

**Ehresman v Dragonetti Bros. Landscaping, Nursery &
Florist, Inc.**

2023 NY Slip Op 31108(U)

March 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 511336/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of March, 2023

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X

SUSAN EHRESMAN,

Plaintiff,

- against -

DRAGONETTI BROTHERS LANDSCAPING, NURSERY & FLORIST, INC. and KEYSpan GAS EAST CORPORATION d/b/a NATIONAL GRID, and NEW YORK PAVING, INC.,

Defendants.

-----X

KEYSPAN GAS EAST CORPORATION d/b/a NATIONAL GRID,

Third-Party Plaintiff,

- against -

NEW YORK PAVING, INC.,

Third-Party Defendant.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	88-105,
Opposing Affidavits (Affirmations).....	108, 110-111,
Reply Affidavits (Affirmations)	112-116

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This is an action for personal injuries allegedly sustained by the Plaintiff Susan Ehresman (hereinafter "the Plaintiff") on December 11, 2018. The Plaintiff allegedly tripped and fell on a roadway defect located on Newport Avenue and Beach 129th Street in Queens County, New York.

¹ The original Decision and Order was issued on or about January 30, 2023. It was apparently misplaced. This is a duplicate of the original.

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KINGS COUNTY CLERK
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Defendant Keyspan Gas East Corporation (d/b/a National Grid) (hereinafter “Keyspan”) now moves (motion sequence #4) for an Order, pursuant to CPLR §3212, granting KeySpan summary judgment and against co-defendant and third-party defendant New York Paving, Inc. (hereinafter “New York Paving”) for contractual indemnity. Keyspan argues that the Plaintiff claims that she tripped on a newly restored roadway in the area of a gas valve cover and that any defect was the result of the negligence of New York Paving. Specifically, Keyspan argues that it contracted New York Paving to repave the roadway where the alleged incident occurred and it was New York Paving’s negligence in improperly paving the roadway in the area around the the gas valve cover that created the alleged defective condition. Keyspan further argues their contract with New York Paving required New York Paving to defend and indemnify Keyspan in the event Keyspan faced suit relating to New York Paving having caused and created the condition alleged.

The Plaintiff and New York Paving each oppose this motion. They argue that Keyspan has failed to meet its *prima facie* burden in that Keyspan does not address its own conduct relating to the gas valve cover and the surrounding roadway. The Plaintiff and New York Paving also argue that there are material issues of fact regarding whether Keyspan employees caused and created the alleged defective condition through an affirmative act of negligence and whether they had failed to properly inspect the subject area after the road was completed by New York Paving.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d

851, 853, 487 N.Y.S.2d 316 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994].

Turning to the merits of Keyspan’s application (motion sequence #4), Keyspan alleges that New York Paving breached their agreement and New York Paving is required to indemnify Keyspan. Keyspan directs the Court to relevant sections of the Terms and Conditions of the agreement:

11. INDEMNIFICATION If any lawsuit or other action is filed or any claim is made against LIPA, the Authority, the Company or National Grid Corporation and/or their parent, subsidiaries, affiliates, officers, directors, shareholders, employees and agents in connection with any action, omission, event or incident occurring on or about the Site (including activities of the Contractor or its subcontractors from the handling or transportation of materials, equipment or personnel to and from the Site during the Period of Performance, or during the actual performance of warranty work), the Contractor shall indemnify and hold harmless and defend LIPA, the Authority, the Company, National Grid Corporation and their parent, subsidiaries, affiliates, officers, directors, shareholders, employees, and agents (collectively, the "Indemnified Parties") from and against any and all obligations, fees, charges, demands, damages, costs, losses (including, but not limited to, property damage, bodily injury and personal injury or death resulting therefrom), claims, penalties, expenses (including, but not limited to, attorneys' fees and expenses of litigation, accounting, consulting or engineering fees and related expenses), judgments, liens and encumbrances arising from such lawsuits, actions or claims whenever made or incurred, except (a) where such indemnity would be precluded by New York State General Obligations Law, Section

5-322.1, or by other applicable law, or (b) for the negligence or breach of statutory duty of the Indemnified Parties; provided however, that such exceptions shall not relieve the Contractor, any subcontractors or any insurers thereof of their obligations under Article 10, entitled "INSURANCE". (See Keyspan's Motion, Exhibit "N", Page 16, Paragraph 11).

