**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF RICHMOND**

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**NIKITA TRETYAKOV,**

**Plaintiff,**

**-against-**

**LORI K PERROTTA,**

**Defendants.**

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**ROBERT MARAIO,**

**Plaintiff,**

**-against-**

**THE CITY NEW YORK, THE BROOKLYN UNION GAS COMPANY, d/b/a NATIONAL GRID NY, NATIONAL GRID ENERGY SERVICES LLC, NATIONAL GRID ELECTRIC SERVICES LLC, NATIONAL GRID ENERGY MANAGEMENT, LLC, THE HALLEN CONSTRUCTION CO., INC., LORI K. PERROTTA, NIKITA TRETYAKOV a/k/a NIKILZ TRETYAKOV and LORISA TRETYAKOV,**

**Defendants.**

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**Present:**

**Hon. Thomas P. Aliotta**

**DECISION AND ORDER**

**Index No. 151544/2016**

**Action No. 1**

**Motion No. 002**

**Index No. 150119/2018**

**Motion Nos. 004, 005**

**Action No. 2**[1]

The following papers numbered 1 to 12 were marked fully submitted on April 29, 2022

| | Papers Numbered |
|---|---|
| Notice of Motion for Summary Judgment by Defendant LORI K. PERROTTA Affirmation in Support and Memorandum of Law, Exhibits (dated January 10, 2022) | 1,2 |
| Affirmation in Opposition by Plaintiff NIKITA TRETYAKOV in Action No. 1 Exhibits (dated April 18, 2022) | 3 |

[1] Action No. 1 and Action No. 2 have been consolidated for the purposes of joint trial.

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| Affirmation in Opposition by Defendants NIKITA TRETYAKOV a/k/a NIKILZ TRETYAKOV and LORISA TRETYAKOV in Action No. 2 (dated February 23, 2022) | 4 |
| Affirmation in Opposition by Plaintiff ROBERT MARAIO in Action No. 2 (dated April 14, 2022) | 5 |
| Reply Affirmation by Defendant LORI K. PERROTTA (dated April 28, 2022) | 6 |
| Notice of Motion (No. 004) in Action No. 2 by Defendant NEW YORK PAVING INC. Affirmation in Support, Exhibits (dated January 19, 2022) | 7 |
| Reply Affirmation by Defendant NEW YORK PAVING INC., (dated April 28, 2022) | 9 |
| Notice of Motion (No. 005) in Action No. 2 by Defendants THE CITY OF NEW YORK THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY, NATIONAL GRID ENERGY SERVICES LLC, NATIONAL GRID ENERGY MANAGEMENT, LLC, THE HALLEN CONSTRUCTION CO., INC. Affirmation in Support, Exhibits (dated January 19, 2022) | 10 |
| Affirmation in Opposition by Plaintiff ROBERT MARAIO in Action No. 2 (dated April 18, 2022) | 11 |
| Reply Affirmation by Defendants THE CITY OF NEW YORK THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY, NATIONAL GRID ENERGY SERVICES LLC, NATIONAL GRID ENERGY MANAGEMENT, LLC, THE HALLEN CONSTRUCTION CO., INC. (dated April 28, 2022) | 12 |

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Upon the foregoing papers, Motion No. 002 in Action No. 1 by defendant LORI K. PERROTTA for summary judgment dismissing the complaint and any cross-claims against her is denied. Motion No. 004 in Action No. 2 by defendant NEW YORK PAVING INC. for like relief is also denied. Motion No. 005 in Action No. 2 for summary judgment dismissing the complaint and any cross-claims by defendants THE CITY OF NEW YORK, THE BROOKLYN UNION

GAS COMPANY d/b/a NATIONAL GRID NY, NATIONAL GRID ENERGY SERVICES LLC, NATIONAL GRID ELECTRIC SERVICES LLC, NATIONAL GRID ENERGY MANAGEMENT, LLC, THE HALLEN CONSTRUCTION CO., INC. is granted.

**FACTS**

Plaintiff NIKITA TRETYAKOV (hereinafter "NIKITA") commenced Action No. 1 to recover damages for injuries he sustained when the vehicle he was operating collided with a vehicle operated by defendant LORI K. PERROTTA (hereinafter "PERROTTA") on Nelson Avenue in Staten Island. The collision allegedly occurred when NIKITA was travelling northbound on Nelson Avenue and PERROTTA's vehicle was travelling southbound after entering Nelson Avenue from Monticello Terrace. It has been alleged that NIKITA was travelling at an excessive rate of speed; lost control of his vehicle; crossed the double yellow lines and collided with PERROTTA's vehicle. NIKITA denies these allegations and claims that it was PERROTTA who caused the collision when she failed to yield to a stop sign on Monticello Terrace before entering Nelson Avenue in front NIKITA's vehicle.

