

**Johnson v City of New York**

2012 NY Slip Op 31546(U)

June 1, 2012

Sup Ct, Richmond County

Docket Number: 102566/09

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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TEMITOPE E. JOHNSON,

Part C-2

Plaintiff,

Present:

-against-

HON. THOMAS P. ALIOTTA

THE CITY OF NEW YORK, NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY and  
SVEN KIRTON,

DECISION AND ORDER

Index No. 102566/09

Motion No. 374-003

Defendants.

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NEW YORK CITY TRANSIT AUTHORITY and  
SVEN KIRTON,

Third-Party

Third-Party Plaintiff,

Index No. A102566/09

-against-

DAIDONE ELECTRIC, INC.,

Third-Party Defendants.

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The following papers numbered 1 to 4 were fully submitted on  
the 11<sup>th</sup> day of April 2012.

Papers  
Numbered

Notice of Motion for Summary Judgment by Defendant City of New York and Third-Party Defendant Daidone Electric, Inc., with Supporting Papers and Exhibits (dated January 31, 2012).....	1
Defendant/Third-Party Defendants' Memorandum of Law (dated January 26, 2012).....	2
Affirmation in Opposition by Plaintiff (dated April 2, 2012).....	3
Reply Affirmation, with Exhibits (dated April 6, 2012).....	4

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Upon the foregoing papers, the motion by defendant the City of New York (hereinafter the "City") and Third-Party defendant Daidone Electric Corp. (hereinafter "Daidone") for an order dismissing the complaint, the third-party complaint and any cross claims against the City is granted.

This is an action for personal injuries which allegedly occurred on September 30, 2008, when plaintiff's vehicle struck a New York City Transit Authority (hereinafter "NYCTA") vehicle at the intersection of Four Corners Road and Richmond Avenue, Staten Island, New York. Plaintiff alleges that the accident occurred, in part, due to a malfunctioning traffic light at the subject intersection. Defendant/third-party plaintiff Sven Kirton was the operator of the NYCTA vehicle. Third party defendant Daidone Electric Inc. was under contract with the City of New York for the maintenance and repair of the subject traffic control device at the time and place of the alleged occurrence.

In support of movants' prima facie case for dismissal, they assert through the deposition testimony of Sven Kirton (see Exhibit "I") and a video recording from an ATM camera located at the Southwest corner of the subject intersection (see Defendant's Exhibit "N"), that the subject traffic light was operating properly

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at the time of the accident. In this regard, while the video does not show the traffic signal itself, it does appear to show traffic flowing smoothly through the subject intersection.

In further support, movants assert that even assuming *arguendo* that the traffic light was not functioning properly, they should still be granted summary judgment since plaintiff has failed to establish that either the City or Daidone created the purported hazard or had actual or constructive notice of the specific condition for a sufficient period of time to remedy or correct it (see Piacquadio v Recine Realty Corp., 84 NY2d 967; Gordon v. American Museum of Natural History, 67 NY2d 836; Martinez v Khaimov, 74 AD3d 1031, 1033). As prima facie proof that the City did not have actual or constructive notice of the allegedly malfunctioning traffic light, it has tendered the affidavit of Peter D'Amico, the Director of Electrical Inspections for the Department of Transportation (hereinafter "DOT") (see Defendant's Exhibit "J"), who averred that (1) DOT had entered into a contract with Daidone in 2007 for the maintenance and repair of the traffic signals on Staten Island; (2) a search of traffic signal maintenance records for the subject intersection was conducted on three separate occasions; and (3) the only prior recorded incident was a report on September 23, 2008 indicating that the DOT computer

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connected to the traffic signal through a telephone line connection maintained by Verizon was not communicating with this traffic light. However, according to Mr. D'Amico "this entry does not indicate that the traffic light at the subject intersection [had] malfunctioned in any way". In addition, he averred that the only reported complaint about this particular traffic light not working was received thirty-one minutes *after* the accident on September 30, 2008 at approximately 3:44 p.m. Daidone was notified and responded to the intersection at approximately 4:15 p.m. (see City's Exhibit "J").

Additionally, movants have submitted the affidavit of Andrew Gallo, the general foreman at Daidone Electric. He states that (1) the only relevant repair report for the subject intersection involved a Verizon cable/telephone line on September 23, 2008; (2) said entry was not indicative of a traffic light malfunction in anyway; (3) the telephone connection has nothing to do with the functioning of the traffic light; and (4) when Daidone accompanied Verizon to the subject intersection earlier on September 23, 2008, a contemporaneous inspection revealed that while the traffic light may have been offline with the DOT, the signal was working properly. In addition Daidone performed preventive maintenance of the control but for the subject traffic lights which were working

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properly upon Daidone's departure. Mr. Gallo further swore based on information and belief that on the accident date, Daidone responded to the intersection within thirty-one minutes of its notification by the City. Upon arriving, it was discovered that "one of the vehicles involved in the accident [had] struck the junction box causing an all out condition of the traffic lights" (see defendant's Exhibit "K").

In opposition to this prima facie showing, plaintiff has wholly failed to refute either movants' contention regarding the absence of notice or to address the facts set forth in the supporting affidavit of either Mr. D'Amico or Mr. Gallo. In addition, plaintiff has failed to submit any affidavit, reference to the deposition testimony or any other evidence sufficient to raise a triable issue of fact as to the lack of notice on the part of either the City or Daidone. Rather, the only evidence in admissible form tendered in opposition to the motion is plaintiff's counsel's self-serving affidavit, which is itself insufficient to raise an issue of fact as to whether or not the traffic light in question had malfunctioned *prior* to the accident (*see generally* Luizzi-Schwenk v. Singh, 58 AD3d 811).

Accordingly it is hereby

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**ORDERED** that the motion is granted and the complaint and any cross claims against defendant the City of New York are severed and dismissed; and it is further

**ORDERED**, that the third-party complaint is dismissed in its entirety; and it is further

**ORDERED** that the Clerk shall enter judgment accordingly.

E N T E R,

/s/  
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Hon. Thomas P. Aliotta  
J.S.C.

Dated: June 1 2012