allegation that the work DeBartolo performed failed to meet specifications in the Contract. He was hired to do the work in the manner done so that the cost to Shady

² In his deposition testimony Mr. DeBartolo stated his contract with Shady Glen/Librett was oral. However, an invoice outlining the work to be done and materials used was submitted by the Defendant as Exhibit O (deposition at pp. 13-14, NYSCEF Doc. No. 67). No signatures appear on the document.

Glen/Librett would be lower than what “milling” would have cost (deposition at pp. 13-14, 16). According to DeBartolo’s deposition testimony, he advised the Board, more than once, that sealing and periodic resealing of the asphalt would extend its life. The Board did not agree to do this, and as a result, DeBartolo conducted no additional servicing of the roadway after 2015, apart from snow removal in the winter months (deposition at pp. 23-24). Thus, it cannot be said that there was a maintenance agreement requiring DeBartolo to inspect and maintain the resurfaced roadway over time; an agreement which might have induced “detrimental reliance [by the Plaintiff] on continued performance.” *Espinal, supra* at 139, citing *Eaves Brooks Costume Co. V.Y.B.H. Realty Corp.*, 76 N.Y.2d 220 at 226.

What must next be considered is whether the work performed by DeBartolo in 2015 “launch[ed] a force or instrument of harm.” *Espinal, supra* at 141. In this context, the question is whether DeBartolo undertook to render services and then negligently created or exacerbated a dangerous condition. *Id.* Plaintiffs argue that the resurfacing of the roadway, in the manner described by DeBartolo, created a hazardous condition. Thus, a contractor who creates or exacerbates a harmful condition may generally be said to have launched it. *Espinal, supra* at 142.

The problem here is that the Plaintiffs’ argument overlooks the issue of contractual obligations and limitations, as discussed by this Court. There is no dispute that DeBartolo was contractually retained to perform the work in question. The scope and manner of the work done by DeBartolo was the product of a contractual agreement between DeBartolo and Shady Glen/Librett. It was not the product of DeBartolo’s own initiative. The choice of resurfacing, instead of milling, was the product of an economic decision by Shady Glen/Librett not to mill,

but to resurface and save money.

Jason Pitingaro, a professional engineer retained by Shady Glen/Librett, states in his affidavit that based on his inspection of the accident area and review of photographs taken of the area at issue shortly after the accident, milling should have been done. The milling would have eliminated the one inch lip, ensured smooth transition from the old asphalt to the new, and would give maximum compression to the milled area so that vehicular traffic would not create further compression.

Ironically, however, Mr. Pitingaro notes that the one inch lip attributable to the resurfacing performed by DeBartolo, and identified as the accident's causal defect, ". . . is within the Department of Transportation's standard for the edge of a road wearing surface overlay" (affd., at ¶ 10). Moreover, the Plaintiffs' claim of violation of the Code of the City of New Rochelle, Article III, sections 281.44 is misplaced. The code cited by the Plaintiffs, Pitingaro notes, ". . . pertains to resurfacing of street openings . . . and [makes] no reference . . . to paving of private roadways (affd., at ¶ 11).

In his affidavit, Mr. Pitingaro states that "[t]he cost of the project has no bearing on whether the work was performed according to industry standards, and any costs included in [DeBartolo's] proposal should have been price based on compliance with industry standards" (Affd. at ¶15). This assertion misses the issue before the Court. The choice by Shady Glen/Librett of resurfacing, instead of milling, was the product of an economic decision by Shady Glen/Librett not to mill. Shady Glen elected to resurface and save money. Industry standards and costs do not apply in the motion before the Court. As stated in Mr. Pitingaro's affidavit, "DeBartolo was retained (by Shady Glen/Librett) to resurface . . . rather than repave."

Thus, the motion before the Court is about contractual obligation and limitations imposed upon the contractor despite his advice to the Board that sealing and periodic resealing of the asphalt would extend its life. The Board elected not to follow his advise and undertook no maintenance of the roadway over the three years leading up to the accident. Shady Glen/Librett's choice does not trigger claims of industry standard malpractice on the part of DeBartolo.

Finally, Pitingaro's ultimate conclusion (to a reasonable degree of engineering certainty) is that the seam created by DeBartolo was not properly done and caused the seam to wear unevenly over time. However, he further concludes that the height differential of the feathered edge was no greater than an inch and is not substantial in the course of walking (as was the case herein)(affd., at ¶ 13).

DeBartolo does not dispute that the resurfacing they did degraded over time faster than milling and repaving would have done. Milling, however, would have cost more. Mr. Pitingaro pegged the increase in the range of \$2,000-\$3,000 dollars (affd., at ¶ 8). In the absence of Shady Glen/Librett's willingness to spend additional money on the project, DeBartolo was not in a position to unilaterally change the terms of their agreement, even if he believed that milling and repavement would have been a better choice than resurfacing.

DeBartolo performed the work it was contracted to do: resurfacing of an area of Shady Glen roadway situated south and east of the designated crosswalk. There is no evidence that resurfacing itself is inherently dangerous simply because it is subject to faster degradation than milling. Thus, based on the forgoing proof, DeBartolo's use of resurfacing, in lieu of milling, cannot properly be regarded as so dangerous or negligent that its use launched a force or instrument of harm.

The remaining question is whether DeBartolo did or did not owe a duty to the Plaintiff, who was not an express beneficiary of the contract between DeBartolo and Shady Glen/Librett. Again, the Court of Appeals and appellate courts have considered this issue on many occasions.

As a general rule, the appellate courts have declined to impose tort liability in favor of a third-party against a party acting within its contractual obligation. As stated in *Espinal, supra* at 139, courts must be aware that when they consider imposing liability upon a contracting party, in circumstances where non-contracting third-parties are injured, a contracting party could be rendered liable to indefinite numbers of potential third-party beneficiaries – an undesired result as a matter of public policy. *Id.*

But the courts have also recognized that under some circumstances, a party who enters into a contract may thereby assume a duty of care to persons outside of the contract. *Id.* Thus, in *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 576, 611 N.Y.S.2d 817 (1994), the court found, and imposed, a duty upon the defendant as to the non-contracting injured plaintiff. The defendant's maintenance duties under its contract with the hospital (which required the defendant to inspect, repair and maintain the facilities entirely), were so broad, that the defendant was found to owe a duty to the non-contracting plaintiff, who the court held was reasonably within the zone and contemplation of the intended safety services. *Supra* at 589 (the functions to be performed by Servicemaster were not directed to a faceless or unlimited universe of persons but to a known and identifiable group--hospital employees, patients and visitors).

Compared to the duties found to have been imposed upon Servicemaster by the Court of Appeals in *Palka, supra*, DeBartolo's resurfacing obligations in its contract with Shady Glen/Librett were not broad at all. Unlike Servicemaster, DeBartolo had no duty to insect, repair

and maintain the area resurfaced, much less the entire Shady Glen Court roadway.

Unlike the third-party, non-contracted hospital employee plaintiff in *Palka*, the persons using the Shady Glen Court roadway and the crosswalk in the instant were the general public. Use of the roadway was not confined to a known, identifiable group, such as Shady Glen residents. The roadway's use included virtually anyone who might walk on the Shady Glen roadway or the adjoining main street side walk (Pelham Road). Its use would encompass pedestrian traffic to and from Shady Glen as well as pedestrians moving to and from the shopping center immediately north and east of the Shady Glen Court roadway. It encompassed neighboring residents, visitors or any pedestrians traversing the Pelham Road sidewalk and the crosswalk at its intersection with Shady Glen Court. Indeed, the Plaintiff in the instant matter was not walking on Shady Glen property at any time prior to the accident. She did not live at Shady Glen. Her route of travel took her along the Pelham Road sidewalk and into the crosswalk that led to the shopping center. Imposition by this Court of a duty upon DeBartolo, that would expand his contractual obligations and extend the reach of the terms therein to the general public, would be an unreasonable application of the exception carved out in *Palka, supra*.

As stated previously, ongoing maintenance of the road by DeBartolo was neither contemplated nor agreed to by the contracting parties. The foreseeability of an accident three years later, based on resurfacing rather than milling and repaving in November of 2015, would be speculative at best and an unreasonable application of the *Palka* exception.

Accordingly, the Court finds that sufficient admissible evidence set forth by the Defendant DeBartolo, demonstrating the absence of any material issues of fact, have been tendered and *prima facie* right to judgment has been established. The burden thus shifts to the

Plaintiffs to establish, by admissible evidence, disputed issues of material fact for trial. CPLR §3212(b); *Zuckerman v. New York, supra*. The Plaintiffs must produce such admissible evidence in the record (showing the existence of material issues of fact) and may not rely on conclusory statements or mere contentions.

Apart from acknowledging that DeBartolo was hired by Shady Glen to perform the resurfacing work in question, and that he performed it, the Plaintiffs' affirmation in opposition (NYSCEF Do. No. 126), does not address the issue of contractual obligation as raised in the Defendant's motion. DeBartolo has set forth *prima facie* evidence that (1) it owed no duty or obligation to Mrs. Camelio as a third-party beneficiary under the contractual terms; (2) it did not launch a force or instrument of harm; (3) the terms of the contract did not impose on DeBartolo a duty as to the non-contracting injured plaintiff; and (4) the contract between DeBartolo and Shady Glen did not displace Shady Glen/Librett's duty to maintain the premises safely. Accordingly, the DeBartolo Defendant's motion for summary judgment is granted.

The Plaintiffs' Cross-motion

Motion Seq. 4 is a cross-motion by the Plaintiffs for summary judgment seeking judgment in the Plaintiffs' favor against DeBartolo on the question of liability. Needless to say, the Plaintiffs' motion carries with it the burden of demonstrating the absence of any material issues of fact, not simple assertions thereof. See, *Zuckerman, supra* at 560.

In their cross-motion, the Plaintiffs contend that by the filing of a motion for summary judgment, the DeBartolo Defendants, have, "per force," conceded that there are no issues of fact. If so, then presumptively the Plaintiff is conceding the facts discussed by the Court in relationship to the issues raised in the DeBartolo motion for summary judgment. Presumptively,

this would include Plaintiffs' acceptance of the testimony in Mr. Pitingaro's affidavit, as well as Pitingaro's opinions and conclusions on the issue of causation (height differential of the feathered edge was no greater than an inch and is not substantial in the course of walking [as was the case herein]). (Pitingaro affd., at ¶ 13.)

In any event, the proof offered by the Plaintiffs in direct support of the cross-motion comes from the deposition testimony of six witnesses: the Defendant John DeBartolo, the Plaintiffs Kathleen Camelio and Julius Camelio, Lawrence Crovatto, Robert Crovatto, and Scott Pickup.

Mrs. Camelio testified that she was caused to fall in the crosswalk spanning the width of the Shady Glen roadway which, at its terminus, linked with the Pelham Road street and its sidewalks by perpendicular alignment. She stated she stepped on uneven pavement (described as a lip) which caused her right foot to turn inward to her left. She testified the lip was approximately two inches higher than the adjacent crosswalk and the differential caused her foot to incline. She fell as a result.

Plaintiff Julius Camelio did not observe the actual fall of Mrs. Camelio. She was seated on the ground and was being assisted by a man unfamiliar to him when he first saw her. His knowledge about where the fall occurred, and the location of the mechanism of the fall, were not acquired through first hand observation. Mr. Camelio's deposition testimony regarding these questions of fact was derived from the statements of his wife, as well as from photographs taken by him and others at various times after the accident.

Much of Mr. Camelio's testimony was opinion evidence. For example, he testified that "the job on Shady Glen Court ended with a height differential because the job was not finished

properly, because they didn't put in 'a key'."³

Mr. Camelio also testified that he saw the completed resurfacing work, but could not remember how long before the accident the resurfacing was done. He ultimately stated it was a year or year and a half.

Robert Crovatto, the son of Shady Glen's Superintendent Lawrence Crovatto, testified that he didn't remember anything about the Plaintiff's accident, other than seeing her sitting on the ground and helping her up. He remembered that she was lying within the crosswalk with her feet toward the street and sidewalk.

Robert's father, Lawrence Crovatto, testified as to the extent of the resurfacing on Shady Glen Court. He testified that it extended to the cross-walk at Pelham Road (deposition at pp.10-11). He testified that DeBartolo Landscaping was hired to do the resurfacing. Mr. Crovatto could not remember exactly when the work was done, but stated it was sometime in 2017-2018. He was shown a Google Map photo, allegedly taken in 2016, but stated he could not recognize the area. He further stated he saw no deterioration in the pavement area at issue. Finally, he testified that the roadway at issue was maintained by himself and his son Robert.

At his deposition, Scott Pickup, CNR's Commissioner of Public Works, was also asked questions regarding the Google Map photo referenced as Exhibit A. He was asked questions regarding the "line" in the roadway that ran along the crosswalk. He stated that the paving done, as depicted, was not done in a straight line. He opined that it was not a "milling pave," and did not have a finished edge. He further stated he could not find a permit for the job. When asked to

³ Mr. Camelio testified that prior to retirement, he had been in the business of resurfacing for 28 years, some of which he was Bronx Borough Supervisor of NYC Department of Transportation.

look at other photos of the area near where the Plaintiff fell, Mr. Pickup testified that the paving job caused a height differential and posed a hazard for pedestrians.

The remaining evidence presented by the Plaintiffs was the deposition testimony of John DeBartolo. His testimony has previously been discussed extensively. In relevant part, DeBartolo testified he did not do a repave of the Shady Glen Court roadway. He resurfaced it applying tar and asphalt on top of the existing roadway. It was not "milled." Mr. DeBartolo readily admitted that the right way to do the job was to remove the old pavement (mill) so that the repavement would be perfectly flat. However, doing the job that way would have raised the price to \$400,000 and Shady Glen/Librett did not want to spend that amount of money. Finally, he testified that the new asphalt was compressed to one and a half inches, which would leave a one and a half inch differential, and at the end of the resurface testified there was, indeed, a one inch differential.

The majority of what the Plaintiffs present in their affirmation in support of their cross-motion for summary judgment constitute issues of fact, not admissible material facts demonstrating the absence of issues of fact which would entitle the Plaintiffs to summary judgment. For example, when was the resurfacing done?

John DeBartolo testified it occurred in November of 2015. Plaintiff Julius Camelio could not remember when the work was done, but testified he saw it being done. He stated that the resurfacing work ended with a height differential of two or more inches, which caused the accident. When pressed, Mr. Camelio estimated the resurfacing work was done a year (or year and a half) before the accident, which would have been two years (or year and a half) after the resurfacing date as given by DeBartolo.

Mr. DeBartolo testified that the resurfacing ended in 2015 with a height differential of one-eighth of an inch. He later amended that to one inch. He testified that while milling and repaving would have been the better way to go, the added costs were not acceptable to Shady Glen/Librett, so milling and repaving could not be done.

Neither Lawrence Crovatto, nor Robert Crovatto, could recall when the resurfacing was done. When shown photographs, Lawrence Crovatto testified that he could not recognize the areas in pictures shown to him. However, when asked if he saw any deterioration in the pavement areas depicted, he stated he could not.

These are all material facts and these are also disputed facts. Was the defect alleged to have been created by DeBartolo's work created in November of 2015? Did the defect occur later? Was the defect created at the time of the resurfacing, or did it evolve from wear and tear over the course of the ensuing years? How large or high was the lip (two inches, one inch, one eighth of an inch)? Was it a trivial defect? Only estimates were offered. No one actually measured it. See, *Simos v. Vic-Armen Realty, LLC*, 161 A.D.3d 1023, 1024-25, 76 N.Y.S.3d 610 (2d Dep't 2016), citing *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79, 19 N.Y.S.3d 802 (2015)(expert's affidavit, and the defendants' photographs and video recording taken more than five years after the plaintiff's fall, were insufficient to establish that no actionable defect existed at the time of the accident).

Many of the photographs used to establish certain facts regarding the alleged accident causing defect were not taken by any of the testifying witnesses who actually viewed the scene, or were present at the scene at any relevant time. Many of the witnesses who were shown the photographs had difficulty at their depositions pinpointing what was pictured. They could not

reliably determine the dimensions of the alleged defect.⁴ So while the photographs may be said to have shown the defect the Plaintiff tripped on, the photographs do not necessary pinpoint when, in time, the defect was created and how much of a hazard it represented—an important issue pertaining to questions of notice and danger.

A credibility determination by a fact finder at trial may resolve these (and other) factual differences and disputes. However, such a determination cannot be made by the Court in the course of deciding a motion for summary judgment. As stated previously, in resolving a motion for summary judgment, competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). On the Plaintiffs' cross-motion, DeBartolo is the non-moving party.

Furthermore, to the extent that the Plaintiffs rely upon weight of evidence considerations, it is not the function of a court, in deciding a summary judgment motion, to make credibility determinations or findings of fact. Rather, it is the task of the Court to identify material, triable issues of fact, or point to the lack thereof. *Vega v. Restani Const. Corp*, 18 N.Y.3d 499, 505, 942 N.Y.S.2d 13 (2012).

Accordingly, the Court finds that on the Plaintiffs' cross-motion for summary judgment, the Plaintiffs fail to make a *prima facie* showing of entitlement to judgment as a matter of law against Defendant DeBartolo. The Plaintiffs' own submissions raise triable issues of fact. See, *Cartolano v. Cornwell Ave. Elementary Sch.*, 183 A.D.3d 689, 121 N.Y.S.3d 895 (2d Dep't

⁴ It must be noted that many of the photographs used during discovery and depositions were acquired from Google Maps. The photographs have dates but it is not clear what the dates represent--the date the picture was taken by Google, or the date when it became available from the internet.

2020). Inasmuch as the Plaintiffs have not met their *prima facie* burden, the Court does not address the sufficiency of the Defendant's opposition papers. *Grant v. 132 W. 125 Co., LLC*, 180 A.D.3d 1005, 120 N.Y.S.3D 345 (2d Dep't 2020). Thus, the Plaintiffs' cross-motion for summary judgment against the Defendant DeBartolo is denied.

Shady Glen/Librett Motion and Plaintiffs' Cross-motion for Summary Judgment

(Seq. Nos. 2 & 5)

The Shady Glen/Librett Motion

The motion (Seq. No. 2), filed on May 4, 2020 by the Shady Glen/Librett Defendants (the Defendants), seeks summary judgment against the Plaintiffs and dismissal of the Plaintiffs' complaint as filed against Shady Glen/Librett. As stated previously, the Defendants' motion carries with it the burden of demonstrating the absence of any material issues of fact, not simple assertions thereof.

In the attorney affirmation on behalf of the Defendants, it is admitted that in-or about August 2015, the Shady Glen board of directors voted to resurface the roadway referred to as Shady Glen Court. The managing representative, at Shady Glen's request, accepted bids from contractors, including DeBartolo Landscaping. The Board voted to hire the DeBartolo company (Affrm. at ¶15).⁵

While there is some dispute as to how and where the resurfacing was performed, there is no significant disagreement that the work undertaken by DeBartolo was pursuant to a contractual agreement between DeBartolo Landscaping and Shady Glen/Librett. A layer of tar was put on

⁵As previously stated, John DeBartolo was the head of the company. He was also a resident and board treasurer who participated in the bidding and voting (DeBartolo deposition at p.16).

the existing pavement followed by two inches of asphalt, which was then paved and rolled by machinery. Following compression by pavement roller, a one-inch lip along the seam between the crosswalk and roadway remained. It was expected that the lip would be compressed by vehicular traffic over time (Affirm. at ¶16).

As set forth in the Defendants' attorney affirmation (and the deposition testimony of John DeBartolo), the paving extended from the residential buildings on the property, to the terminus of the Shady Glen Court roadway at its junction with the "no parking" sign. (Affirm at ¶16.) The resurfacing was done in the manner as testified by John DeBartolo, and as set forth in the invoice (Exhibit W, DeBartolo deposition at pp. 13-14, NYSCEF Doc. No. 67).

The Plaintiff Kathleen Camelio testified at her deposition that she had lived in close proximity to Shady Glen, in another apartment complex, and had walked the roadway and crosswalk weekly over the course of forty-three years. She stated she had never fallen nor made complaints about the roadway prior to the accident. (Affirm at ¶19.) She admitted that prior to the accident, she had "probably seen [the lip] several times when [she walked] across the street" (deposition at p. 103).

Mrs. Camelio identified the trip hazard in a photograph shown to her by marking it with an "X" (Defendants' Ex. B). The "lip," as she referred to it, is a part of the Shady Glen Court roadway that adjoins the crosswalk along its length and which she described as being "about two inches" higher in elevation than the crosswalk (Deposition at p. 23). It would appear from the Defendants' affirmation, and from the testimony and photograph marked at the deposition (Ex. B), that both sides are referencing the same "lip." The Plaintiff identified it as the cause of her accident. A fair interpretation of Mrs. Camelio's testimony is that while traversing the crosswalk

she fell as a result of her right foot stepping on the adjoining “two-inch higher” Shady Glen Court lip defect, causing her to fall to her left into the crosswalk.

In their motion, the Defendants raise a question as to who was responsible for the maintenance of the crosswalk and the area immediately around it. The Defendants allege that the City of New Rochelle was the owner of the crosswalk and was responsible for its maintenance as well the maintenance of a portion of the Shady Glen Court roadway. (Affirm. at ¶¶33, 34.) Thus, it is argued that CNR, not Shady Glen/Librett, owed the Plaintiff the duty to exercise reasonable care in maintaining the property at issue (Points II and III in the Defendants attorney’s affirmation in support of the motion).

In support of its position as to CNR ownership and/or maintenance responsibility of the area at issue, the moving Defendants rely upon work alleged to have been done by CNR a year or more after the accident, and four years or more after the resurfacing. The work CNR performed involved installation of “ADA compliant” curb ramps, sidewalk replacement, pothole repair, resurfacing of Pelham Road and the like. It was done in 2018 and 2019 and included repaving by CNR of the crosswalk at issue. This is not admissible proof that CNR had maintenance responsibility of the resurfaced portion of Shady Glen Court in years 2015 through June of 2018.

The moving Defendants cite testimony from Scott Pickup, the Commissioner of Public Works for CNR. During his testimony, Mr. Pickup was asked: “What is a right of way?” He responded that it is the area the city is responsible for, and in most cases it extends a distance of thirty-five feet from the center of the roadway. However, he could not say “what the center line is on Pelham Road” and “what the right of way is off of Pelham Road.” When shown an exhibit depicting the intersection of Pelham Road and Shady Glen Court (a picture identified as Exh. A),

Mr. Pickup could not tell where the property line is on Shady Glen Court, or where the City's right of way ends (deposition at pp. 38-39). He was next shown a photograph identified as Exhibit B which showed a portion of the intersection of Shady Glen Court and Pelham Road. The photograph is dated June 4, 2019--almost one year after the accident--and showed some resurfacing work done on Pelham Road and, partially, on Shady Glen Court. Mr. Pickup was asked if the resurfacing was done by CNR. He responded neither yes or no. He said only that it would have been done by a contractor because CNR does not do "large volume paving" and the work would have been bid (deposition at pp. 43-44). He did not state or suggest who the contractor was, or could have been.

The evidence proffered by Mr. Pickup cannot be said to have established, as a matter of law, CNR's ownership, right of way, and/or maintenance obligations as to the area at issue in this action during the years between resurfacing (2015) and year 2019. Reliance by the Defendants on projects undertaken by CNR in the months and years after the date of the accident does not represent admissible proof that, at all times before the accident, CNR was responsible for maintenance of the Shady Glen Court roadway. It is speculative at best and unsupported by admissible material facts. The Defendants offer no admissible evidence of CNR's involvement with the maintenance of Shady Glen Court in the alleged defective area prior to the accident (Affirm at ¶¶ 21, 35).⁶ Thus, a claim of *prima facie* right to judgment as a matter of law is not established.

⁶ In any event, CNR is no longer a litigant. A third-party action was initiated and pleaded solely by Third-Party Plaintiff and Defendant Debartolo Landscaping, Inc. against The City of New Rochelle. However, that action has been dismissed by the Court under New Rochelle City Charter Article XII, section 127A, as set forth in the Court's decision under Motion Seq. No.1, *supra*.

Assuming, *arguendo*, that CNR had a right of way, and assuming, *arguendo* that the right of way was resurfaced (accidentally or otherwise) by DeBartolo, that does not absolve from liability, Shady Glen/Librett, the party that hired DeBartolo.

Shady Glen/Librett offers no proof that CNR had a maintenance obligation of the alleged right of way. There are no facts supporting a claim by the Defendants that CNR created the alleged defect and there is no proof that CNR ever had notice—constructive or actual—of the presence of a defect in the alleged right of way.

There is no proof that CNR did any paving work in the right of way area at issue, or proof that CNR hired a contractor of its own to do paving work on Shady Glen Court at any time between November of 2015 and July of 2018. Nevertheless, Shady Glen/Librett essentially allege that the mere existence of a CNR right of way in the area of the accident absolves Shady Glen/Librett of any liability claimed by the Plaintiffs (or anyone else) against them.

Shady Glen further asserts that it is also immune from liability because DeBartolo was an independent contractor. DeBartolo, who was hired by Shady Glen, allegedly caused the defect that created the injury, and thus the Defendants cannot be held liable for what DeBartolo did.

Case law provides that “. . . a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor’s negligent acts.” *Brothers v. New York State Elec. & Gas Corp.*, 11 N.Y.3d 251, 257, 869 N.Y.S.2D 356 (2008), *citing*, *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273(1993).

