Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.:701785/2020

JOSEPH P. WERNER, III,

Motion Date: 4/15/2024

Plaintiff,

Motion Cal. No.: 24

-against-

Motion Sequence No.: 3

JOSEPH L. BALKAN, INC., THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID and THE CITY OF NEW YORK,

Defendants.

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The following efiled papers numbered 59-72, 86-99 submitted and considered on this motion by Defendant Joseph L. Balkan, Inc. (hereinafter referred to as "Defendant" or "Balkan") seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 granting defendant summary judgment and dismissing Plaintiff Joseph P. Werner, III's (hereinafter Werner) complaint and all cross-claims in their entirety as asserted against moving defendant.

Motion Sequence 3	Papers Numbered
Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 59-72
Affirmation in Opposition-Affidavits Exhibits.....	EF 86-92, 93-94, 95-97
Affirmation in Reply-Affidavits-Exhibits.....	EF 98-99

Relevant Factual and Procedural Background

This action arises from an incident on April 17, 2019, wherein Werner sustained personal injuries after his skateboard struck a sinkhole in the roadway in front of 164-29 99th Street, Howard Beach, New York. Werner alleges that the sinkhole was caused by the negligent excavation and backfilling work performed by the Defendants, The Brooklyn Union Gas Company d/b/a National Grid (hereinafter "BUG"), and Balkan.

Balkan performed subsurface plumbing work on the roadway adjacent to the building located at 164-29 99th Street, nearly two months prior to the alleged occurrence. This work was completed on or before March 5, 2019. Balkan's work was inspected three times by the New York City

Department of Transportation ("DOT") between March 1, 2019, and April 17, 2019. Each inspection resulted in a "pass" grade, indicating no need for remedial/restorative work on the roadway. BUG hired Hallen Construction (hereinafter "Hallen") to perform gas main work around the same area. Hallen's work, performed under permits issued to BUG, involved excavation and backfilling and was conducted between March 9, 2019, and April 14, 2019, just days before Werner's accident. Although the permits listed the address as 164-20 99th Street, the work extended to 164-29 99th Street where the incident occurred. Balkan now moves for summary judgment, contending it did not create the defect, arguing that its work was completed two months prior, and that intervening events (specifically BUG's work) contributed to the defect. Additionally, Balkan asserts that the subject roadway passed inspection on the day of the alleged accident, absolving it from liability.

Law and Application

CPLR §3212 provides:

> (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.
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> (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to

> a summary judgment, the court may grant such judgment without the necessity of a cross-motion...
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> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

"The movant 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 Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Summary judgment is a drastic measure 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 (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]*; Doize v. Holiday Inn Ronkonkoma*, 6 A.D.3d 573, 774 N.Y.S.2d 792 [2d Dept. 2004]). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party" (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]; quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d at 335 [2011])..

Balkan argues it cannot be held liable for the defect, because its work was completed two months prior to the accident, it passed multiple DOT inspections, and intervening events, specifically BUG's work, caused the defect. However, viewing the evidence in the light most favorable to the non-moving party, this Court finds that Balkan has failed to establish prima facie that it is entitled to summary judgment.

First, this Court finds that contrary to Balkan's arguments, the mere six weeks between the completion of work and the occurrence of an accident does not absolve Balkan of liability. Also, the argument that the exact location where Balkan performed its work is not the same as the Werner's accident location is unsupported by any evidence.

Second, the argument that there were intervening events does not automatically absolve Balkan of liability. "When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*see Hain v Jamison*, 28 NY3d 524, 529 [2016]; *see also Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Thus, "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed" (*see Id.* at 529; citing *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). The work performed by BUG and Hallen in close proximity to the defect and within days of the accident was not an extraordinary event but part of the ongoing construction activity in the area. Therefore, it does not break the causal connection between Balkan's earlier work and the defect.

Third, the DOT inspections and subsequent passing grades do not conclusively absolve Balkan of liability. The fact that the roadway passed inspections on March 1, 2019, and March 4, 2019, does not address whether the work performed by Balkan was sufficient to prevent the formation of a latent defect that manifested later. The 311 call and subsequent inspection on April 15, 2019, which noted active work and compliance, also complicates attributing the cause of the defect solely to Balkan or Hallen's work. The ongoing issues with the roadway conditions, as evidenced by the 311 call, and the DOT's inspection marking the area as "in-compliance" on the day of the accident, suggest that the defect may have developed due to the combined effects of both Balkan's and Hallen's work.

Hence, this Court finds that genuine triable issues of fact exist, and Balkan has failed to meet its prima facie burden of demonstrating that it is entitled to summary judgment as a matter of law. The arguments presented by Balkan regarding the time line of its work, the intervening events, and the DOT inspections, without supporting evidence, do not conclusively establish that Balkan is free from liability for the defect that caused Werner's accident, and the factual disputes are better left to the trier of fact to resolve. Accordingly, it is hereby

ORDERED, that the motion by Joseph L. Balkan, Inc. for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: July 1, 2024

Hon. Chereé A. Buggs, JSC