

Blinbaum v City of New York
2022 NY Slip Op 31366(U)
April 26, 2022
Supreme Court, New York County
Docket Number: Index No. 154164/2018
Judge: J. Machele Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

LAUREN CASSELL BLINBAUM AND JACQUES
BLINBAUM,

PlaintiffS,

INDEX NO. 154164/2018

MOTION DATE 03/18/2022

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., DANELLA
CONSTRUCTION OF NY, INC., NICO ASPHALT PAVING
INC., TRIUMPH CONSTRUCTION CORP.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

DANELLA CONSTRUCTION OF NY, INC.

Plaintiff,

-against-

Third-Party
Index No. 595114/2022

RESTANI CONSTRUCTION CORP., CARLO LIZZA & SONS
PAVING, INC.

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

Second Third-Party
Index No. 595142/2022

CARLO LIZZA & SONS PAVING INC., RESTANI
CONSTRUCTION CORP.

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 65, 66, 67, 68, 69,
70, 71, 72, 73, 74, 75, 76, 80, 81, 82, 83

were read on this motion to/for DISMISSAL.

In the underlying action, plaintiff Lauren Cassell Blinbaum alleges that she sustained injuries on November 23, 2017 when she tripped and fell due to defect at the pedestrian crosswalk on East 77th Street at its intersection with Lexington Avenue, on the east side of Lexington Avenue, in Manhattan.

Plaintiffs filed this action against The City Of New York (the “City”), Consolidated Edison Company Of New York, Inc. (“Con Ed”), Danella Construction Of NY, Inc. (“Danella”), Nico Asphalt Paving Inc. (“Nico”), and Triumph Construction Corp. (“Triumph”).¹

Defendants Con Ed and Danella each filed a third-party complaint against RESTANI CONSTRUCTION CORP. (“Restani”) and CARLO LIZZA & SONS PAVING, INC. (“Carlo”).

Now pending before the court is a motion filed by third-party defendant Restani seeking an order, pursuant to CPLR 3211 (a)(l), to dismiss, with prejudice, both of the third-party complaints filed against Restani.

“On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

¹ Plaintiffs had also filed against Safeway Construction Enterprises LLC (“Safeway”), but the action against Safeway was discontinued pursuant to a stipulation on consent dated June 5, 2020 (NYSCEF Document #47).

Third-party complaint filed by Con Ed

Neither Con Ed nor any other party filed papers in opposition to Restani's motion seeking to dismiss the third-party complaint filed by Con Ed against Restani.

Accordingly, this branch of Restani's motion is granted as unopposed.

Third-party complaint filed by Danella

There is no dispute that Restani did, in fact, undertake milling and some paving work in the area of plaintiff's accident, around the time the accident occurred. The "AGREEMENT" dated February 22, 2017 between Restani and the City's Department of Transportation ("DOT") (NYSCEF Document #69) shows that Restani entered into an agreement with the City for "Milling existing asphaltic concrete wearing course in preparation of resurfacing thereon by others at designated locations as required, together with all work incidental thereto Manhattan and the Bronx." A "Street Opening Permit" (NYSCEF Document #71) shows that Restani was granted permission by the DOT to "open the roadway at [...] East 77th Street from 3rd Avenue to Lexington Avenue," during the dates from October 16, 2017 to December 31, 2017. Restani's own "Daily Report" (NYSCEF Document #72) shows that Restani undertook "mill 77st from Madison ave to 2ave" on October 27, 2017, less than one month prior to plaintiff's alleged accident on November 23, 2017. A copy of the New York City Department of Transportation inspection report dated October 27, 2017, (NYSCEF Document #73), shows that the work performed by Restani that was being inspected was "Grinding existing asphaltic concrete wearing course" in the borough of "Manhattan" on "E77th Street" from "Madison Avenue to 2nd Avenue."

Nevertheless, Restani argues that the third-party complaint against Restani must be dismissed because on the date of the alleged accident, Restani was no longer responsible for maintaining the roadway where plaintiff fell. Specifically, Restani argues that Section 6.70.11(FX2) of the Standard Highway Specifications promulgated by the New York City Department of Design and Construction (the “DDC Highway Specifications”) provides that a milling contractor is responsible for the area where they work “not beyond a period of fifteen (15) days after completion of all his/her work within that City block, as approved by the Engineer. After this period of fifteen (15) days, maintenance of [the area] shall be the responsibility of others.”

Restani also argues that Section 6.70.11(HX6) and (7) of the DDC Highway Specifications provides that if the adjustment of street hardware (i.e., manholes, catch basins, utility heads, etc.) is required, then paving operations are to be completed within fifteen (15) working days of the start of milling within each block and if an adjustment of street hardware is not required, paving operations should be completed within six (6) working days of the start of milling within each block.

Restani argues that here, the alleged accident occurred more than fifteen (15) working days after Restani performed its milling and related work and, thus, regardless of whether adjustment of street hardware was required, the roadway at issue should have been paved by DOT or one of its contractors prior to the date of the alleged accident.

Restani further argues that a roadway that was milled by Restani was not opened up to vehicular and pedestrian traffic until Restani received the approval of the inspectors, who were employees of DOT that inspected/oversaw Restani's work, and that after Restani completed its work, the DOT or one of its contractors would pave the roadway. Restani argues, “Most notably,

the paving work fully covered all of the milling work and other work performed by Restani, such that none of Restani's work remained exposed to the public.”

In opposition, Danella and Triumph argue that this motion is premature, as Restani has yet to interpose an Answer, provide documentary evidence, or provide any witnesses to be deposed. They argue that they would be prejudiced in this matter if this motion were granted, as they would be denied access to relevant evidence and testimony regarding the work that Restani performed in the area where plaintiff alleges the incident occurred.

Here, as noted above, there is no dispute that Restani did, in fact, undertake milling and some paving work in the area of plaintiff’s accident, around the time the accident occurred. Furthermore, it is undisputed that Restani has yet to Answer or to participate in discovery. Given this, the court finds that this motion is premature, as the parties have not yet had the opportunity to explore key issues such as the extent, quality and timing of Restani’s work, and whether such work contributed in any way to plaintiff’s accident. *See Belziti v. Langford*, 105 A.D.3d 649 (Sup. Ct. App. Div, 1st Dept. 2013) (finding that “Green’s motion for summary judgment was properly denied as premature, since limited discovery had taken place and Green himself had not yet been deposed”); *Weinstein v. WB/Stellar IP Owner, LLC*, 125 A.D.3d 526 (Sup. Ct. App. Div, 1st Dept. 2015) (“Plaintiff opposed the motion on the ground that it was premature since ‘facts essential to justify opposition may exist but cannot then be stated’ [...] Stellar's motion should have been denied as premature, since plaintiff had no opportunity to depose Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion”).


For all of the aforementioned reasons, it is hereby:

ORDERED that the branch of Restani’s motion seeking to dismiss the third-party complaint against Restani that was filed by Con Ed, is **GRANTED** as unopposed; and it is further

ORDERED that the branch of Restani’s motion seeking to dismiss the third-party complaint against Restani that was filed by Danella, is **DENIED** as premature; and it is further

ORDERED that Restani shall interpose an Answer and participate in discovery; and it is further

ORDERED that Restani is granted leave to re-file this motion after relevant discovery has been completed.

<u>4/26/2022</u> DATE		 _____ J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE