Granata v Village of Port Chester
2021 NY Slip Op 33373(U)
November 12, 2021
Supreme Court, Westchester County
Docket Number: Index No. 53897/2019
Judge: William J. Giacomo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

---x

ANDREA GRANATA,

Plaintiff,

Index No. 53897/2019

– against –

Motion Seq. 2, 3, 4 & 5

THE VILLAGE OF PORT CHESTER,
ELQ INDUSTRIES, INC., and
DOLPH ROTFIELD ENGINEERING, P.C.,

DECISION & ORDER

Defendants.

---x

In an action to recover damages for personal injuries, (1) the defendant ELQ INDUSTRIES, INC. moves for summary judgment dismissing the complaint and cross-claims, pursuant to CPLR 3212, (2) the defendant THE VILLAGE OF PORT CHESTER ("Port Chester") moves for summary judgment dismissing the plaintiff's claims, co-defendants' cross-claims, pursuant to CPLR 3212, and granting summary judgment against defendant ELQ INDUSTRIES, INC. ("ELQ") on the cross-claim for contractual indemnification, pursuant to CPLR 3212, (3) the defendant DOLPH ROTFIELD ENGINEERING, P.C. ("DRE") moves for summary judgment dismissing plaintiff's complaint and cross claims with prejudice pursuant to CPLR 3212 and for an order directing ELQ to indemnify DRE, and (4) the plaintiff moves for summary judgment on the issue of liability against the defendants pursuant to CPLR 3212:

Papers Considered **NYSCEF DOC NO. 64-189; 206-262; 264-327**

1. Notice of Motion/Statement of Leslie G. Abele, Esq. of undisputed material facts/Affirmation of Leslie G. Abele, Esq./Affidavit of Chris Pierson/Exhibits A-GG
2. Notice of Motion/Affirmation of Stuart Diamond, Esq./Statement of Stuart Diamond, Esq. of undisputed material facts/Exhibits A-Q/Memorandum of law
3. Notice of Motion/Affirmation of Mark R. McCauley, Esq./Statement of Mark R. McCauley, Esq. of material facts/Certification of Mark R. McCauley, Esq. of word count/Memorandum of law/Exhibits A-S/Affidavit of Anthony Oliveri/Exhibits 1-10/Amended Notice of Motion (signed)/Affirmation of Mark R.

McCauley, Esq. (signed)/ Statement of Mark R. McCauley, Esq. of material facts (signed)/ Certification of Mark R. McCauley, Esq. of word count (signed)/ Memorandum of law (signed)

4. Notice of Motion/Statement of Daniel G. Ecker. Esq. of material facts/ Affidavit of John A. Serth, Jr., P.E./Affirmation of Daniel G. Ecker. Esq./ Exhibits 1-22/Memorandum of law
5. Affirmation of Mark R. McCauley, Esq. in opposition (motion seq. 5)/Exhibits A-S/Affidavit of Anthony Oliveri, P.E./Exhibits 1-10/Memorandum of law/Counter statement of Mark R. McCauley, Esq. of material facts/Certification of Mark R. McCauley, Esq. of word count
6. Affirmation of Stuart Diamond, Esq. in opposition (motion seq. 5)/Exhibits A-C/ Response of Stuart Diamond, Esq. to plaintiff's statement of undisputed material facts/Exhibit C (document no. 312)
7. Affirmation of Leslie G. Abele, Esq. in opposition (motion seq. 5)/Exhibits A-M/ Counter statement of Leslie G. Abele, Esq. of material facts
8. Table of Contents and Table of Authorities (motion seq. 5)/Certification of Daniel G. Ecker, Esq. of word count
9. Affirmation of Daniel G. Ecker, Esq. in opposition (motion seq. 2)/Exhibits 1-11/Responsive Statement of Daniel G. Ecker, Esq. of undisputed material facts/Affidavit of John A. Serth, Jr., P.E./Exhibit 1/Memorandum of law in opposition
10. Affirmation of Daniel G. Ecker, Esq. in opposition (motion seq. 3)/Exhibits 1-11/Responsive Statement of Daniel G. Ecker, Esq. of undisputed material facts/Affidavit of John A. Serth, Jr., P.E./Exhibit 1/Memorandum of law in opposition
11. Affirmation of Daniel G. Ecker, Esq. in opposition (motion seq. 4)/Exhibits 1-11/Responsive Statement of Daniel G. Ecker, Esq. of undisputed material facts/Affidavit of John A. Serth, Jr., P.E./Exhibit 1/Memorandum of law in opposition
12. Affidavit in reply of Anthony Oliveri, PE (motion seq. 4)/Memorandum of law in reply
13. Reply Affirmation of Stuart Diamond, Esq. (motion seq. 3)/Exhibits A-B
14. Reply Affirmation of Leslie G. Abele, Esq. (motion seq. 2)
15. Certification of Mark R. McCauley, Esq. of word count (document no. 319)
16. Memorandum of law (motion seq. 5)/Affidavit of John A. Serth, Jr., P.E. (document no. 321)/Exhibits 23-24/Certification of Daniel G. Ecker, Esq. of word count
17. Affidavit of Anthony Oliveri (motion seq. 4)(document no. 325)/Affidavit of Anthony Oliveri (motion seq. 4)(document no. 326)
18. Affidavit of Anthony Oliveri, PE (motion seq. 5)(document no. 327)

Factual and Procedural Background

Plaintiff sustained injuries on March 9, 2018 at approximately 7:30 a.m. when she was caused to slip and fall on an ice patch on the roadway of Burdsall Drive in front of her house. At the time of the fall, the plaintiff was wearing slip on clogs with rubber soles and carrying a small bag of garbage weighing less than five pounds.

Defendant DRE entered into an Engineering Services contract with defendant Port Chester on July 11, 2001 for two categories of engineering services, Category A or complex assignments and Category B or less complex assignments and included local streets, sidewalks, curbs, parking lots. Defendant ELQ entered into a contract with defendant Port Chester on September 20, 2016 to perform, inter alia, milling and repaving of certain roadways including on Burdsall Drive, where the plaintiff resided, which was an add-on to the project. The project specifications and project plans were prepared and stamped by defendant DRE.

Plaintiff moves for summary judgment on the issue of liability against the defendants pursuant to CPLR 3212. As to defendant ELQ, plaintiff argues that it is liable to plaintiff for creating or exacerbating the roadway condition and ice that was the cause of her fall and injuries by failing to ensure the proper cross slope on Burdsall Drive pursuant to its contract with defendant Port Chester. As to defendant DRE, plaintiff argues that it is liable to plaintiff based on its failure to properly inspect defendant ELQ's performance of its work pursuant to its contract with defendant Port Chester. As to defendant Port Chester, plaintiff argues that it is liable to plaintiff based on its breach of its nondelegable duty to maintain its roadways in a reasonably safe condition which is not relieved by work done by an independent contractor.

In support, plaintiff submits an affidavit of John A. Serth, Jr., P.E. ("Serth"), a licensed professional engineer in New York State. Serth explains that a cross slope on a two lane section of a road is the slope of the surface of the pavement away from the centerline of the road to the edges of the road. Serth states that cross slope is a critically important component of roadway design and construction and its purpose on a straight section of roadway is to drain the water away from the pavement surface to the edge of the roadway. Seth states that when a road is resurfaced, the original cross slope will typically be maintained, however, if the cross slope is not correct before a road is to be resurfaced, a truing and leveling (T&L) course of asphalt pavement will be placed to create the required and proper cross slope.

Serth affirms that the subject paving and resurfacing contract entered into between defendant ELQ and defendant Port Chester on September 20, 2016 included the placement of the required T&L course for the resurfacing of Burdsall Drive as a bid item, and the plans and bid items were all incorporated into the subject resurfacing contract. Serth states that the plans prepared by defendant DRE were a component of the contract and required the contractor to pave all roadways under the contract with a cross slope of one eighth of an inch per foot. Serth states that defendant DRE was responsible for inspecting the project as it progressed, and under the contract terms, defendant ELQ was required to ensure that Burdsall Drive was repaved with the proper cross slope as

required by the New York State Education Law, including that the road was required to slope to drain from the centerline to the gutters at the curb line of the road. Serth states that a contractor has no discretion to depart from or in any way modify plans that are prepared and stamped by an engineer without the revisions being stamped by another engineer.

As such, Serth affirms that defendant ELQ had no discretion to depart from or modify, in any way, the plans prepared and stamped by DRE including that portion of the plans requiring defendant ELQ to repave all roadways under the contract with a proper cross slope, pursuant to the contract plans. Serth affirms that he inspected Burdsall Drive on August 21, 2018, performed a water test and based on the results, opines, to a reasonable degree of engineering certainty, that defendant ELQ failed to construct the roadway of Burdsall Drive, including the area in front of plaintiff's premises to the proper cross slope. Serth swears that the project plans are in violation of the NYSDOT Specifications and normal safe industry practice. Therefore, based on his inspection and observation of the water, Serth opines, to a reasonable degree of engineering certainty, that defendant ELQ failed to repave the roadway of Burdsall Drive, including the area in front of 22 Burdsall Drive with the required and proper cross slope. In addition, Serth opines, to a reasonable degree of engineering certainty, that defendant DRE failed to properly supervise and inspect defendant ELQ's work, despite its obligations and duties to do so. Serth states that the records show that no T&L was placed on Burdsall Drive to provide the required cross slope and that defendant ELQ's application for payment dated October 26, 2016 shows that the T&L course was not being placed and that the full depth asphalt patch item 44 was not being placed, and that this violated the requirements of the contract plans created and signed by the licensed engineer, defendant DRL. As such, Serth opines, to a reasonable degree of engineering certainty, that the subject area of ice where plaintiff suffered her fall in front of 22 Burdsall Drive was caused by the failure to construct the road surface with the proper cross slope for drainage, resulting in a freeze of ponded water on the surface as it spread across the pavement.

Defendant ELQ moves for summary judgment to dismiss the plaintiff's complaint and co-defendants Port Chester and DRE's cross-claims. Defendant ELQ also opposes plaintiff's motion for summary judgment. Defendant ELQ argues that plaintiff's claims against defendant ELQ are grounded in negligence that plaintiff failed to establish that it owed a duty of care to plaintiff as no contract existed between plaintiff and defendant ELQ and an *Espinal*[1] defense is not applicable. Defendant ELQ argues that it contracted with defendant Port Chester, and did not have a contract with plaintiff.

In support, defendant ELQ submits an affidavit of professional engineer, Chris Pierson who swears that he inspected the asphalt paving in front of 22 Burdsall Drive. Pierson states that he observed that the resurfacing provided by defendant ELQ matched the existing asphalt pavement grades as intended and was properly sloped to drain from the street along the subject driveway. Pierson also concurs with defendant DRE that

[1] In *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002], the Court of Appeals defined three exceptions to the general rule that the breach of a contractor's contractual obligation does not give rise to tort liability to others not in privity with the contractor, as the duty flows between only the parties to the contract.

defendant ELQ's work progressed as indicated and that the quality of work was in accordance with defendant DRE's specification and drawings.

In opposition, plaintiff argues that defendant ELQ was a contractor hired to perform work and failed to exercise reasonable care to ensure that it repaved Burdsall Drive with the required and proper cross slope and thereby launched a force or instrument of harm. Plaintiff references the deposition testimony of defendant ELQ's paving superintendent, Jose Monteiro who testified that the cross slope of the road remained the same during the repaving.

In opposition to plaintiff's motion, defendant ELQ references the plaintiff's testimony to support its argument that it did not create or exacerbate the condition as plaintiff testified that it existed from 1989, and the slope was returned to the prior condition after the work was complete.

Defendant DRE moves for summary judgment on the ground that defendant DRE did not cause the icing condition that caused plaintiff to fall, the resurfacing plans and specifications prepared by it confirmed to the New York State Department of Transportation design standards, and that there is no evidence that DRE's design or professional engineering services departed from commonly accepted practice, and DRE was not in control of the street at the time of plaintiff's injury. Defendant DRE also argues that defendant ELQ is obligated to indemnify DRE pursuant to its contractual agreement with defendant Port Chester.

In support of its motion and in opposition to plaintiff's motion, defendant DRE argues that the slope of the roadway did not cause the icing condition as the design of the roadway cannot prevent water from falling on the roadway nor freezing when temperatures fall below the freezing point. Defendant DRE also contends that plaintiff's expert's opinion that DRE's plans failed to meet the NYSDOT Design Manual is erroneous as it does not provide any specific cross-slope standard for simple roadway top coat replacement projects, such as the project at issue, and the top coat replacement work confirmed with DRE's design plans. Defendant DRE argues that the street resurfacing work performed in 2016 did not create a depression, as the resurfacing work followed the same cross slope profile of the existing street. The cross-slope profile of the roadbed surrounding plaintiff's driveway had a lower pitch than other sections of the roadway, which caused the water to drain away from the street at a lower rate than sections with a higher pitch. Regardless of the pitch of the cross-slope profile, defendant DRE argues that the profile did not create an unreasonably dangerous condition, and that some amount of water would fall and remain on the street until it evaporates and that residual water will freeze if temperatures fall below freezing. Defendant DRE further contends that the only reasonable method to prevent the formation of ice is to spread an electrolyte onto the roadbed or remove the ice through a mechanical means, which was the sole responsibility of defendant Port Chester.

In support, defendant DRE submits an affidavit of Anthony Oliveri ("Oliveri"), Associate Vice President of Dolph Rotfeld Engineering, P.C. and Vice President of Dolph Rotfeld Engineering, Division of AI Engineers, Inc., P.C. Oliveri has a professional

engineering license from the State of New York. Oliveri states that defendant DRE prepared plans and specifications as requested by defendant Port Chester to an annual road resurfacing project for streets within Port Chester that suffered from long term deterioration. Oliveri states that defendant Port Chester added Burdsall Drive to the list of local streets to be resurfaced and defendant DRE subsequently prepared plan for the resurfacing of Burdsall Drive. Oliveri affirms that the plans and specifications prepared by DRE confirmed to the design standards as set by the New York State Department of Transportation (NYSDOT), specifically in a Highway Design Manual which it publishes and periodically updates. Oliveri states that among the numerous standards for road design and rehabilitation, the NYSDOT Design Manual prescribes the degree of grade for the cross-slope profile, or two slopes that meet at the center of the street, or the high point of the slope, to form a "crown". The NYSDOT Design Manual sets the slopes of the asphalt at a grade of between 1.5% and 3%. Oliveri explains that the cross profile slope allows for storm water drainage from the travel lanes of the street and the intent of the design is to allow storm water to drain away from the middle of the street toward the sides of the street, and then drain down the sides of the street until the storm water falls into a subsurface catch basin or other drainage structure, and this proper drainage is required to allow the accumulation and build-up of water on the roadway, which can cause motor vehicles to lose traction.

Oliveri affirms that the NYSDOT Design Manual provides guidelines that allow a municipality to retain the existing profile of a street and sets guidelines that reflect the fact that some existing varying or non-confirming street conditions cannot be reasonably rectified by milling and replacement of the top coat resurfacing project without performing a complete major removal and replacement of the roadway bed, specifically, the specifications state that truing and leveling of the roadway cannot exceed 50% of the top course, which limits the amount of grading to re-pitch the existing slope of the streets. Oliveri swears that the plan for Burdsall Drive includes a typical resurfacing cross profile diagram, and explained that a typical detail is a detail that does not necessarily apply to all cross slope profiles of the existing street and the purpose is to generally inform and instruct the contractor to install a new topcoat later that confirms to the existing cross slope profile of the existing street, which was generally a grade of about 2% but varied between 1.5% and 3% which was in conformance with the NYSDOT Design Manual.

Oliveri states that the cross slope profile of some streets in Port Chester, including Burdsall Drive, was irregular with varying cross slope grade, and the typical detail allowed the contractor to install the top coat of asphalt that generally followed the existing profile of the road bed rather than changing the slope of the existing road bed. Oliveri swears that this practice confirmed to the NYSDOT Design Manual Standards.

Oliveri affirms that defendant ELQ performed the resurfacing work of Burdsall Street in 2016 and milled the existing deteriorated asphalt and replaced the asphalt with a new top coat layer. Oliveri also swears that the top coat layer was installed with an asphalt paving machine that applied asphalt along the same crown cross slope grade of the existing road bed, which was generally between 1.5% and 3%. Oliveri stated that, regardless of the design of the roadway, storm water will remain on the street after it falls until it evaporates into the air, and will form ice when ambient temperatures fall below the freezing point.

Oliveri states that there is no road design that causes the creation of ice nor prevents the formation of ice, and further states that the street resurfacing work performed in 2016 did not create a "depression" as it followed the same cross slope profile of the existing street. Oliveri states that the cross slope profile surrounding plaintiff's driveway had a lower pitch (more level) than other sections of the roadway which caused the water to drain away from the street at a lower rate than sections with a higher pitch. Oliveri opines that the pitch of the cross slope profile did not create an unreasonable dangerous condition. Oliveri states that the NYSDOT Design Manual regarding a 1.5% to 3% cross slope standard does not apply to the 2016 road resurfacing project at issue. Oliveri opines that the plans and specifications prepared by DRE conformed to the design standards as set by NYSDOT, as it was a "1R" project as it involved the replacement of the top layer of asphalt, which only requires "an acceptable cross slope and profile".

Defendant Port Chester moves for summary judgment, inter alia, on the ground that it lacked prior written notice of the alleged defective condition pursuant to Title VII, § 16 of Port Chester's Village Charter, and the two exceptions to the requirement of prior written notice, special use and affirmative negligence, do not apply.

In support, defendant Port Chester submits the affidavit of the Village Clerk of the Village of Port Chester, Janusz R. Richards ("Richards"). Richards attests that the Village Clerk is responsible for receiving, recording, and maintaining all written notices of defects or hazardous conditions on Village property, including those involving the existence of snow and ice, and a record is kept of all such notices indexed by street location. Richards affirms that he searched the records in his office for written notices of defects or hazardous conditions relating to all of Burdsall Drive received on or before the date of the incident, and that no such notices about any defects or hazardous conditions in the roadway of Burdsall Drive on or before such date. In addition, Richards swears that the Village Clerk is responsible for receiving, recording, and maintaining all notices of claim, and a record is kept of all such notices indexed by claimant's name and by street location. Richards swears that he searched the records in his office for notices of claim relating to Burdsall Drive received on or before the date of the accident, and no such notices of claim were received by the Village alleging a defect or hazardous condition in the roadway of Burdsall Drive on or before that date. It is undisputed that defendant Port Chester had no prior written notice of the alleged dangerous condition.

In opposition, plaintiff argues, as supported by her expert, that the contour map evidences the existence of an improper and defective slope in front of 22 Burdsall Drive as is consistent with the expert's findings during his inspection on August 21, 2018. Serth opines, to a reasonable degree of engineering certainty, that the subject area was defective. As Port Chester has a nondelegable duty to maintain its roadways in a reasonably safe condition, it is liable for ELQ's exacerbation of the defective condition. Plaintiff also argues that Port Chester has failed to establish that the defective condition was open and obvious and not inherently dangerous.

Discussion

A party seeking summary judgment has the burden of tendering evidentiary proof in admissible form to demonstrate the absence of material issues of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving party establishes prima facie entitlement to judgment as a matter of law, the burden then shifts to the opposing party to demonstrate that genuine issues of fact exist to preclude summary judgment (Alvarez v Prospect Hosp., 68 NY2d 320, 324; *Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

It is well-established that the breach of a contractor's contractual obligation does not give rise to tort liability to others not in privity with the contractor, as the duty flows between only the parties to the contract (*Santos v Deanco Servs., Inc.*, 142 A.D.3d 137, 140 [2d Dept 2016], citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]). However, the Court of Appeals has defined three narrow circumstances under which a contractor may be liable in negligence to a plaintiff with whom there is no contractual privity, for circumstances related to its contractual obligation. The first exception is where the contracting party, in failing to exercise reasonable care in the performance of contractual duties, launches a force or instrument of harm (*see Espinal v Melville Snow Contrs.*, 98 NY2d at 140). The second exception is where the plaintiff detrimentally relies on the continuing performance of the contractor's duty (*id.*). The third exception is where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely (*id.*).

Plaintiff argues only that the first exception applies here, that defendant ELQ launched a force or instrument of harm when it breached its contractual duties by failing to repave the road with the proper cross slope which created or exacerbated a dangerous condition, causing injury to plaintiff.

Uniformly, a launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition (*Santos v Deanco Servs., Inc.*, 142 A.D.3d 137, 141 [2d Dept 2016]). Launch is an action verb, requiring by definition evidence that the contractor affirmatively left the premises in a more dangerous condition than it was found (*id.* at 142). [E]vidence must still be introduced linking the conduct to the creation or exacerbation of the condition (*id.*). Here, while plaintiff's expert opines that the proper cross slope of the road was not achieved during the repaving of Burdsall Drive in 2016, the expert does not opine as to whether the condition of the street which existed prior to the repaving was the same or exacerbated during the repaving. Similarly, while defendants' experts opine that the cross slope of the roadway prior to the repaving in 2016 was kept the same during the repaving, they do not opine as to whether the condition in the road in front of plaintiff's house remained the same. However, plaintiff testified that after the repaving in 2016, the depression in the roadway in front of her house became more "apparent."

Q. I'm just trying to find out whether you, at any point before the accident, noticed a change in the appearance of the depression?

A. When they repaved it.

Q. When was that repaving?

A. I think it was 2016.

Q. How did the appearance change?

A. That it was a more apparent depression. ...

(Andrea Granata deposition tr at 103, lines 12-21)

As such, there is an issue of fact as to whether the depression in the roadway was exacerbated by the repaving by defendant ELQ in 2016. As defendant DRE does not contest that it had contractual obligations and undertook daily inspections of defendant ELQ's work, it is a question of fact as to whether, if the depression in the roadway was exacerbated by the repaving by defendant ELQ in 2016, if it should have been identified by defendant DRE.

A municipality that has adopted a "prior written notice law" cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies (*D. D. v Incorporated Vil. of Freeport*, 186 A.D.3d 795, 796 [2d Dept 2016]). There are two exceptions to the prior written notice requirement: where an affirmative act of negligence by the municipality creates the defect; or where a special use of the property confers a special benefit upon the municipality (*id.*)

Here, defendant Port Chester made a prima facie showing of entitlement to judgment as a matter of law by providing the affidavit of the Village Clerk. It is also undisputed that defendant Port Chester had no prior written notice of the alleged dangerous condition.

Defendant Port Chester also established, prima facie, that it did not create the allegedly defective condition through an affirmative act of negligence and did not derive a special benefit from a special use of the street at the location where the plaintiff fell (*D. D. v Incorporated Vil. of Freeport*, 186 A.D.3d 795, 796 [2d Dept 2016]). In opposition, plaintiff raises a triable issue of fact. Plaintiff argues that defendant Port Chester has a nondelegable duty to maintain its roads in a reasonably safe condition, and that this obligation is imposed on it even if the dangerous condition is created by an independent contractor (*Hill v Fence Man, Inc.*, 78 AD3d 1002 [2d Dept 2010]). Plaintiff argues that the roadway was defective due to the existence of an improper and defective slope in front of 22 Burdsall Drive. While plaintiff testified that the depression in the roadway in front of her house existed prior to the repaving in 2016, she also testified that the depression became more apparent after the repaving in 2016. As a result, it is a question of fact as to whether the alleged condition was exacerbated by the repaving in 2016.

The competing expert opinions presents an issue of credibility for the trier of fact to determine (*Rapaport v. Sears, Roebuck & Co.*, 28 A.D.3d 449, 450 [2d Dept. 2006]).

The parties' remaining contentions have been considered by the Court and are found to be without merit.

Accordingly, it is hereby

ORDERED that defendant ELQ INDUSTRIES, INC.'s motion for summary judgment pursuant to CPLR 3212 is DENIED; THE VILLAGE OF PORT CHESTER's motion for summary judgment pursuant to CPLR 3212 is DENIED; defendant DOLPH ROTFIELD ENGINEERING, P.C.'s motion for summary judgment pursuant to CPLR 3212 is DENIED; and plaintiff's motion for summary judgment pursuant to CPLR 3212 is DENIED.

The parties are directed to appear in the Settlement Conference Part at a date and time to be provided.

Dated: White Plains, New York
November 12, 2021

HON. WILLIAM J. GIACOMO, J.S.C.