As a result of said collision, NIKITA alleges to have sustained, *inter alia*, a right lung contusion; T10 vertebral body fracture; disc herniation with bilateral foraminal stenosis at L2-L3 and L3-L4 levels; annular bulging with thecal sac compression and disc herniation at L5-S1 level. All injuries and resulting disabilities are claimed to be permanent in nature.

Plaintiff ROBERT MARAIO (hereinafter "MARAIO"), a passenger in the NIKITA vehicle commenced a separate action (Action No. 2) against the drivers of both vehicles and against defendants THE CITY OF NEW YORK, BROOKLYN UNION GAS, NATIONAL GRID, THE HALLEN CONSTRUCTION CO., NEW YORK PAVING INC., and J. BRUNO &

SONS[2]. The allegations against THE CITY OF NEW YORK (hereinafter "THE CITY") include the failure to install appropriate traffic controls at the subject intersection; defective design of the roadway; and failure to conduct a traffic study in that location. In regard to BROOKLYN UNION GAS, NATIONAL GRID, THE HALLEN CONSTRUCTION CO., and NEW YORK PAVING, INC., MARAIO alleges that these defendants illegally parked construction trucks on Nelson Avenue near the site of the collision. According to MARAIO, there was an ongoing construction project in that area and trucks involved in the project were parked along Nelson Avenue and caused NIKITA to swerve across the yellow lines into the middle of the road where his vehicle collided with PERROTTA's vehicle.

As a result of said collision, MARAIO alleges to have sustained, *inter alia*, multiple pelvic fractures requiring extensive surgery; urinary bladder injury; urethral injury; collapsed urinary bladder; torn urethra; bladder and urethra surgery; splenic laceration; pneumothorax; pulmonary embolism; retroperitoneal hematoma; focal hemorrhage medial to right kidney and lumbosacral radiculopathy. MARAIO further alleges dental injuries; abrasions and lacerations; hypersesthesia and pain in the legs and feet; neuropathic pain; and impaired gait. All of these injuries and resulting disabilities are associated with further soft tissue injuries and are claimed to be permanent in nature.

PERROTTA now moves in Action No. 1 (Motion 002) for summary judgment dismissing the complaint and any cross-claims against her and contends that her actions were not the proximate cause of the accident or of plaintiff's injuries. According to PERROTTA, there is no proof of any negligence on her part, and that it was NIKITA who caused the accident by travelling

[2] The action against defendant J. BRUNO & SONS, INC. was discontinued on or about August 19, 2020.

at an excessive rate of speed on Nelson Avenue; losing control of his vehicle which caused him to cross over the double yellow lines and strike the front passenger side of PERROTTA's vehicle. According to PERROTTA, she was travelling southbound on Nelson Avenue and lawfully occupying her lane of travel and there was nothing she did to cause the collision, nor was there anything she could have done to avoid the collision.

In support, PERROTTA submits the expert affidavit of Robert Genna, who prepared an Accident Reconstruction Report which she claims establishes that it was NIKITA's negligence that caused the collision with PERROTTA's vehicle. Mr. Genna indicates in his affidavit that he reviewed various documents relative to the subject accident including, *inter alia*, a police accident report, photographs of both vehicles, a vehicle repair estimate and EBT transcripts of the parties. Mr. Genna also reviewed statements made by non-party witness Gioacchino Alaimo, a construction worker, who claimed that he observed NIKITA's vehicle with its engine racing, travelling on Nelson Avenue and spun-out of control before the collision occurred.

Mr. Genna also conducted a site inspection and claimed to have observed tire scuff marks in the northbound lane and gouge marks in the southbound roadway. Mr. Genna stated that the presence of 75 feet of pre-collision skid marks on the roadway and the curvature of the marks veering from right to left indicate that NIKITA had lost control of his vehicle before the collision. He further stated that the gouge marks are indicative of the location of impact. This information, in addition to the final resting location of both vehicles and the damage to the vehicles, together indicate that NIKITA was travelling approximately 49-54 miles per hour when he lost control of his vehicle; skidded 75 feet; and impacted PERROTTA's vehicle at approximately 39 miles per hour. Based on these findings, Mr. Genna concluded that the accident was caused by NIKITA,

who lost control of his vehicle while travelling at a high rate of speed which caused his vehicle to cross into the opposite lane of traffic and strike PERROTTA's vehicle.

