SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9
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BURHAN UDDIN,

Plaintiff,

-against-

THE CITY OF NEW YORK
and JOHN CIVETTA & SONS, INC.,

Defendants.
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DECISION / ORDER

Index No.: 507532/2019

Motion Seq. No. 3

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, and Exhibits Annexed	55-70
Affirmation in Opposition and Exhibits Annexed	72-86
Affirmation in Reply	87-94

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This personal injury action arises out of a one-car motor vehicle accident that took place on September 26, 2018, at approximately 9:50 p.m. in the eastbound lane of the overpass road (sometimes referred to as the Atlantic Avenue overpass) on Atlantic Avenue near Jardine Place in Brooklyn, New York. Plaintiff claims that he was driving his vehicle over the Atlantic Avenue overpass when his vehicle suddenly began to jump up and down as a result of his driving over defectively placed steel plates that had been installed by the defendants, and that as a result, he sustained serious personal injuries.

Defendants move, in motion sequence #3, for summary judgment pursuant to CPLR Rule 3212, and seek an order dismissing all claims against defendant The City of New York (hereinafter "City") "for lack of notice", and dismissing all claims against defendant

John Civetta & Sons, Inc. (hereinafter "Civetta"), because "it did not owe a duty to Plaintiff," and dismissing all claims against both defendants because "[p]laintiff has not met the serious injury threshold." For the reasons which follow, the motion is denied in its entirety.

Liability

Both defendants are represented by one law firm, presumably because Civetta is required to indemnify the City pursuant to its contract. In support of their motion, the defendants submit an attorney's affirmation, copies of the pleadings, the plaintiff's bill of particulars, the parties' deposition transcripts, plaintiff's dash-camera video, photos, an affidavit from a bio-mechanical engineer, Dr. Andrew Rentschler, and affirmed reports from an orthopedic surgeon, Dr. Andrew Bazos, and from a neurologist, Dr. Adam Bender, who conducted independent physical examinations of the plaintiff on behalf of the defendants.

Regarding the portion of the motion seeking summary judgment on the issue of liability, defendant City contends that it had no notice of any dangerous condition, citing NYC Administrative Code § 7-201(c), and argues that it did not cause or create the dangerous condition. Defendant City argues that co-defendant Civetta "was the entity that installed and maintained the road plates that Plaintiff claims caused his accident," and that defendant City "did not perform the installation of the road plates." Defendant City further contends that even if "the plates were in a defective condition, the City of New York did not create or cause them to be in that condition. The plates were installed and maintained by independent contractor Civetta" and, as such, the plaintiff's claims against defendant City should be dismissed.

Defendant Civetta contends that the plaintiff's claims against it should be dismissed because, as a third-party independent contractor, it did not owe a duty to the plaintiff and because its actions were not the proximate cause of the plaintiff's accident. Defendant

Civetta argues that it did the work according to the plans it was provided, that the road plate work was inspected in accordance with the plan, and that such installation was subject to the inspection of the resident engineer. Defendant Civetta further argues that "there is no evidence that a violation or complaint was made in regards to the road plates on this subject roadway."

Oddly, with one law firm representing both defendants, the City blames Civetta, and Civetta claims the City is responsible for the roads.

The defendants jointly contend that the cause of the plaintiff's accident was his excessive speed. In support of this argument, the defendants offer an affidavit from a bio-mechanical engineer, Dr. Andrew Rentschler [Doc 69], who opines that, based on the dash-camera video footage, the plaintiff was travelling at an excessive rate of speed [32-34 mph] and that the injuries that the plaintiff claims he sustained would not have been sustained if he had not been travelling over the posted speed limit of 25 mph.

Arduino Montoni, a project executive for defendant Civetta, testified at his deposition [Doc 64] that in 2017, defendant Civetta was awarded a contract by the NYC Department Of Transportation (DOT) to perform work on the subject road overpass. The Google Maps photos for July 2018 and November 2019 show the work going on. Montoni testified that "[t]he concrete deck was removed and plated over" by defendant Civetta [p 21]. He also testified that defendant City had oversight of the project and that "at any given time there were three or four engineers" present from defendant City who had "oversight over the work that was going on" [pp. 35-36]. He testified that defendant Civetta was responsible for placing cones and warning signs on both sides of the overpass before work began each night at approximately 9:30 p.m. [p. 44], and that defendant Civetta would erect other/additional warning signs along the road if the contract called for it, but he wasn't sure

that they were erected on this project. He did recall that they had installed "raise plow" signs [pp. 51-53]. It seems that because this is a busy roadway, work stopped in the morning and in the evening for the rush hour traffic. Therefore, the roadway was temporarily restored to be drivable several times each day. It appears this involved placing metal plates and loose asphalt on the roadway, which was done for the evening rush hour, then again when the work stopped for the evening, in advance of the morning rush hour.

Thomas Henderson, a civil engineer for the NYC DOT, testified on behalf of defendant City [Doc 65]. At his deposition, he testified that "[m]ostly, I'm in the field at a construction site checking on the construction, monitoring the field work and doing the paperwork and computer work that follows it" [p. 9]. He stated that the contractor is responsible for supplying and erecting temporary advance warning signs for traffic around the construction site, and that the resident engineer inspects to ensure that the correct signs are present. He also stated that the DOT will also inspect the signs provided by the contractor, but not to the same extent that the resident engineer would. He testified that "[t]he city guys would go out and they skim through it" [pp. 17-18]. Mr. Henderson testified that the DOT requires that their contractors and engineers follow the National Manual on Uniform Traffic Control Devices (MUTCD) [p. 18], that the MUTCD would be specifically listed in a DOT permit or in a contract between the DOT and a contractor [p. 20], and that the resident engineer would inspect to make sure contractor is complying [p. 20]. The witness stated that different signs are supposed to be displayed at different stages of the construction, but that the information contained in the drawings regarding signs is what controls. Mr. Henderson was not sure whether the City or the State of New York owned the subject overpass but testified that both the City and the State were on the construction project at issue [p. 34]. He testified that on the job that is the subject of this lawsuit, he

"made sure that the construction went according to the specs and plans as best I could" [p. 44]. Mr. Henderson could not recall what signs were displayed at this worksite or if asphalt was used at the sides of the temporary metal road plates. Mr. Henderson also testified that he was unsure if signs that read "street plate-raise plow" are in compliance with the MUTCD [p. 65]. When shown the plaintiff's dash-camera video, Mr. Henderson did not see any signs that said, "road work ahead," or that gave any warning about "steel plates" or "street plates" [pp. 75-77]. Finally, Mr. Henderson testified that there were complaints about the noise and the construction work, and conceded that there might have been complaints about the steel plates as well, but he wasn't sure [pp. 88-89].

The plaintiff testified [Doc 63] that at the time of the accident, he was in the course of his employment for Uber [p. 71]. The plaintiff testified that, prior to the accident, he usually drove through the area where the accident occurred a couple of times per week [p. 66]. He had last driven on the overpass where the accident occurred approximately one week prior to the accident. He recalled that he had noticed construction going on in the area, and that it had been going on for quite a while, but did not recall seeing any work actively going on the last time he had driven there [pp. 67-68]. It had rained heavily shortly before the accident, and at the time of the accident, it was still raining [pp. 78-79]. After the plaintiff dropped off his fare, approximately 3-5 minutes elapsed before the accident occurred. Plaintiff had stopped for three or four traffic lights on Atlantic Avenue before he reached the overpass [p. 81]. The plaintiff testified that as he started to drive on the subject overpass, he noticed that the car in front of his car started "jumping". He testified that he attempted to apply his brakes, but his car had already started jumping as well [pp. 82-83]. Plaintiff saw no construction warning signs as he approached the overpass. His vehicle was equipped with a dash-camera [p. 83]. The plaintiff testified that as he approached the

overpass, he was accelerating to get up the incline, but as soon as he saw the vehicle in front of him start to jump, he applied his brakes. He also testified that, as a result of his car jumping up and down, he had trouble keeping his foot on the brake pedal [p. 89]. Plaintiff stated that he did notice one sign as he approached the overpass that had a "separated arrow", and that it seemed to have to do with going right or left to either go up onto the overpass or to continue on the regular roadway, based on which lane you were in [p.90]. Plaintiff testified that as he drove his car over the overpass, it started to jump. He later learned that the steel plates caused his car to jump. He stated that after the first jump, each successive jump became stronger, and that his car jumped four to five times, and that his airbags deployed after the second or third jump [pp. 91-92]. After reviewing the dash-camera video at the deposition, the plaintiff conceded that he could see two signs on the approach to the overpass - one was an illuminated warning sign that alternated between "caution" and "lane shift ahead" and the other one was the one with arrows indicating that there was a lane shift ahead.

Plaintiff testified that as a result of his car jumping up and down several times, his head hit the headrest and the roof of the car, his right arm struck the center console, and the airbag struck his chest [p. 93]. He was driving a Toyota Avalon. The plaintiff called 911 and waited approximately 20-30 minutes for an ambulance to arrive [pp. 94-95]. The ambulance transported the plaintiff to Interfaith Medical Center.

In opposition to the liability portion of the motion, the plaintiff argues that the motion should be denied because there are questions of fact regarding whether the defendants caused and created the dangerous and hazardous condition and whether or not plaintiff's speed contributed to the happening of the accident. Regarding the defendants' claim that the plaintiff was speeding, the plaintiff offers an affidavit from a bio-mechanical engineer,

Dr. James Pugh [Doc 74], who states that the dash-cam video footage which the defendants' expert relies on "was obtained during nighttime conditions with darkness and rain, and the perspective is not permissive of accurate determinations of speed of the vehicle." He further states that "the video footage, nevertheless, appears to show the Toyota Avalon travelling with the established flow of traffic on the roadway based on the vehicle transiting the area directly in front of the Toyota. The estimate of 32 to 34 mph opined by defense expert Rentschler is VERY APPROXIMATE."

Dr. Pugh states that "roadway defects have effects on vehicular dynamics for those vehicles traveling over those defects involving the specifics of the suspension of the particular vehicle, the loaded weight of the vehicle, the type and age of the shock absorbers on the vehicle, the type of tires and wear of the tires, the air pressure in the tires, the depth and specific character of the roadway defects, the spacing of the roadway defects, and the elastic and plastic characteristics of the roadway and the roadway defects, including the construction specifics and materials used in building the roadway, the thickness of the steel deck plates, the condition of the asphalt seams between the deck plates, including the nature of the bed prepared onto which the roadway surface and deck plates was laid" and that all of these are factors to consider in the analysis of the accident. As such, he opines that "it is an unjustified posit by defense expert Rentschler that traveling at a reduced speed over a particular set of sequential defects reduces the injury potential associated therewith" and that the "only justifiable conclusions to be drawn from the available information associated with this case is that the potential for injuries would have been minimized if the vehicle were passing through the construction site at a speed of approximately 3 mph or lower."

Dr. Pugh further states that "[t]he asphalt ramp leading to the deck plates, the deck plates themselves flexing under the weight of the Toyota, the asphalt seams between the deck plates, and the asphalt ramp leading away from the deck plates, all constitute a sequence of defects with different elasticities which interact with the shock absorbers, tires, and springs of the Toyota, to create a mechanical system prone to amplified harmonic oscillations. Such deck plates are recommended to be welded together at the seams and not spaced and filled with asphalt, which would have altered the vehicle dynamics." He states that "traveling over a sequence of defects such as occurred with the subject accident at a lower speed does not necessarily mean that the encountering of those defects is less benign, although it would seem to be so and tempting to make the posit by defense expert Rentschler. On the contrary traveling over that sequence at a lower speed could cause increased disturbance and jolting to the vehicle and the occupant due to those exact same principles. Only a full examination of the numerous variables affecting that interaction would shed light on the effects of reduced speed on the vehicle dynamics." Dr. Pugh also takes issue with the defendants' contention that "other vehicles ahead of the Toyota passed through the area without incident", arguing that "motions such as the Toyota suffered may not actually have been adequately visible in darkened nighttime and rainy conditions, the harmonic interactions for those vehicles and for the plaintiff's vehicle were likely very different because of variations in vehicle stiffness, weight, and other factors enumerated earlier in this affidavit" and that "the video footage shows the vehicle directly in front of the Toyota bouncing in an exaggerated manner also."

Finally, Dr. Pugh opines that "the defendants failed to comply with the Work Zone Traffic Control Manual, the NYC-DOT Highway Rules Title 34, Chapter 2, the National Manual on Uniform Traffic Control Devices for Streets and Highways and the NYS

Supplement to the MUTCD, in failing to properly and timely erect the proper traffic signs to warn motorists that their [sic] was road work ahead and that there were street plates ahead on the road where plaintiff's accident occurred. Further, the video clearly shows rainy condition with wet roadways causative of slippery conditions, particularly on steel deck plates. Under MUTCD Section 6F.46 (Steel Plates Ahead Sign), this warning is used to warn travelers that the presence of temporary steel plates make the road surface uneven and cause slippery conditions during wet weather. Had such devices been in place at the time of the accident, the vehicle in front of the Toyota and the operator of the Toyota likely would have reduced the speed well below 25 mph, and would have approached a low enough speed of transit not productive of injuries. Pursuant to the NYCDOT Permit and the contract for the construction of the subject overpass, the contractor Civetta was bound to comply with the MUTCD and the NYS Supplement to the MUTCD. Such compliance would have alerted the plaintiff Uddin of the need to reduce speed and would have reduced the potential for injuries, and would have altered the harmonic dynamics of the vehicles." Based on the foregoing, the plaintiff contends that an issue of fact exists regarding the defendants' contention that his speed was solely responsible for the happening of the accident.

The plaintiff further contends that issues of fact exist "as to whether the steel plates were properly placed and whether defendants had properly warned motorists of the ongoing construction including the steel road plates." Plaintiff argues that defendant City's witness, Mr. Henderson, testified that the DOT requires its contractors to follow the National Manual on Uniform Traffic Control Devices (MUTCD) for any particular job which is specifically listed in the DOT permits and contracts, but he was not sure whether the "raise plow" sign that was used for the site complied with the MUTCD. Plaintiff further contends

that defendant Civetta's witness testified that Civetta was required to place warning devices on both sides of the overpass before the road plate installation began and that all warning signs were erected pursuant to the contract. The plaintiff further argues that a question of fact exists regarding whether the defendants properly erected traffic signs to warn of the hazardous condition in the roadway. Plaintiff testified that, aside from the sign with arrows and an electronic sign that switched between "caution" and "lanes shift ahead", there were no construction warning signs as he approached and crossed over the overpass.

After reviewing the NYCDOT Proposal/Contract No. HBK1201, photographs and Google images of the subject construction site, and defendants' testimony, plaintiff's expert, Dr. Pugh opines that the defendants failed to comply with the Work Zone Traffic Control Manual, the NYC-DOT Highway Rules Title 34 - Chapter 2, and the National Manual on Uniform Traffic Control Devices for Streets and Highways, together with the NYS Supplement to the MUTCD, in that they failed to place or erect the proper traffic signs to warn motorists that there was road work ahead and steel street plates ahead on the roadway. Plaintiff also points to the dash-camera video, which confirms that, aside from the two signs that the plaintiff mentioned, there were no warning signs about construction or steel plates anywhere. The plaintiff further argues that the defendants' contention that he could have avoided the accident if he had observed what there was to observe and had reduced his speed also raises questions of fact, because Dr. Pugh opined that the plaintiff's rate of speed did not cause the subject accident, and that the video footage shows that it was a dark and rainy night, and that there were no warning signs about the construction, the presence of steel plates or the bumps between the plates.

It is the plaintiff's contention that the defendants created the hazardous condition that caused his accident and that, as such, defendant City's argument that it had no actual

or constructive notice is irrelevant. The witness for defendant City, Mr. Henderson, testified that defendant City had people at the work site daily who would conduct inspections and that they had oversight duties/responsibilities regarding the subject construction job, and that, as such, defendant City had, at least, constructive notice of the condition, if not actual notice of the condition. The plaintiff argues that defendant Civetta was responsible for the actual work that was being done, that it negligently and improperly placed the metal plates and the asphalt in the road, and that it failed to install warning signs as was required. Plaintiff urges that it is clear from his testimony and from his dash-camera video that defendant Civetta failed to comply with its NYCDOT permits, its contract, and the MUTCD, by failing to display proper warning signs. Regarding defendant Civetta's claim that it owed no duty to the plaintiff, the plaintiff specifically points to Section 82 of the NYC DOT contract safety standards and procedures [Doc 79, p. 519], which expressly states that the contractor "shall be responsible for any damage to persons or property resulting from his work on the Contract and must provide suitable protective measures."

Based upon the foregoing, the court finds that the plaintiff has established that questions of fact exist regarding the alleged negligence of the defendants and, as such, the branch of the defendants' motion seeking summary judgment dismissing the complaint on the issue of liability is denied. Not only are there dueling expert's reports, but the City is under a nondelegable duty to maintain its streets in a reasonably safe condition. That duty remains fixed even if a dangerous street condition that causes injury is created by an independent contractor such as Civetta (*Belmer v HHM Assoc., Inc.*, 101 AD3d 526, 527 [1st Dept 2012], citing *Thompson v City of New York*, 78 NY2d 682, 684, 585 NE2d 819, 578 NYS2d 507 [1991]). Further, Civetta is not the first contractor who has argued unsuccessfully that it had no duty to plaintiff because its work was performed pursuant to

the City's contract specifications and approved by its engineers. Approval of the work by the City's engineers does not conclusively establish that it performed its work pursuant to the contract specifications, particularly here, where the road was opened and closed so traffic could pass several times each day (*Belmer v HHM Assoc., Inc.*, 101 AD3d 526, 529 [1st Dept 2012]). Pursuant to *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002], New York law acknowledges that under some circumstances, a party who enters into a contract assumes a duty of care to certain persons outside the contract. These circumstances have become known as the "Espinal exceptions" and the one applicable here is that a contractor who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury.

The Serious Injury Threshold in Insurance Law §5102(d)

The defendants also move for summary judgment dismissing the complaint based on their contention that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

In the plaintiff's bill of particulars, he alleges that as a result of the accident, he sustained injuries to his right shoulder, which necessitated a surgical repair, as well as injuries to his cervical and lumbar spine, and injuries to his right ankle. At the time of the accident, the plaintiff was twenty-five years old. He states in his bill of particulars that he was totally disabled for at least three months after the accident, and that he continues to be partially disabled.

At his EBT, taken on December 17, 2020, plaintiff describes the care and treatment for his alleged injuries. He had MRIs and x-rays and his treatment included physical therapy, acupuncture, and chiropractic care. Plaintiff also testified that he was referred to Dr. Randall Ehrlich, an orthopedic surgeon, who performed surgery on the plaintiff's right

shoulder in June of 2019 [p. 119]. Plaintiff stated that the surgery was required because the doctor found a tear in his labrum [p. 124]. After the surgery, the plaintiff was required to wear his arm in a sling for approximately six to eight weeks, was given an “ice machine” for his arm and was referred for further physical therapy [pp. 120-122]. Plaintiff also testified that he treated with a pain management physician, Dr. Kosharskyy, who gave the plaintiff injections in his back and discussed the possibility of back surgery with the plaintiff [pp. 122-123]. The plaintiff also received treatment at The New York Spine Institute and The Hospital for Special Surgery. He saw several other physicians for his back, including Dr. Pyun, Dr. Gerling and Dr. Sama [pp. 123-124]. Prior to the subject accident, the plaintiff had never injured his neck, back, head, right shoulder, right leg or chest.

The plaintiff testified that he can no longer drive for work, he cannot sit for an extended periods of time, and he cannot sleep. He testified that he cannot do anything physical with his right hand or his right shoulder. He claims that he cannot lift or push anything heavy and that he can no longer play cricket or billiards. He has pain when standing and cannot lie down on his back or side without pain [pp. 140-141]. At the time of the deposition, the plaintiff was still employed as a home health aide for his parents, but he testified that he has difficulty, especially with things requiring physical labor, and that he and his parents now “help each other” and that he’s needed his sister’s help as well [pp. 142-143]. Finally, plaintiff testified that his shoulder doctor told him not to drive until his shoulder felt more stable and that Dr. Shusterman and the pain management doctor said the same thing about his back, and that he should refrain from doing anything that would exacerbate the pain.

Plaintiff testified that he was driving a taxi at the time of his accident, and that he was approved for Workers’ Compensation benefits [Doc 63 Pages 18, 153]. Specifically,

[Doc 63 Page 152] he testified that all of his medical treatment related to the accident was covered by Workers' Compensation, and that he received weekly payments for some period of time [Doc 63 Page 153]. He said the payments started around the time of his shoulder surgery, which was, according to his bill of particulars, on June 4, 2019, but he had hired an attorney to get the benefits early in 2019 [Doc 63 Page 21]. He testified that he started driving for Uber and Lyft in April of 2018 and stopped after the accident. He said he has been unable to work since the accident [Page 44]. He lives with his disabled parents and takes care of them, which he is paid for by Medicaid on an hourly basis. A copy of the decision from the Workers' Compensation Board is submitted by plaintiff at Document 85. It reflects that his hearing was held on April 4, 2019, and the decision was rendered a few days later.

With regard to the 90/180 category of injury, the only evidence submitted by defendants is plaintiff's EBT testimony. It does not make out a prima facie case for dismissal. He testified that he did not return to work after the accident. He testified that he made a claim for Workers' Compensation as a result of the accident, which was approved. Plaintiff provides a copy of the approval. There is no evidence of how long he received Workers' Compensation payments for, but there is no evidence that he returned to work in the six months after the accident. When a plaintiff does not return to work for more than three months after a motor vehicle accident and receives Workers' Compensation for his loss of earnings, the court must conclude that he in fact had a medically determined injury which prevented him from returning to work (See *Peplow v Murat*, 304 AD2d 633 [2d Dept 2003]).

As defendants have failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, this branch of the motion must be

denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Accordingly, it is **ORDERED** that the defendants' motion is denied, with regard to both the issue of liability and the issue of the "serious injury" threshold in Insurance Law §5102(d).

This constitutes the decision and order of the court.

Dated: December 22, 2022

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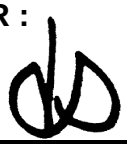

Hon. Debra Silber, J.S.C.