SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

X

SALVATORE D'ANNA,

Plaintiff,

-against-

THE INCORPORATED VILLAGE OF HEMPSTEAD, THE TOWN OF HEMPSTEAD, THE COUNTY OF NASSAU, JACKSON PRIME REALTY, LLC, MILLENNIUM TOYOTA, RED ROCK INDUSTRIES, INC., J.S. HEMPSTEAD REALTY, LLC, GALLI ENGINEERING. P.C., MILLENNIUM SUPER STORE, LTD., NEW YORK AUTOMOTIVE GIANT, LLC., VIGILANT CESSPOOL & SEWER SERVICE, INC., DOBLER CHEVROLET, INC., GLEN BROCK, JOHN STALUPPI and JOHN F. CAPOBIANCO,

Defendants.

Index No. 025366/09
Motion Sequence...10, 11, 12, 13, 14, 15
Motion Date...01/18/12

X

J.S. HEMPSTEAD REALTY, LLC,

Third-Party Plaintiff,

-against-

MAZO PLUMBING & HEATING CORP.,

Third-Party Defendant.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 10).....x
Notice of Motion (Mot. Seq. 11).....x
Notice of Cross-Motion (Mot. Seq. 12).....x
Notice of Cross-Motion (Mot. Seq. 13).....x
Notice of Motion (Mot. Seq. 14).....x
Notice of Cross-Motion (Mot. Seq. 15).....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Affirmation in Partial Opposition.....x
Affirmation in Partial Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Reply Affirmation.....x
Reply Affirmation.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Affirmation in Partial Opposition.....x
Reply Affirmation.....x
Affirmation in Opposition.....x
Affirmation in Partial Opposition.....x
Affirmation in Opposition.....x
Affirmation in Partial Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion (Mot. Seq. 10) by the Defendant, Vigilant Cesspool & Sewer Service, Inc. (hereafter Vigilant) and the Defendant, Glen Brock (hereafter Brock), individually, seeking an order pursuant to CPLR § 3212 granting the Defendants, Vigilant and Brock summary judgment dismissing all claims and cross-claims against them; the motion (Mot. Seq. 11) by the Third-Party Defendant, Mazo Plumbing & Heating Corp. (hereafter Mazo) seeking an order pursuant to CPLR § 603 and CPLR § 1010 severing the third-party action from the main action, or pursuant to 22 NYCRR § 206.12 (d) striking the Plaintiff's Note of Issue and Certificate of Readiness; the motion (Mot. Seq. 12)

by the Defendant/Third-Party Plaintiff, JS Hempstead Realty LLC (hereafter JS) seeking an order pursuant to CPLR § 3212 granting the Defendant, JS, summary judgment dismissing the Plaintiff's complaint and all cross-claims, or in the alternative, granting the Defendant, JS, summary judgment on its cross-claims for indemnification against the Defendants, Red Rock Industries and Vigilant; the motion (Mot. Seq. 13) by the Defendant, Red Rock Industries, Inc. (hereafter Red Rock) seeking an order pursuant to CPLR § 3212 granting the Defendant, Red Rock, summary judgment dismissing the complaint and any cross-claims against it and denying the Defendant, Vigilant summary judgment; the motion (Mot. Seq. 14) by the Defendant, Mazo Plumbing & Heating Corp. (Mazo) seeking an order pursuant to CPLR § 3212 granting summary judgment to the Defendant, Mazo, dismissing the Plaintiff's complaint and all cross-claims against it; and the motion (Mot. Seq. 15) by the Defendants, MILLENNIUM TOYOTA, MILLENNIUM SUPER STORE, LTD. and NEW YORK AUTOMOTIVE GIANT, LLC. (hereafter the MILLENNIUM Defendants) seeking an order pursuant to CPLR § 3212 granting the Millennium Defendants summary judgment dismissing the complaint and all cross-claims against them, or in the alternative, granting the Millennium Defendants summary judgment on its cross-claims for indemnification against the Defendants JS, Red Rock and Vigilant are determined as hereinafter set forth.

This is an action for personal injuries allegedly sustained by the Plaintiff on December 5, 2008. The Plaintiff alleges he slipped and fell on the west side of North Franklin Street, Hempstead, New York approximately 50 feet south of the southwest corner

of Smith Street and N. Franklin Street. The area is adjacent to 286 N. Franklin Street, Hempstead, New York, which is also known as 257 N. Franklin Street, Hempstead, New York and referred to hereinafter as the "subject premises." The Plaintiff is a retired union iron worker now employed by a union to protest at "non-union construction sites." Since October, 2008, the Plaintiff was in charge of bringing a large inflatable rat to the subject construction site. He had set up the inflatable rat at the same location and place on the sidewalk at the subject construction site prior to the alleged accident.