Mr Genna stated that PERROTTA did nothing to cause the subject collision. Her EBT testimony indicates that she stopped at the stop sign at Monticello Terrace before proceeding into the southbound land of Nelson Avenue. After completing her turn, she noticed NIKITA's vehicle moving quickly on Nelson Avenue. She claims that NIKITA lost control of the vehicle and it began to skid on the roadway as it was coming towards her vehicle. At that time, she claims to be travelling about 20 miles per hour and had applied her brakes but had nowhere to move her vehicle. Based on this testimony, in addition to his calculations and findings, it was Mr. Genna's opinion that the accident was caused solely by NIKITA. Accordingly, PERROTTA claims that there are no triable issues in regard to her actions or the cause of the subject collision. Therefore, she is entitled to summary judgment in her favor.

As defendants in Action No. 2, NIKITA and LORISA TRETYAKOV (hereinafter collectively "NIKITA") were granted permission to intervene in Action No. 1 and oppose PERROTTA's motion. These defendants argue that PERROTTA's motion is procedurally defective since she failed to attach a Statement of Material Facts as required by the Uniform Civil Rules for the Supreme Court §202.8-g. According to NIKITA, said failure constitutes a substantive defect in a motion for summary judgment and requires its denial.

NIKITA further argues that the motion for summary judgment be denied on the merits due to the existence of questions of fact regarding the cause of the accident. According to NIKITA's EBT testimony, he was travelling northbound on Nelson Avenue and it was PERROTTA who failed to stop at a stop sign on Monticello Terrace, a street perpendicular to Nelson Avenue, and

caused the collision to occur. NIKITA also argues that PERROTTA's failure to stop at a stop sign and yield to the right of way constitutes negligence as a matter of law (*see* Klein v. David, 50 AD3d 745 [2nd Dept. 2008]). Accordingly, summary judgment in PERROTTA's favor is not appropriate.

NIKITA also opposes PERROTTA'S motion as the plaintiff in Action No. 1 and contends that the motion must be denied due to vastly conflicting versions of how the accident occurred. In particular, NIKITA argues that the EBT testimony of the parties raises questions as to whether PERROTTA had failed to stop at the stop sign governing her direction of travel and improperly made a left turn in disregard of her surroundings, both in violation of Vehicle and Traffic Law §1142 (*see* Mohammed v. Ning. 72 AD3d 913 [2nd Dept. 2010]). There is also a dispute regarding whether NIKITA had, in fact, crossed the double yellow lines in the middle of the road into PERROTTA's lane of travel; whether construction vehicles were illegally parked on the roadway and obstructed the proper lanes of travel; and whether NIKITA was driving in excess of the speed limit at that location. Based on conflicting testimony in this regard, PERROTTA's motion for summary judgment must be denied.

Additionally, NIKITA contends that the expert report by PERROTTA's expert, Robert Geena, must be rejected as it is based only on a selective view of the evidence. Also, Mr. Geena fails to set forth the methodologies he relied upon in making his conclusions. In this regard, his analysis of tire marks and his conclusions in regard to the speed of the vehicles are speculative since there is no proof establishing that the tire marks were, in fact, from NIKITA's vehicle. Also, the analysis fails to mention the position of the stop sign on Monticello Terrace and that it was set back a distance from the intersection where NIKITA was proceeding. In addition, there is no mention by Mr. Genna that PERROTTA had changed her EBT testimony regarding the speed she

was travelling prior to the accident, *e.g.*, from 20 miles per hour to 15 miles per hour and eventually, it was stated that she was travelling only 8 miles per hour at the time of the collision. Based on these obvious contradictions, NIKITA argues that Mr. Genna's report is inconsistent with PERROTTA'S EBT testimony and should be disregarded. Also, Mr. Genna fails to disclose the calculations and formula he used in his collision reconstruction analysis. Accordingly, Mr. Genna's findings are, at best, speculative and must be discounted by this Court.

NIKITA also argues that PERROTTA's motion is defective in that it fails to attach a Statement of Material Facts as required by the Uniform Rules for the Supreme Court and County Courts (*see* Section 202.8-g). Therefore, the motion must be denied.

MARAIO also opposes PERROTTA's motion as the plaintiff in Action No. 2 and argues that the accident reconstruction report submitted by PERROTTA's expert, Mr Genna, is inadmissible because it is not sworn to. MARAIO further argues that Mr. Genna's opinion evidence is not admissible since he has no personal knowledge of the events but, instead, his opinion is based on, *inter alia*, an unauthenticated police report containing an inadmissible statement from a non-party witness, who is now deceased; and a newspaper photograph and car repair estimate that were never authenticated. Accordingly, his report cannot be considered in support of PERROTTA's application for summary judgment.