Further, Keyspan argues that the actions of New York Paving, pursuant to the terms of the contract, establish as a matter of law that its Third Party Claim for indemnification should be granted. In support of their application, Keyspan relies primarily on the deposition testimony of the Plaintiff, the deposition of Walter Stone, the deposition of Peter Miceli, the contract between Keyspan and New York Paving and the related paving order issued. During her deposition, when the Plaintiff was asked whether her accident occurred as she was crossing Newport Avenue, she stated, "[y]es." (See Keyspan's Motion, Exhibit "I", Page 25). When asked how many steps she had taken into the roadway, the Plaintiff stated, "[a]bout four to six." (See Keyspan's Motion, Exhibit "I", Page 25). When asked to describe what caused her fall, the Plaintiff stated that "[m]y foot got -- the front of my right foot got caught in the depressed and uneven gas cap and pavement, and that's what caused me to fall." (See Keyspan's Motion, Exhibit "I", Page 26).

During his deposition, Walter Stone stated "I'm a consultant for Keyspan Gas East doing business as National Grid." (See Keyspan's Motion, Exhibit "K", Page 12). When asked if he found records potentially relating to the road work at issue, Mr. Stone stated that, "I found a job control report, paving order, and a New York City street opening permit." (Page 28). When asked why there was a street opening permit issued to Keyspan, Mr. Stone stated that "[a]ccording to this document, there was an emergency for a gas leak." (See Keyspan's Motion, Exhibit "K", Page 32). When asked where, Mr. Stone stated "[a]t the address of 128-19 Newport 21 Avenue." (See Keyspan's Motion, Exhibit "K", Page 32). Mr. Stone was then asked if such a gas leak could have required Kespan to work on the gas cap in the roadway, Mr. Stone stated "[i]f the leak involved the gas valve itself or within close proximity of the gas valve." When asked if he was knowledgeable as to who would have been responsible for any asphalt repair in the area within a

twelve inch perimeter of the gas cap, Mr. Stone stated “[n]o, I’m not.” (See Keyspan’s Motion, Exhibit “K”, Page 35). When asked what Keyspan would do if a gas cap was more than half an inch depressed from the surrounding asphalt, Mr. Stone stated that, “[i]f they’re aware of the situation, they would adjust the valve cover.” (See Keyspan’s Motion, Exhibit “K”, Page 37). When asked why, Mr. Stone stated “I believe it’s a requirement from the City.” (See Keyspan’s Motion, Exhibit “K”, Page 38). When asked whether the paving order reflected that work was completed by Keyspan, Mr. Stone stated that, “the actual start date for the gas leak repair, and ‘WO completed’ is when the gas leak was repaired and the next line is the date that it was issued to the paving contractor to restore the opening and the next line, ‘date paved,’ is when New York Paving reported that the paving was completed.” (See Keyspan’s Motion, Exhibit “K”, Page 42).

In response to the question “[a]nd when it says, ‘comments tighten fitting’, what does that mean” Mr. Stone answered, “[t]he gas pipes are connected with a fitting, and this one came loose, so they tightened that fitting.” (See Keyspan’s Motion, Exhibit “K”, Page 57). When asked if to complete this repair, the asphalt around the area had to be ripped up, Mr. Stone stated “[y]es.” When asked who removed the asphalt, Mr. Stone stated “Keyspan Gas East employees.” (See Keyspan’s Motion, Exhibit “K”, Page 58). When asked what Keyspan would do if it had notice of a misleveled gas cap “in excess of half an inch,” Mr. Stone stated “they would raise or lower the cover as necessary.” When asked why, Mr. Stone stated “[t]hat’s a requirement of the City.”

When asked what his current position with New York Paving was, Mr. Miceli stated “[d]irector of operations.” When asked how long he had been employed by New York Paving, Peter Miceli stated, “25 years.” (See Keyspan’s Motion, Exhibit “M”, Page 13). When asked if he reports directly to the President, Mr. Miceli stated, “[t]hat’s correct.” (See Keyspan’s Motion, Exhibit “M”, Page 13). When asked what type of work New York Paving engages in, Mr. Miceli stated, “[a]sphalt paving and concrete paving, that’s right.” (See Keyspan’s Motion, Exhibit “M”, Page 17). When asked about the work conducted on behalf of Keyspan, Mr. Miceli stated, “[s]o,

