

Nunez v City of New York
2025 NY Slip Op 35547(U)
January 15, 2025
Supreme Court, Queens County
Docket Number: Index No. 701010/2021
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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Index No.: 701010/2021

FELIX NUNEZ,

Motion Date: 11/4/2024

Plaintiff,

Motion Cal. No.: 27

-against-

Motion Sequence No.: 6

CITY OF NEW YORK, HALLEN CONSTRUCTION COMPANY,
INC., NEW YORK PAVING, INC., THE BROOKLYN UNION GAS
COMPANY D/B/A NATIONAL GRID NY AND P&T II
CONTRACTING CORP.,

Defendants.

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THE HALLEN CONSTRUCTION CO. INC. i/s/h/a HALLEN
CONSTRUCTION COMPANY, INC.

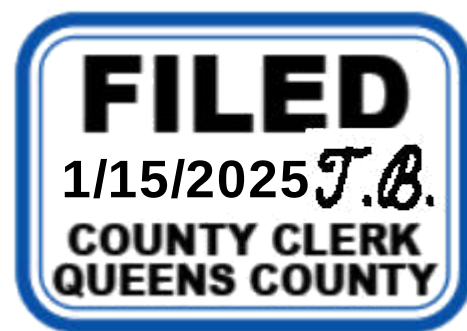
Third- Party Plaintiff,

-against-

JUAN A. RIVERA

Third- Party Defendant.

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The following efiled papers numbered EF 137-157, 160, 162-197 and 199-206 submitted and/or considered on this motion by plaintiff, FELIX NUNEZ (hereinafter collectively referred to as “Plaintiff”) seeking an order pursuant to CPLR § 3212 granting partial summary judgment on the issue of liability against defendants, HALLEN CONSTRUCTION COMPANY, INC. (hereinafter referred to as “Hallen”), THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY (hereinafter referred to as “National Grid”) and NY PAVING INC. (hereinafter referred to as “Paving”) and striking the defendants’ comparative negligence claims and this cross-motion by third-party defendant JUAN RIVERA (“Rivera”) seeking summary judgment dismissing the Third-Party Complaint (filed incorrectly under motion sequence

number five) and the cross-motion by Paving seeking summary judgment dismissing Plaintiff's Complaint as against them, alternatively granting partial summary judgment on the issues of whether plaintiff was sole proximate cause or comparatively at fault all motions seeking such other and further relief as this Court deems just and proper.

	Papers <u>Numbered</u>
Notice of Motion- Aff. in Support-SOF- Exhibits.....	EF 137-157
Notice of Cross- Aff./Memo- SOF-Exhibits.....	EF 162-171
Notice of Cross- Aff./Memo- SOF- Exhibits.....	EF 172-178
Stipulation.....	EF 160, 179, 181-182 and 206
Opp to Cross.....	EF 180
Opp to Cross-Exhibits.....	EF 183-187
Opp to Cross- Exhibits.....	EF 188-193
Opp to Cross- Exhibits.....	EF 194-197
Opp to Cross.....	EF 199
Aff. In Reply.....	EF 200
Aff. in Reply- Memo- Exhibits.....	EF 201-205

At the outset, EF 172-178 were erroneously filed under motion sequence number five. In light of the fact that opposition was submitted to the same under the proper motion sequence, this Court will consider the papers. However, the party who filed the EF 172-178 is directed to correct the error.

This action was commenced by the Plaintiff for injuries he allegedly sustained in a motor vehicle accident which occurred on March 14, 2019 on Atlantic Avenue at or near its intersection with 120th Street in the County of Queens, State of New York (hereinafter referred to as the "Site"). According to the plaintiff, shortly prior to the incident, he was in "heavy" traffic stopped at a traffic light behind two cars. When the light turned green and the vehicles in front of him proceeded through the intersection, plaintiff followed a distance of approximately four car lengths when he alleges that both of his tires sank into two holes located within the roadway causing damages. It is undisputed that there were no cones or flagmen present at the Site during the relevant time. Plaintiff initially commenced separate actions against the defendants but the actions were ultimately consolidated.

According to the plaintiff, National Grid obtained a New York City Department of Transportation street opening permit to install a gas main under the roadway at the Site. National Grid retained Hallen to perform the work and Hallen retained Paving to install the temporary asphalt.

The witness from Hallen, Clayton Daly, testified that he was the foreman and was present at the site on March 13, 2019 and March 14, 2019. That, he observed a depression in the roadway on March 13, 2019 (one day prior to the accident) and notified his representative at Hallen of the condition so that they would in turn notify Paving to return to the Site to add more asphalt (referred to as a "make safe call"). On

the morning of the accident, Mr. Daly observed that the condition worsened and placed another make safe call. Mr. Daly acknowledged that he did not place a flagman or cone to warn of the condition prior to the subject accident.

Mr. Daly was present at the site when the accident occurred and made the following entry in his incident report:

“Vehicle drove over depression in crossing of Atlantic Ave 2 days after paving and the trench sunk. Vehicle bottomed out and axle was damaged. I called in for a make safe the day before as depressions were visible but they worsened overnight. Vehicle was low to the ground and speeding.”

Law and Application

“The proponent of a summary judgment motion 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 Morejon v. New York City Tr Auth.*, 216 AD3d 134, 136 [2dDept 2023]; citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, however, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action”. (*See Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v. City of New York*, 49 NY2d at 562 [1980]).

In support of the motion, plaintiff points to *Maldonado v. 527 Lincoln Place, LLC et al.* (173 AD3d 730, 731 [2d Dept 2019]) where the plaintiff allegedly sustained injuries when he tripped and fell due to a hole in an asphalt trench on a public sidewalk in Brooklyn that abutted a property owned by the defendant/movant 527 Lincoln Place (“Lincoln”) (*id.*). Defendant, National Grid, through its contractors (Hallen Construction and NY Paving) constructed the subject trench which was apart of a gas main replacement project that spanned the entire block. Lincoln moved for dismissal and the appellate court affirmed. The Appellate Court found that the duty to maintain the trench was imposed upon National Grid via statute (*id.*). “National Grid had a statutory obligation, under Administrative Code of the City of New York § 19-147 and the Rules of the City of New York Department of Transportation (34 RCNY) § 2-11 (e)(16), to repair and restore the subject sidewalk” (*id.*). “Moreover as a permittee performing work to the public sidewalk, National Grid was liable for any “damage...to persons animals or property by reason of negligence in any manner connected with the work” (*id.* citing Administrative Code of City of N.Y. § 19-110).

Plaintiff argues that the defendants herein are liable for the injuries he allegedly sustained because they violated the following statutes and were therefore negligent per se.

New York City Administrative Code § 19-147 Replacement of pavement and maintenance of street hardware.

- a. General provisions. Whenever any pavement, sidewalk, curb or gutter in any street shall be taken up, the person or persons by whom or for whose benefit the same is removed shall restore such pavement, sidewalk, curb or gutter to its proper condition to the satisfaction of the commissioner of transportation.

New York City Administrative Code § 19-110 Liability for damage.

In all cases where any person shall engage in activity for which a permit is required pursuant to this subchapter, such person shall be liable for any damage which may be occasioned to persons, animals or property by reason of negligence in any manner connected with the work.

New York City Administrative Code § 19-109 Protection at work site.

- a. Protective measures. Any person who removes, opens or otherwise disturbs the pavement of or excavates in a public street or uses any part of a public street so as to obstruct travel therein shall provide barriers, shoring, lighting, warning signs or other protective measures in accordance with the rules of the department, so as to prevent danger to persons and property, and such barriers, shoring, lighting, warning signs or other protective measures shall be maintained in accordance with such rules until the work shall be completed or the danger removed.

34 RCNY § 2-11 Street Openings and Excavations.

(e) Excavation and Restorations Requirements.

9. Temporary Asphaltic Pavement

(i) immediately upon completion of the compaction of the backfill of any street opening, the permittee shall install a temporary pavement of an acceptable asphalt paving mixture not less than four inches in thickness after compaction, flush with the adjacent surfaces.

