

**Guerrero v City of New York**

2011 NY Slip Op 33300(U)

July 25, 2011

Supreme Court, Queens County

Docket Number: 25606/08

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X

Jose Guerrero,

Plaintiff,

- against -

Index  
Number: 25606/08  
  
Motion  
Date: 7/12/11

The City of New York, Carlos Ruiz,  
Two Hump Taxi, LLC, Consolidated Edison  
of New York and Welsbach Electric Corp.,

Defendants.

Motion  
Cal. Number: 12  
  
Motion Seq. No.: 6

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The following papers numbered 1 to 16 read on this motion by defendants, Welsbach Electric Corp. And The City of New York, for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law-Exhibits.....	5-7
Affirmation in Opposition(Pltf).....	8-10
Affirmation in Opposition(Ruiz & Two Hump).....	11-12
Reply to Plaintiff.....	13-14
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Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City and Welsbach for summary judgment dismissing the complaint and all cross-claims against them is granted.

Plaintiff allegedly sustained injuries in a motor vehicle accident in which the vehicle he was operating collided with the vehicle operated by Ruiz and owned by Two Hump Taxi at the intersection of 43<sup>rd</sup> Avenue and 11<sup>th</sup> Street in Queens County at 7:15 P.M. on December 3, 2007.

It is undisputed that said intersection was controlled by a traffic light and that at the time of the accident said traffic

light was not working as a result of a Con Edison power failure. The City had a maintenance contract with Welsbach encompassing City traffic signals, including the subject traffic signal. Under the contract, Welsbach was required to make repairs when contacted by the City and was required to dispatch a technician to effect repairs within various time frames of notification, depending upon the severity of the condition. Where the traffic light is completely out, Welsbach must respond within two hours of being notified. The Welsbach technician who responded to the subject location on December 3, 2007, John Sangiorgio, testified in his deposition that Welsbach received notification at 1:06 P.M. on December 3, 2007 that the traffic signals were out at the subject intersection and that he arrived at the location at 2:45 P.M. He determined that the problem was, what he termed, an "all out", meaning that there was no power coming from the Con Edison facility. He explained that in such circumstances, there was nothing he could do. He was at the location for a total of 25 minutes. He also testified that when he arrived, he set up a temporary stop sign on 11<sup>th</sup> Street, based upon his notation in his report saying "all out put up stop sign on 11<sup>th</sup> Street, no power from Edison." He could not recall whether he also set up stop signs on 43<sup>rd</sup> Avenue as well. He stated that if he had four signs on his truck, he would have used all four, although he did not recall whether he did have four stop signs on his truck. He explained, "I could have been parked on 11<sup>th</sup> Street and just saw it and just wrote 11<sup>th</sup> Street knowing that I probably did put them on all four."

Plaintiff testified in his 50-h hearing that he was traveling on 11<sup>th</sup> Street and when he came to the intersection of 43<sup>rd</sup> Avenue, he came to a full stop, looked both ways, then proceeded into the intersection at 5-10 mph, at which point he was struck on the front driver's side by Ruiz. He stated that the intersection was dark and he did not notice that there was a non-functional traffic light until after he was struck. He stopped at the intersection "because every time I get to an intersection I slow down and stop." He also testified that he did not have a stop sign, but there was a stop sign controlling Ruiz' movement. In his deposition, plaintiff contradicted his 50-h testimony by stating that he did not remember whether he saw a traffic light, working or non-working, at the subject intersection as he was driving down 11<sup>th</sup> Street and approaching the intersection, and that he was traveling approximately 15-20 mph on 11<sup>th</sup> Street and continued at the same speed through the intersection and did not slow down at all as he entered the intersection.

Ruiz testified in his deposition that he was traveling on 43<sup>rd</sup> Avenue and stopped at the intersection of 11<sup>th</sup> Street because he saw that the traffic light controlling said intersection was

"completely dead". He first noticed that the traffic light was not working when he was approximately half a block distant from the intersection. He testified that after coming to a full stop one car length before the subject intersection, he looked both ways down 11<sup>th</sup> Street. He then proceeded into the intersection at 5 mph, where he saw, for the first time, plaintiff's vehicle on the right traveling on 11<sup>th</sup> Street and approaching the intersection at high speed. He first noticed plaintiff's vehicle when it was 3-4 car lengths from the intersection. It did not slow down at the intersection and was traveling "very fast, so fast, he impacted me right away." Ruiz testified that his vehicle was struck on the passenger side by plaintiff's vehicle. He also testified that he did not see any stop sign controlling his direction of travel on 43<sup>rd</sup> Avenue. He also did not know whether there was a temporary stop sign controlling plaintiff's direction of travel on 11<sup>th</sup> Street.

The City and Welsbach move for summary judgment upon the grounds that the alleged inadequacy of Welsbach's placement of a stop sign at the intersection was not the proximate cause of the accident, but rather the sole proximate cause of the accident was plaintiff's and Ruiz' failure to enter the intersection where the traffic light was down with proper caution, and that Welsbach fulfilled its contractual obligation to the City by placing a stop sign at the subject intersection.

Plaintiff, in opposition, argues that Sangiorgio's alleged omissions with respect to the proper placement of stop signs and the lack of evidence as to whether Welsbach ever attempted to switch the traffic light to "flashing" operation raises questions of fact as to whether Welsbach and the City were negligent and whether Welsbach fulfilled its contractual obligations to the City.

As a general rule, a contractual obligation, standing alone, imposes a duty only in favor of the promisee and specific third-party beneficiaries, establishes only a cause of action for breach of contract, and does not give rise to tort liability in favor of a third party where the alleged harm results from mere inaction (see Eaves Brooks Costume Co. V. Y.B.H. Realty Corp., 76 NY 2d 220 [1990]; Torres v. City of New York, 298 AD 2d 318 [1<sup>st</sup> Dept 2002]).

A contractual obligation may give rise to tort liability on behalf of a third party only where the contracting party 1) "launches a force or instrument of harm"; 2) where plaintiff detrimentally relies upon the contracting party's continued performance of its duties or 3) where the contracting party has "entirely displaced the other party's duty to maintain the premises safely" (Espinal v. Melville Snow Contractors, Inc., 98 NY 2d 136, 140 [2002]).

The negligent repair of a traffic light is an example of the first category, where the contracting party launches a force or instrument of harm (see Davilmar v. City of New York, 7 AD 3d 559 [2<sup>nd</sup> Dept 2004]). In order to establish that the contracting defendant launched a force or instrument of harm, which would expose it to liability in tort to a third party, plaintiff is required to show that defendant "either created or exacerbated a dangerous condition" (see Salvati v. Professional Security Bureau, Ltd., 40 AD 3d 735 [2<sup>nd</sup> Dept 2007]).

Welsbach and the City have established a prima facie entitlement to summary judgment by proffering evidence that they neither created nor contributed to the non-working traffic light. In fact, plaintiff's counsel is not claiming that the non-working condition of the traffic light was caused by Welsbach or the City or that the traffic light was in any way defective. It is uncontested that the reason the traffic signal was not working was because there was a power outage originating at the Consolidated Edison power facility. Indeed, plaintiff does not allege that the non-working traffic lights were a proximate cause of the accident.

As heretofore stated, the sole basis of plaintiff's claim is that Welsbach contributed to the accident by the misplacement of temporary stop signs or the failure to place stop signs at the appropriate location in the intersection and the failure to switch the traffic lights to flashing mode.

Specifically, plaintiff's counsel contends that there are question of fact as to whether the stop sign placed by Sangiorgio was placed on 11<sup>th</sup> Street or on 43<sup>rd</sup> Avenue, which of the two roadways had the most heavy volume of traffic and, consequently, which roadway was the more appropriate for placement of a stop sign, and whether Sangiorgio's failure to attempt to switch from normal to flashing operation or otherwise recommend the placement of artificial lighting was a proximate cause of the accident.

However, there is no evidence that Sangiorgio's actions in the placement of the temporary stop sign at 11<sup>th</sup> Street instead of 43<sup>rd</sup> Avenue or vice-versa and/or switch the traffic lights to flashing mode or install other artificial lighting created or exacerbated a dangerous condition. Indeed, counsel does not argue, nor may he be heard to argue, that Sangiorgio's placement of a stop sign on either roadway, whether 11<sup>th</sup> Street or 43<sup>rd</sup> Avenue, made the intersection more hazardous. On the contrary, the erection of a stop sign at the otherwise uncontrolled intersection undisputably made the intersection safer.

In addition, counsel's contention that Sangiorgio's failure to

switch the traffic light to flashing mode may have contributed to the accident is disingenuous, since it is undisputed that there was an "all out" and there was no power running to the lights at all. The Court notes that Section 8 of the contract between the City and Welsbach entitled "Temporary Repairs", states, "Where it is impossible to install flashing operation because of low line voltage or power failure, the Contractor shall install temporary 'STOP' signs." Even if there was power to the lights, said section of the contract also states, "In no instance shall the intersection be left on flashing operation for a period of greater than two (2) hours. Flashing operation shall not be considered a temporary repair, but only an emergency measure while effecting repairs." Sangiorgio arrived at the intersection at 2:45 P.M. The accident did not occur until 7:15 P.M. Therefore, even if he had rigged the light for flashing operation, he could not have left it in that mode until the time of the accident.

Therefore, there is no issue of fact, on this record, as to whether Welsbach launched a force or instrument of harm.

With respect to the second basis for tort liability, to wit, where plaintiff detrimentally relies upon the contracting party's continued performance of its duties, the record on this motion does not establish that plaintiff detrimentally relied upon Welsbach's continued performance of its contractual obligations.

The third possible basis for liability, namely, where the contracting party has "entirely displaced the other party's duty to maintain the premises safely", does not apply to the facts of this case and plaintiff does not argue that it does. The record, on this motion, establishes that Welsbach was only responsible to respond to a call of an "all out" to make repairs to a specific traffic control device within 2 hours after being notified of the problem (see Section 7 of the contract, "Time for Reaching Site"). The Court also notes, in perusing the contract between the City and Welsbach, that the only periodic maintenance that it was required to perform was to clean the traffic signal controller and signal lenses of the subject traffic control device once each year (see Section 15 of contract, "Cleaning and Inspection"). The limited scope of Welsbach's contractual undertaking, thus, is not the type of "comprehensive and exclusive" property maintenance obligation which would "entirely displace" the City's duty to maintain the traffic control device safely (see Espinal v. Melville Snow Contractors, Inc., supra). There is nothing to indicate that the City did not at all times retain its duty as the owner of the traffic control device to inspect and safely maintain it (id). In any event, as heretofore stated, the accident was not caused by a failure of the traffic light. There is no issue that the light was

out because of neglect or negligence in its maintenance.

The essence of plaintiff's position is that the accident was proximately caused by Welsbach's mere inaction, which is not a basis of liability against it. In contracting with the City to repair traffic signals, Welsbach did not assume any duty to the general public and, therefore, owed no duty of care to plaintiff for its alleged failure to perform its contractual obligations (see Torres v. City of New York, supra). In any event, the evidence presented, on this record, is that Welsbach fully complied with its contractual duties regarding the subject traffic light. With respect to the City, the evidence on this record establishes that the traffic light at the intersection was not defective and that the City did nothing to cause or contribute to the accident.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed against Welsbach and the City.

Dated: July 25, 2011

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KEVIN J. KERRIGAN, J.S.C.