MARAIO further argues that there is no proof that the tire scuff marks or gouge marks referred to by Mr. Genna were caused by NIKITA's vehicle. Thus, Mr. Genna's reliance on this proof is misplaced and any conclusion drawn from its presence is purely speculative. According to MARAIO, proof indicates that construction was taking place in the area where the accident occurred and that some of the roadway marks could have been caused by construction vehicles and not by the two vehicles that are the subject of this litigation. Also noteworthy is that that Mr.

Genna completely discounted evidence or testimony that was contrary to PERROTTA's version of events and, therefore, his conclusions should not be considered in support of her summary judgment application. Finally, MARAIO argues that PERROTTA has failed to submit a Statement of Material Facts in compliance with 22 NYCRR §202.8-g, and therefore the motion is procedurally defective and should be denied on that basis alone.

In Action No. 2, defendant NEW YORK PAVING INC. also moves (Motion No. 004) for summary judgment dismissing the complaint and any cross-claims against it and argues that it bears no liability for the subject accident since none of its trucks were parked on Nelson Avenue at the time of the subject accident. According to NEW YORK PAVING, MARAIO claims that one of NEW YORK PAVING's trucks was illegally parked on Nelson Avenue which consequently caused NIKITA to swerve into the opposite lane of traffic and collide with PERROTTA's vehicle. NEW YORK PAVING argues that besides MARAIO's own self-serving EBT testimony, there is no other proof corroborating the claim that a NEW YORK PAVING truck was illegally parked on Nelson Avenue at the time of the accident. In this regard, photographs taken at the scene of the accident failed to depict any NEW YORK PAVING trucks at that location after the accident.

NEW YORK PAVING also submits the EBT testimony of one of its dump truck drivers, Michael Greenberg, who indicated that on the date of the accident, he was scheduled to deliver asphalt to a job in progress on Hillcrest Street which is off Nelson Avenue. He testified that he drove on Nelson Avenue and turned onto Hillcrest Street and parked his truck on Hillcrest in order to unload asphalt from his vehicle. He claims that at no time did he park his vehicle on Nelson Avenue but that his vehicle stayed on Hillcrest Street until additional employees arrived to help unload the asphalt. It was during that time that he heard a loud boom coming from Nelson Avenue

and saw the accident that had just occurred from his rearview mirror. Mr. Greenberg further testified that he did not see any other trucks parked along Nelson Avenue.

In further support, NEW YORK PAVING also relies on the EBT testimony of defendant PERROTTA, who testified that when she stopped at the stop sign on Monticello Terrace before proceeding onto Nelson Avenue, she had a clear view of Nelson Avenue; no vehicles were approaching; and that there were no trucks parked on Nelson Avenue. Although she did observe construction workers across the street on Hillcrest Street and that a large dump truck was parked on Hillcrest, there was no truck parked on Nelson Avenue. NEW YORK PAVING also relies on the EBT testimony of NIKITA, who testified that he did not see any trucks parked along Nelson Avenue and that he did not have to drive around any vehicle parked on the roadway, nor did he drive across the yellow lines on the road. Instead, the police accident report contains a statement made by him indicating that it was PERROTTA who ran a stop sign and t-boned him from the right side.

NEW YORK PAVING further argues that MARAIO's EBT testimony is wholly inconsistent with the testimony of other witnesses in regard to (1) the direction of travel on Nelson Avenue; (2) whether there was a dump truck parked on Nelson Avenue; and (3) whether the roadway was ripped up due to ongoing construction. MARAIO also testified that prior to the collision, NIKITA had to avoid a "Hallen" truck on Nelson Avenue. Also, there have been questions as to whether MARAIO was even paying attention prior to the collision or was he looking down at his phone. Also, the Staten Island University Hospital (hereinafter "SIUH") records indicate that MARAIO was sleeping at the time of the accident; had been smoking marijuana and took either Ativan or Xanax prior to the accident. MARAIO denies making these statements to anyone.