16. Other Requirements

(f) Excavations and Street Openings in Protected Streets

4. Restorations

(iv) Permittees shall be responsible for the proper repair of the street opening or excavation for a period of three years from the date of completion or for the duration of the protected street guarantee period, whichever is longer.

Plaintiff further argues that defendants are liable under the common law as they created a dangerous condition. In support of this contention, plaintiff points to the holding in *Robert Ortiz v. Roseny Nunez et al.* (32 A.D.3d 759, 760 [1st Dept 2006]) “...anyone undertaking work on a public highway is under a nondelegable duty to avoid creating conditions dangerous to the users of that thoroughfare”. In *Ortiz*,

plaintiff commenced the action on behalf of the infant-plaintiff alleging injuries after the infant slipped on gravel while crossing a street (*id* at 759). The defendant/movant performed excavation work on a nearby street and moved for summary judgment arguing it should not be held liable for the negligence of its independent contractor. The First Department affirmed the trial courts decision denying the motion reasoning that exceptions exist when the party for whose benefit the work is done knows or has reason to believe “that the assigned task involves special dangers inherent in the work or which should have been anticipated” *id* at 760.

National Grid

Plaintiff argues, as the permit holder, National Grid had a duty to maintain the subject roadway and breached that duty when a depression in the subject roadway, formed after the work began, caused damages and injuries to the plaintiff after he drove over the same. Plaintiff has established prima facie entitlement to judgment as a matter of law as against National Grid by establishing that they violated New York City Administrative Code §§ 19-147, 19-109 and 19-110 and 34 RCNY §§ 2-11 (e) 9 (1) and (e)(16)(f)(4)(iv).F Furthermore, plaintiff has established prima-facie that National Grid is liable under the common law. *See Maldonado v. 527 Lincoln Place, LLC et al.* (173 AD3d 730, 731 [2d Dept 2019]); *see also Robert Ortiz v. Roseny Nunez et al.* (32 A.D.3d 759, 760 [1st Dept 2006]).

In opposition, National Grid failed to raise a triable issue of fact. While National Grid attempts to rely on the holding in *Hussain v City of NY* (179 A.D.3d 1046, 1047) that “[g]enerally 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” (*citing Kleeman v. Rheingold* (81 NY.2d 270, 273 [1993])) This Court notes that this is merely the general rule. As further noted in *Kleeman*, “[d]espite the courts’ frequent recitation of the general rule against vicarious liability, the common law has produced a wide variety of so-called ‘exceptions’...these exceptions, most of which are derived from various public policy concerns, fall roughly into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or ‘inherently’ dangerous and, finally, instances in which the employer is under a specific non-delegable duty” (*id* at 274 [citations omitted]).

Here, the evidence indicates that as the permittee, National Grid had a non-delegable duty. *See Maldonado* at 731.

Hallen

Plaintiff has established prima facie entitlement to judgment as a matter of law that *Hallen* violated New York City Administrative Code §§ 19-109 and 19-110. Plaintiff has also established that Hallen is liable under the common law. The deposition testimony of Mr. Daly was as follows in relevant part:

Q: And what particular job was Hallen carrying out either on this day or the days prior?

A: We were running plastic gas main on both side of Atlantic Avenue sidewalk with crossing in the street there at 120th Street.

Q. Great.

Q: And when you say crossing in the street, what do you mean?

A: We excavated in the street as opposed to the sidewalk as we came across 120th Street.

(EF 148 pg 14 lines 23-25, pg 15 lines 2-6 and 13-17).

Q: When you saw the condition on March 13 or two days prior to this accident, did you try to put a plate onto the hole or something like that?

A: No, I called it in for New York Paving to fix it. If I had put a plate over it, then they wouldn't have been able to fix it.

Q: Did you barricade the area in any way?

A: No. It was only a one-inch depression. It wasn't really anything to worry about at that time.

Q: And when you went in the second day, did the depression grow in any way?

A: Yes.

Q: To how many inches?

A: A total of two or three.

Q: At that time, did anyone try to put a steel plate on top of it or barricade it?

A: At that point, it was too late. The guy had crashed and filled it in as you could see in the pictures.

(EF 148 pg 56 lines 2-25).

