A.V. v City of New York
2018 NY Slip Op 30380(U)
February 28, 2018
Supreme Court, New York County
Docket Number: 152667/12
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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A_____ V_____ by his Mother and
Natural Guardian CARMEN FLORES-RAMOS
and CARMEN FLORES-RAMOS, Individually,

Plaintiffs,

-against-

Index No.: 152667/12

THE CITY OF NEW YORK and the DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK, APPLEGATE ASSOCIATES, INC., FERREIRA CONSTRUCTION COMPANY, INC., CORNELIUS JOHNSON, CHERYL FOOTE-JOHNSON and GANDHI ENGINEERING, INC.,

Defendants.

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GANDHI ENGINEERING, INC.,

Third-Party Plaintiff,

-against-

Third-Party
Index No.: 595272/14

FERREIRA CONSTRUCTION COMPANY INC. AECOM TECHNOLOGY,

Third-Party Defendants.

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THE CITY OF NEW YORK,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No.: 595638/14

AECOM TECHNOLOGY CORPORATION, AECOM USA, INC. and AECOM INC.,

Second Third-Party Defendants.

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ALEXANDER M. TISCH, J.:

Motion sequence numbers 001 through 005 are consolidated for disposition.

The infant plaintiff (A.V.) and his mother seek compensation for injuries that the plaintiff sustained in a collision with an automobile while A.V. was riding a bicycle, at the intersection of East 78th Street and the southbound FDR Drive service road, in the County, City and State of New York on July 21, 2011. The defendants and all third-party defendants move for summary judgment pursuant to CPLR 3212 dismissing the claims against them.

Plaintiffs allege that the individual defendants, Cornelius Johnson and Cheryl Foote-Johnson (together, the Johnsons) owned the motor vehicle involved in the accident. Plaintiffs allege that Cornelius Johnson (Johnson) was driving negligently, and that the other defendants were negligent in their design, ownership, operation or maintenance of the roadways where the accident occurred, which includes a nearby pedestrian and bicycle overpass bridge that crosses over the FDR Drive (the Bridge).

On its east side, the Bridge connects to a public bicycle and pedestrian path, and a park located adjacent to, and between, the FDR Drive and the East River (the Esplanade). The Esplanade runs north and south, and is not open to vehicular traffic. John Jay Park, a public park with a swimming pool, spans from East 76th Street to East 78th Street. Shortly before the accident, the plaintiff had exited John Jay Park.

When the accident occurred, the Bridge was being replaced as part of a larger renovation project (the Project) commenced by defendant The City of New York (the City), and was closed to pedestrian and bicycle traffic. Defendant Gandhi Engineering, Inc. (Gandhi) is an engineering firm that was involved in the Project's design. Defendant Ferreira Construction Company, Inc.

contracted to perform the construction work. Third-party defendants AECOM Technology Corporation, AECOM USA, Inc. and AECOM Inc. (together, AECOM) were impleaded by Gandhi and the City. AECOM is an engineering firm. Plaintiffs claim that the foregoing defendants failed to: (1) adequately warn about the Bridge construction and closure; (2) provide adequate signage concerning the bicycle route and detour; and (3) provide a safe pedestrian and bicycle route from John Jay Park to the Esplanade, an area in which children would be in close proximity to vehicular traffic and accidents would be foreseeable. Plaintiffs allege that this conduct resulted in the then 12-year old plaintiff's serious injury while attempting to access the Bridge from another ramp.

Motion Sequence No. 001 - The Johnsons

The Johnsons argue that they are entitled to summary judgment dismissing the complaint because they did not breach a duty owed to plaintiffs, or cause or contribute to the infant plaintiff's injury. These defendants assert that Johnson was lawfully driving on the FDR service road when the plaintiff, who was riding on a bicycle, without a helmet, traveling the wrong way on East 78th Street, a one-way street,[1] collided with the Johnsons' car. In support, they submit Johnson's testimony that he was looking straight ahead, driving 15-20 mph on the service road, and swerved when he heard a thump, and that his mirror came off. Johnson testified that he did not see the plaintiff prior to the accident, but, after the collision, pulled over, saw the plaintiff on the ground, went to the boy and called 911.

At the time of the accident, the plaintiff was with his brother and also his father, nonparty

[1] The record contains sworn testimony that the block where East 78th Street intersects with the FDR service road is a westbound, one-way street. Plaintiffs' expert confirms this testimony.

Alvaro Villanueva (Villanueva), both of whom were on another bicycle. Villanueva testified that he was about three meters behind his son, A.V., who was traveling at a moderate pace on the bicycle, heading east on East 78th Street. Villanueva testified that the family was traveling east on East 78th Street because there were no cars, and he thought that the street was closed. Villanueva had trouble recalling details about the accident, but testified that A.V. turned right at the FDR service road. Villanueva also testified that, prior to the accident, he knew that the Bridge's ramp was under construction and closed, but not that the Bridge was closed, and that he had discussed finding another ramp to access the Bridge with his sons.

New York City Police Department (NYPD) investigators arrived at the scene after the accident. In support of their motion, the Johnsons submitted the police report created by the NYPD investigators after the accident and the deposition testimony of one of the investigators. The NYPD investigator testified that Villanueva stated that his son had turned left, or northbound, onto the southbound FDR service road. The police investigation report also reflects, and the NYPD investigator testified, that he interviewed Villanueva at the hospital where the plaintiff was taken after the collision, and not at the accident site.

A driver has a duty to "see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Cupp v 754 McGaffick*, 104 AD3d 1283, 1284 [4th Dept 2013] [internal quotation marks and citation omitted]; *Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 777 [2d Dept 2012] ["under the common law, a driver is bound to see what is there to be seen through the proper use of his or her senses, and is negligent for the failure to do so" (internal citations omitted)]; Vehicle and Traffic Law § 1146 [a] ["Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to

avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary"]). Furthermore, proximate cause is almost always a jury question. Assuming, arguendo, that the infant plaintiff was negligent in failing to obey the rules of the road, and that his negligence contributed to the accident, "[t]here can be more than one proximate cause of an accident and the issue of comparative negligence is generally a question for the jury to decide" (*Todd v Godek*, 71 AD3d 872, 872 [2d Dept 2010] [internal quotation marks and citations omitted]; *Colpan*, 97 AD3d at 777; *Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept 2000] ["There may be one, or more than one, substantial factor"]).

For purposes of this motion, Villanueva's testimony, that the plaintiff turned right at the FDR service road, must be viewed in the plaintiffs' favor, and the inference drawn that the infant plaintiff was traveling in the correct direction on the FDR service road. Johnson's testimony is not clear as to whether, and if so, why his vision was obstructed at the intersection. The evidence concerning the extent and location of the damage to Johnson's car, as well as how far into the intersection Johnson was at the time, are factors to be considered by the trier of fact in determining whether Johnson could have seen the plaintiff, and whether, under the circumstances, it would have made any difference. In reply, the Johnsons argue that the accident occurred almost immediately after Johnson entered the middle of the intersection, but Johnson's testimony was that he was six to twelve inches into the intersection.[2] The evidence is not conclusive as to whether there was damage to the front of Johnson's vehicle, or only to the side.

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[2] The police accident report diagram does not definitively demonstrate that Johnson was in the middle of the intersection (Gross affidavit, exhibit C [sequence No. 005]).

Issues of reasonable care under the circumstances, and proximate cause, preclude summary judgment in the Johnsons' favor.

Motion Sequence No. 002 - Gandhi

Gandhi moves for summary judgment dismissing the complaint and all cross-claims asserted against it. Gandhi's moving arguments are that: (1) it is not liable because its work conformed to all contractual requirements; and (2) it has no duty to plaintiffs. In support, Gandhi provides its contract with the City for engineering services, and the sworn testimony of Hayes Lord, of the New York City Department of Transportation (DOT), that he provided the drawings and specifications for where the bike route and signs should be. Gandhi also submits the affidavit of Scott E. Derector, P.E., an engineer, as expert opinion. Derector avers that Gandhi: (1) followed Lord's notes and prepared final drawings in conformance with DOT's plans; (2) performed its contractual obligations in compliance with the contract, drawings and specifications; (3) complied with industry standards and professional standards of care; and (4) performed its work properly and in compliance with section 6G.05 of the Manual on Uniform Traffic Control Devices (MUTCD), titled Work Affecting Pedestrian and Bicycle Facilities. Derector states that MUTCD § 6G.05 does not require the placement of signs guiding pedestrians to the alternate bicycle detour route on every street between York Avenue and the FDR service road. He further opines that the MUTCD only requires detectability of the temporary facility, and that alternative pedestrian routes be provided when pedestrian routes are closed. Derector avers that while MUTCD § 6G.05 provides that provisions of MUTCD chapter 6D apply where pedestrian or bicycle usage is high, chapter 6D is silent as to signs guiding pedestrians to

alternative routes.[3]

In opposition, plaintiffs state that Gandhi was responsible for creating the Maintenance and Protection of Traffic plan (MPT) for the entire renovation project, which included the bicycle detour plan, and that its responsibilities were comprehensive and for the purpose of ensuring pubic safety. Plaintiffs claim that MUTCD Chapters 6A and 6B apply to temporary traffic control (TTC), and provide that affirmative guidance to bicyclists must be provided in a clear and positive manner relating to TTC. Plaintiffs submit the affidavit of Nicolas Bellizzi, P.E., an engineer, who opines that Gandhi and the City failed to take into account or conduct a study of areas that would generate high volumes of bicycle traffic, such as parks, and that the signage plan lacked a rational basis and deviated from good and accepted transportation engineering practice. Bellizzi avers that the traffic plan did not meet MUTCD requirements because it did not provide affirmative guidance to the infant plaintiff as to how to safely cross over the FDR Drive to the Esplanade. Plaintiffs also argue that: (1) the reasonable expectation of bicyclists is that the construction site would have appropriate signage as to alternative passage to other bridges that spanned the FDR; (2) the law imposes a non-delegable duty on Gandhi; (3) evidence demonstrates that Gandhi's responsibilities included bicycle traffic, but Gandhi did not analyze bicyclist patterns or volume at the Bridge or John Jay Park; (4) work concerning the public or a public thoroughfare is inherently dangerous; and (5) a contractor that fails to comply with the MUTCD is affirmatively negligent, and has launched a force or instrument of harm.

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[3] Derector states that Villanueva's testimony confirms that he and his children had actual knowledge that the Bridge was closed, so that signage would not have affected the infant plaintiff's conduct. This statement is not consistent with Villanueva's testimony, but raises a credibility issue.

Gandhi correctly states the well known legal concept that, absent a duty to a plaintiff, courts do not impose liability upon a defendant. There is also case law which provides that "a contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (*Diaz v Vasques*, 17 AD3d 134, 135 [1st Dept 2005] [internal quotation marks and citation omitted]). However, this line of cases concerns contractors that build or construct according to a design plan furnished by another (*see e.g. Gee v City of New York*, 304 AD2d 615, 616 [2d Dept 2003]; *Gonzalez v City of New York*, 300 AD2d 626, 626-627 [2d Dept 2002] [no fact issue raised that contractor did not construct playground according to school plans]). Here, Gandhi was the engineering professional responsible to provide the MPT and the final design of the Project.

Both sides rely upon *Espinal v Melville Snow Contrs.* (98 NY2d 136, 139-141 [2002]), which concerns the extension, to a party to a contract, of a tort duty of care to a non-contracting third party. This line of cases, addressing the existence of a duty, is inapposite because an engineer has a duty of care to third parties, and may be liable for personal injuries caused by the engineer's negligence which creates an unsafe condition (*see Cubito v Kreisberg*, 69 AD2d 738 [2d Dept 1979], *affd* 51 NY2d 900 [1980]; *Richards v Passarelli*, 77 AD3d 905, 909 [2d Dept 2010] [standard to be met is of care in design "that a reasonably prudent architect would use to avoid an unreasonable risk of harm to anyone likely to be exposed to the danger"]; *Hughes v City of New York*, 5 Misc 3d 1024(A), 2002 NY Slip Op 50724(U),*2 [Sup Ct, NY County 2002]; Lee S. Kreindler, David C. Cook, Noah H. Kushlefsky and Megan W. Benett, New York Law of Torts § 13:44 [West's NY Prac Series, vol 15, August 2017 Update] [architects and engineers

have a duty of care to third parties]). Consequently, summary judgment is denied.

In addition, while the City initially developed the bicycle path detour, in what appear to be rough drawings indicating where signage should be placed for the bicycle detour, there is also the matter of the protection of traffic at the intersection where construction work was being performed and where a bridge was rendered unavailable due to construction. While Gandhi's expert concludes that Gandhi acted within its contractual obligations to conform to the City's specifications, he does not provide factual details of the standard of care for Gandhi's engineering review, and what it should have entailed. Moreover, while he states that Gandhi reviewed the final contract drawings and confirmed that, for the signs' size and color, they were in compliance with the MUTCD, this does not demonstrate that Gandhi was not also required to address the signs' location in the MPT.

In reply, Gandhi argues that plaintiffs will not be able to establish that Gandhi bore responsibility for the maintenance and protection of traffic. However, plaintiffs' expert states that Gandhi's duties and responsibilities included the preparation of plans and specifications for the project, which encompassed the bicycle detour design drawings and the MPT. While Gandhi's expert states that Gandhi's role was solely to implement the bicycle detour plan that Lord designed and which was, eventually, approved by DOT, the opinion does not adequately support the basis for this opinion about the professional scope of duties concerning signage and the MPT.

The photographic evidence that Gandhi attaches to demonstrate its assertion that signs were properly placed on the corner of Cherokee Place and East 78th Street is improperly submitted for the first time in reply and the argument improperly raised (*Matter of Government*

Empls. Ins. Co. v Torres, 100 AD3d 411, 411-412 [1st Dept 2012] [on summary judgment motion arguments raised in reply for the first time are not considered]). In any event, of the three photos, only exhibit D contains signs, under the Bridge, on the FDR service road, and not, as asserted by Gandhi, at Cherokee Place, and their content is not visible. Gandhi also improperly raised MUTCD § 6F.08 for the first time in reply, when plaintiffs have not been heard concerning this provision.[4] Gandhi's reply argument, that a Bridge Closed sign was not required because the fencing and construction barriers and Bridge's condition were sufficient warning of the Bridge's closure, requires the drawing of inferences against the nonmoving party, which is impermissible on summary judgment (*DeLourdes Torres v Jones*, 26 NY3d 742, 763 [2016] ["facts must be viewed in the light most favorable to the plaintiff, and every available inference must be drawn in the plaintiff's favor]). Gandhi also did not raise proximate cause in moving, but only, impermissibly, in reply.

Motion Sequence No. 003 - AECOM

Third-party defendant AECOM argues that the claims against it should be dismissed because: (1) no party has provided an opinion, from a qualified engineer, detailing the standard of care owed by a firm providing "Resident Engineering" services or indicating how AECOM failed to meet the standard; (2) AECOM was hired only to inspect for conformance with plans that were made by others; (3) AECOM did not proximately cause the accident; (4) common-law indemnity is not available from AECOM, as plaintiffs' claims allege independent breaches

[4] MUTCD § 6F.08 addresses the posting of "BRIDGE OUT" or "BRIDGE CLOSED" signs and Road Closed or Street Closed signs. Derector's assertion that a "Bridge Closed" sign was inappropriate, because contractors were working on the Bridge appears contrary to Gandhi's presentation of the language of section MUTCD § 6F.08, that such a sign should be used when the road is closed to users except contractors (*see* Gandhi reply affirmation, ¶ 53).

against Gandhi and the City, rather than vicarious liability for AECOM's conduct; (5) the City dictated the bicycle detour route, and the signage is in accordance with the government's manual, so that AECOM is entitled to governmental immunity; (6) the DOT's contractual indemnification claim fails, for numbers 1 and 2 above, as there is no evidence that AECOM breached any duty or proximately caused plaintiffs' injuries, or that AECOM is contractually bound to indemnify the DOT; (7) Gandhi's claims for contractual indemnity or breach of contract for failing to procure insurance fails because AECOM's predecessor did not contract with Gandhi; and (8) absent the showing of a negligent act, AECOM did not agree to indemnify the City.

To support its contentions, AECOM provides an engineer's affidavit and sworn testimony (*see* Kinlan tr at 28-29, 33). Essentially AECOM argues that it was hired only to check that signs, chosen by others, were in place, and that it did this. In opposition, the City and Gandhi do not point to admissible evidence demonstrating a fact question as to AECOM's negligence, but submit only conclusory attorney affirmations stating that if their motions are not granted, then AECOM's motion should not be granted. To defeat summary judgment the opponent of the motion must lay bare its proofs and produce evidence to demonstrate the existence of an issue of fact, or provide an adequate excuses for having failed to do so. As the City and Gandhi do neither here, AECOM's motion is granted.

Motion Sequence No. 004 - Ferreira

Ferreira argues that it is entitled to summary judgment dismissing the complaint and cross claims asserted against it. Concerning the complaint, in moving, Ferreira argues: (1) that it has no liability because it merely followed the plans that it was provided, as drawn up by another; and (2) that it has no duty to plaintiffs, because it did not contract with them to perform work at

the site. In support, Ferreira submits testimony that demonstrates that the City and Gandhi worked on the bicycle detour route and MPT plan. Ferreira contends that it cannot be held liable unless plaintiffs raise a triable issue of fact as to whether the contract's plans were so clearly defective that a contractor of ordinary prudence would not have performed the work.

As discussed above, there is case law to support the proposition that if a contractor performs its work in accordance with contract plans it may be insulated from liability barring notice that the plans may be dangerous. In addition, it is well settled that a party that enters into a contract typically does not have a duty to third parties absent three exceptions:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

Espinal (98 NY2d at 140 [internal quotation marks and citation omitted]).[5] However, there is a fact issue as to whether Ferreira failed to place a Closed Bridge sign in accordance with the plans. On the record here,[6] it cannot be determined, as a matter of law, that the failure to post a Bridge Closed sign, as required in the plans that Ferreira asserts it contracted to post, was not an omission that did not create or increase an unreasonable risk of harm. In addition, in opposition, plaintiffs submit a DOT issued permit for Ferreira, that provides that:

> "[w]arning signs and traffic safety devices shall be provided, installed, maintained and removed by the Permittee [Ferreira] in accordance with the New York State

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[5] The elements of a negligence claim are "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]).

[6] The record reveals that there was a Sidewalk Closed sign, but no Bridge Closed sign, and that there was a Use Crosswalk sign where there may have been no crosswalk.

> Department of Transportation's "Manual of Uniform Traffic Control Devices." [Ferreira] shall provide the appropriate channelization for traffic leaving and approaching [its] worksite. [Ferreira] shall provide flagpersons, cones, barricades, etc. as required for public safety. [Ferreira] is responsible for the adequacy of the safety devices"

(Shapey opposition affirmation, exhibit K, ¶ 29). This raises a fact issue as to the scope of Ferreira's duties to post signs that may have aided the infant plaintiff, or lessened what may have been confusion caused by signage. In light of this, it is unnecessary to reach the other *Espinal* exceptions.

Ferreira's reply argument, that Villanueva knew the Bridge was closed, which is based on Villanueva's testimony concerning photographs of the Bridge, is improperly raised in reply and ignores his testimony (*see* Villanueva tr at 47-50, 120 [family was planning to take the Bridge to cross over the FDR to go home and intended to find another ramp to use the Bridge and Villanueva did not notice construction near or on the Bridge or that a portion of the Bridge had been removed, as shown in picture, or that the Bridge was closed]). Villanueva also may have based his testimony on knowledge about the Bridge that he gleaned after the accident that day. To the extent that any defendant suggests that there are credibility issues, such issues are not adjudicated on summary judgment.

Concerning the cross-claims, to obtain summary judgment on a contractual indemnification Ferreira carried the burden to demonstrate that there is no contractual indemnity obligation, by either demonstrating that there is no applicable contractual indemnification provision in a contract or that, if there is one, it is not triggered or applicable. The indemnification provision Ferreira quotes concerns only claims relating to the failure to comply with the engineer's directions promptly. It is unclear why this provision was quoted, or if there is

another, in the voluminous contract Ferreira submits, but Ferreira does not state that this is not the case. As Ferreira has not met its burden and does not address common law indemnification or contribution cross-claims, the motion is denied.

Motion Sequence No. 005 - The City

Plaintiffs claim that the City was negligent in failing to: (1) provide safe ingress and egress to John Jay Park for pedestrians and bicyclists; (2) properly design, install and implement traffic control and speed modifications to avoid foreseeable accidents with children in proximity to the construction site; (3) warn drivers who approached the Bridge construction that extra caution should be used because the area was frequented by children; (4) provide safe, effective, alternative, detour routing or suitable warnings, directions, informational signage, or traffic control devices, such as cones or personnel, to guide, direct and protect pedestrians and bicyclists; (5) conduct a site visit on a bicycle; (6) warn that the Bridge was closed and unable to be used; (7) provide a safe alternative to those who intended to use the Bridge by rerouting them with a detour that was readily observable and understandable to the public; (8) close East 78th Street between York Avenue and the FDR Drive, instead of designating it as a westbound, one-way street; and (9) plan for proper traffic control in conformity with regulations, statutes, the New York State MUTCD, and the Federal Highway Administration Manual on Uniform Traffic Control. Plaintiffs also allege that the City negligently permitted obstructions on the sidewalk to impair and obstruct the view on the access road at the corner of 78th Street.

In moving, the City argues that it is entitled to immunity for its discretionary decisions regarding traffic planning, as exercised by the DOT, with regard to the maintenance and protection of traffic at the accident site. The City argues that all of its actions, including the

response of the director of the DOT's bicycle unit, Hayes Lord, to requests for bicycle detour signs; the decisions as to what signs were placed at the accident site; and, the hiring of Gandhi and AECOM, were in the exercise of the City's governmental discretionary decision making.

The City does not dispute that it owed a duty of care to the infant plaintiff (*Ferguson v Sheahan*, 71 AD3d 1207, 1208 [3d Dept 2010] [municipalities owe a duty to erect adequate warning signs]). "To establish its entitlement to qualified immunity, a governmental body must show that a public planning body considered and passed upon the same question of risk as would go to a jury in the case at issue" (*Leon v New York City Tr. Auth.*, 96 AD3d 554, 554 [1st Dept 2012] [internal quotation marks and citation omitted]). "A mere informal review or internal policy will not suffice. The defendant must demonstrate that a study, inquiry or investigation into that question was conducted and reached the determination now relied upon" (*id.* at 555 [internal quotation marks and citation omitted]).

The City has not established that its analysis was studied and reasoned, in light of all of the circumstances to be considered at the time, and that it covered the risk claimed in this action concerning bicyclists seeking access to the Bridge. Assuming, arguendo, that the City provided evidence to establish that it adequately conducted a detailed study or investigation into the safety considerations of the Project as it might affect bicyclists, plaintiffs raise a fact issue by submitting evidence of the City's intention to collect data for a study that was not conducted.

Whether the City is entitled to governmental function immunity turns on whether the City "was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Turturro v City of New York*, 28 NY3d 469, 477 [2016], quoting *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). This defense has no applicability where the

municipality has acted in a proprietary capacity, in which case, the municipality is subject to suit under ordinary negligence principles, even though the municipality's acts may be characterized as discretionary (*id.*, 28 NY3d at 479, citing *Wittorf v City of New York*, 23 NY3d 473, 479 [2014]). Highway planning, design and maintenance constitute proprietary functions that arise from a municipality's proprietary duty to keep its roads and highways in a reasonably safe condition (*Turturro*, 28 NY3d at 479; *Wittorf*, 23 NY3d at 479). The City's development and implementation of the detour and the traffic maintenance and protection plan concerning bicyclists and the Bridge, was a proprietary function concerning roadway planning, design and maintenance (*Wittorf*, 23 NY3d at 480), making the City's contention that it is entitled to governmental function immunity unpersuasive.

The City also argues that there is no evidence that its conduct was a proximate cause of the infant plaintiff's accident, as there was a traffic plan in place, all traffic directional signs were clearly posted, and the intersection was reasonably safe for those who obeyed the rules of the road. Proximate cause is demonstrated by showing that a defendant's act or failure to act was a "substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). "[T]here may be more than one proximate cause of an injury" (*Mazella v Beals*, 27 NY3d 694, 706 [2016]) and ordinarily this issue is a

> "fact question[ ] to be decided by a jury. While it is appropriate to decide the question of legal cause as a matter of law where only one conclusion may be drawn from the established facts, where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide"

(*White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008] [internal quotation marks and citation omitted]).

In support, the City submits the police report and testimony of the NYPD investigating detective, who concluded that the accident was due to bicyclist error. The City asserts that there was a one-way directional arrow at the northwest corner of East 78th street, at the intersection; that the FDR service road was southbound, with an unposted speed limit of 30 MPH; and that the sidewalk on the north side of 78th Street was open. The City argues that plaintiffs have the burden to submit evidence to demonstrate that there is a fact issue as to proximate cause. In opposition, plaintiffs argue that the City's conduct, in failing to supply appropriate signage and design a proper bicycle plan, was a foreseeable and substantial cause of the A.V.'s accident.

Where a bridge is present to protect bicyclists from otherwise having to cross a highway with vehicular traffic, it is foreseeable that preteens and teens on bicycles might attempt to ride across the bridge to a nearby park, which contains a bicycle path, from another nearby park. Here there is evidence, through Villanueva's testimony, that the infant plaintiff and his family were looking for a ramp to access the Bridge, and there was a sign that stated "Sidewalk Closed," but there was no sign indicating that the Bridge, to which the closed sidewalk normally led, was closed, or other signage about a detour. There was also no signage about how to get across the FDR, to the Esplanade, or its bicycle path. The infant plaintiff was riding a bicycle when the accident occurred, as might be expected in the particular area at issue here. Assuming, arguendo, that A.V. was seeking access to the Bridge, to get across the highway to reach the Esplanade, it cannot be said, as a matter of law, that the absence of signage advising that the Bridge was closed to bicycle traffic,[7] or that there was a bicycle detour, was not an omission that may have caused

[7] Although in moving, the City referred to evidence of a Bridge Closed sign, plaintiffs submit Villanueva's affidavit, in which he avers otherwise.

the infant plaintiff to become confused, distracted, or both, or that these circumstances demonstrate a reasonably safe intersection. Possible issues of credibility, or that, depending on varying inferences, a jury also might find the infant plaintiff's conduct, in traveling the wrong way on 78th Street, or on the access road, or otherwise, contributed to or solely caused the accident does not change that proximate cause is a fact issue here. The City has not adequately demonstrated that it not create and/or have notice of a dangerous condition.

Conclusion

In light of the foregoing it is

ORDERED that the motions of defendants Cornelius Johnson and Cheryl Foote-Johnson (motion sequence No. 001), Gandhi Engineering, Inc. (motion sequence No. 002) Ferreira Construction Company, Inc. (motion sequence No. 004) and The City of New York (motion sequence No. 005) for summary judgment dismissing the complaint are denied; and it is further

ORDERED that the motion of third-party defendants AECOM Technology Corporation, AECOM USA, INC. and AECOM, Inc. for summary judgment dismissing all claims against them (motion sequence No. 003) is granted and the Second Third-Party Action (Index no. 595638/2014) is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the Third-Party Action (Index no. 595272/2014) is dismissed in its entirety against third-party defendants AECOM Technology Corporation, AECOM USA, INC. and AECOM, Inc., and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

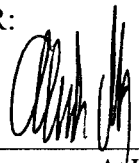
ORDERED that the action is severed as to third-party defendants AECOM Technology Corporation, AECOM USA, INC. and AECOM, Inc. and continued against the remaining defendants and third-party defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158) in accordance with the e-filing protocol, who are directed to mark the court's records to reflect the change in the caption herein.

Dated: February 28, 2018

ENTER:



A.J.S.C.

HON. ALEXANDER M. TISCH