Vigilant Cesspool & Sewer Service, Inc. and Glen Brock

The prime plumbing contractor at the project was Mazo Plumbing & Heating Corp. (Mazo) who retained the services of the Defendant, Vigilant, for the specific purpose of disconnecting and cutting off the water main supply to the building that was to be demolished and a new building constructed. Glen Brock was the owner of Vigilant. Vigilant priced the job on September 7, 2007. The water main was located underneath the sidewalk in what is called a "curb box". Vigilant's job was to open the sidewalk at the cub box, which was a 4x4 foot square opening around the circular curb box and dig down approximately 4 feet to the water line and disconnect the services. This was done in one day on October 5, 2007. After completing the disconnect, Vigilant backfilled the hole, tamped down the dirt and applied 3 inches of cold patch black-asphalt type of material so that it was even with the surrounding sidewalk. According to the contract with Mazo, Vigilant was not hired or required to apply any type of permanent patch, i.e., concrete. Vigilant contends that when

the new building was constructed the plan was to reconnect the water service. Therefore, "the general contractor" had to be able to access the curb box again, and as such, did not want a permanent patch of concrete. Vigilant further asserts that no one from Mazo or the "General Contractor," Red Rock, or anyone else made any complaints from the date the work was performed (October 5, 2007) up to and including the date of the Plaintiff's accident (December 5, 2008), one year and two months prior to the date of the accident.

Mazo Plumbing & Heating Corp.

Mazo was the "prime plumbing contractor" for the project. After Mazo was brought into this action as a third-party defendant, the Plaintiff amended the complaint to add Mazo as a direct defendant. In support of its motion for summary judgment, Mazo argues that Vigilant had complete control over the work to be done at the site. Mazo asserts it had no supervision or control over the subject work, and should be considered a "general contractor." Mazo argues that a general contractor is not liable for the independent contractor's negligent acts. *See Kleeman v. Rheingold*, 81 N.Y.2d 270 (1993); *Flagship International Corp. v. Dennelisse Corp.*, 38 A.D.3d 307 (1st Dept. 2007). Moreover, Mazo asserts it did not create the alleged condition. Nor did it have actual or constructive notice of the alleged condition.

JS Hempstead Realty, LLC

The Defendant, JS Hempstead (JS), was the owner of the premises adjacent to

the sidewalk. JS claims to have been an absentee owner, a real estate holding company with no employees. JS argues it did not create the alleged condition that caused the incident. JS asserts that the "independent contractors" were not retained by JS but rather retained by the Defendant, Millennium Toyota. Further, JS alleges the work at the premises was done exclusively for the benefit of Millennium Toyota. JS argues that it neither created the condition complained of nor had notice of the condition, or negligently failed to rectify the condition.

Red Rock Industries, Inc.

The Defendant, Red Rock Industries, Inc. (Red Rock) was the "concrete excavation contractor." Red Rock erected the orange safety fence that it alleged was inspected twice per day by Red Rock employees. Dominic DelMonaco, the principal of Red Rock, testified that he walked by the asphalt patch each day and never saw any type of depression until December 6, 2008, the date of the Plaintiff's accident. Mr. DelMonaco asserts he had his workers inspect the safety fencing twice daily to make sure the fence was tight and secure. Since it was next to a bus stop, he wanted to make it was secure at all times. Mr. DelMonaco testified that prior to December 6, 2008, no one ever told him that a portion of the asphalt patch collapsed and needed to be refilled nor did he observe that the patch collapsed.

The Millennium Defendants

In or about 2007, the Millennium Defendants decided to relocate their Toyota

dealership from 220 N. Franklin Street, Hempstead, New York to 257 N. Franklin Street, Hempstead, New York. Atlantic Automotive Group, Inc. is the owner of the Defendants, Millennium Toyota, Millennium Super Store Ltd., and New York Automotive Giant, LLC (Millennium Defendants). John Pickett, an employee of Atlantic, appeared at a deposition on behalf of the Millennium Defendants. JS purchased 257 N. Franklin Street, Hempstead, New York on May 14, 2007. Millennium states that on June 25, 2008, non-party 257 N. Franklin Development LLC as "contractor" entered into a written construction contract with Red Rock as "subcontractor" for the project designated as "new Facility for Millennium Toyota." The Defendant, Millennium Super Store Ltd. as tenant and JS as landlord entered into a written lease agreement for the subject premises on October 1, 2008. According to paragraph 36 of the Rider to the Lease, Millennium had no duty or obligation to maintain, inspect or repair the premises until the Defendant, JS, obtained a Certificate of Occupancy for the premises. At the time of the accident, JS had not yet obtained a Certificate of Occupancy. Mr. Pickett testified there was no "general contractor" for the job. Mr. Rodolitz helped Mr. Pickett with the bids for the contractors. If there were any issues that any of the contractors had with respect to scheduling or with respect to work they were doing, they would go to Mr. Rodolitz as a go-between with Atlantic. Mr. Rodolitz would review payments to contractors and "sign off" on them "to make sure the scope of work was performed." Mr. Pickett testified that Red Rock was the "concrete contractor." Mr. Pickett visited the site once or twice a week. Mr. Pickett testified that he believed Atlantic had

"contracts" with the Defendants Red Rock and Mazo.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v. Twentieth Century Fox Films Corp.*, 3 N.Y.2d 395, 404 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611 (1987); *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132 (2nd Dept. 1986).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065 (1979). Conclusory statements are insufficient. *Sofsky v. Rosenberg*, 163 A.D.2d 240 (1st Dept. 1990), *aff'd* 76 N.Y.2d 927; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *see Indig v. Finkelstein*, 23 N.Y.2d 728 (1968); *Werner v. Nelkin*, 206 A.D.2d 422 (2nd Dept. 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 A.D.2d 781 (1st Dept. 1981), *app dism.* 53 N.Y.2d 1028; *Jim-Mar Corp. v. Aquatic Construction, Ltd.*, 195 AD2d 868 (3rd Dept. 1993), *lv app den.* 82 N.Y.2d 660.

Assuming *arguendo* that each of the moving defendants made an adequate *prima facie* showing of entitlement to summary judgment, when considering all the

arguments together, and with the opposition submitted by the Plaintiff, there are questions of fact that preclude the granting of summary judgment on behalf of any of the moving defendants except for Glen Brock, individually, against whom no opposition has been interposed.

The Plaintiff testified that his left foot got entangled with something where the netting extended out over the hole. He further testified that when he fell both his feet ended up in the hole, right next to the orange net fence. Frank Furino, an eyewitness, alleged in an affidavit that the hole and the orange netting extended out from the fence and had been there "for at least several days prior to Sal's accident." Another eyewitness, Charlie DeJesus alleged in is affidavit that he actually saw the Plaintiff in motion of tripping and falling. The Plaintiff's "left foot [went] into the hole where there was a piece of missing sidewalk, right at the point where the orange netting . . . extended out from the fence." Affidavits from eyewitnesses are sufficient to raise triable issues of fact. *See Gaida-Newman v. Holtermann*, 34 A.D.3d 634 (2nd Dept. 2006); *see also Bauman v. Homefield Bowl, Inc.*, 12 A.D.3d 212, 212-213 (1st Dept. 2004). Although self-serving, the Plaintiff's affidavit in opposition does not contradict or undercut his prior testimony at the 50-h hearing and deposition. Therefore, its evidentiary value in defeating the summary judgment motion must be given weight. *Shapiro v. Boulevard Hous. Corp.*, 70 A.D.3d 474 (1st Dept. 2010); *see also Enamorado v. KHR Holding Co. LLC*, 24 A.D.3d 411 (2nd Dept. 2005). The Plaintiff testified there were two factors that contributed to the accident, "the hole or the fence that was sticking out," but

he was not sure how much of a role each of these factors played in the accident. There may be more than one proximate cause of an accident. *See Kallard v. Hungry Harbor Associates*, 84 A.D.3d 889 (2nd Dept. 2011).

While a property owner ordinarily is not responsible for the negligence of an independent contractor retained to work on its property, there is a nondelegable duty to see that the maintenance of the property poses no hazard to those lawfully on the sidewalk. The owner may be liable for the negligence of its independent contractor if the work performed for them was inherently dangerous.

The Plaintiff argues that anyone undertaking work on a public highway is under a nondelegable duty to avoid creating a condition dangerous to the users of the thoroughfare. *Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663 (1992); *Milligan v. Banco Popular*, 6 A.D.3d 272 (1st Dept. 2004); *Kopinska v. Metal Bright Maintenance Company*, 309 A.D.2d 633 (1st Dept. 2003); *Emmons v. City of New York*, 283 A.D.2d 244 (1st Dept. 2001).

There is a question of fact as to whether or not there was a hole for which notice could be imputed. The Defendants argue that should the existence of a hole be established, there is a question of fact as to the proper installation of the asphalt patch and the length of time it should have lasted. The Defendant, JS, asserts that the "temporary-ness" of the patch installed by the Defendant, Vigilant, refers to the material used and the ease by which it would be removed. JS asserts it does not refer to the length of time that it was

designed to last. The Defendants also argue that Vigilant has not presented any evidence within a reasonable degree of engineering certainty to determine how long the patch was expected to last. Whether the patch, as required by the contract with Mazo, was properly installed by Vigilant is a question of fact. A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense. *Fromme v. Lamour*, 292 A.D.2d 417 (2nd Dept. 2002); *George Larkin Trucking Co. v. Lisbon Tire Mart*, 185 A.D.2d 614 (4th Dept. 1992). It is not clear from the submissions before the Court which entity was responsible for the overall job site, i.e., who was the general contractor. JS, the owner of the property, contends that because it had no employees and was "a real estate holding company" it has no responsibility. Without any evidentiary proof, JS contends it "was at best an absentee owner." Although the Millennium Defendants argue they were merely tenants with no responsibility at the job site, JS contends the testimony of Millennium by John Pickett demonstrates that the independent contractors were not retained by JS Hempstead, but rather by Millennium. JS, John Staluppi, Millennium and Atlantic cannot use putative corporate entities to obscure who may be ultimately responsible for any wrongdoing at the construction site. There is still no affidavit in evidentiary form either from John Staluppi or a principal of JS stating their relationship to Atlantic and Millennium, if any, and the subject premises. The Plaintiff argues that Vigilant's deposition testimony demonstrates that in conversations with the Defendant Mazo's principal, he was told it was not his responsibility to permanently

patch the opening and that arrangements had been made to have the Defendant, Red Rock, perform the permanent patch since they were retained to perform all of the concrete work at the job site. Moreover, there is a question of fact as to whether or not the orange mesh fence was maintained so as not to create an unsafe and hazardous condition. Regardless of whether the Millennium Defendants were not yet responsible as tenants in possession under the lease, there are triable facts as to whether Millennium should be liable for the conduct of any independent contractors that Millennium and/or its agents may have engaged to work at the subject premises. *Ortiz v. Nunez*, 32 A.D.3d 759 (1st Dept. 2006).

Mazo's application to strike the Note of Issue is **DENIED**. However, since it is within the Court's discretion to allow the case to remain on the trial calendar while discovery is ongoing (*Nikpour v. City of New York*, 179 Misc 2d 928 (Sup. Ct. NY 2/19/99), Mazo shall have the right to depose any of the principals in this action, including the Plaintiff, within 45 days of today's date, in the event the depositions have not already taken place.

Accordingly, it is hereby

ORDERED, the branch of the motion (Mot. Seq. 10) by the attorneys for the Defendant, Vigilant Cesspool & Sewer Service, Inc. seeking an order pursuant to CPLR § 3212 granting the Defendant, Vigilant, summary judgment dismissing all claims and cross-claims against them is **DENIED**; and it is further

ORDERED, the branch of the motion (Mot. Seq. 10) by the attorneys for the Defendant, Glen Brock, seeking an order pursuant to CPLR § 3212 granting the Defendant,

Glen Brock summary judgment dismissing all claims and cross-claims against him is **GRANTED**; and it is further

ORDERED, that the motion (Mot. Seq. 11) by the attorneys for the Third-Party Defendant, Mazo Plumbing & Heating Corp. seeking an order pursuant to CPLR § 603 and CPLR § 1010 severing the third-party action from the main action, or pursuant to 22 NYCRR § 206.12 (d) striking the Plaintiff's Note of Issue and Certificate of Readiness is **DENIED**, except Mazo shall have the right to depose any of the principals in this action, including the Plaintiff, within 45 days of today's date, in the event the depositions have not already taken place; and it is further

ORDERED, that the motion (Mot. Seq. 12) by the attorneys for the Defendant/Third-Party Plaintiff, JS Hempstead Realty LLC seeking an order pursuant to CPLR § 3012 granting it summary judgment dismissing the Plaintiff's complaint and all cross-claims, or in the alternative, granting the Defendant, JS Hempstead Realty LLC, summary judgment on its cross-claims for indemnification against the Defendants, Red Rock Industries and Vigilant is **DENIED**; and it is further

ORDERED, that the motion (Mot. Seq. 13) by the attorneys for the Defendant, Red Rock Industries, Inc. seeking an order pursuant to CPLR § 3212 granting the Defendant, Red Rock, summary judgment dismissing the complaint and any cross-claims against it and denying the Defendant, Vigilant summary judgment is **DENIED**; and it is further

ORDERED, that the motion (Mot. Seq. 14) by the attorneys for the Defendant, Mazo Plumbing & Heating Corp. seeking an order pursuant to CPLR § 3212 granting

summary judgment to the Defendant, Mazo, dismissing the Plaintiff's complaint and all cross-claims against it is **DENIED**; and it is further

ORDERED, that the motion (Mot. Seq. 15) by the Defendants, MILLENNIUM TOYOTA, MILLENNIUM SUPER STORE, LTD. and NEW YORK AUTOMOTIVE GIANT, LLC. seeking an order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint and all cross-claims against them, or in the alternative, granting them summary judgment on their cross-claims for indemnification against the Defendants JS, Red Rock and Vigilant is **DENIED**.

This decision constitutes the order of the court.

DATED: Mineola, New York
March 23, 2012

/S/
Hon. Randy Sue Marber, J.S.C.