NEW YORK PAVING also relies on the affidavit of Walter Stone, a records searcher who gave testimony on behalf of defendant NATIONAL GRID. Mr. Stone stated that he conducted a two-year search for documents relating to the subject intersection, *e.g.*, permits, paving orders, *etc.* This search indicated that HALLEN was hired by NATIONAL GRID to install a gas main at Nelson Avenue between Amboy Road and Hillcrest Street. Mr. Stone also found eleven paving orders, one of which was dated October 30, 2016 and instructed NEW YORK PAVING to perform a final "mill and pave" on Nelson Avenue at Hillcrest Street. According to Mr. Stone, the work was performed on Hillcrest Street, not on Nelson Avenue. Hillcrest Street was closed to traffic on that day for that reason. In addition, the police accident report indicates that the accident occurred when PERROTTA ran through a stop sign at Monticello Terrace and that NIKITA was speeding and crossed the double yellow line on Nelson Avenue. Neither driver told the police that there was a construction vehicle illegally parked on Nelson Avenue which obstructed their vision and caused the accident. Similarly, PERROTTA's expert places the blame of the collision on NIKITA for speeding and losing control of the vehicle, not on an illegally parked construction vehicle. Based on the above, NEW YORK PAVING contends that it is clear that it had nothing to do with the subject accident and summary judgment should be granted in its favor.

MARAIO opposes NEW YORK PAVING's motion and argues that its attorney also relies on inadmissible evidence in support of its motion, including, *inter alia*, the uncertified police report containing statements by a now-deceased, non-party witness; statements contained within uncertified hospital records; and information contained within the accident reconstruction report by PERROTTA's expert, Mr. Genna. Accordingly, the Court should not consider the exhibits referred to in NEW YORK PAVING's attorney affirmation as they are inadmissible.

MARAIO further contends that in his amended complaint and during two of his EBTs, he alleged that NIKITA was travelling along Nelson Avenue near the intersection of Hillcrest Street and Monticello Terrace when the vehicle he was riding in was struck by the PERROTTA vehicle. He also testified that roadwork was taking place in the vicinity of Nelson Avenue and the Hillcrest/Monticello intersection and that a construction truck owned by NEW YORK PAVING was parked on Nelson Avenue, obstructing the entire northbound lane. Accordingly, NIKITA entered the southbound lane in order to get around the truck and struck the passenger side door of the PERROTTA vehicle. MARAIO also refers to the testimony of NATIONAL GRID record searcher, Mr. Stone, who confirmed that corrective action was needed with respect to the gas line project and that a repaving order was issued on October 30, 2016. In addition, NEW YORK PAVING's witness, Mr. Greenberg testified that his truck was parked on the left side of Hillcrest Street, but it is not clear whether the bed of the truck was raised or not at the time of the accident. MARAIO argues that based on conflicting testimony regarding the location of the truck and the facts surrounding the happening of the accident, NEW YORK PAVING's motion for summary judgment must be denied.

In Action No. 2, THE CITY also moves (Motion No. 005) for summary judgment and contends that the action against THE CITY alleging (1) failure to install appropriate traffic controls at the subject intersection; (2) defective design of the roadway; and (3) failure to conduct a traffic study at the subject location must be dismissed since a municipality has qualified immunity from tort liability with respect to traffic design and highway planning decisions except if the traffic study is plainly inadequate or there is no reasonable basis for the traffic plan.

THE CITY argues that it performed a traffic study for the subject intersection in 2012 and concluded that a traffic signal was not warranted as there were no preventable accidents in the two

years prior; the average rate of speed of traffic at that location was 31.1 miles per hour; and that there was insufficient traffic volume to meet THE CITY's threshold requirement for the installation of a traffic light at the subject intersection. THE CITY also argues that there is no proof that the traffic study was inadequate or that the failure to install a traffic light was the proximate cause of the accident. Accordingly, the action against THE CITY must be dismissed.

It is further argued that the action against remaining defendants BROOKLYN UNION GAS d/b/a NATIONAL GRID NY, NATIONAL GRID ENERGY SERVICES, LLC, NATIONAL GRID ELECTRIC SERVICES LLC, NATIONAL GRID ENERGY MANAGEMENT LLC, AND THE HALLEN CONSTRUCTION CO., INC. must be dismissed since there is no proof that any work performed by these entities was the proximate cause of the subject accident. In this case, both NIKITA and PERROTTA testified that there were no construction vehicles on Nelson Avenue and that any construction activity was limited to Hillcrest Street. NIKITA and PERROTTA also testified that nothing obstructed their view of the road in front of them prior to the accident. Also, the testimony of NEW YORK PAVING's employee, Michael Greenberg, indicates that neither NATIONAL GRID nor HALLEN had any personnel or vehicles present at the subject location at the time of the accident. Instead, it was NEW YORK PAVING that was there in response to a request made by THE CITY for paving repair work at Hillcrest Street. Thus, it cannot be said that NATIONAL GRID or HALLEN proximately caused the subject accident. Accordingly, the action against them must be dismissed.

