Malayeva v City of New York
2017 NY Slip Op 30670(U)
March 27, 2017
Supreme Court, Queens County
Docket Number: 4024/12
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

EMILYA MALAYEVA,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

Index No. 4024/12

Motion
Date October 18, 2016

Motion
Cal. No. 85, 84, 86, 87

Motion
Seq. No. 5, 6, 7, 8

The following papers numbered 1 to 54 read on this (1) motion by V.P. Construction, Inc., ("VP Construction"), for summary judgment in its favor pursuant to CPLR 3212; (2) motion by MECC for summary judgment in favor of MECC and Con Edison dismissing all claims and cross claims against it; (3) Motion by Tri-Messine for summary judgment in its favor; (4) motion by Consolidated Edison Company of New York, Inc. (Con Edison) for summary judgment in its favor; (5) cross motion by Brooklyn Union Gas d//b/a National Grid NY (National Grid), for summary judgment in its favor; and (6) cross motion by plaintiff to strike the answer of National Grid, pursuant to CPLR 3126.

	Papers Numbered
Notices of Motions-Aff.-Exhibits.....	1-16
Notices of Cross Motions-Affs.-Exhibits.....	17-24
Answering Affidavits-Exhibits.....	25-39
Reply Affidavits.....	40-54

Upon the foregoing papers it is ordered that the motions and cross motions are combined herein for disposition, and determined as follows:

Plaintiff sustained personal injuries when she tripped and fell due to an alleged defect in the road while crossing 63rd Avenue, near the intersection of 108th Street, in Queens. Prior to

the accident, defendant Con Edison contracted with defendant MECC and defendant Tri-Messine to perform work and services in the area of 63rd Avenue and the intersection of 108th Street. The evidence presented demonstrates that approximately ten (10) months earlier, MECC made two (2) openings (cuts) in the roadway for a total length of 78 feet on the north side of 63rd Street, in the parking lane to 108th Street. Tri-Messine repaired and restored the excavation.

At her deposition, plaintiff unequivocally marked the exact location of her fall, which was almost at the end of the roadway all the way across 63rd when her foot got caught in a ditch and she fell forward on to the roadway. Plaintiff further testified that, on the date of the accident, she did not see the ditch and/ or area that she identified as causing her to fall. She returned to the accident location two (2) days later with her daughter, and observed a depression in the street which she concluded was the cause of her fall. Her daughter took photographs marked as defendant's exhibits, and plaintiff testified that she saw "the only place I can stuck. . .I don't know. I know is this place."

Non-party witness, plaintiff's neighbor and eyewitness to the alleged accident, Stella Kaziyeva testified at a deposition. She stated that she witnessed plaintiff's accident as they were walking together when plaintiff fell. Kaziyeva testified that plaintiff fell on the *sidewalk* of 108th Street, while walking toward the Long Island Expressway and walking on the right side of the street. In fact, Kaziyeva testified five (5) times that the accident occurred on the *sidewalk* of 108th Street, and not in the roadway. She stated that the accident occurred before they were going to cross a two-way street. They were walking and talking at the time plaintiff fell. On the date of the accident, plaintiff never pointed out the defect that caused her to fall.

Con-Edison's witness, Patrick Keogh, a specialist who performs searches of Con-Ed's records testified as follows: a search of Con-Edison's records was performed for opening tickets paving orders, emergency tickets, notices of violation and corrective action requests created in the two (2) years prior to and including February 20. 2011, for the area of the intersection of 63rd Avenue and 108th Street, in Queens, New York. The relevant records are opening ticket PI206609 and PS499495. Opening ticket PI206609 indicates that two (2) cuts were made by MECC within the intersection of 63rd Avenue and 108th Street on March 5, 2010, and Tri-Messine paved the cuts on April 29, 2010. Keogh testified that opening ticket PS499495 indicates that on March 4, 2010, MECC made a cut in the roadway for a total length of 78 feet on the north side of 63rd Avenue, in the parking lane to 108th and

paved by Tri-Messine on April 29, 2010.

