

**Niyzaova v City of New York**

2024 NY Slip Op 34607(U)

December 23, 2024

Supreme Court, Kings County

Docket Number: Index No. 500951/2015

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
JEREN NIYZAOVA,

Plaintiff,

Index No. 500951/15

-against-

**DECISION and ORDER**

THE CITY OF NEW YORK, 3021 REALTY LLC, THE  
BROOKLYN UNION GAS COMPANY d/b/a NATIONAL  
GRID NY, NATIONAL GRID USA SERVICE COMPANY INC.,  
HALLEN CONSTRUCTION CO., INC., and NEW YORK  
PAVING, INC.,

Defendants.

Mot. Seq. Nos. 7-10

-----X  
3021 REALTY LLC,

Third-Party Plaintiff,

-against-

THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL  
GRID NY, NATIONAL GRID USA SERVICE COMPANY INC.,

Third-Party Defendants.

-----X  
THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL  
GRID NY, NATIONAL GRID USA SERVICE COMPANY INC.,

Second-Third-party Plaintiffs,

-against-

NEW YORK PAVING INC.,

Second-Third-Party Defendant.

-----X  
3021 REALTY LLC,

Third-Third-Party Plaintiff,

-against-

HALLEN CONSTRUCTION CO., INC., and NEW YORK  
PAVING, INC.,

Third-Third-Party Defendants.

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FILED

**HON. LISA S. OTTLEY, J.S.C.**

Recitation as required by CPLR 2219(a), of the papers considered in the review of this Notices of Motion for Summary Judgment submitted on April 29, 2024.

Papers	Numbered
Notice of Motion and Affirmation.....	1&2 [Exh. A-K]
Notice of Cross Motions and Affirmations .....	6&7[Exh.A-C]; 9&10[Exh.A-N]; 13&14[Exh.A-B] and 15
Affirmation in Opposition.....	4[Exh. 1-6]; 5 [Exh.1-6] 8;12[Exh.1-8];13
Reply Affirmation.....	14
Other [Memoranda of Law].....	3;11

Upon the foregoing cited papers, careful review of the moving papers and opposition thereto, the court finds as follows:

Plaintiff commenced this action for personal injuries allegedly sustained by the plaintiff, a pedestrian, who tripped and fell on July 26, 2014, on a piece of black asphalt backfill which was raised above the sidewalk adjacent to 3031-21 Brighton 13<sup>th</sup> Street in Brooklyn, New York.

Defendants, Brooklyn Union Gas Company d/b/a National Grid NY, National Grid USA Service Company, Inc., and Hallen Construction Co., Inc., (hereinafter "National Grid and Hallen") move for an order (Mot. Seq. #7) pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint against them; and granting Hallen summary judgment in its favor for contractual indemnity, including attorney's fees, costs, and expenses, as against defendant/second third-party defendant/third third-party defendant, New York Paving Inc., (hereinafter "New York Paving") and an order dismissing all third-party claims, crossclaims, and counterclaims against National Grid and Hallen. New York Paving cross-moves for an order (Mot. Seq. #8) pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all other crossclaims, third-party claims and counterclaims asserted against it; and dismissal of plaintiff's complaint against defendants/third-party defendants 3021 Realty LLC (hereinafter "3021 Realty"), National Grid and Hallen. 3021 Realty cross-moves for an order (Mot. Seq. #9) pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint, amended complaints and all crossclaims against 3021 Realty with prejudice and summary judgment on its third-party complaints and crossclaims for common law indemnification, including attorney's fees, costs, and expenses against National Grid, Hallen and New York Paving. Plaintiff cross-moves for summary judgment on the issue of liability (Mot. Seq. #10).

National Grid/ Hallen and NY Paving's Motion & Cross-Motion for Summary Judgment – Seq. Nos. 7 and 8

National Grid retained Hallen to perform gas main and services work in the sidewalk adjacent to Brighton 13 Street between Corbin Avenue and Oceanview Avenue. The project involved excavating and installing gas mains which required Hallen to create an opening in the sidewalk and replace existing gas mains. Once the gas mains were installed, Hallen backfilled the trench by putting dirt back into the trench. Thereafter, Hallen called New York Paving to restore the excavation with asphalt at the subject location. On May 7, 8 and/or 9, 2014, New York Paving performed all the temporary restoration work at the location by installing a “strip of asphalt” in the concrete sidewalk to cover the excavation. A final restoration at the location was done by New York Paving, where they removed the asphalt and installed new sidewalk flags on August 12, 2014. The subcontract for restoration of asphalt and concrete surfaces between National Grid and Hallen was entered into on April 29, 2014.

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. See, *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). To make out a prima facie case of negligence, the plaintiff has the obligation to demonstrate that the defendant created the condition or had actual or constructive notice of the defective condition and failed to remedy it. See, *Gordon v. American Museum of National History*, 67 N.Y.2d 836 (1986). National Grid and Hallen argue that the plaintiff's claims must be dismissed as a matter of law since neither of them created the allegedly defective condition which caused the plaintiff to trip and fall, and neither owed plaintiff a duty to maintain the sidewalk. Plaintiff testified that her foot came into contact with a bump of asphalt that was raised three to five centimeters above the surrounding sidewalk, which she described as blackish, grayish, and appearing fresh. In addition, there was testimony that Hallen's work entailed everything below ground, and New York Paving's work was everything above ground.

Here, National Grid retained Hallen, as an independent contractor to install gas mains and did not perform the work which allegedly caused plaintiff to trip and fall. Generally, “a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts. Defendant, National Grid has established its prima facie entitlement to summary judgment as a matter of law, by showing that it did not perform any work in the area where plaintiff tripped and fell. See, *Santiago v. 527 Grand, LLC*, \_\_\_ N.Y.S.3d \_\_\_, Slip Op. 05999 (2<sup>nd</sup> Dept., 2024). The work was performed by two independent contractors, Hallen who was contracted by National Grid and New York Paving, who was contracted by Hallen.

Each defendant moving for summary judgment has the burden of establishing that it did not perform any work on the portion of the roadway where the accident occurred or that it did not create the allegedly defective condition that caused the allegedly defective condition that caused the plaintiff to trip and fall. See, *Morris v. City of New York*, 143 A.D.3d 681, 38 N.Y.S.3d 574 (2<sup>nd</sup> Dept., 2016). The court finds that there are issues of fact which preclude summary judgment from being granted to defendants Hallen and New Paving. Hallen and New York Paving performed work on the location where the plaintiff's trip and fall occurred and neither Hallen, nor New York Paving have satisfied its prima facie burden of demonstrating that it did not perform any of the work where the accident occurred or created the allegedly dangerous condition. In addition, the defendants Hallen and New York Paving failed to establish, prima facie, that the condition that caused the plaintiff's accident was open and obvious and not inherently dangerous.

#### Contractual Indemnification

Hallen also seeks summary judgment in its favor for contractual indemnity, including attorney's fees, costs, and expenses, as against defendant/second third-party defendant/third-third-party defendant, New York Paving Inc.

"The right to contractual indemnification depends upon the specific language of the contract" (*George v. Marshalls of MA, Inc.*, 61 A.D.3d 925 (2<sup>nd</sup> Dept., 2009)). In addition, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefore." See, *Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660 (2<sup>nd</sup> Dept., 2009). The contract is between defendants Hallen and New York Paving, and Paragraph 5.1 of the Contract entitled "INDEMNITY" provides as follows:

To the fullest extent permitted by law, New York Paving, Inc. ("Subcontractor") agrees to indemnify, defend and hold harmless The Hallen Construction Co., Inc. ("Contractor"), all applicable additional indemnitees, if any, their officers, directors, agents, employees and partners (hereinafter collectively "Indemnitees") from and against any and all claims, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements related to death, personal injuries, property damage (including loss of use thereof) or the alleged violation of any laws, statutes, rules or ordinances brought or assumed against any of the indemnitees by any person, entity or firm, arising out of in connection with or as a result of or as a consequence of the performance of the work to be undertaken by the Subcontractor (the "Work") as well as any additional work, extra work or add-on work, whether or not caused

in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly, by the Subcontractor including any sub subcontractors and sub tier contractors thereof and their employees. The parties expressly agree that this indemnification agreement contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any and all liability imposed over and above that percentage attributable to actual fault on the part of the Indemnitees whether by statute, operation of law or otherwise. Where partial indemnity is provided under this agreement, attorneys' fees, costs, court costs, expenses and disbursements hereunder shall include all those attorneys' fees, costs, court costs, expenses and disbursements incurred in defense of any underlying claim, in the enforcement of this indemnity agreement, in the prosecution of any claim for indemnification hereunder and in pursuit of any claim for insurance coverage that the Subcontractor is required to procure.

The court finds that Hallen has not met its burden of demonstrating its entitlement to contractual indemnification as against New York Paving since there are issues of fact concerning the work performed by Hallen at the location where the plaintiff tripped and fell.

#### 3021 Realty's Cross-Motion for Summary Judgment – Seq. #9

The defendant, National Grid, through its contractors hired Hallen to install gas mains where Hallen excavated and backfilled a trench that was then covered with asphalt by New York Paving that allegedly caused the plaintiff's accident. This case is analogous to Maldonado v. 527 Lincoln Place, LLC, 173 A.D.3d 730, 103 N.Y.S.2d 581 (2<sup>nd</sup> Dept., 2019), where the Appellate Division affirmed the lower court's decision, dismissing the complaint as to the co-defendant owner of the property where the plaintiff was caused to trip and fall. In Maldonado, Lincoln established, prima facie, that the duty to maintain the asphalt-filled trench was imposed upon National Grid pursuant to Administrative Code of the City of New York §19-147 and Rules of the City of New York Department of Transportation (34 RCNY) §2-11(e)(16), to repair and restore the subject sidewalk. In the case at bar, 3021 Realty similarly has established, prima facie its entitlement to summary judgment as a matter of law. 3021 Realty did not create the alleged dangerous condition or cause it to occur through a special use, and the court finds that no issues of fact have been raised that would warrant denial of 3021 Realty's cross-motion for summary judgment and dismissal of any and all crossclaims against 3021 Realty. See, Giammarino v. City of New York, National Grid, et. al., 221 A.D.3d 660, 199 N.Y.S.3d 600 (2<sup>nd</sup> Dept., 2023); Meyer v. City of New York, et. al., 114 A.D.3d 734, 980 N.Y.S.2d 482 (2<sup>nd</sup> Dept., 2014).

#### Plaintiff's Cross-Motion for Summary Judgment – Seq. #10

Plaintiff cross moves for an order granting partial summary judgment on the issue of liability against the named defendants, 3201 Realty, LLC, National Grid and New York Paving. To prevail on a motion for summary judgment, the plaintiff must demonstrate, prima facie, that the

defendant either created the sidewalk defect or had actual or constructive notice of the defect. *See, Luo v. Croyden Apts., Inc.*, 219 A.D.3d 1364, 195 N.Y.S.3d 798 (2<sup>nd</sup> Dept., 2023). In support of plaintiff’s cross-motion for partial summary judgment on the issue of liability, the plaintiff as well as the defendants rely on the photograph from plaintiff’s deposition testimony, her deposition testimony and 50-H hearing where the plaintiff testified as to what she believed caused her to trip and fall, which she describes as a bump and has been referred to as a bump of asphalt on the sidewalk. Neither of the defendants established that the defect which caused the plaintiff to trip and fall, under the circumstances described herein, was physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. *See, Karpel v. National Grid Generation, LLC, et. al.*, 174 A.D.3d 695, 106 N.Y.S.3d 99 (2<sup>nd</sup> Dept., 2019). In the case at bar, the plaintiff tripped and fell and was knocked unconscious. Furthermore, the defendants failed to carry their burden of demonstrating that the plaintiff could not establish, through direct or circumstantial evidence, that the plaintiff tripped and fell because of a defect in the sidewalk. *See, Kontorinakis v. 27-10 30<sup>th</sup> Realty, LLC*, 172 A.D.3d 835, 101 N.Y.S.3d 50 (2<sup>nd</sup> Dept., 2019).

Accordingly, defendant, National Grid’s motion for summary judgment (Mot. Seq. #7) is **GRANTED** to the extent that the plaintiff’s complaint is dismissed as to National Grid, and **DENIED** as to dismissal of plaintiff’s complaint as to defendant, Hallen Construction Co., Inc., and

**IT IS HEREBY ORDERED** that the defendants, National Grid and Hallen’s motion for summary judgment for contractual indemnification (Mot. Seq. #7) in favor of defendant, Hallen against New York Paving is hereby **DENIED**, and it is further

**ORDERED**, that defendant New York Paving’s cross-motion for summary judgment (Mot. Seq. #8) dismissing the complaint is hereby **DENIED** in its entirety, and it is further

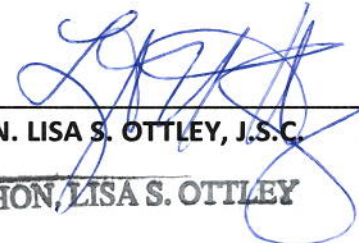
**ORDERED**, that defendant-third-party plaintiff, 3021 Realty, LLC’s cross-motion for summary judgment dismissing the complaint (Mot. Seq. #9), and any and all crossclaims against 3021 Realty, LLC, is hereby **GRANTED**, and it is further

**ORDERED**, that plaintiff’s cross-motion for partial summary judgment on the issue of liability (Mot. Seq. #10) is hereby **GRANTED**.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York  
December 23, 2024

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HON. LISA S. OTTLEY, J.S.C.  
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