

<b>Asaro v City of New York</b>
2026 NY Slip Op 30353(U)
January 28, 2026
Supreme Court, New York County
Docket Number: Index No. 452775/2024
Judge: Ilana J. Marcus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ILANA J. MARCUS PART 05

Justice

-----X

JOHN ASARO,

Plaintiff,

- v -

THE CITY OF NEW YORK, RESTANI CONSTRUCTION CORP.

Defendant.

-----X

INDEX NO. 452775/2024

MOTION DATE 09/09/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 were read on this motion to/for DISMISS

Co-defendant Restani Construction Corp., (Restani), moves to dismiss plaintiff, John Asaro's, (Asaro), amended complaint and to dismiss defendant, the City of New York's (the City), cross claims for indemnification pursuant to CPLR 3211 (a)(1) and (a)(7). Plaintiff opposed the motion. The City appeared at oral argument, but did not submit written opposition nor state a position. After oral argument and for the reasons set forth herein, the motion is granted, as follows:

BACKGROUND

On November 15, 2023, Plaintiff allegedly fell from an electric scooter because of a defective condition in the bike lane at or near the intersection of 33rd Street and Broadway in New York County. Plaintiff commenced this action on or about June 7, 2024, to recover for the injuries he suffered as a result of the fall (NYSCEF Doc No 1). The City joined issue by service of its answer on July 8, 2024 (NYSCEF Doc No 5). On May 6, 2025, Plaintiff moved to amend the caption to include Restani and alleged Restani maintained the roadway near 33rd Street and Broadway (NYSCEF Doc No 15). Plaintiff's relief to add Restani as a defendant was granted on June 12, 2025 (NYSCEF Doc No 23). Restani's instant motion seeks to dismiss plaintiff's amended complaint as against it and the City's cross claim pursuant to CPLR 3211(a)(1) and (a)(7), (NYSCEF Doc No 30).

In support of its motion Restani argues that applicable documentary evidence conclusively establishes a defense to plaintiff's negligence claim. Restani submits documentary evidence including the agreement between the City and Restani; New York City Department of Transit (NYC DOT) issued permits to perform milling; a NYC DOT task order, Restani's daily report; and NYC DOT's Inspector's Report (NYSCEF Doc Nos 33-37). Restani argues that it did not owe a duty to maintain the roadway on 33<sup>rd</sup> Street and Broadway on the date of the accident and is therefore not liable for any breach. Restani argues that plaintiff does not have a cause of action against it and therefore, the City is barred from maintaining an indemnification claim.

Plaintiff's opposition was inapposite to Restani's motion and mischaracterized Restani's motion as one for summary judgment. Therefore, plaintiff's opposition was afforded little consideration.

### DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence defendant presents must conclusively establish a defense to the claims asserted as a matter of law (*see David v Hack*, 97 AD3d 437 [1st Dept 2012]). Here, Restani's documentary evidence, namely the agreement, Restani's daily report, task order, NYC DOT permits, and Inspector's Report demonstrate that Restani owed no duty to maintain the subject roadway on the date of plaintiff's accident (NYSCEF Doc Nos 33-37).

Plaintiff alleges that Restani maintained the roadway on 33<sup>rd</sup> Street and Broadway on November 15, 2023, the date of Plaintiff's accident (NYSCEF Doc No 25). Restani's documentary evidence indicates that it contracted with the City to perform milling work on 33<sup>rd</sup> Street and Broadway and completed such work on May 6, 2019 (NYSCEF Doc Nos 36 and 37). Pursuant to Department of Design and Construction (DDC) Highway Specifications § 6.70.11(F)(2) and (H)(6) and (7)A, a milling contractor is to maintain temporary ramps placed on the roadway following milling for a maximum of fifteen (15) days following the completion of work. In accordance with the DDC Highway Specifications, Restani's responsibility to maintain the roadway at 33<sup>rd</sup> Street and Broadway ceased fifteen (15) days after its completion of milling. As such, Restani puts forth a defense to plaintiff's claims pursuant to CPLR § 3211(a)(1).

On a motion pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true and accord favorable inference to the plaintiff. (*see David*, 97 AD3d at 438). However, allegations consisting of bare legal conclusions and any factual claims flatly contradicted by documentary evidence do not warrant such treatment (*id.*) Furthermore, when evidentiary material is provided in support of a motion pursuant to CPLR 3211(a)(7), the court must determine whether

plaintiff has a cause of action rather than if plaintiff merely stated a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Here, Restani's documentary evidence illustrates plaintiff lacks a cause of action against it for negligence. Restani performed contractual milling at the site of Plaintiff's alleged accident four years prior to the date of the incident. Restani's duty to maintain the roadway expired fifteen (15) days after its completion of the milling on May 6, 2019. As the documentary evidence was not rebutted, plaintiff fails to state a cause of action as against Restani.

As to the cross claim, given that Restani was not negligent, it cannot be held liable on any cross claim (*see Dluzen v. Equinox Grp.*, 242 AD3d 478, 480 [1st Dept 2025]).

Accordingly, Restani's motion to dismiss pursuant to CPLR 3211 (a)(1) and (a)(7) is granted. It is hereby, ORDERED that Defendant Restani Construction Corp's motion to dismiss is granted; and it is further

ORDERED that the action shall bear the following caption:

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JOHN ASARO,  
Plaintiff,

against

THE CITY OF NEW YORK,  
Defendant.

-----x

; it is further

ORDERED that counsel for Restani shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, which are directed to amend the caption as written above; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website).

This constitutes the decision and order of the court.

1/28/2026

DATE



ILANA J. MARCUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE