

**Shaoul v Bank of Am., N.A.**

2020 NY Slip Op 35143(U)

August 21, 2020

Supreme Court, Nassau County

Docket Number: Index No. 605576/18

Judge: James P. McCormack

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**SUPREME COURT- STATE OF NEW YORK**

**PRESENT: Honorable James P. McCormack  
Justice**

\_\_\_\_\_ X

**MINOO SHAOUL**

**TRIAL/IAS PART 18  
NASSAU COUNTY**

**Plaintiff(s)**

**-against-**

**Index No.: 605576/18**

**Motion Seq. 001, 002, 003, 004  
& 005**

**Motions Submitted: 7/14/2020**

**BANK OF AMERICA, N.A., 2630 STEINWAY  
LLC, GGG CONSTRUCTION CORP.,  
COUNTY OF NASSAU and ELDOR  
TRAFFIC SIGNAL CONTRACTING  
CORPORATION,**

**Defendant(s)**

\_\_\_\_\_ X

**COUNTY OF NASSAU,**

**Third-Party Plaintiff(s)**

**-against-**

**ELDOR TRAFFIC SIGNAL  
CONTRACTING CORPORATION,**

**Third-Party Defendant(s),**

\_\_\_\_\_ X

The following papers read on these motions:

Notices of Motion/Supporting Exhibits.....	XXXXX
Affirmation in Opposition/Supporting Exhibits.....	X
Reply Affirmations.....	XXXXXX

GGG Construction Corp. (GGG), moves this court (Motion Seq. 001) for an order pursuant to CPLR §3212, for summary judgement dismissing the complaint and all cross claims against it. Defendant 2630 Steinway LLC (2630 Steinway) moves this court (Motion Seq. 002) for an order granting it summary judgment and dismissing the complaint and all cross claims against it. Defendant, Bank of America, NA (BOA), moves this court (Motion Seq. 003) for summary judgment dismissing the complaint and all cross claims against it. Defendant/Third Party Plaintiff, County of Nassau (the County), moves this court (Motion Seq. 004) for an order granting it summary judgment dismissing the complaint and all cross claims against it. Defendant/Third Party Defendant, Eldor Traffic Signal Contracting Company (Eldor), moves this court (Motion Seq. 005) for summary judgment dismissing the complaint, third-party complaint, and all cross claims against it. Plaintiff, Minoos Shaoul (Shaoul) opposes all five motions. None of the Defendants opposed any of the co-Defendants' motions to dismiss the cross claims.

Shaoul commenced this trip-and-fall action by summons and complaint dated April 26, 2018. Issue was joined by service of an answer with cross claims by the County dated May 14, 2018. 2630 Steinway interposed an answer with cross claims on May 30, 2018. GGG served an answer with cross claims dated June 21, 2018. BOA interposed an

answer with cross claims dated June 29, 2018. The County then commenced a third-party action against Eldor by third-party summons and complaint dated March 14, 2019. After Eldor answered, Shaoul amended her complaint to add Eldor as a direct Defendant. GGG then submitted an answer with cross claims to the amended complaint dated May 15, 2019. Eldor interposed an answer with cross claims to the amended complaint dated May 16, 2019. BOA served an answer with cross claims to the amended complaint dated May 21, 2019. 2630 Steinway interposed an answer with cross claims to the amended complaint dated May 31, 2019. The case certified ready for trial on August 15, 2019, and a note of issue was filed on October 15, 2019.

On April 3, 2017, Shaoul had parked her car in a municipal parking lot and was walking to the Great Neck train station in Great Neck, County of Nassau. She was walking on the sidewalk on Cuttermill Road, near its intersection with Middle Neck Road. While walking on the sidewalk that abuts 10 Middle Neck Road, Shaoul alleges that her foot hit an uneven part of the sidewalk and she then fell down. As a result of the fall, she suffered injuries including a broken wrist.

The following facts are undisputed: At the time of Shaoul's fall, 2630 Steinway owned 10 Middle Neck Road and BOA rented part of the property from 2630 Steinway. Three and a half years prior to the accident, the County hired Eldor to replace a traffic light at the intersection of Cuttermill Road and Middle Neck Road. The work would require excavating and replacing the sidewalk in the area where Shaoul would later fall. Eldor hired GGG to, *inter alia*, perform the excavating of the sidewalk, and then laying

down cement for a new sidewalk. GGG performed the work, but did not replace a triangular piece of sidewalk. Instead, the triangular piece was removed and then put back into the ground intact. The County had an inspector on site while the traffic light was being replaced and the new sidewalk was being installed. At the time of the accident, there was no statute or code provision shifting liability from the municipality to the landowner for injuries caused by defective sidewalks. (*See Castro v. Rodriguez*, 176 AD3d 1031 [2d Dept 2019]). Shaoul alleges that because the new sidewalk was placed next to the triangular piece, it was uneven and was the cause of her fall. Each Defendant now moves to dismiss the complaint

In a motion for summary judgement, the moving party bears the initial burden of establishing a *prima facie* showing that he or she is entitled to summary judgement as a matter of law (*Harmitt v Riverstone Assoc.*, 123 AD3d 1089, 1091 [2d Dept 2014]). The moving party must present sufficient evidence to demonstrate the absence of a material issue of fact (*Meyers v Big Six Towers, Inc.*, 85 AD3d 877, 877 [2d Dept 2011]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the moving party makes this showing, the burden shifts to the plaintiff produce admissible evidence to establish the existence of material issues of fact which requires a trial of the action (*Meyers*, 85 AD3d at 878-879; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). If the nonmoving party is unable to provide sufficient

evidence, “the defendant’s motion for summary judgement dismissing the complaint should be granted” (*Meyers*, 85 AD3d at 879).

In determining a motion for summary judgement, the court must view the evidence “in the light most favorable to the nonmovant” (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). The primary purpose of the court on such motion is “not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Schumacher v Pucciarelli*, 161 AD3d 1205, 1205 [2d Dept 2018], quoting *Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005]). As such, summary motion should only be granted when no triable issues of fact exist (*see Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015]).

“A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk” (*Giulini v Union Free School Dist. No. 1*, 70 AD3d 632, 632-633 [2d Dept 2010]; *see also Basso v Miller*, 40 NY2d 233, 239 [1976]). In order to hold a landowner liable for a third party’s injuries, there must be sufficient evidence indicating “the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Morrison v Apostolic Faith Mission of Portland*, 111 AD3d 684, 685 [2d Dept 2013]).

**GGG'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 001)**

For GGG to be liable to Shaoul, it must be established it owed Shaoul a duty, that GGG breached that duty and that the breach was the proximate cause of Shaoul's injury. (*Pasternack v. Laboratory Corp. of Am. Holdings*, 27 NY3d 817 [2016]). To be awarded summary judgment, GGG must establish either that it did not create the defect, or that it had actual or constructive notice of it. (*Bruno v. T-Mobile*, 176 AD3d 1160 [2d Dept 2019]).

In support of its motion, GGG relies upon, *inter alia*, the deposition transcript of Ronald Colleluori, its vice president, and John Fontanes, who, at the time the work was performed, held the position of Traffic Inspector I for the County. Mr. Colleluori testified to the circumstances under which GGG was engaged to perform the subject work. He was present the day the sidewalk was dug up and replaced. According to Mr. Colleluori, once his work is complete, a County inspector inspects the work and then issues a report. For the work performed in the area where Shaoul fell, Mr. Fontanes signed off on the report and Jose Sanchez, Mr. Colleluori's foreman, signed off on behalf of GGG. Mr. Colleluori testified that it is up to the County to determine if the work is acceptable. If the inspector signs off, then the work was acceptable. In this matter, the County signed off on the work. Along these lines, Mr. Colleluori testified that there is no standard regarding an acceptable height differential between a new piece of sidewalk and

an existing piece of sidewalk. In fact, he testified that it is impossible to match up new sidewalk with existing sidewalk completely:

It is pretty impossible to get everything completely level. Remember, we are matching up existing in four different sides. So, you -- I don't think there is anything to that, no. You match up to your existing the best to your ability.