As provided in the Affirmation for Tri-Messine (Twaddell), the closest work performed on behalf of Con-Edison to the alleged accident location, as testified to by Luigi Moccia for MECC and Alfonso Messina for Tri-Messine, are indicated on opening tickets PI2206609 and PS499495, and their related paving orders and permits. Both Moccia and Messina testified and attest that the work performed under both of these opening tickets was *not* at plaintiff's alleged accident location.

Messina was shown plaintiff's photograph marked as defendant's exhibits "B" "I" and "K" where plaintiff circled or indicated the location of the alleged accident. Messina testified that, even though he saw defects in the roadway in the photograph, he did not see evidence of a defect created by defective paving. In Messina's affidavit, he further states that he reviewed plaintiff's photographs and the pothole or roadway defect circled by plaintiff as the accident location, is not in the area of the newer paving and sealer and is (instead) a condition caused by wear and tear of the roadway.

Motion by VP Construction, Inc.

The motion by VP Construction for summary judgment is denied as untimely. In an order dated April 28, 2016, the court directed that all motions for summary judgment should be made returnable "no later than 8/16/16." Here, VP Construction made its motion returnable on September 2, 2016, in violation of the court's order, and without demonstrating good cause for the delay (*see,* CPLR 2004, 3212[a]; *Brill v. City of New York,* 2 NY 3d 648, 652, 781 NYS2d 261, 814 NE2d 431; *Buffolino v. City of N.Y.*, 92 AD3d 633, 633, 937 NYS2d 871 [2d Dept 2012]; *Van Dyke v. Skanska USA Civ. Northeast, Inc.*, 83 AD3d 1049, 921 NYS2d 544). VP Construction failed to seek an extension of time to file their motion or to proffer an excuse for their delay, doing so only in reply to plaintiff's opposition. The motion is thus denied as untimely (CPLR 3212[a]), and the court declines to reach the merits (*Brill v. City of New York,* 2 NY3d 648, 781 NYS2d 261, 814 NE2d 431 [2004]; *see also, Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379, 819 NE2d 995 [2004]; *Cabibel v. XYZ Assocs., L.P.*, 36 AD3d 498, 498-99, 828 NYS2d 341, 342 [2007]).

It is noted that whatever the source of the deadline with which a party fails to comply, the lateness may not be excused without a showing of good cause within the meaning of CPLR 3212(a)---a showing of something more than mere law office failure (*see, Polanco v. Creston Ave. Props., Inc.*, 84 AD3d 1337,

1341, 924 NYS2d 512 [2d Dept 2011]; *Powell v. Kasper*, 84 AD3d 915, 917, 921 NYS2d 890 [2d Dept 2011]; *Deberry-Hall v. County of Nassau*, 88 AD3d 634, 635, 930 NYS2d 266 [2d Dept 2011]; *Fine v. One Bryant Park, LLC*, 84 AD3d 436, 921 N.Y.S.2d 524 [1st Dept 2011]; *Riccardi v. CVS Pharmacy, Inc.*, 60 AD3d 838, 874 NYS2d 381 [2d Dept 2009]; *Giudice v. Green 292 Madison, LLC*, 50 AD3d 506, 858 NYS2d 111 [1st Dept 2008]; *Glasser v. Abramovitz*, 37 AD3d 194, 830 NYS2d 61 [1st Dept 2007]). Here, VP Construction's perfunctory claim of law office failure in reply, is nonetheless insufficient to establish the same (*see, Quinones v. Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. Scis. of Cornell Univ.*, 114 AD3d 472, 473-74 [1st Dept 2014]). "If the credibility of court orders and the integrity of [the] judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (2 NY3d at 652-653, 781 NYS2d 261, 814 NE2d 431, quoting *Kihl* at 123, 700 NYS2d 87, 722 NE2d 55).

Accordingly, the motion by VP Construction for summary judgment is denied as untimely.

