SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

JOSE URENA, JOHNNY PENA AND M&M TRUCK & BODY REPAIR, INC.,

Plaintiff(s),

**DECISION AND ORDER**

Index No: 309944/10

- against -

KIEWIT CONSTRUCTORS INC., KIEWIT INFRASTRUCTURE CO., WEEKS MARINE, INC., KIEWIT CONSTRUCTORS INC./WEEKS MARINE, INC., A JOINT VENTURE THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MIRTON BAEZ-PENA, AND ANDRES GUZMAN,

Defendant(s).
----------x

In this action for personal injuries stemming from, *inter alia*, negligence in the performance of construction, defendants KIEWIT CONSTRUCTORS INC., KIEWIT INFRASTRUCTURE CO., WEEKS MARINE, INC., and KIEWIT CONSTRUCTORS INC./WEEKS MARINE, INC., A JOINT VENTURE (hereinafter "Kiewit"), move for an order granting them summary judgment. Kiewit avers that inasmuch as the work they performed near the situs of the instant accident did not reduce the height of the overpass below the maximum height of vehicles traveling thereunder allowed by law, they cannot be deemed negligent and, thus, bear no liability. Plaintiffs oppose the instant motion as untimely because it was allegedly made more than 120 days from the filing of the note of issue. Plaintiffs also contend that questions of fact with respect Kiewit's negligence

preclude summary judgment.

For the reasons that follow hereinafter, Kiewit's motion is granted.

The instant action is for alleged personal injuries allegedly sustained as a result of defendants' negligence in the ownership and maintenance of a highway and an overpass. Specifically, plaintiffs JOSE URENA (Urena) and M&M TRUCK & BODY REPAIR, INC. (M&M) allege that on December 7, 2009, Urena, while operating a vehicle owned by M&M, struck an overpass located on the Major Deegan Expressway near the Willis Avenue Exit. Plaintiff JOHNNY PENA (Pena) alleges that on December 11, 2009, while operating another vehicle owned by M&M, he struck the foregoing overpass and was thereafter struck by a vehicle owned by defendant ANDRES GUZMAN (Guzman) and operated by defendant MIRTON BAEZ-PENA (Pena). Plaintiffs allege that all defendants except Guzman and Baez-Pena owned, maintained, possessed, and controlled the overpass, were negligent in failing to maintain the same in reasonably safe condition; such negligence causing the foregoing accidents and the injuries resulting therefrom. Pena further alleges that Guzman and Baez-Pena were negligent in the ownership and operation of their vehicle, said negligence causing the instant accident and injuries resulting therefrom.

Kiewit's motion is decided on the merits because contrary to

plaintiffs' assertion, it was timely made. Significantly, under prevailing First Department case law, the instant motion was made within 123 days of service of the note of issue such that it was timely.

CPLR § 3212(a) prescribes the time within which summary judgement motions may be made and states 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.

Absent a showing of "good cause" for the delay in timely filing a motion for summary judgment, a court cannot consider such a motion on the merits and must instead decline to hear the motion outright (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 727 [2004]; *Glasser v Ibramovitz*, 37 AD3d 194, 194 [1st Dept 2007]; *Rocky Point Drive-In, L.P. v Town of Brookhaven*, 37 AD3d 805, 808 [2d Dept 2007]). Accordingly, whether a motion has merit, the cause of action is meritless, summary judgment is in the interest of judicial economy, or that the opponent will not be prejudiced by the court's consideration of the motion, the foregoing shall not, absent a showing of good cause, be sufficient grounds for the court

to hear a belated motion for summary judgment (*Brill* at 653). This is because "statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously" (*Miceli* at 727).

For purposes of CPLR § 3212, good cause means a good excuse for the delay in filing the motion, meaning a satisfactory explanation for the delay (*Brill* at 652). More specifically,

> [g]ood cause is written expression or explanation by the party or his legal representative evincing a viable, credible reason for the delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement

(*Bruno Surace v Diane Lostrappo*, 176 Misc2d 408, 410 [Supreme Court Nassau County 1998]). Ultimately, what constitutes good cause has less to do with the merits of the actual motion and more to do with reason for the untimeliness (*Luciano v Apple Maintenance & Services, Inc.*, 289 AD2d 90, 91 [1st Dept 2001]), and, thus, provided that good cause is shown, a court is always within its discretion to hear a motion for summary judgment regardless of the delay in making the same (*id.*).

It is well settled that law office failure, or ignorance, does not constitute good cause warranting consideration of a belated motion for summary judgment (*Giudice v Green 292 Madison*, LLC, 50 AD3d 506, 506 [1st Dept 2008] ["Nor are we persuaded by USADATA's

argument, raised for the first time on appeal, that good cause existed by reason of the ambiguity created by the court's preliminary compliance order and compliance conference orders. USADATA's failure to appreciate that its motion was due within 45 days after the filing of the note of issue is no more satisfactory than a perfunctory claim of law office failure" (internal quotation marks omitted).]; *Azcona v Salem*, 49 AD3d 343, 343 [1st Dept 2008] [Defendant's motion for summary judgment was denied as untimely because court held that defendant's failure to learn that new note of issue had been filed, which started the clock on the time within which to make such motion, constituted law office failure and was, thus, not tantamount to good cause.]; *Crawford v Liz Claiborne, Inc.*, 45 AD3d 284, 286 [1st Dept 2007] [Defendant's motion for summary judgment denied when made after the deadline set by the court. Court held that defendant's failure to be aware that the court had shortened the time to make motion was tantamount to law office failure, which does not constitute good cause], *revd on other grounds* 11 NY3d 810 [2008]; *Farkas v Farkas*, 40 AD3d 207, 211 [1st Dept 2007] [Court held that plaintiff's failure to abide by statutory time frame due to oversight was tantamount to law office failure, which does not amount to good cause], *revd on other grounds* 11 NY3d 300 [2008]; *Breiding v Giladi*, 15 AD3d 435, 435 [2d Dept 2005] [Court held that clerical inadvertence and reassignment of counsel were not tantamount to good cause so as to warrant

consideration of a belated motion for summary judgment.]).

The First Department holds that the time period within which to make motions for summary judgment, as prescribed by CPLR § 3212(a), is triggered not from the date the note of issue is filed, but rather from the date that said note is mailed to the defendant (*Szabo v XYZ, Two Way Radio Taxi Ass'n, Inc.*, 267 AD2d 134, 135 [1st Dept 1999]). On this issue the court in *Szabo* stated

> the 60-day period [within which to make motions for summary judgment] cannot be construed to run from the date of the unilateral act of filing a note of issue where, as here, defendants, by virtue of plaintiff's service of the notice by mail, cannot be charged with knowledge of the triggering event commencing the 60 days, i.e., the filing of the note of issue, until the service by mail is completed

(*id.* at 135). Thus, the First Department holds that when plaintiff serves the note of issue by mail, pursuant to CPLR § 2103(b)(2), the time within which to make motions for summary judgment prescribed by the CPLR or court order is increased by five days, measured from the date note of issue is served by mail (*id.*; *Krasnow v. JRBG Management Corporation*, 25 AD3d 479, 480 [1st Dept 2006]; *Luciano v Apple Maintenance & Services, Inc.*, 289 AD2d 90, 90 [1st Dept 2001]). The Second and Third Departments are at odds with the First, holding that the time period prescribed by CPLR § 3212(a) runsm without extension, from the date plaintiff files

his/her note of issue (*Mohen v Stepanov*, 59 A.D.3d 502, 503 [2d Dept 2009]; *Coty v County of Clinton*, 42 AD3d 612, 613-614 [3d Dept 2007]). As such the Second and Third Departments hold that CPLR § 2103(b)(2) does not apply to the time period prescribed by CPLR § 3212(a) (*Mohen* at 503; *Coty* at 613-614).

CPLR § 2211 states that "[a] motion on notice is made when a notice of the motion or an order to show cause is served." Thus, a motion is deemed made when served, not when filed (*Ageel v Tony Casale, Inc.*, 44 AD3d 572, 572 [1st Dept 2007]; *Gazes v Bennett*, 38 AD3d 287, 288 [1st Dept 2007]; *Rivera v Glen Oaks Village Owners, Inc.*, 29 AD3d 560, 561 [2d Dept 2006]; *Russo v Eveco Development Corp.*, 256 AD2d 566, 566 [2d Dept 1998]). Moreover, it is well settled that service by mail is deemed complete, regardless of delivery to the intended recipient upon the mailing of the papers being served (*Engel v Lichterman, M.D.*, 95 AD2d 536, 538 [2d Dept 1983]; *Vita v Heller*, 97 AD2d 464, 464 [2d Dept 1983]; *DeForte v Doctors Hospital of Staten Island*, 66 AD2d 792, 792 [2d Dept 1978]; *14 Second Ave Realty Corp. v Szalay*, 16 AD2d 919, 919 [1st Dept 1962]).

Here, a review of the note of issue indicates that it was served upon all parties on January 8, 2016. A review of the affidavit of service for the instant motion establishes that it was served upon all parties on May 10, 2016, 123 days after the note of

issue was served upon them. Thus, because the First Department holds that when plaintiff serves the note of issue by mail, pursuant to CPLR § 2103(b)(2), the time within which to make motions for summary judgment is increased by five days, measured from the date note of issue is served by mail (*Szabo* at 135; *Krasnow* at 480; *Luciano* at 90), Kiewit had 125 days from January 8, 2016 to make the instant motion or until May 12, 2016. Since a motion is made when served (*Ageel* at 572; *Gazes* at 288; *Rivera* at 561; *Russo* at 566), Kiewit made the instant motion when it served the same on May 10, 2016, before the time to make the sane expired.

Kiewit's motion for summary judgment is granted insofar as it demonstrates that while they had been retained to replace the overpass prior to the instant accidents, they had not yet done so and while they had re-paved the road under the overpass, such work did not reduce the height of the overpass below 13 feet, 6 inches, the maximum height of any vehicles traveling thereunder allowed by law. Thus, not having created the condition alleged have caused plaintiffs' accident, Kiewit cannot be deemed negligent and, therefore bears no liability.

Before a defendant can be held liable for negligence, it must be shown that the defendant owed a duty to the plaintiff (*Pulka v Edelman*, 40 NY2d 781, 783 [1976]). Where defendant owes no duty to

plaintiff, there can be no breach, therefore there can be no negligence, and, thus, no liability (*id.*). When defendant owes plaintiff a duty, negligence then turns on proof that defendant breached that duty, and liability requires proof that as a result of the breach, plaintiff was in fact injured (*Atkins v Glen Falls City School District*, 53 NY2d 325, 333 [1981]. Assuming a duty is owed, said duty is breached when defendant fails to "do what a reasonable and prudent man would have done or would have omitted to do in the exercise of ordinary care under all circumstances" (*Sadowski v Long Island Railroad Company*, 292 NY 448, 454 [1944]). Accordingly, a defendant who establishes that it was free from negligence, establishes prima facie entitlement to summary judgment (*see generally*, *Cahill v County of Westchester*, 226 AD2d 571, 571 [2d Dept 1996] ["The evidence submitted by the defendants in support of their motion for summary judgment established a prima facie case that treatment of the infant plaintiff was not negligent, and that the infant plaintiff did not suffer any injuries."]; *Dinham v Wagner*, 48 AD3d 349, 350 [1st Dept 2008] [defendant established entitlement to summary judgment by negating negligence]; *Cerda v Parsley*, 273 AD2d 339, 339 [2d Dept 2000] [same]). A defendant can also establish prima facie entitlement to summary judgment by negating proximate causation (*Espinoza v Loor*, 299 AD2d 167, 168 [2d Dept 2002]; *Borges v Zukowski*, 22 AD3d 439, 439 [2d Dept 2005]).

Unlike the owner of real property, a contractor hired to perform work at a premises is not generally liable to a third-party - such as a plaintiff who sustains injuries within the premises - either in tort or for the breach of an underlying contract which injures a third party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 139 [2002] ["Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party."]); *Moch v Rensselaer Water Co.*, 247 NY 160, 161 [1928]; *Bugiada v Iko*, 274 A.D.2d 368, 368-369 [2d Dept 2000]). Thus, while a contractor is liable to the person who hired him, *e.g.*, the owner of premises, for a breach which causes injury to a third-party, the contractor is not generally liable to third-party whose injured by the contractor's breach of his contractual obligation unless (1) the contracting party, in failing to exercise reasonable care in the performance of his duties, creates a dangerous condition; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal* at 140; *Moch* at 168; *Eaves Brooks Costume Company, Inc. v. Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 587 [1994]; *Bugiada* 368-369).

In support of their motion, Kiewit submits Urena's 50-h

hearing transcript wherein he testified, in pertinent part, as follows: On December 7, 2009, Urena was involved in a motor vehicle accident while operating a tractor trailer in the course of his employment with GM Transfer, a demolition company. Immediately prior to the accident, Urena was operating the tractor trailer on the southbound Major Deegan Expressway. As he approached the overpass located just north of Exit 2 at or near Willis Avenue, an area on which he drove regularly, he was traveling at approximately 45 miles per hour in the right lane. As his truck traveled under the overpass, a portion of the trailer impacted the overpass, causing a portion of the trailer to break off. At the start of his day, Urena performed his usual pre-trip inspection on his truck. The inspection entailed checking the air in the tires, checking the pressure of the air brakes and ensuring that the truck's lights were working.

Kiewit also submits Pena's deposition transcript wherein he testified, in pertinent part, as follows: On December 9, 2009, Pena was involved in an accident while operating a removable container truck owned by M&M. Immediately prior to the accident, Pena was operating the truck on the southbound Major Deegan Expressway. As he approached the overpass located just north of Exit 1 at or near Willis Avenue, an area on which he drove regularly, he was traveling at approximately 45 miles per hour and in the right lane. As his truck traveled under the overpass, a

portion of the container struck the overpass, bringing his truck to a stop. At the start of his day, Pena performed his usual pre-trip inspection on his truck. The inspection entailed checking the air in the tires, checking the pressure of the air brakes and `ensuring that the truck's lights were working. Although he testified that his truck was 13 feet tall, he noted that he never measured the same's height. After exiting his truck, Pena became aware that another vehicle had also impacted his truck in the rear.

Kiewit submits an affidavit from Corey Hopper (Hopper), Superintendent of Operations for Kiewit in 2009, who states the following: In 2009, he was employed bu Kiewit in relation to a construction project at or near the Willis Avenue Bridge. Kiewit had been retained by the New York City Department of Transportation (NYCDOT) to, *inter alia*, replace the Willis Avenue Bridge, replace the roadway on the Major Deegan Expressway between Exits 1 and 2, and replace the overpass located thereat. Hopper's responsibilities in relation to the foregoing project included the investigation of any accidents related to the construction. On December 7, 2009, as a result an accident where a truck driven by Urena impacted the overpass at or near the Exits 1 and 2, Hopper measured the distance between the bottom of the overpass and the roadway. He noted that the distance was 13 feet, 9 inches. On December 9, 2009, as a result an accident where a truck driven by Pena impacted the overpass at or near the Exits 1 and 2, Hopper

measured the distance between the bottom of the overpass and the roadway. He noted that the distance was 13 feet, 9 inches. Hopper states that because NYCDOT restricts the height of any vehicle traveling on roadways to 13 feet, 6 inches, the foregoing vehicles exceeded the maximum height prescribed by law. In fact, given that the distance between the overpass and the roadway was 13 feet, 9 inches on the dates of the respective accidents, the heights of the vehicles exceeded 13 feet, 9 inches. On the date of the foregoing accidents, Kiewit had completed all paving work on the roadway near the underpass, and had not yet performed any work on the underpass.

Based on the foregoing, Kiewit establishes prima entitlement to summary judgment insofar as the evidence tendered demonstrates that prior to the instant accidents they performed no work on the overpass so as to affect its height and because any paving work performed by Kiewit did not diminish the distance between the bottom of the underpass and the roadway beyond the legally allowable maximum height for vehicles traveling on the highways within this City and State. Thus, Kiewit establishes that it did not create the condition alleged to have caused the instant accident. When defendant owes plaintiff a duty, negligence turns on proof that defendant breached that duty, and liability requires proof that as a result of the breach, plaintiff was in fact injured (*Atkins* at 333). A duty is breached when defendant fails to "do what a reasonable and prudent man would have done or would have

omitted to do in the exercise of ordinary care under all circumstances" (*Sadowski* at 454), and, thus, a defendant who establishes that it was free from negligence, establishes prima facie entitlement to summary judgment (*see generally*, *Cahill* at 571; *Dinham* at 350; *Cerda* at 339). As relevant, here, because Kiewit had been retained by the NYCDOT, presumably the oowner of the highway and overpass, its liability can only stem from Kiewit's creation of the hazard alleged to have caused plaintiffs' accident. To be sure, unlike the owner of real property, a contractor hired to perform work at a premises is not generally liable to a third-party, unless the contracting party, in failing to exercise reasonable care in the performance of his duties, creates a dangerous condition (*Espinal* at 140; *Moch* at 168; *Eaves Brooks Costume Company, Inc.* at 226; *Palka* at 587; *Bugiada* 368-369).

Here, as per Hopper's affidavit, Kiewit's only connection with the overpass and roadway in question was that it was retained to replace the overpass and re-pave the road thereat by the NYDOT, owner of the highway and overpass. Thus, with respect to plaintiffs' claims that Kiewit failed to maintain the overpass in a reasonably safe condition, the evidence establishes that it had no such responsibility since it did not own it. With respect to plaintiffs' contention that Kiewit created the condition alleged to have caused the accidents - diminishing the height of the underpass - the evidence establishes that Kiewit had not yet performed work

on the underpass such that it could not have created the condition alleged by working on the underpass. Moreover, while it is true - as averred that Kiewit's re-paving work on the road below the overpass could have created the condition alleged by diminishing the distance between the roadway and the bottom of the overpass, Kiewit's evidence belies such assertion. To be sure, Hopper indicated that when the distance between the bottom of the overpass and the roadway thereunder was measured immediately after the accidents, the same measured 13 feet, 9 inches. Such distance is above the maximum height for vehicles - 13 feet, six inches - prescribed by VTL § 385(2)[1] and by 34 RCNY 4-15(b)(2)[2]. Accordingly, even if the re-paving work diminished the distance between the overpass and the roadway thereunder, Kiewit could not

---

[1] VTL § 385 states that "[e]xcept as otherwise specifically provided in subdivision fifteen of this section, no person shall operate or move, or cause or knowingly permit to be operated or moved on any highway or bridge thereon, in any city not wholly included within one county, any vehicle or combination of vehicles of a size or weight exceeding the limitations provided for in the rules and regulations of the city department of transportation of such city adopted pursuant to section sixteen hundred forty-two of this chapter." VTL § 385(2) states that "[t]he height of a vehicle from under side of tire to top of vehicle, inclusive of load, shall be not more than thirteen and one-half feet."

[2] 34 RCNY 4-15(b) states that "[n]o person shall operate or move, or cause or knowingly permit to be operated or moved on any highway or bridge any vehicle or combination of vehicles of a size or weight exceeding the limitations provided for in this subdivision (b)." 34 RCNY 4-15(b)(2) states that "[t]he height of a vehicle from underside of tire to top of vehicle, including its load, shall not be more than 13 1/2 feet."

be deemed negligent because the foregoing distance was above a vehicles' maximum height as prescribed by law.

Nothing submitted by plaintiff raises an issue of fact sufficient to preclude summary judgment. Significantly, plaintiff's reliance on this Court's decision in a related case, dated January 8, 2016 is misplaced. As evinced by the Court's January decision, the related action stems from the accident involving Pena and Baez-Pena, in which Pena was allegedly rear-ended by Baez-Pena after Pena's truck came to a stop upon striking the overpass. Baez-Pena sued, *inter alia*, Pena, M&M, and Kiewit asserting that the collision between Pena and Baez-Pena was the result of, *inter alia*, Pena's negligence. Upon a motion by Pena and M&M, the Court granted them summary judgment, dismissing that action against them on grounds that the cause of the Pena/Baez-Pena's accident was Baez-Pena's failure to place more distance between itself and Pena's vehicle, which under prevailing law constitutes negligence by Baez-Pena. Contrary, to plaintiffs' assertion, nothing in the Court's January decision precludes summary judgment. Significantly, this Court is not bound by the assertion within the January decision - that a report submitted by Pena and M&M noted the height of Pena's truck as 13 feet, 5 inches - because it finds no competent support in the record for crediting such assertion.

To be sure, plaintiffs submit the report referenced by the Court in its earlier decision, wherein Michael Szymanski (Szymanski), and employee of M&M, states that he reported to the scene of Pena's accident on the date it occurred. Szymanski states that the height of the container atop the Pena's truck measured 13 feet, 5 inches and "that is the height all my trailers are [sic]." Plaintiffs aver that the foregoing statement raises an issue of fact with respect to whether the overpass was lower than asserted by Hopper and lower than the maximum vehicle height allowed by law. To the extent that the foregoing statement is bereft of any evidence that Symanski actually measured the trailer's height at the scene of the accident, it is conclusory, cannot establish the height of the trailer on the date of the accident, let alone at the scene, and therefore cannot raise an issue of fact sufficient to preclude summary judgment (*Zuckerman* at 562["We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient."]). It is hereby

**ORDERED** that the complaint and all cross-claims asserted against Kiewit be dismissed, with prejudice. It is further

**ORDERED** that Kiewit serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : February 28, 2017
Bronx, New York

Ben Barbato, JSC