Alternatively, these movants contend that they are entitled to conditional contractual indemnification from NEW YORK PAVING since it was the only party present at the location of the accident. Relative here is the contract between NATIONAL GRID and NEW YORK PAVING which provides for, *inter alia*, contractual indemnification for liability arising out of any bodily

injury claims related to NEW YORK PAVING's work. The same is true for NEW YORK PAVING's contract with HALLEN, which also provides for indemnification for liability arising out of personal injury claims related to NEW YORK PAVING's work.

In opposition, MARAIO argues again that defendants rely upon the affirmation of their attorney who references inadmissible evidence, *i.e.*, an accident reconstruction report, an uncertified police accident report containing statements made by a now-deceased witness; and uncertified hospital records. Accordingly, the Court should not consider such proof or any references to it made by counsel in his affirmation.

In regard to THE CITY, MARAIO argues that THE CITY failed to address his allegations regarding THE CITY's failure to conduct adequate safety and traffic studies to ensure sufficient traffic calming measures were in place to reduce the speed on Nelson Avenue. According to EBT testimony of DOT's borough supervisor, Roumany Wasef, traffic control studies are performed by the DOT's Intersection Control Unit ("ICU"). However, he also testified that the ICU does not conduct traffic calming studies but only performs traffic studies to determine the need for a traffic light or all-way stop sign. According to MARAIO, traffic signals are paramount to pedestrian safety but not vehicular speeding, and that it is traffic calming measures that reduce speeding. Accordingly, MARAIO argues that THE CITY has not addressed or refuted his claim regarding the failure to perform an adequate study assessing the need for traffic calming measures on Nelson Avenue and said failure was a contributing cause of the subject accident.

In addition, MARAIO argues that THE CITY failed meet their burden of establishing the absence of complaints/reports of vehicular speeding and the need for traffic calming measures, especially since THE CITY was notified on numerous occasions prior to the accident that speeding was a problem on Nelson Avenue, and that there were, in fact, prior accidents that took place on

Nelson Avenue. Also significant is that the accident did not occur at an intersection but after PERROTTA had already made her turn onto Nelson Avenue and was travelling straight. Again, it was not a traffic control issue at the intersection, but a traffic calming issue addressing vehicular speeding on Nelson Avenue, and yet there is no proof submitted by THE CITY that it considered and/or conducted any traffic calming studies at the subject location. Accordingly, THE CITY has failed to establish that it is entitled to qualified immunity and its motion must be denied.

In regard to the defendants NATIONAL GRID and HALLEN, MARAIO argues that roadwork was taking place in the vicinity of Nelson Avenue at the Hillcrest intersection at the time of the accident and that Hillcrest Street was under construction and the pavement was ripped up at the corner. He further testified that he observed a large truck parked approximately 50 feet ahead by the corner of Monticello Avenue and he described it as blackish-green color. According to MARAIO, the truck narrowed the northbound lane of travel on Nelson Avenue causing NIKITA to cross into the opposite lane of travel. MARAIO argues that his testimony is corroborated by a HALLEN foreman who confirmed that HALLEN performed work at the subject location as part of a gas line installation and that additional work was needed to be done at the location of Nelson Avenue and Monticello Street. Accordingly, MARAIO claims that triable issues remain regarding HALLEN's continued activities at that location and the presence of HALLEN vehicles. Also, it was confirmed by NATIONAL GRID's record searcher that corrective action was needed at the subject location and a repaving order was issued to HALLEN in regard to the gas line project.

Similarly, NEW YORK PAVING witness Michael Greenberg confirmed that NEW YORK PAVING was doing paving work at that location and that he parked his truck on Hillcrest Street on the date of the accident, but could not recall if the bed of the truck was raised or not prior to the accident. Accordingly, MARAIO argues that there is no dispute that repaving work was performed

at Nelson Avenue and Hillcrest Street and required excavation of the defective pavement. Accordingly, questions of fact exist regarding which trucks were still at or near Nelson Avenue at the time of the accident and, therefore, the motions by defendants must be denied.

**DISCUSSION**

Beginning with PERROTTA's motion, the opponents correctly point out that PERROTTA, as the movant, has not submitted a Statement of Material Facts pursuant to 22 NYCRR §202.8-g. By way of background, as of February 1, 2021, 22 NYCRR [Uniform Rules of Supreme and County Court] §202.8-g(a) required that a motion for summary judgment annex a "separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried". There has been some discrepancy, however, in regard to the remedy imposed by the Courts in New York for failing to comply with this rule.

In response to inconsistent rulings, the Uniform Rules have recently been amended as of July 1, 2022 to allow the Courts discretion in deciding a remedy when the movant for summary judgment fails to provide a Statement of Material Facts (22 NYCRR §202.8-g[e]). While the motions in this case were made prior the recent amendment, the Court, nevertheless, considers the absence of said statement to be inconsequential as the circumstances surrounding the happening of the accident are highly contested, and to require an additional statement of facts at this juncture would be redundant, at best, and would serve only to delay the resolution of the case on the merits. Moreover, none of the parties have asserted any claim of prejudice by PERROTTA's failure to submit an additional statement of facts. Accordingly, the lack of a Statement of Material Facts is not determinative of the subject motion. The Court, instead, must deny the motion on the merits as there are triable issues of fact as to whether the actions of either party amounted to negligence and, if so, their responsibility for the ensuing collision.

It is well settled that summary judgment, being the procedural equivalent of a trial (*see* Capelin Assocs. v. Globe Mfg. Corp., 34 NY2d 338, 341 [1974]), is a drastic remedy that will only be granted if the proponent can establish the absence of triable issues of fact (*see* Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Once the party seeking summary judgment has made a *prima facie* showing of its entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to come forward with proof in admissible form demonstrating the existence of such issues (*see* Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]).

In negligence cases, an award of summary judgment is usually inappropriate since the issue of whether the parties acted reasonably under the circumstances can rarely be resolved as a matter of law (*see* Andre v. Pomeroy, 35 NY2d 361, 364 [1974]). In this regard, the case at bar is unexceptional since most of the proof submitted is not sufficient to eliminate triable issues of fact as to the cause of the subject accident. Most prevalent here is that the parties tender conflicting allegations as to the cause of the subject accident. While it has been alleged that it was PERROTTA who failed to stop at a stop sign on the corner of Monticello Avenue upon entering Nelson Avenue and collided with NIKITA, PERROTTA alleges that it was NIKITA who caused the accident. Issues also remain in regard to the speed the vehicles were travelling prior to the collision and whether NIKITA's travel was obscured or affected by a construction vehicle parked in the area of the subject intersection. The plain result of these conflicts is the creation of triable issues of fact as to whether the actions of the parties amounted to negligence and, if so, their responsibility for the ensuing collision. These are issues which must be resolved by the trier of fact.

The expert affidavit of Mr. Geena and his accident report submitted in support of PERROTTA's application fail to eliminate triable issues. More specifically, there is no basis for

his conclusion that the tire or skid marks were created by NIKITA's vehicle when the accident occurred. Accordingly, his analysis of the data in regard to the cause of the collision and the speed of both vehicles based on the location of the tire or skid marks is speculative and calls into question his findings based thereon. Moreover, Mr. Geena's relies primarily on PERROTTA's testimony and disregards the opposing EBT testimony of NIKITA in rendering his reconstruction analysis of the collision. Thus, his report contradicts other evidence.. Also, nowhere in his report does he reconcile PERROTTTA's own contradictions insofar as the speed she was travelling up to the moment of impact. Since PERROTTA has failed to eliminate triable issues of fact, her motion must be denied.

Similarly, the motion for summary judgment by NEW YORK PAVING is denied since the Court has found issues of fact regarding the location of one of its construction vehicles and whether said vehicle obstructed NIKITA's travel along Nelson Avenue. Relevant here is the EBT testimony of record searcher, Walter Stone, whose testimony indicates that corrective action was needed for the gas line project at Hillcrest Street and a repaving order was issued on the date in question thereby confirming that additional work was required at that location.

Furthermore, the EBT testimony of NEW YORK PAVING's witness, Mr. Greenberg, confirms that on the date of the subject accident, he parked his dump truck on Hillcrest Street near the intersection of Nelson Avenue for purpose of repaving the roadway following a gas line installation. He is not certain, however, if the bed of the truck was raised or not prior to the accident which, according to MARAIO, obstructed the northbound lane on Nelson Avenue. MARAIO claims that he observed the truck parked ahead of Monticello Terrace which caused NIKITA to swerve out of the northbound lane on Nelson Avenue. Together, this proof raises triable issues regarding NEW YORK PAVING's presence at the accident location and prevents the Court from

awarding summary judgment in its favor. Where the presence of any significant doubt as to whether there is a material issue of fact, or where an issue of fact is "arguable", the motion must be denied (*see* Phillips v. Kantor & Co., 31 NY2d 307, 311 [1972]).

With regard to THE CITY, in the opinion of this Court, THE CITY has met its *prima facie* burden of establishing its right to claim governmental immunity, and that MARAIO has failed to rebut that showing and raise triable issues of fact in regard to THE CITY's planning and traffic control decisions regarding the area on Nelson Avenue where the accident occurred. (*see* Zuckerman v. City of New York, 49 NY2d 557 [1980]).