In terms of an "acceptable" height differential, Mr. Colleluori testified that it was up to the County to decide. If the County signed off, it was acceptable:

Q. So you could put in a new sidewalk that is three inches higher than existing sidewalk?

A. It would get rejected. So, no you could not.

Q. At what point does it not get rejected?

A. When people feel that it is adequate.

Q. What is that standard?

A. There is no standard. You are dealing with existing conditions. Three, four, five, six, seven different ways. You have to meet it all to the best of your ability. As long as the County feels you have, then you are acceptable.

Q. Do you know what standard the County uses to make that determination whether or not you have met their standard?

A. Pretty much what I just said. You are looking at something that is not there. We have to match the best we can to everything around us. And the County will determine whether we did or did not.

Q. So there is no set height differential that you are required to --

A. No such thing, no. No such thing.

Q. There is no such thing?

A. As a standard height of differential?

Q. Yes.

A. No, no such thing.

GGG further argues that Mr. Fontanes measured the height differential and found it acceptable. However, that is not an accurate recitation of his testimony. Mr. Fontanes

testified to measuring the slabs of concrete, and to seeing no height differential with his eyes, but specifically denied measuring whether there was height differential:

Q. When you inspected it, where the old met the new did you see any height differential at that point?

A. No.

Q. None at all?

A. No.

Q. Did you measure to see if there was any height differential?

A. No.

The testimony of these two witnesses contradict one another. Mr. Colleluori stated that it was not possible to avoid some height differential when placing new cement next to existing cement, while Mr. Fontanes testified to seeing no height differential. Further, Mr. Colleluori acknowledges ceding to the inspector the issue of whether a height differential is acceptable. He defined “acceptable” as that which the County approves. While the County deemed the subject work acceptable, Mr. Fontanes description of how he came to that conclusion is lacking. It is certainly possible that a visual observation could be enough to determine there was no or little height differential, however Mr. Fontanes did not describe the manner in which he performed his visual inspection. This is problematic because depending upon what angle the sidewalk is viewed can change whether there appears to be a height differential. For example, in two of the pictures offered by Shaoul of the location, one is taken from an angle and one is taken essentially standing above the location. From an angle, there appears to be a differential, but from above, it is harder to tell.

The court finds GGG has failed to establish summary judgment as matter of law. GGG's submissions, particularly the above-referenced deposition transcripts, raise an issue of fact as to whether they created the defect. (*Madonia v. City of New York*, 164 AD3d 1320]). As a result, their motion for summary judgment will be denied in its entirety.

**2630 STEINWAY'S MOTION FOR  
SUMMARY JUDGMENT (MOTION SEQ. 002)**

2630 Steinway argues it cannot be held liable because there is no liability shifting statute making them responsible for injuries caused by the sidewalk abutting their property. (*Castro v. Rodriguez, supra*). Therefore, they argue that 2630 Steinway can only be liable for Shaoul's injuries if it created the defect. (*Diaz v Vieni*, 303 AD2d 713 [2d Dept 2003]).

In support of the motion, 2630 Steinway submits, *inter alia*, the deposition transcript of Dr. Fred Khalili, a member of 2630 Steinway. According to Dr. Khalili, 2630 Steinway purchased the subject property less than a year and half prior to Shaoul's fall. He has a lease with BOA that indicates that 2630 Steinway is responsible for maintaining the outside of the premises. He denied that 2630 Steinway, nor anyone associated with it, performed any work or repairs on the sidewalk abutting the premises. He was not aware of any defect on the sidewalk, and no one had complained to him or the company about a defect. There were no other lawsuits filed against 2630 Steinway in

connection with the sidewalk, and he was unaware of Shaoul's accident until he was served with a summons and complaint. After the accident, he claims that someone from the Village of Great Neck informed him some repairs were needed on the sidewalk, and 2630 Steinway hired a contractor to perform the work.

Based upon Dr. Khalili's testimony and the other submissions, the court finds 2630 Steinway has established entitlement to summary judgment as matter of law. The burden shifts to Shaoul to raise an issue of fact requiring a trial of the matter.

In opposition, Shaoul points to her bill of particulars where she alleges that 2630 Steinway failed to properly maintain and repair the sidewalk. While it is true that the Village Code of the Village of Great Neck imposes a duty on a landowner to maintain their sidewalk, the Code does not shift liability to the owner (*Castro v. Rodriguez, supra*). As a result, while 2630 Steinway could be cited by the Village assuming the Code was violated, and in fact was given a "Violation Order" to address the sidewalk being "in need of maintenance" after Shaoul's fall, that does not make 2630 Steinway liable to Shaoul. As Shaoul offers no other credible argument or admissible evidence in opposition to 2630 Steinway's motion, the motion will be granted. The complaint will be dismissed against 2630 Steinway, and as the court finds they are not liable, all cross claims against them will be dismissed. 2630 Steinway's cross claims will be dismissed as moot.

**BOA'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 003)**

In support of its motion, BOA submits the deposition transcript of Aimee Jaramillo who was the Financial Center Manager, which she likened to “Branch Manager” of the subject location on the date Shaoul states she fell. BOA rented the premises from the previous owner, and then from 2630 Steinway when it purchased the building. The lease indicates that 2630 Steinway is responsible for maintaining the outside of the building. If the inside of the building required repairs of some kind, she would contact an entity called CBRE who has a contract with BOA for such services. 2630 Steinway uses an entity known as David and Yonathan. However, there are occasions when David and Yonathan may address an issue inside the building, such as the boiler. Regardless, based upon the lease, and the testimony of Ms. Jaramillo, the court finds that BOA has established entitlement to summary judgment as matter of law. As the lessor, they have no responsibility for sidewalk maintenance, and there is no proof or even an allegation they created the defect, or attempted a repair of it. The burden shifts to Shaoul to raise an issue of fact requiring a trial of the action. In opposition, Shaoul is unable to raise an issue of fact. As such, the complaint will be dismissed against BOA. As the court finds BOA is not liable, all cross claims against them will be dismissed, and their cross claims will be dismissed as moot.

**THE COUNTY'S MOTION FOR  
SUMMARY JUDGMENT (MOTION SEQ. 004)**

The County argues it cannot be liable for Shaoul's injuries because there was no prior written notice, as required by statute. "Where, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; see *Martinez v City of New York*, 105 AD3d 1013, 1014 [2d Dept 2013]).

"The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality" (*Wald v City of New York, supra*; *Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007], quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo*, 93 NY2d

471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (see *Walker v Incorporated Village of Northport*, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

In support of the motion, the County submits the affidavit of Robert S. Dujardin, an employee of the Bureau of Claims within the Nassau County Attorneys Office. Part of his job duties include maintaining the files containing notices of claim and notices of defects. Mr. Dujardin researched the records maintained by his office for a period of time dating six years prior to Shaoul's accident. The results of his search indicated no such prior written notice.

While it is clear there was no prior written notice, it is undisputed that the County performed work at the exact location where Shaoul fell three and a half years prior to the fall. As discussed, *supra*, the County was replacing the traffic light at that intersection and hired Eldor to perform the work. Eldor hired GGG to excavate and replace the subject sidewalk. Therefore, it is necessary to determine if the County created the defective condition. To support their argument they did not create the defective condition, the County relies on the deposition transcript of Mr. Fontanes. As was previously discussed, Mr. Fontanes was a Traffic Inspector I, employed by the County, at

the time the traffic light was replaced. He was present while the work was being performed, and signed off on the work as having been completed in an acceptable matter.

For the affirmative negligence exception to apply, the defect must have been created immediately after the work was performed, and not over time due to wear and tear. (*Diaz v City of New York*, 56 AD3d 599 [2d Dept 2008]). The County's motion must be denied as there is an issue of fact as to whether the defect was created at the time the work was performed. It has already been established that Mr. Colleluori testified that it was impossible to make the area where Shaoul fell completely level because GGG was putting new cement next to existing sidewalk. Mr. Fontanes testified that the sidewalk was completely level, but he did not measure and only determined this by looking at it. He did not describe the extent to which he observed it, or from what angle. The conflicting testimony of Mr. Colleluori and Mr. Fontanes raises an issue of fact as to whether the defect that Shaoul claims to have tripped over was created at the time the work was performed.

#### **ELDOR'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 005)**

Eldor argues it cannot be found laible for Shaoul's injuries because it played no part in either creating the defect or approving the work. While it was Eldor who the County hired to replace the traffic signal, Eldor hired GGG to perform the part of the work that required excavating the sidewalk and then replacing the sidewalk with new cement. Eldor further argues that should the court find they are liable, then the court

should grant them summary judgment against GGG on the cross claim for contractual indemnification.