In *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136, 140 [2002]), the Court provides: “a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm” (*see H.R. Moch Co. v Rensselaer Water Co.*, 247 NY at 168 [1928]); (2) where the plaintiff detrimentally relies on the

continued performance of the contracting party's duties (*see Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d at 226 [1990]); and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka v Servicemaster Mgt. Services Corp.*, 83 NY2d at 589 [1994]). These principles are firmly rooted in our case law, and have been generally recognized by other authorities (*see e.g. Restatement [Second] of Torts § 324A*)”.

Plaintiff has not established that Hallen violated the aforementioned subsections of the 34 RCNY §2-11 as plaintiff has failed to establish that Hallen was a “permittee”.

In opposition, Hallen contends that plaintiff cannot prove the second or third prongs in *Espinal* because Paving, not Hallen completed its work in the same location prior to the occurrence.

In its reply, Plaintiff noted that Hallen was under a statutory obligation. *See Maldonado v. 527 Lincoln Place, LLC et al.* (173 AD3d 730, 731 [2d Dept 2019]) to warn of the condition. Furthermore, Plaintiff alleges that Hallen is liable under the common law as it is undisputed that both Hallen and Paving worked on the subject portion of the roadway prior to the development of the depressions.

While there remains an issue of fact as to whether Hallen created the condition upon the roadway this Court has found that Hallen had a duty to warn and there is no dispute that Hallen failed to do so. This Court finds, in light of Hallen’s statutory obligation to warn, Hallen’s failure to warn amounts to Hallen “launching a force or instrument of harm” (*Espinal* at 140)(*See Moch v Renasselear Water Company*, 247 NY 160, 168 [1928]; *see also Bono v Halben’s Tire*, 84 AD.3d 1137 [2d Dept 2021]) In *Moch*, the Court of Appeals held that “[t]he query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good” (*id*). This Court finds that it cannot be said that one who fails to fulfill a statutory obligation to warn has merely “stopped where inaction is at most a refusal to become an instrument for good” (*id*)

Paving

Plaintiff has established prima facie entitlement to judgment as a matter of law that Paving violated New York City Administrative Code § 19-110. Plaintiff has further established that Paving is liable to it under the common law.

Plaintiff submitted the contract between Hallen and Paving in support of the motion. Article 2 of the contract entitled “SCOPE OF WORK” indicates that Paving as the subcontractor was to perform “2. Permanent asphalt roadway and driveway restoration”.

The testimony of Mr. Daly indicates:

Q: Now, on this job prior to this March 14, 2019, had Hallen completed the work and had New York Paving then paved over your work?

A: Yes, in the street, yes.

(EF 148 pg 17 lines 18-22)

Finally, Plaintiff also submitted a copy of a document entitled “DPMS Review Paving Order Panel” (“March 12th Order”) along with the testimony of the witness for National Grid, Walter Stone. According to Mr. Stone, the March 12th Order reveals that the request was sent to Paving on March 11, 2019 (evidenced by the acronym “DTPC” or date to paving contractor) which means that Paving had 24 hours to fulfill the same. Mr. Stone explained “[i]t’s indicating to the paving contractor to have this done within 24 hours of that date, but the computer system, when it puts in the date that it’s received by the paving contractor, is the next working day” (EF 146 pg 25 lines 14-19).

In its totality, the evidence indicates that Paving performed paving in accordance with their scope of work prior to the subject accident and prior to the development of the depressions in the roadway. Plaintiff has established prima facie entitlement to judgment as a matter of law as against Paving.

Plaintiff has not established that Paving violated the aforementioned subsections of the 34 RCNY §2-11 as plaintiff has failed to established that Paving was a “permittee”. Plaintiff has also failed to establish that Paving violated NYC Administrative Code § 19-147(a) because plaintiff failed to establish that Paving was “the person [who performed excavation] or persons by whom or for whose benefit [excavation was performed]”. See NYC Administrative Code § 19-147(a)

Paving Cross-Motion

In opposition, Paving has cross-moved for summary judgment arguing that the evidence indicates they did not perform work prior to the subject accident and therefore cannot be held liable to plaintiff. That, Paving had no duty to the plaintiff under the holding in *Espinal v Melville Snow Contractors* (98 N.Y.2d 136 [2002]) and were therefore not liable pursuant to NYC Administrative Code § 19-110.

