

**Rudenstine v City of New York**

2023 NY Slip Op 32934(U)

August 23, 2023

Supreme Court, New York County

Docket Number: Index No. 151178/2019

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. JOHN J. KELLEY **PART** **56M**

*Justice*

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|   |   |                  |             |                    |            |                        |     |
|---|---|------------------|-------------|--------------------|------------|------------------------|-----|
| DAVID RUDENSTINE, as executor of the estate of<br>ZEBORAH SCHACHTEL,<br><br><div style="text-align: center;">Plaintiff,</div> | <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 30%;"><b>INDEX NO.</b></td> <td style="border-bottom: 1px solid black;">151178/2019</td> </tr> <tr> <td><b>MOTION DATE</b></td> <td style="border-bottom: 1px solid black;">05/05/2023</td> </tr> <tr> <td><b>MOTION SEQ. NO.</b></td> <td style="border-bottom: 1px solid black;">004</td> </tr> </table> | <b>INDEX NO.</b> | 151178/2019 | <b>MOTION DATE</b> | 05/05/2023 | <b>MOTION SEQ. NO.</b> | 004 |
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| <b>MOTION SEQ. NO.</b>  | 004   |                  |             |                    |            |                        |     |

- v -

THE CITY OF NEW YORK and RESTANI CONSTRUCTION  
CORP.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 107, 111, 112, 113, 114, 122, 123, 124, 125, 126, 127, 128, 132, 134, 136, 139

were read on this motion to/for

JUDGMENT - SUMMARY

In this action to recover damages for personal injuries and wrongful death, arising from a trip-and-fall accident, the defendant Restani Construction Corp. (Restani) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The plaintiff and the defendant City of New York oppose the motion. The motion is granted only to the extent that Restani is awarded summary judgment dismissing the City's cross claim against it for contribution, as that claim has been rendered academic, and the motion is otherwise denied.

The facts of this dispute, as well as the legal standards applicable to summary judgment motions in personal injury actions involving trip-and-fall accidents, are described in detail in this court's August 23, 2023 decision and order deciding MOTION SEQUENCE 003.

Although a roadway repair contractor such as Restani may not be held liable to the plaintiff based solely on its contractual obligation to the City, it may be held liable to the plaintiff where, "in failing to exercise reasonable care in the performance of [its] duties, [it] launch[e]s a force or instrument of harm" (*Miller v Infohighway Communications Corp.*, 115 AD3d 713, 715

[2d Dept 2014], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). The gravamen of the plaintiff's claim against Restani is that, in the course of milling the pavement of a City roadway to prepare the roadway surface for repaving, Restani launched an instrument of harm by creating a large, jagged, rectangular declivity in a crosswalk, surrounded by a jagged and uneven surface. Restani, however, seeks summary judgment not on the ground that it did not create the allegedly dangerous condition upon which the plaintiff's decedent fell, but solely upon the ground that the alleged defect was open and obvious and not inherently dangerous as a matter of law, circumstances that may provide a basis for dismissal under appropriate circumstances (see generally *Tagle v Jakob*, 97 NY2d 165, 169 [2001]; *Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475, 476 [1st Dept 2007]).

The issue of whether a condition is a hazard or open and obvious is usually a question of fact (see *Schulman v Old Navy/Gap, Inc.*, 45 AD3d at 516), and the Appellate Division, First Department, repeatedly has explained that a finding that a hazardous condition was open and obvious is "not fatal to a plaintiff's negligence claim, but rather is relevant to plaintiff's comparative fault" (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 [1st Dept 2011]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 [1st Dept 2004]). With respect to whether a defect was open and obvious and not inherently dangerous, it is not dispositive that a plaintiff was able to see the condition before the accident occurred (see *Chrin v Gate of Heaven Cemetery*, 190 AD3d 516, 516- 517 [1st Dept 2021]; *Farrugia v 1440 Broadway Assoc*, 163 AD3d 452, 453-455 [1st Dept 2018]).

Restani, by submitting the transcript of the deposition testimony of nonparty witness Larry G. King, in which King described a declivity in the crosswalk that rendered the roadway in "bad shape" and dangerous, revealed the existence of a triable issue of fact as to the danger posed by the defect. Hence, Restani failed to establish its prima facie entitlement to judgment as a matter of law in connection with the plaintiff's claims against it. Summary judgment thus must be denied regardless of the sufficiency of the plaintiff's opposition papers. In any event,

the plaintiff's submissions, which included King's written witness statement that he had reviewed prior to giving his deposition testimony, and a photograph of the accident site as it appeared on the date of the accident, which King authenticated, raised triable issues of fact as to whether the subject roadway defect was or was not hazardous. In his witness statement, King asserted that "the street was dug up in the cross walk and the surface was uneven," explaining that the decedent's "foot got caught and she fell forward" and that "the cause of the accident was the fact that the street was uneven and difficult to walk on due to the construction that was done." The photograph that King identified depicted a rectangular declivity in the crosswalk of the roadway, approximately three feet long, one foot wide, and several inches deep, which revealed that Restani already had milled the existing roadway surface by that time, but that the declivity had neither been repaved nor even patched, even though other portions of the roadway surface had been temporarily patched. Moreover, the photograph depicted the surface at the bottom of the rectangular declivity to be jagged and uneven as well, while the higher surface surrounding the declivity was also jagged and striated.

Consequently, that branch of Restani's motion seeking summary judgment dismissing the complaint insofar as asserted against it must be denied.

In its order determining Motion Sequence 003, the court awarded the City summary judgment on the issue of liability on its cross claim against Restani seeking contractual indemnification for defense costs. For the same reason underlying that determination, that branch of Restani's motion seeking summary judgment dismissing that cross claim must be denied. In that same order, the court concluded that the City's cross claim for contribution against Restani had been rendered academic because the plaintiff's claims against the City were being dismissed. For that reason, the branch of Restani's motion seeking summary judgment dismissing that cross claim against it must be granted.

Accordingly, it is

ORDERED that the motion of the defendant Restani Construction Corp. is granted to the extent that it is awarded summary judgment dismissing the cross claim of the defendant City of New York seeking contribution against it, that cross claim is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a pretrial conference on October 10, 2023, at 2:00 p.m.

This constitutes the Decision and Order of the court.

8/23/2023  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: