

Papaiakovou v City of New York
2022 NY Slip Op 35145(U)
March 30, 2022
Supreme Court, Richmond County
Docket Number: Index No. 150473/2021
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2-----X
IAKOVOS PAPAIAKOVOU,

Plaintiff,

-against-

CITY OF NEW YORK, RESTANI CONSTRUCTION
CORP., DIFAZIO INDUSTRIES, AQUIFER DRILLING
AND TESTING, INC., PERFETTO CONTRACTING CO.,
INC., and HALLEN CONSTRUCTION COMPANY, INC.,
CORP.,Defendants.
-----X

Present:

Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No: 150473/2021

Motion No. "1", 002 & 003

Recitation, as required by CPLR 2219(a), of the following papers numbered "1" through
"12" were marked fully submitted on January 28, 2022.**Papers
Numbered****Motion Seq. #1 & 003** Defendant Restani Construction Corp.'s Motion
to Dismiss pursuant to CPLR 3211(a)(1)(7), Affidavit, Affirmation
and supporting Exhibits (NYSCEF 29-52, 74)1, 2Defendant City of New York's Affirmation in
Opposition with supporting Exhibits (NYSCEF 69-72)3Plaintiff's Affirmation in Opposition
with supporting Exhibit (NYSCEF 78-81)4Defendant Restani Construction Corp.'s
Affidavit and Affirmation in Reply (NYSCEF 87-88)5**Motion Seq. 002** Defendant Perfetto Contracting Co., Inc.'s
Motion to Dismiss pursuant to CPLR 3212, Affirmation
and Affidavit with supporting Exhibits (NYSCEF 53-64)6, 7Defendant City of New York's Affirmation in
Opposition with supporting Exhibits (NYSCEF 65-68)8

Plaintiff's Affirmation in Opposition with supporting Exhibit (NYSCEF 75-77)	9
Defendant Perfetto Contracting Co., Inc.'s Reply to Defendant City of New York's Opposition (NYSCEF 82-83)	10
Defendant Perfetto Contracting Co., Inc.'s Reply to Plaintiff's Opposition (NYSCEF 84-85)	11
Defendant City of New York's Sur-Reply to Defendant Perfetto Contracting Co., Inc.'s Reply (NYSCEF 86)	12

Upon the foregoing, Defendant Restani Construction Corp.'s motion to dismiss the complaint pursuant to CPLR § 3211 (a)(1) and (7) is granted. Defendant Perfetto Contracting Co.,s motion to dismiss pursuant to CPLR 3212 is denied as premature for the reasons set forth below.

This action was commenced to recover damages for personal injuries allegedly sustained on August 26, 2020. At the time of the accident, plaintiff was riding his motorcycle on Arthur Kill Road, near the intersection of Arden Avenue in Staten Island, New York, when he lost control after riding over a "dangerous and slippery condition" on the roadway.

Plaintiff filed a Notice of Claim on November 17, 2020, and this action was commenced against The City of New York [hereinafter "City"] on March 3, 2021. On July 13, 2021, plaintiff also commenced a separate action against defendants, Restani Construction Corp [hereinafter Restaini], DiFazio Industries, Aquifer Drilling and Testing, Inc., Perfetto Contracting Co., [hereinafter "Perfetto"] and Hallen Construction Company under Index No: 151328/2021. On August 27, 2021, plaintiff filed a motion to consolidate both actions, which was granted by an Order dated November 1, 2021, and the matters were consolidated under this Index Number.

Pursuant to the terms of the Order, “the consolidated pleadings shall stand as the pleadings in this action” (NYSCEF 16, p.3).

On September 16, 2021, Restani filed a motion to dismiss pursuant to CPLR § 3211(a)(1) and (7) under Index Number 151328/2021 as Motion Sequence 001 prior to the consolidation. Upon consolidation, the motion was assigned Motion Sequence “1” in this Index Number. On November 16, 2021, defendant Perfetto filed a motion to dismiss pursuant to CPLR §3212 in this Index Number (Motion Sequence 002). Restani had moved to dismiss with prejudice the Verified Complaint and Cross-Claims of defendant Aquifer Drilling and Testing, Inc. and defendant, Hallen Construction Company, Inc. in Index Number 151328/2021. Perfetto also moves to dismiss the complaint and cross-claims against them as well.

Motion Sequence 1 & 003 – Restani

In support of their motion, defendant Restani attaches the written Agreement entered into with the New York City Department of Design and Construction (DDC) in which Restani was to furnish certain milling and related work on various roadways throughout the boroughs of Brooklyn and Staten Island, including Arthur Kill Road from Woodrow Road to Huguenot Avenue in Staten Island, New York (hereinafter “Arthur Kill Milling”). Restani’s work under the Agreement was limited to milling and related work, which involved grinding off the top layer (1.5 inches to 2 inches) of the asphalt surface of the roadway. After the milling was completed, the roadway was paved by the New York City Department of Transportation (DOT) or one of its contractors.

Defendant Restani also attaches the affidavit of Eliecer Pertuz, who is now employed as Operations Manager by Restani, but formerly held the title of Project Manager. Pertuz has been employed by Restani since November 2014 and was the project manager for the milling work

under the Arthur Kill project. Pertuz conducted a search of the permits issued to Restani for Arthur Kill Road and Arden Avenue and found permits issued by the DOT for work under contract HW2CR15A (Arthur Kill Milling). Restani's Daily Field Reports show that they performed the Arthur Kill Milling between September 16, 2015, and September 23, 2015. Additionally, the Daily Field Reports also revealed that on September 21, 2015 and September 22, 2015, Restani performed its milling and related work in the area where plaintiff's accident occurred. A review of the relevant portion of the Weekly Milling Report confirms that Restani completed the work, and the DOT or a contractor, paved Arthur Kill Road from September 30, 2015, through and including October 7, 2015.

The crux of Restani's argument is that they could not possibly be responsible for plaintiff's accident as the milling was completed five years before the plaintiff's accident. Moreover, Restani's work was only in preparation for the resurfacing that DOT performed afterwards that completely covered the roadway with a smooth surface. Therefore, the milling and related work could not have contributed to the plaintiff's accident.

In opposition to Restani's motion to dismiss, defendant City argues that defendant has failed to put forth a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient admissible evidence to prove its entitlement to dismissal of the claim or action. In support of this, defendant City refers to the MV-104, where plaintiff indicated that he struck debris in the road. During his 50-h hearing, he described the condition as wet, with a two by two foot patch of recent repair work, that had a pothole of fluid on top of it.

Plaintiff also opposes Restani's motion as premature as no witnesses have been deposed and the litigation is in its infancy. Further, plaintiff contends that Restani was issued a work permit by the City of New York for work in the area where the accident occurred. Defendants,

DiFazio Industries, Aquifer Drilling and Testing, Inc., Perfetto and Hallen have not submitted opposition to the motion.

“Any party may move for summary judgment in any action, after issue has been joined” (CPLR 3212[a]). A grant of summary judgment is not premature merely because discovery has not been completed (*see Haidhaqi v. Metropolitan Transp. Auth.*, 153 AD3d 1328, 1329; *HSBC Bank USA, N.A. v. Armijos*, 151 AD3d 943, 944 [2d Dept 2017]; *Lamore v. Panapoulos*, 121 AD3d 863, 864 [2d Dept 2014]). In order for a motion for summary judgment to be denied as premature, the opposing party must “provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party” (*Suero-Sosa v. Cardona*, 112 AD3d 706, 708, [2d Dept 2013]; *see Vikram Constr., Inc. v. Everest Natl. Ins. Co.*, 139 AD3d 720, 721 [2d Dept 2016]; *1375 Equities Corp. v. Buildgreen Solutions, LLC*, 120 AD3d 783, 784 [2d Dept 2014]).