In support of this contention, Paving points to the March 12th Order with at DTPC date of March 12, 2019, it indicates that temporary asphalt was to be put down at an area spanning 13 feet from the east of the eastern curb line of Atlantic Avenue and **42 feet** from the north of the southern curb line of 120th street. There is no dispute that Paving performed this work. Thereafter, Hallen became aware of the depression in the roadway. Hallen sent a second paving order with a DTPC of March 14, 2019, for Paving to return and lay asphalt. Paving points to the testimony of their witness that recalled that the second paving order was meant to cover an area spanning 13 feet from the east of the eastern curb line of Atlantic Avenue and **60 feet** from the north of the southern curb line of 120th street. Paving argues they did not fulfill the

March 13, 2019 order until after the subject accident. That, the area covered in the second paving order spans an additional 18 feet, presumably to cover the Site where the accident occurred. Paving argues this indicates that they did not perform work at the Site prior to the accident.

This Court was not provided with the second paving order that Paving is referring to. This Court was provided with a paving order which depicts a DTPC of March 14, 2019 (“March 14th Order”) and requests that paving be performed to cover an area that was 13 feet from the east of the eastern curb line of Atlantic Avenue and **25 feet** from the north of the southern curb line of 120th street (EF 184). This documentary evidence indicates that the March 14th Order, encapsulated the area that Paving initially paved on March 13, 2019.

Thus, Paving has not established that they are not liable to plaintiff pursuant to the holding in *Epinal* in violation of NYC Administrative Code § 19-110.

Sole Proximate Cause

Plaintiff seeks the dismissal of defendant’s claims that Plaintiff was the sole proximate cause of the accident. All defendants allege that the plaintiff was the sole proximate cause of the accident because he was allegedly speeding. Plaintiff argues any allegations of speeding were based upon pure speculation. The following is an excerpt from the deposition of Mr. Daly:

Q: Did anyone directly eyewitness this car approaching this sinkhole?

A: Yes.

Q: Was it you or someone else?

A: Me. I guess as it happened, as I heard it, you know, hit the area. I wasn’t watching it as it approached as much as, you know.

Q: Okay. So how were you able to determine that it was speeding?

A: By the fact that it traveled another 150 feet without a wheel.

Q: Well, are you assuming then that in the approach to the hole it was speeding based on the movement of the car afterwards?

A: Yes

(EF 148 pg 24 lines 7-24)

Mr. Daly was presented as a fact witness not an expert witness. Thus, it appears his assertions that plaintiff was speeding was solely based upon speculation. *See Szczotka v. Adler* (291 A.D.2d 444 [2d Dept 2002]).

Paving moved for partial summary judgment on the issue of plaintiff's comparative fault. In support of the same, Paving submitted the preliminary findings and accident reconstruction analysis of Stephen N. Emolo a Board Certified Traffic Accident Reconstructionist.

Mr. Emolo based his findings upon seven color photographs taken at the accident scene, the registration of the subject vehicle (2003 Honda Accord), the repair estimate prepared by Benji Transmission Auto Repair Shop, the testimony of the plaintiff and Mr. Daly, and a site inspection.

Mr. Emolo opined that based upon the 145-foot post-impact travel distance and a one-second perception/reaction time for full braking the plaintiff was driving approximately 46 miles per hour or 21 miles over the speed limit pre-impact. That, had the plaintiff been traveling at the 10 mph, as he testified, he would have stopped approximately 20 feet post impact. Furthermore, Mr. Emolo opined that the abnormally high amount of damage was associated with the high rate of speed. Finally, Mr. Emolo concluded that the plaintiff's actions and/or improper repairs/poor maintenance were the sole proximate cause of the accident.

Notably, Mr. Emolo does not opine that if plaintiff was travelling at the speed limit he would not have suffered any injuries. It appears to this Court that but for the existence of the hole, plaintiff would not have suffered injuries following his impact with the same. While Mr. Emolo's report speaks to damages and mitigating factors such as plaintiff's alleged speed, this report fails to establish prima facie that plaintiff was the sole proximate cause of the accident.

Arguments that there were two vehicles traveling ahead of plaintiff are unpersuasive, as this Court was only presented with plaintiff's testimony related to the vehicle directly in front of him and he testified that "it was a bigger vehicle" or "taller vehicle" (EF 144 at pg 147 lines 21-25). Thus, a comparison would be inappropriate.

Thus, Paving has failed to establish prima facie that plaintiff was the sole proximate cause of the accident.

Comparative Negligence

Plaintiff argues that defendants were the sole proximate cause of his accident. That, any reference to his speed amounts to speculation.

The defendants Hallen and National Grid point to the affidavit of Peter Nicholls (EF 169) an employee of Hallen who was an alleged witness to plaintiff's speed ("the Affidavit"). However, the affidavit contains inconsistencies that contradict the plaintiff's testimony and the incident report prepared by Hallen employee, Mr. Daly. First, the Affidavit asserts that the incident occurred at "approximately 7:00 AM". The

incident report indicates that the shift started at 7:30 AM and the incident occurred at approximately 8:30 AM. Plaintiff testified that he left the house “[a]t 9:00” in the morning. (EF 144 lines 6-9). Second, the Affidavit states that plaintiff was first observed by Mr. Nichols when he was “10 to 15 car lengths from the intersection of 120th street”. That, “the traffic light at 120th street and Atlantic Avenue was green, and Plaintiff did not stop or slow down before the impact occurred”. However, as previously mentioned, the Plaintiff testified that prior to the accident he was stopped at a red light behind two cars in the right lane. Once the light turned green and the vehicles ahead of him proceeded, the accident occurred at or near the intersection when plaintiff traveled approximately four car lengths. Third, the Plaintiff alleged traffic was heavy on that Thursday morning. The Affidavit alleges traffic was light. This Court will not consider the Affidavit as there are a host of inconsistencies that call into question its validity. Notwithstanding, Mr. Nicholls has not held himself out to be an expert in the field of accident reconstruction and he has not otherwise put forth any explanation to support his conclusive assertion that plaintiff was travelling 45 to 50 miles per hour. Hallen also relied upon the report of the expert Dr. Emolo. However, this Court has already expressed its reservations regarding the same.

Paving argues that plaintiff was negligent as a matter of law for driving in excess of the speed limit. In support of its contention, Paving points to: *Chong Suk Rose v State* (19 AD3d 680, 690 [2d Dept 2005]), where the court found that the excessive speed of the driver caused his gasoline tanker truck to tip over; *Kante v Tong Fei Chen* (176 AD3d 928 [2d Dept 2019]) where the court found that the plaintiff, who was stopped in the left lane of travel with his hazards lights on, was not a proximate cause of the accident. Rather, the court found it was the defendant’s excessive speed and failure to maintain a safe driving distance (*id* at 930). The court found that plaintiff’s actions merely “furnished the condition or occasion for” the accident. (*id*); and *Riddel v City of NY* (209 A.D.3d 891, 893 [2d Dept 2022]) where the court found that the plaintiff’s negligence in operating his vehicle while intoxicated and at a high rate of speed was the sole proximate cause of the accident.

In opposition, Plaintiff argues that the purpose of VTL § 1180 was not to protect motorists from being injured in the event that their vehicles strike a roadway depression and thus the argument amounts to a “red herring”.

Plaintiff points to *Pasternak v. County of Chenango* (156 A.d.3D 1007, 1008 [3d Dept 2017]) when the plaintiff lost control of his motorcycle on a roadway owned and maintained by the road. Plaintiff alleged the surface conditions on the roadway caused his accident (*id*). The court considered several accounts of witnesses who affirmed that there were defects in the road (*id*). The court found that the defendant failed to establish that the plaintiff “intoxicated” conduct was the sole proximate cause of his injuries (*id* at 1009).

