

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Lizzette Lopez,

Plaintiff,

- against -

The City of New York, Gilson J. Teixeira,
and Welsbach Electric,

Defendant.
-----X

Index
Number: 15160/08

Motion
Date: 4/13/10

Motion
Cal. Number: 12

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendants, City of New York and Welsbach Electric, for summary judgment.

Papers
Numbered

Amended Notice of Motion-Affidavit-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition.....	7-8
Reply.....	9-10

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QUEENS COUNTY CLERK
FILED

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 against them is granted.

Plaintiff allegedly sustained injuries in a motor vehicle accident in which the vehicle she was operating was struck by the vehicle operated by Teixeira at the intersection of 31st Street and 38th Avenue in Queens County on May 25, 2007.

It is undisputed that said intersection was controlled by a four-way traffic light and that at the time of the accident said traffic light was out as a result of an earlier traffic accident at the subject location in which the traffic signal was knocked down by a truck. 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. It is undisputed that Welsbach received notification at 3:15 P.M. on May 25, 2007 that the traffic signals were out at the subject intersection and that a Welsbach technician arrived at the location at 4:20 P.M. It is also undisputed that the Welsbach technician placed temporary stop signs on 38th Avenue at the corner of the subject intersection to control traffic traveling on 38th Avenue. He did not place stop signs on 31st Street to control traffic traveling on that street.

Plaintiff testified in her deposition that she was traveling on 38th Avenue at 6:00 P.M. and first saw the stop sign when she was three-quarters of the way down the block. She also knew that the traffic light was out when she first saw the stop sign. She stopped at the stop sign for a couple of seconds, looked both ways and proceeded into the intersection at 5-10 mph when she was struck on the passenger side front by Teixeira's vehicle, which was traveling on 31st Street. She did not see his vehicle until the moment of impact. Teixeira testified in his deposition that he did not stop at the intersection and did not see plaintiff's vehicle until it was already in the intersection.

The City and Welsbach move for summary judgment upon the grounds that Welsbach only owed a contractual duty to the City, which it fulfilled, and that the stop sign was not the proximate cause of the accident, but rather plaintiff's failure to yield to Teixeira, who had the right of way.

Plaintiff argues that it is not the placement of the stop sign on 38th Avenue or the non-functional traffic light that caused the accident, but rather the failure of the Welsbach technician to place a stop sign on 31st Street in addition to 38th Avenue to control Teixeira's movement. Plaintiff contends that the placement of a stop sign on 38th Avenue only, and not on 31st Street as well, created a dangerous condition that was the proximate cause of the accident.

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 [1st Dept 2002]).

A contractual obligation may give rise to tort liability on behalf of a third party only where, inter alia, the contracting party "launches a force or instrument of harm" (Espinal v. Melville Snow Contractors, Inc., 98 NY 2d 136, 140 [2002]).

The negligent repair of a traffic light is an example of the contracting party launching a force or instrument of harm (see Davilmar v. City of New York, 7 AD 3d 559 [2nd Dept 2004]). However, 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 [2nd Dept 2007]).

As heretofore stated, the sole basis of plaintiff's claim is that Welsbach created a dangerous condition by not installing a temporary stop sign on 31st Street. Counsel for plaintiff specifically stresses that plaintiff is not claiming that the non-working traffic lights were a proximate cause of the accident. Therefore, that a temporary stop sign was not set up on 31st Street did not alter the uncontrolled condition of the intersection wherein there was no traffic control device controlling traffic on 31st Street. Thus, plaintiff has failed to show that Welsbach launched a force or instrument of harm or created a dangerous condition through mere inaction. Indeed, the only action taken prior to the accident was the installation of a stop sign on 38th Avenue, which undisputably made the intersection safer.

Therefore, movants have established a prima facie entitlement to summary judgment by proffering undisputed evidence showing that they neither created nor contributed to a dangerous condition.

Therefore, on this record, there is no basis of liability against movants.

Accordingly, the motion is granted and the complaint is dismissed as against the City and Welsbach. That branch of the motion also seeking dismissal of all cross-claims against movants is moot, since counsel for plaintiff and movants apprised the Court at the calling of the calendar that the matter was discontinued against Teixeira.

Dated: April 16, 2010


 KEVIN J. KERRIGAN, J.S.C.

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