Here, defendant Restani established, prima facie, that they did not cause or contribute to the plaintiff’s alleged accident. Restani had performed the milling work pursuant to contract that was executed on July 3, 2014. The Permits for the roadwork were issued on August 13, 2015, and valid from August 17, 2015 through November 14, 2015. The plaintiff’s accident occurred on August 26, 2020, five years after the milling work had been completed by Restani. In addition, as the affidavit of the Project Manager indicates, the milling work was paved over by the DOT right after it was completed. Neither plaintiff nor City have provided proof to suggest that further discovery might lead to relevant evidence or facts that Restani contributed to the plaintiff’s alleged accident. Accordingly, the motion is granted.

Motion Sequence 002 – Perfetto

Defendant Perfetto Contracting Corp., moves for summary judgment, and relies on the affidavit of its President, Cesare Perfetto. Perfetto contends that while they requested a street opening permit to perform work on Arthur Kill Road pursuant to a contract with the Department of Sanitation, the work was never commenced due to a hold being placed on the project. He further stated that prior to August 26, 2020, and throughout 2020, Perfetto never performed any construction work on the Arthur Kill Road project. Further, Perfetto argues that his company did not have an agreement or contract with any other defendants in this action with respect to work to be performed either for the Department of Sanitation project or the Arthur Kill Road project. In further support of their motion, Perfetto attaches the Progress Meeting Minutes dated December 23, 2020, highlighting portions of pages 3 and 4 which show that Perfetto (PCC) had not begun any work as of December 9, 2020 as they were waiting for the DEC to approve the entire project.

In opposition, defendant City argues discovery has barely begun and assertions and unequivocal findings cannot be made that Perfetto did not do any work at any time on Arthur Kill Road in 2020. Similarly, plaintiff opposes the motion as premature and contends that the Perfetto affidavit and meeting minutes contain internal conflicts. Defendants, DiFazio Industries, Aquifer Drilling and Testing, Inc., Restani and Hallen have not submitted opposition to the motion.

A party moving for summary judgment must establish the entitlement to judgment as a matter of law by tendering evidence in admissible form, eliminating any material triable issues of fact from the case (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). In determining a motion for summary judgment evidence

must be viewed in a light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (*see Adams v Bruno*, 124 AD3d 566 [2d Dept 2015]).

The law is also well-established that a party opposing summary judgment is entitled to obtain discovery when it appears that facts supporting his position may exist but cannot then be stated, especially where the motion for summary judgment is made prior to the parties conducting depositions (CPLR 3212[f]; *Sepulveda v Cammeby's Mgt. Co., LLC*, 119 AD3d 927 [2d Dept 2014]; *see also Schlichting v Elliquence Realty, LLC*, 116 AD3d 689 [2d Dept 2014]). “This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion” (*see Gardner v Cason, Inc.*, 82 AD3d 930, 931 [2d Dept 2011]), quoting *Baron v. Incorporated Vil. Of Freeport*, 143 AD2d 792 [2d Dept 1988]).

Here, Perfetto’s motion for summary judgment is denied as premature. The Progress Meeting Minutes between DSNY and Perfetto reveal that Perfetto had an active ongoing contract with the Department of Sanitation that began on March 6, 2020, and ended on March 5, 2021, within the time frame of plaintiff’s accident. A portion of the progress minutes under Arthur Kill Road construction marks the status as “ongoing.” Therefore, it cannot be determined at this juncture whether Perfetto performed any work at the subject location.

Accordingly, it is

ORDERED, that defendant, RESTANI CONSTRUCTION CORP.’S, motion for summary judgment (Motion Sequence “1” & 003) is granted and the complaint, together with all cross-claims, against them are dismissed; and it is further

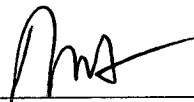
ORDERED, that the Clerk shall enter judgment accordingly as to defendant, RESTANI CONSTRUCTION CORP.; and it is further

ORDERED, that defendant, PERFETTO CONTRACTING CO., INC.'S, motion for summary judgment (Motion Sequence 002) is denied without prejudice and with leave to renew upon the completion of discovery.

The foregoing constitutes the decision and order of the Court.

Dated: March 30, 2022

E N T E R:



HON. THOMAS P. ALIOTTA, J.S.C.