It appears that in *Pasternak* the court was presented with evidence that the plaintiff was speeding and intoxicated¹ as the court notes “[t]hree separate witnesses testified that plaintiff, while perhaps traveling in excess of the posted speed limit, was not thrown from his motorcycle until he hit the ‘uneven’, ‘wavy’ section of road containing depressions or divots (*id* at 1009). In consideration of the same, the court aptly noted that “there can be more than one proximate cause of an accident”.

The question before this Court is whether the plaintiff’s speed was a contributing factor to the occurrence of his accident **or** his injuries. This Court finds that there are issues of fact regarding the same.

The issue of the Plaintiff’s comparative negligence is best left to a jury or fact finder.

Premature

Paving further cross-moved for a finding that plaintiff’s summary judgment motion was premature because plaintiff moved before Paving had an opportunity to depose the owner or the vehicle and third-party defendant, Juan Rivera. Paving argued that, Paving was unable to obtain discovery related to the maintenance of the vehicle which has foreclosed them from presenting the same in support of their contention that poor maintenance was the sole proximate cause of the action.

This argument fails. As noted above, Paving has not established that plaintiff would not have sustained injuries had he been traveling the speed limit. The issue of maintenance speaks to the issue of damages which is not an issue before this Court.

Rivera’s Motion for Summary Judgment

The Third-party Complaint sounds in common law indemnity and contribution. However, Rivera seeks summary judgment as to claims of negligent entrustment. This Court finds that Rivera’s motion is premature pursuant to CPLR 3212(f). Therefore, it is

ORDERED, that the portion of plaintiff’s motion seeking partial summary judgment as to liability against National Grid, Hallen and Paving is granted to the extent that plaintiff has established National Grid violated New York City Administrative Code §§ 19-147, 19-109 and 19-110 and 34 RCNY §§ 2-11 (e) 9 (1) and (e)(16)(f)(4)(iv); Hallen violated New York City Administrative Code § 19-109 and 19-110; Paving violated NYC Administrative Code § 19-110 and all three defendants are liable to plaintiff under a theory of common law negligence; and it is further

¹ In *Pasternak v. County of Chenango* (226 A.D.3d 1220, 1221 [3d Dept 2024]) we learn that a jury convicted the plaintiff of driving while intoxicated at the time of the accident.

ORDERED, that those branches of plaintiff's motion that seeks summary judgment on the issue of whether Hallen and Paving violated 34 RCNY §§ 2-11 (e) 9 (1) and (e)(16)(f)(4)(iv) are denied; and it is further

ORDERED, that the branch of plaintiff's motion that seeks summary judgment on the issue of whether Paving violated New York City Administrative Code § 19-109 is denied; and it is further

ORDERED, that branch of plaintiff's motion seeking to strike the defendants comparative negligence claims and the branch of Paving's cross-motion seeking partial summary judgment on Plaintiff's comparative negligence are denied; and it is further

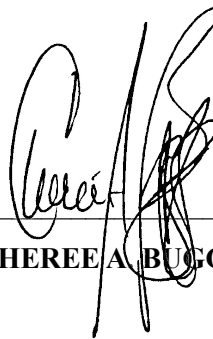
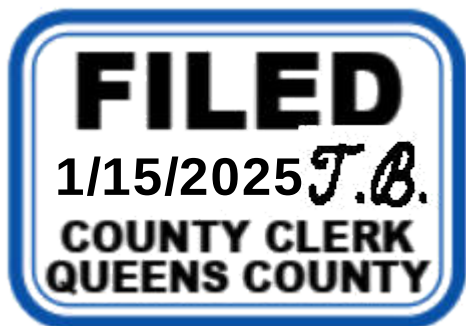
ORDERED, that Paving cross-motion seeking to dismiss plaintiff claim that it violated New York City Administrative Code §§ 19-147 and 19-109 and 34 RCNY §§ 2-11 (e) 9 (1) and (e)(16)(f)(4)(iv) is granted; and it is further

ORDERED, that the remaining portions of Paving's motion are denied; and it is further

ORDERED, that Juan Rivera's cross-motion is denied as premature.

This constitutes the decision and order of this Court.

Dated: January 15, 2025



HON. CHEREE A. BUGGS, J.S.C.