National Grid gives us a paving order, and they'll have very specific codes on what to tell us on what to do at a particular location.” (See Keyspan’s Motion, Exhibit “M”, Page 20). When asked if Keyspan provides any instruction to New York Paving other than the paving order, Mr. Miceli stated “[n]o.” (See Keyspan’s Motion, Exhibit “M”, Page 21). When asked whether he had seen Keyspan inspect work after it was completed by New York Paving, Mr. Miceli stated, “[y]es, on many times.” (See Keyspan’s Motion, Exhibit “M”, Page 23). When asked what New York Paving would have done regarding a gas valve cover, Mr. Miceli stated, “[t]hey pave right up to the valve box, you know, leave it level with the street.” When asked who would set the gas cap valve cover, Mr. Miceli stated that “the excavator [Keyspan] sets the box, sets the valve box whatever you want to call it, the service box to grade.” (See Keyspan’s Motion, Exhibit “M”, Page 52). Mr. Miceli then stated “[w]e can make some minor adjustments out in the field, but you're not given a whole lot of leeway in adjusting a valve box or any box for that matter.” (See Keyspan’s Motion, Exhibit “M”, Page 52). When asked to confirm whether the paving order had a code for a gas cap, Mr. Miceli replied “I'm looking at the ticket, there is no gas cap in this -- just looking at it, without having any personal knowledge of it.” (See Keyspan’s Motion, Exhibit “M”, Page 54). When asked if that would change what work was done, Mr. Miceli stated “[n]o, if there's a -- if this particular job has a -- I should call it a gas cap or a valve box, whatever in it, we would still pave up and, you know, do the correct job and leave it, you know, within half an inch, like I said most of the time flush to it.” (See Keyspan’s Motion, Exhibit “M”, Page 55). When shown a photo of the gas cap valve box cover at issue and whether he believed it looked flush with the roadway, Mr. Miceli stated “[i]t does.” When asked again who sets the gas cap valve box, Mr. Miceli stated, “[w]ell, the Excavator sets them. Like I said we can tweak them a little bit.” (See Keyspan’s Motion, Exhibit “M”, Page 80).

The Court finds that Keyspan has failed to meet their *prima facie* burden. Keyspan argues that summary judgment should be granted on its third party claim for indemnification against New

York Paving since,² New York Paving's actions created the defect that caused the Plaintiff to trip and fall. This is significant as "[t]he party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability." *Jardin v. A Very Special Place, Inc.*, 138 A.D.3d 927, 931, 30 N.Y.S.3d 270 [2d Dept 2016], quoting *Arriola v. City of New York*, 128 AD3d 747, 749, 9 N.Y.S.3d 344 [2d Dept 2015]; see also *Van Nostrand v. Race & Rally Const. Co.*, 114 AD3d 664, 667, 979 N.Y.S.2d 638 [2d Dept 2014].

However, Keyspan has failed to show, as a matter of law, that it was the work performed by New York Paving, and not the initial excavation and any potential adjustment of the gas cap valve box cover by Keyspan that caused the condition that purportedly caused the Plaintiff to trip and fall. Generally, in a personal injury action involving a roadway defect, a Defendant must provide admissible evidence sufficient to show that they did not create the alleged defect. See *Weinberg v. City of New York*, 96 AD3d 736, 945 N.Y.S.2d 758, 759 [2d Dept 2012]; *Cendales v. City of New York*, 25 AD3d at 580–581, 807 N.Y.S.2d 414 [2d Dept 2006]; *Shvartsberg v. City of New York*, 19 AD3d 578, 579, 798 N.Y.S.2d 85 [2d Dept 2005]. Keyspan did not present evidence that the defect at issue was not created, at least in part, by Keyspan's placement of the cap and its employees prior to any work being conducted by New York Paving. Further, Keyspan has not established that it did not have constructive notice of the condition after New York Paving completed its work insofar as Keyspan could have corrected any height differential by adjusting the cap, something New York Paving was not permitted to do. New York Paving had only limited authority to "tweak" the cap height. The testimony of both Walter Stone and Peter Miceli acknowledged that Keyspan would have initially excavated the area around the gas cap valve box cover and adjusted the gas cap and in so doing left open the possibility that the initial excavation

² Ministerial correction.

work or the work concerning the gas leak could have contributed to the alleged defective condition.

Accordingly, Keyspan failed to meet its burden and its motion is denied.

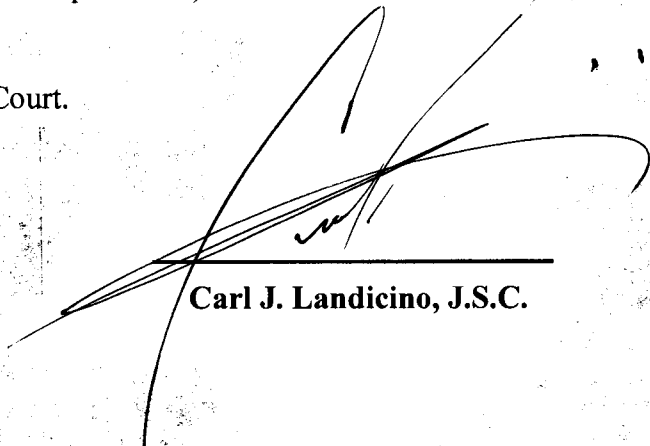
Since Keyspan failed to meet their *prima facie* burden, we need not consider the sufficiency of the opposition papers of New York Paving or the Plaintiff. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 A.D.3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

Based on the foregoing, it is hereby ORDERED as follows:

Keyspan's motion for summary judgment (motion sequence #4) is denied.

This Constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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