It is well established that a municipality has an absolute, non-delegable duty to the public to keep its streets in a reasonably safe condition (*see* Weiss v. Fote, 7 NY2d 579, 584). In measuring that duty, however, the courts have long recognized that their power to intrude upon a municipality's planning and decision-making functions with regard to its traffic control system is limited, and that under the doctrine of "qualified immunity", a governmental body may not be held liable for an injury arising out of a duly executed highway safety plan unless it was evolved without adequate study or lacked a reasonable basis.

"Under the doctrine of qualitied immunity, 'a governmental body may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan'" (Marrow v. State of New York, 105 AD3d 1371, 1372, *quoting* Friedman v. State of New York, 67 NY2d 271, 280). Alternatively, liability may be predicated upon the government's negligent failure to implement a remedial planning decision once it has been made, or to review its traffic control plan in light of actual experience (*see* Brown v. State of New York, 79 AD3d 1579, 584 [4th Dept. 2010]). It must also be proved that the government's negligent failure was a proximate cause of the subject injury in order for liability to attach.

In this case, proof submitted by THE CITY in support of its application includes, *inter alia*, the EBT transcript of Roumany Wasef, a borough supervisor in the DOT's ICU, which is responsible for, *inter alia*, investigating the need for a stop sign or traffic signal at a particular intersection. Also before the Court is a copy of a 2012 Intersectional Control Analysis for the area of Nelson Avenue and Hillcrest Street/Monticello Terrace which contains a history of accidents at the subject location; a traffic volume study; speed data; maps and diagrams; and pedestrian traffic data. According to Mr. Wasef, the above analysis of the area revealed that the volume of traffic, vehicle speed and preventable accidents were well below the threshold guidelines warranting a traffic signal at the subject intersection. On the basis of this proof, THE CITY has sufficiently established that the decision not to install a traffic signal at the subject intersection was the product of a deliberate decision-making process (*see* Boyd v. Trent, 262 AD2d 260, 261 [2nd Dept. 1999]), and accordingly, is qualifiedly immune from judicial scrutiny.

"[T]he courts [will] not go behind the ordinary performance of planning functions by the officials to whom those functions are entrusted" (Weiss v Fote, 7 NY2d at 584). As the Court of Appeals has explicitly recognized in that case "[t]o accept a jury's verdict as to the reasonableness and safety of a plan of governmental service and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts (*see id* at 585, 586). While MARAIO's position is that THE CITY was negligent by failing to perform a traffic calming study, such posture is unsupported by evidence, expert or otherwise, as vehicular and pedestrian volume as well as speed data were included in this study.

In regard to NATIONAL GRID and HALLEN, in the opinion of this Court, the proof submitted by each of these defendants is sufficient to establish their entitlement to judgment as a

matter of law dismissing the complaint against them. The EBT testimony of their respective witnesses, in addition to a record search establishes that neither of these entities were present at the location of the accident on the date in question. There is also no proof that NATIONAL GRID or HALLEN created any dangerous condition in the location of the subject accident as a result of a gas line installation since the job was completed prior to the date of the accident. Although the records search confirmed that the gas line project required corrective action and that repaving was necessary, NEW YORK PAVING was the party responsible for that job on the day in question. Contrary to MARAIO's contentions, there is no proof placing either NATIONAL GRID or HALLEN at the location that day. Accordingly, MARAIO has failed to raise triable issues of fact in regard to NATIONAL GRID or HALLEN's liability for the subject accident.

**CONCLUSION**

Accordingly, it is hereby:

ORDERED that the motion (No. 002 in Action No. 1) by defendant LORI K. PERROTTA for summary judgment dismissing the complaint and any cross claims against her is denied; and it is further

ORDERED that the motion (No. 004 in Action No. 2) by defendant NEW YORK PAVING INC. for summary judgment dismissing the complaint and any cross claims against it is denied; and it is further

ORDERED that the motion (No. 005 in Action No. 2) by defendants THE CITY OF NEW YORK, THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY, NATIONAL GRID ENERGY SERVICES LLC, NATIONAL GRID ELECTRIC SERVICES LLC, NATIONAL GRID ENERGY MANAGEMENT LLC, and THE HALLEN CONSTRUCTION CO., INC., for summary judgment dismissing the complaint and any cross

claims against it is hereby granted in its entirety and the action against them is hereby severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

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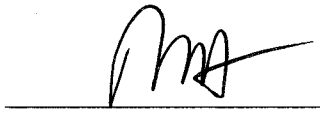

Hon. Thomas P. Aliotta

DATED: July 8, 2022