In support of their motion, Eldor submits, *inter alia*, the deposition transcript of Kevin Gerard. Mr. Gerard held the title of foreman at the time of his deposition but was a worker when the traffic signal in question was replaced. He recalled that Eldor hired GGG to perform the sidewalk excavation for that job. According to Mr. Gerard, after the sidewalk was dug up, Eldor installed a conduit into the ground. He denied that Eldor supervised or directed GGG how to perform its work. If there was a problem with the work, the County inspector would step in, not Eldor. Further, once the conduit was put into the ground, the Eldor employees left. They were not present when the replacement concrete work was performed.

Eldor argues it did not breach a duty to Shaoul because it did not perform the work that allegedly caused the accident. They also deny having any ownership, occupancy, control or special use of the subject property. (*Minott v. City of New York*, 230 AD2d 719 (2d Dept 1996)]. Further, in citing to the rule enunciated in *Espinal v. Melville Snow Constr.*, 98 NY2d 136 (2002), Eldor argues it did not owe a duty to Shaoul. The *Espinal* case and its progeny hold that a contractor does not owe a duty to a third party who was not a party to the contract unless: 1) the contractor launched a force or instrument of harm, 2) the plaintiff relied to her detriment on the continued performance of the contractor or 3) the contractor entirely displaced the other party's duty to maintain the premises. *Id.*

The court finds that Eldor has established entitlement to summary judgment as matter of law. Based upon *Espinal*, it is clear that Eldor did not owe a duty to Shaoul. They did not launch a force or instrument of harm as they took no part in excavating or replacing the concrete that made up the sidewalk. There is no evidence or even an allegation that Shaoul knew about Eldor at the time of the accident, much less relied upon their continued performance. Similarly, there is no proof or even the allegation that Eldor entirely displaced 2630 Steinway, GGG or the County's duties to maintain the premises. Further, even if a duty was owed, there is no admissible evidence indicating that Eldor breached a duty to Shaoul. The burden shifts to Shaoul to raise a material issue of fact requiring a trial of the action. In opposition, Shaoul raises no argument challenging any of Eldor's submissions. As such, she is unable to raise an issue of fact. The complaint and third-party complaint will be dismissed against Eldor. Because the court finds that Eldor is not liable, all cross claims against Eldor will be dismissed, and Eldor's cross claims will be dismissed as moot.

Accordingly, it is hereby

**ORDERED**, that GGG's motion for summary judgment (Motion Seq. 001) is DENIED in its entirety; and it is further

**ORDERED**, that 2630 Steinway's motion for summary judgment (Motion Seq. 002) is GRANTED. The complaint and all cross claims are dismissed against 2630 Steinway. As the court finds 2630 Steinway is not liable, their cross claims are dismissed as moot; and it is further

**ORDERED**, that BOA's motion for summary judgment (Motion Seq. 003) is GRANTED. The complaint and all cross claims are dismissed against BOA. As the court finds BOA is not liable, their cross claims are dismissed as moot; and it is further

**ORDERED**, that the County's motion for summary judgment (Motion Seq. 004) is DENIED in its entirety; and it is further

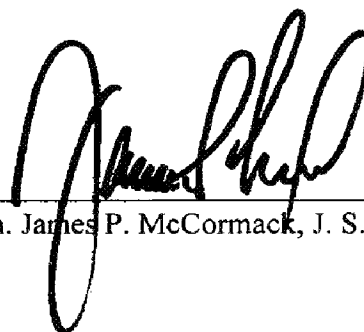
**ORDERED**, that Eldor's motion for summary judgment (Motion Seq. 005) is GRANTED. The complaint, third-party complaint and all cross claims are dismissed against Eldor. As the court finds Eldor is not liable, their cross claims are dismissed as moot.

The third-party complaint is dismissed in its entirety.

The court has considered the remaining contentions of the parties and finds them to be without merit.

This constitutes the decision and order of this court.

Dated: Mineola, New York  
August 21, 2020



Hon. James P. McCormack, J. S. C.

**ENTERED**

**Aug 24 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE