



NYSCEF Confirmation Notice

Queens County Supreme Court



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726747/2021

ALEX COLLADO v. 215 WEST 28TH STREET PROPERTY OWNER LLC et al

Assigned Judge: CC COMPLIANCE

Documents Received on 05/21/2024 04:46 PM

Doc #	Document Type
126	NOTICE OF ENTRY, Motion #004

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Queens County Supreme Court



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Assigned Judge: CC COMPLIANCE

E-mail Service Notifications

An email regarding this filing has been sent to the following on 05/21/2024 04:46 PM:

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Email Notifications NOT Sent

Role	Party	Attorney
Respondent	Triton Construction Company, LLC	No consent on record.
Respondent	DNA Plumbing Contractors Inc.	No consent on record.
Respondent	NYC Mainman Corp.	No consent on record.
Third Party Respondent	Hylan Datacom & Electrical LLC	No consent on record.

* Court rules require hard copy service upon non-participating parties and attorneys who have opted-out or declined consent.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
ALEX COLLADO,

Plaintiff(s),

Index No.: 726747/2021

- against -

NOTICE OF ENTRY

215 WEST 28TH STREET PROPERTY OWNER LLC,
THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, THE CITY OF NEW YORK,
HAP CONSTRUCTION LLC, TRITON
CONSTRUCTION COMPANY, LLC, DNA
PLUMBING CONTRACTORS INC., E-J ELECTRIC
INSTALLATION COMPANY, INTER
CONTRACTING CORP., NYC MAINMAN CORP.,
VERIZON NEW YORK INC., SAFEWAY
CONSTRUCTION ENTERPRISES L.L.C., URBAN
ATELIER GROUP, L.L.C., SPECTRUM NEW YORK
METRO, LLC, E.E. CRUZ & COMPANY, INC., and
PLUMBING NYC, INC.

Motion Sequence # 4

Defendants.
-----X

PLEASE TAKE NOTICE that the attached is a true and accurate copy of an order of
Honorable Justice Kevin J. Kerrigan, Judge of the Supreme Court, Queens County dated May 10,
2024, duly entered in the office of the Clerk May 10, 2024.

Dated: New York, New York
May 21, 2024

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By: 

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File No. 5442-21

TO: All Parties via NYSCEF, including:

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Alex Collado,

Index
Number: 726747/21

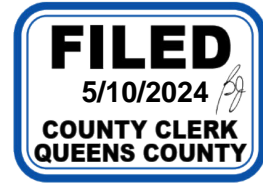
Plaintiff,

- against -

Motion
Date: 5/6/24

Motion Seq. No.: 4

215 West 28th Street Property Owner LLC,
The New York City Department of Transportation,
The City of New York, HAP Construction LLC,
Triton Construction Company LLC, DNA Plumbing
Contractors Inc., E-J Electric Installation
Company, Inter Contracting Corp., NYC Mainman
Cpr., Verizon New York Inc., Safeway
Construction Enterprises LLC, Urban Atelier Group,
LLC, Spectrum New York Metro, LLC, EE Cruz &
Company Inc. And Plumbing NYC Inc.,



Defendants.

-----X

The following papers numbered E106-E116, E122 & E124 read on this motion by Defendant, EE Cruz & Company Inc., for an order to dismiss or in the alternative, granting summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... E106-116
Affirmation in Opposition..... E122
Reply..... E124

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendant, EE Cruz & Company Inc., for an order to dismiss or in the alternative, granting summary judgment is granted.

Plaintiff allegedly sustained injuries while riding his bicycle in the public roadway on 28th Street in New York County on

September 11, 2021. Plaintiff alleges that his bicycle came into contact with a pothole in front of 215 West 28th Street, causing him to be ejected from the bicycle, and sustain injury. Photographs annexed to the motion depict a round depressed hole in the roadway at the aforementioned location which is situated next to white and orange barriers.

In his summons and complaint, Plaintiff alleges that EEZ Cruz & Company, Inc. ("EE Cruz") was a contractor at the premises and failed to direct, maintain, and control the construction site in a reasonably safe condition, and that it ultimately created the allegedly defective roadway condition which ultimately caused Plaintiff's injuries.

Movant, avers that it is entitled to dismissal pursuant to CPLR 3211(a)(1) and (a)(7), or in the alternative, summary judgment pursuant to CPLR 3211(c), because it did not perform any work at the accident location.

A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) addresses merely the sufficiency of the pleadings. Unless a 3211(a)(7) motion is converted into a motion for summary judgment, pursuant to CPLR 3211(c), affidavits submitted in support of the motion are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (see Rovello v. Orofino Realty Co., 40 N.Y.2d 633 [1976]; Hornstein v. Wolf, 109 A.D.2d 129 [2d Dept. 1985]), but may be received only for the limited purpose of remedying defects in the complaint, unless the affidavits conclusively establish that the plaintiff has no cause of action (see Rovello, 40 NY.2D at 633). Here, EE Cruz has also moved for dismissal pursuant to CPLR 3211(c), requesting that, in the alternative, the Court treat the motion as one for summary judgment. Pursuant to CPLR 3211(c), the Court may treat a motion to dismiss under CPLR 3211 as a motion for summary judgment upon adequate notice to the parties. The requirement of adequate notice to the parties, however, is applicable only where the Court seeks to treat the motion as one for summary judgment sua sponte and not where a party moves for such relief (see generally Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:46). Since Movant, in fact, requested that the instant motion be treated as one for summary judgment, this Court need not further apprise the parties of its intention to treat the motion as one for summary judgment.

EE Cruz has established its prima facie entitlement to summary judgment by proffering uncontested evidence that it did not perform any work at this specific location and, thus, did not create the condition (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851

[1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). The un rebutted evidence proffered on this record is that the only work performed by or on behalf of EE Cruz was in front of 220 West 28th Street. Indeed, in support of the motion, EE Cruz proffers the affidavit of Lorenzo De Feo, who is employed by EE Cruz. De Feo provides that EE Cruz's scope of work did not include the roadway in front of 215 West 28th Street. EE Cruz was solely contracted to perform work, and solely completed said work, across the street, in front of 220 West 28th Street.

In opposition, Plaintiff argues that the motion must be denied as premature, as discovery is incomplete. The Court disagrees, as there is only "hope and speculation" as to what additional discovery will uncover here (see Lelekakis v. Kamamis, 4 A.D.3d 507 [2d Dept. 2004]). A party contending summary judgment is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition of to the motion are exclusively within the knowledge and control of the movant (see Rutherford v Brooklyn Navy Yard Dev. Corp., 174 A.D.3d 932 [2d Dept. 2019]). Plaintiff failed to do so here.

Since no evidence has been proffered to rebut EE Cruz's evidence that it did not cause or create the defect in question and, therefore, that it owed no duty of care to Plaintiff, EE Cruz is entitled to summary judgment as a matter of law (see Livichusca v M&T Mortgage Co., 49 AD 3d 822 [2d Dept. 2008]).

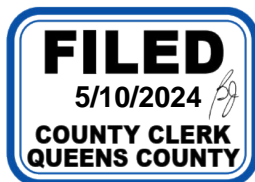
Accordingly, the motion is granted and the complaint and all cross-claims as against EE Cruz & Company Inc. are dismissed.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: May 10, 2024



KEVIN J. KERRIGAN, J.S.C.



Index No.: 726747/2021

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

ALEX COLLADO,

Plaintiff(s),

- against -

**215 WEST 28TH STREET PROPERTY OWNER LLC,
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,
THE CITY OF NEW YORK, HAP CONSTRUCTION LLC, TRITON
CONSTRUCTION COMPANY, LLC, DNA PLUMBING CONTRACTORS INC.,
E-J ELECTRIC INSTALLATION COMPANY, INTER CONTRACTING CORP., NYC
MAINMAN CORP., VERIZON NEW YORK INC., SAFEWAY
CONSTRUCTION ENTERPRISES L.L.C., URBAN
ATELIER GROUP, L.L.C., SPECTRUM NEW YORK
METRO, LLC, E.E. CRUZ & COMPANY, INC., and PLUMBING NYC, INC.**

NOTICE OF ENTRY



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