The Shady Glen/Librett Defendants cite a number of cases which are generally cited for the above proposition. But as discussed at length by the Court of Appeals, “[t]his general rule . . . is subject to various exceptions . . . [and] is now primarily important as a preamble to the

catalog of its exceptions.” *Brothers, supra* at 258.

The exceptions in the instant case are evident, relevant and apply. As opposed to the facts highlighted in *Brothers, supra*, Shady Glen, as the employer of DeBartolo, never sought nor obtained from CNR a permit to resurface, much less a permit which set forth a detailed outline of how the work should have been done. See, *Brothers, supra* at 253.

For example, would milling, instead of resurfacing, have been required under CNR code? As previously addressed in the Court’s discussion of Motion Seq. No.1, Scott Pickup, CNR’s Commissioner of Public Works, testified at his deposition that he searched for and found no record of a permit issued for the job in question in this case. Thus, there is no proof that CNR would have required milling and it cannot be said that DeBartolo’s resurfacing was a departure from CNR code requirements.

The Shady Glen/Librett Defendants retained P.E. expert Jason Pitingaro, who opined in his affidavit that based upon his inspection of the subject area, milling, and not resurfacing, should have been performed. However, Pitingaro acknowledged that milling would have required Shady Glen to pay a cost higher than resurfacing.

John DeBartolo, in his deposition, agreed that milling was the proper way to do the job but testified that the Shady Glen/Librett Defendants did not want to pay the additional cost. As a result, resurfacing, not milling, was performed. Accordingly, it cannot be said that the Shady Glen/Librett Defendants were unaware of the paving options. They could have required or contracted DeBartolo to mill. They chose resurfacing instead. Thus, DeBartolo’s use of resurfacing was not an independent act of negligence. While Shady Glen had every right to require milling instead of resurfacing, it did not exercise that right. Thus, it cannot be said that

Shady Glen had “. . . no right to control the manner in which the work [was] to be done.” See, *Brothers, supra* at 257-258.

In addition, according to the deposition testimony of Lawrence Crovatto, Shady Glen board members observed the repaving as it occurred, and would have seen what was done, how it was done, and where it was done (deposition at pp. 16-17). Shady Glen was in a position to evaluate whether DeBartolo stayed within the area owned by Shady Glen and stayed outside of the alleged right of way. Assuming, *arguendo*, DeBartolo did not stay outside of the right of way, the Defendants could have ordered corrective action. Again, Shady Glen/Librett had the ability to direct corrective action, but chose not to. Thus, assuming that the resurfacing trespassed upon the CNR right of way, it cannot be said that any such trespass by DeBartolo absolved Shady Glen of possible exposure to liability, as a matter of law. See, *Pesante v. Vertical Indus. Development, Corp.*, 142 A.D.3d 656, 36 N.Y.S.3d 716 (2d Dep’t 2016); *Reynolds v. Ferrante*, 107 A.D.3d 1424, 967 N.Y.S.2d 788 (4th Dep’t 2013)(a person who hires an independent contractor may be held liable for negligence in selecting, instructing or supervising the independent contractor).

In the three years between the resurfacing and the accident, no corrective actions were taken by Shady Glen/Librett. Their own proof, offered herein to shift blame to CNR and DeBartolo, raises issues of fact. They do not establish *prima facie* evidence, as a matter of law. Thus, Shady Glen/Librett’s burden to show entitlement to summary judgment as a matter of law has not been met and their assertion under Point V, that they cannot be responsible for negligent acts by DeBartolo, cannot be resolved as a matter of law, and must be denied.

On the issue of ownership or right of way, Mr. Crovatto, the superintendent, testified that

the so-called no-parking sign was at the end of the Shady Glen Court property and what came after that (including the crosswalk) was CNR property. He testified that he told DeBartolo that the Shady Glen Court roadway ended at the no-parking sign (deposition at p. 22).

Crovatto was asked if anyone on behalf of Shady Glen “supervised [DeBartolo’s] work.” Crovatto responded that some board members were watching. He testified that he recalled the name of one such board member, Paul Mancinelli (deposition at pp. 16-17).

At John DeBartolo’s deposition, DeBartolo was asked to view a photograph marked as exhibit 2. The photograph showed areas of the crosswalk and roadway at issue, and his attention was directed to parts of the photograph showing different coloration of the pavement (deposition at p. 31).⁷ DeBartolo was asked whether he resurfaced an area on the photograph that fell between the no-parking sign and the crosswalk (deposition at p. 33). DeBartolo responded by saying “[n]ot to that point . . . [t]hat’s not Shady Glen property” (deposition at p. 34). He stated further that he “. . . paved where the super [Crovatto] told him to go to the property line . . . where the no parking sign is” (deposition at pp. 35-39; 61-63).

Nothing set forth in the foregoing testimony of the two witnesses establishes, as a matter of law, that DeBartolo resurfaced beyond Shady Glen property. Nevertheless, the Shady Glen/Librett Defendants cite these statements as proof that DeBartolo “knowingly resurfaced a portion of Shady Glen Court . . . outside of Shady Glen’s Property and clearly within the City’s right of way” (affrm. at ¶ 55). The Shady Glen/Librett Defendants rely entirely on the photo exhibit shown to the two witnesses. They apparently ignore, or fail to credit, the witnesses’

⁷ The photograph was taken after the accident and at least three years after the 2015 resurfacing.

testimony. (Affirm. at ¶ 55.) Whether DeBartolo knowingly resurfaced beyond Shady Glen's property line cannot be established as a matter of law simply from the pictures.

In addition, and as previously discussed herein, there is testimony from Scott Pickup as to the question of the location of CNR's right of way on Shady Glen Court. When shown an exhibit depicting the intersection of Pelham Road and Shady Glen Court (a picture identified as Ex. A), Mr. Pickup could not tell where the property line is on Shady Glen Court or where the City's right of way ends (deposition at pp. 38-39). Thus, the issue of whether DeBartolo's resurfacing created a tripping hazard at the edge of Shady Glen Court's intersection with the crosswalk remains an issue of fact to be determined at trial.

As to Shady Glen/Librett's claim that DeBartolo failed to use proper technique with regard to the seam joint at the accident site, the moving Defendants concede that DeBartolo does not agree with the assertions, by other witnesses, that he used improper techniques (Affirm. at ¶ 57). To the extent that the Shady Glen/Librett Defendants rely upon weight of evidence considerations, it must again be stated that it is not the function of a court, in deciding a summary judgment motion, to make credibility determinations or findings of fact. Rather, it is the task of the Court to identify material, triable issues of fact, or point to the lack thereof. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 505, 942 N.Y.S.2d 13 (2012).

Given the moving party's failure to sustain its burden, the Court need not address the adequacy or sufficiency of the opposing party's proof. *Grant v. 132 W. 125 Co., LLC*, 180 A.D.3d 1005, 120 N.Y.S.3D 345 (2d Dep't 2020). Accordingly, so much of the motion seeking summary judgment against the Plaintiffs, or the DeBartolo Defendant, as argued under Point II, III, IV and V of the Defendants' Affirmation in Support, is denied.

The Plaintiffs' Cross-motion

The Plaintiffs' cross-motion (Seq. No. 5), filed on May 28, 2020, seeks summary judgment against the Shady Glen/Librett Defendants. As stated previously, the Plaintiffs' cross-motion carries with it the burden of demonstrating the absence of any material issues of fact, not simple assertions thereof.

In the attorney affirmation in support of the Plaintiffs' cross-motion, under Point II, the Plaintiffs concede that Defendants Shady Glen/Librett are not liable by reason of owning the property at issue. Instead, the Plaintiffs claim the Defendants are liable because DeBartolo Landscaping created the hazard in the course of resurfacing.

Under Point III of the attorney affirmation in support of the Plaintiffs cross-motion, the Plaintiffs concede that liability cannot be imposed upon the Defendants Shady Glen/Librett by reason of status as an abutting land owner. Instead, they claim the Defendants are liable because they failed to acquire a permit from CNR which would have led to inspection of the work by CNR.

Under Point IV of the attorney affirmation in support of the Plaintiffs cross-motion, the Plaintiffs oppose the Defendants' claim that the defect (or "lip"), alleged to have caused the Plaintiff to trip and fall, was trivial and was therefore not actionable.

Under Point V of the attorney affirmation in support of the Plaintiffs cross-motion, the Plaintiffs oppose so much of the Defendants' claims that they are not responsible for negligent resurfacing work performed by Defendant DeBartolo Landscaping Inc.

The Plaintiffs' proofs in support of their cross-motion for summary judgment come almost entirely from the depositions of the Plaintiffs Kathleen Camelio and Julius Camelio, John

DeBartolo, Robert Crovatto, Lawrence Crovatto, Scott Pickup, and the affidavit of Jason A. Pitingaro (P.E.) as well as exhibits produced in the course of the discovery process and used as exhibits in the depositions and motions pleaded herein. Very little, or no, case citation or legal argument in support of their summary judgment motion accompanies the evidentiary proof referenced above.

On the issue of whether the defect attributed to the Plaintiff's accident is "trivial" or not, none of the witnesses gave testimony on the subject that may be said to establish the claim as a matter of law. Pitingaro's conclusion as to the height, depth, width, firmness or decay of the "lip" was not based on any inspection of the actual alleged defect. Visual assessment was based entirely on photographs produced during discovery. Of the photographs proffered as proof, none show a close-up of the portion of the lip that caused the fall and cannot be relied upon to answer these necessary questions. See, *Simos v. Vic-Armen Realty, LLC*, 161 A.D.3d 1023, 1024-25, 76 N.Y.S.3d 610 (2d Dep't 2016)(expert's affidavit, and the defendants' photographs and video recording taken more than five years after the plaintiff's fall, were insufficient to establish that no actionable defect existed at the time of the accident).

At least three different height estimations were proffered by witnesses who were neither present at the accident scene on the date thereof, or afterwards. None of these witnesses actually measured the alleged defect. See, *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977-78, 665 N.Y.S.2d 615 (1997)([in] determining whether a defect is trivial, the court must examine all of the facts presented, including width, depth, elevation irregularity and appearance of the defect along with time, place and circumstance of the injury). Was the defect trivial? Had the Plaintiff not stepped to her right, partially out of the crosswalk with her right foot, as she described, would

there have been no accident? That cannot be determined as a matter of law.

As to the circumstances under which the accident occurred, it is alleged by the Plaintiffs that there was pedestrian traffic on the crosswalk at the time of the Plaintiff's fall. Some were walking toward the Plaintiff and others were walking in her same direction. Mrs. Camelio testified that just before she fell, a woman pushing a baby carriage was walking slowly ahead of her but was moving in the same direction, about three feet ahead (Plaintiff's deposition at p.19). Was that a contributing "circumstance?" Did the other pedestrians block her view of the crosswalk? If so, did it cause her to fall? It cannot be determined from Plaintiffs' submissions as a matter of law.

The "lip" was adjacent to the crosswalk, not in the crosswalk. As such, was the defect hidden or obvious? At her deposition Mrs. Camelio admitted that prior to the accident, on prior occasions, she had "probably seen [the lip] several times when [she walked] across the street" (deposition at p. 103). A conclusion might be drawn that it was obvious. However, her statement alone does not determine the issue as a matter of law.

Given the moving party's failure to sustain its burden, the Court need not address the adequacy or sufficiency of the opposing party's proof. *Grant v. 132 W. 125 Co., LLC*, 180 A.D.3d 1005, 120 N.Y.S.3D 345 (2d Dep't 2020). Accordingly, so much of the motion seeking summary judgment against the Defendants, as argued under Plaintiffs' Points II through V, must be denied.

Defendant/Third-Party Plaintiff DeBartolo's Cross-motion for Summary Judgment

(Seq. No. 6)

Motion sequence No. 6, filed on June 22, 2020 by the DeBartolo Defendants, is a cross-

motion seeking summary judgment against the Plaintiffs and dismissal of the Plaintiffs' complaint as filed against the DeBartolo Defendants. As stated previously, the Defendants' motion carries with it the burden of demonstrating the absence of any material issues of fact, not simple assertions thereof.

Inasmuch as DeBartolo's motion (Seq. No. 1) for summary judgment against the Plaintiffs has been previously determined and granted, and inasmuch as the Plaintiffs' complaint as filed against the DeBartolo Defendants has been dismissed, the instant cross-motion by the DeBartolo Defendants is resolved as moot. Thus, as to the instant cross-motion for summary judgment (Seq. No. 6) the Court need not, and does not, reach the merits therein. In addition, opposition by the Plaintiffs to the Defendant DeBartolo's cross-motion (Seq. No. 6) is not pleaded or filed and is therefore not before the Court. Accordingly, the instant cross-motion of the DeBartolo Defendant is dismissed as moot.

Upon the instant motions and cross-motions, denominated as Seq. Nos. 1 through 6 and brought before the Court, it is hereby:

ORDERED, that the Third-Party Defendant City of New Rochelle's motion for summary judgment (Seq. No. 3) is granted, and the action by the Third-Party Plaintiff DeBartolo Landscaping Inc. against Third-Party Defendant City of New Rochelle is dismissed; and it is further

ORDERED, that the motion of Defendant DeBartolo Landscaping Inc. for summary judgment against the Plaintiffs Kathleen Camelio and Julius Camelio (Seq. No. 1) is granted, and so much of the Plaintiffs' complaint that seeks judgment against Defendant DeBartolo Landscaping Inc., is dismissed; and it is further

ORDERED, that the cross-motion of Plaintiffs Kathleen Camelio and Julius Camelio for summary judgment against the Defendant DeBartolo Landscaping Inc. (Seq. No. 4) is denied and dismissed; and it is further

ORDERED, that the motion of Defendants Shady Glen Owners' Corp. and Librett Estate Group Inc. for summary judgment against Plaintiffs Kathleen Camelio and Julius Camelio and Defendant DeBartolo Landscaping Inc. (Seq. No. 2) is denied; and it is further

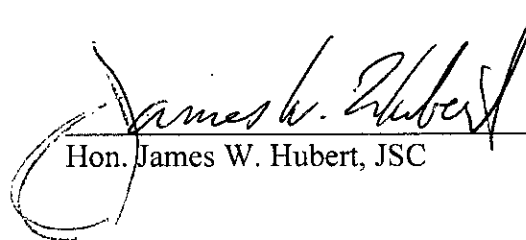
ORDERED, that the cross-motion of Plaintiffs Kathleen Camelio and Julius Camelio for summary judgment against Defendants Shady Glen Owners' Corp. and Librett Estate Group Inc. (Seq. No. 5) is denied and dismissed; and it is further

ORDERED, that the cross-motion of the Defendant DeBartolo Landscaping Inc (Seq. No. 6) for summary judgment against Plaintiffs Kathleen Camelio and Julius Camelio is denied as moot; and it is further

ORDERED, that counsel for Plaintiffs Kathleen Camelio and Julius Camelio and Defendants Shady Glen Owners' Corp. and Librett Estate Group Inc. shall appear before the Settlement Conference Part, Courtroom 1600, at 9:15 a.m. on any Tuesday date, as determined by that Part for a Pre-Trial Conference.

The foregoing constitutes the Decision & Order of the Court.

Dated: White Plains, New York
October 22, 2020


Hon. James W. Hubert, JSC