Motions by MECC, Tri-Messine and Con Edison

MECC, Tri-Messine, and Con Edison established a prima facie case in support. Con Edison's contractors, MECC and Tri-Messine, did not owe a duty to plaintiff. As a general rule, a limited contractual obligation to repair the roadway does not render the contractor liable in tort for the personal injuries of third parties (*see, Lubell v. Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1103 [2010]; *Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 677 [2008]). However, in *Espinal v Melville Snow Contrs* (98 NY2d 136, 140 [2002]), the Court of Appeals recognized that exceptions to this rule apply: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her 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 another party's duty to maintain the premises safely. Contrary to the plaintiff's contention, defendants made a prima facie showing of their entitlement to judgment as a matter of law by offering proof that the plaintiff was not a party to their respective contracts with Con Edison and that they thus, owed her no duty of care (*see, Henriquez v. Inserra Supermarkets, Inc.*, 89 AD3d 899, 901 [2011]; *Lubell v. Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d at 1103; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2010]). Since the plaintiff did not allege facts in her complaint or bill of particulars which would establish the possible applicability of any of the *Espinal* exceptions, MECC and

Tri-Messine in establishing their prima facie entitlement to judgment as a matter of law, was not required to affirmatively demonstrate that these exceptions did not apply (*see, Henriquez v. Inserra Supermarkets, Inc.*, 89 AD3d at 901; *Foster v. Herbert Slepoy Corp.*, 76 AD3d at 214). Furthermore, in opposition to defendants' prima facie showing, the plaintiff offered no evidence to support the contention that either MECC or Tri-Messine launched a force or instrument of harm by creating or exacerbating a dangerous condition on the roadway that allegedly caused her to fall (*see, Fung v. Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]; *Knox v. Sodexho Am., LLC*, 93 AD3d 642, 642-43, 939 N.Y.S.2d 557 [2d Dept 2012]; *Henriquez v. Inserra Supermarkets, Inc.*, 89 AD3d at 902; *Quintanilla v. John Mauro's Lawn Serv., Inc.*, 79 AD3d 838, 839 [2010]; *Foster v. Herbert Slepoy Corp.*, 76 AD3d at 215; *Castro v. Maple Run Condominium Assn.*, 41 AD3d 412, 413-414 [2007]).

Moreover, even assuming a duty to plaintiff, MECC and Tri-Messine demonstrated, prima facie, that they did not create the defect which plaintiff alleges she tripped over. In a personal injury action based on an alleged trip and fall on a roadway defect against a defendant who does not own the roadway, plaintiff has the burden of demonstrating that the defendant caused the defect that allegedly caused the accident (*Palone v. City of New York*, 5 AD3d 750 [2d Dept 2004]; *Maloney v. Con Edison*, 290 AD2d 540, 736 NYS2d 630 [2d Dept 2002]; *Verdes v. Brooklyn Union Gas*, 253 AD2d 552, 677 NYS2d 168 [2d Dept 1998]; *Palazzo v. City of New Rochelle*, 236 AD2d 528, 654 NYS2d 612 [2d Dept 1997]; *Withe v. Port Washington*, 114 A.D.2d 359, 493 NYS2d 879 [2d Dept 1985]). Where, as in this case, a defendant utility and or contractor submits proof in support of their summary judgment motions that they did not create the alleged defective condition which caused the accident, plaintiff must submit evidence in admissible form which demonstrates that there is an issue of fact as to whether the movant[s] caused the alleged defect. Vague proof that the defendant[s] *may have* performed work in the vicinity of the accident location does not create an issue of fact sufficient to deny summary judgment (*Verdes v. Brooklyn Union Gas, supra*).

Defendants Con Edison, MECC and Tri-Messine established their entitlement to judgment as a matter of law by submitting evidence that they did not create the roadway defect that allegedly caused plaintiff's fall. Both Luigi Moccia for MECC and Alfonso Messina for Tri-Messine testified and attest that the opening tickets for the paving orders and permits for the location in question, to wit PI206609 and PS499495, are not at

plaintiff's alleged accident location. Messina was shown plaintiff's photographs marked as defendants' Exhibits "B", "I" and "K" where plaintiff circled or indicated the location of the alleged accident. Messina testified that, even though he observed defects in the roadway in the photograph, he did not see any evidence of a defect created by defective paving. In Messina's affidavit, he further states that he reviewed plaintiff's photographs and that the pothole or roadway defect circled by plaintiff as the accident location is not in the area of the newer paving and sealer and is a condition caused by wear and tear of the roadway.

The evidence that plaintiff submitted in opposition to the motion fails to raise a triable issue of fact as to whether certain work performed by Con Edison and its contractors approximately ten (10) months earlier and approximately 78 feet away from the accident site created the alleged roadway defect (*see, Cendales v. City of N.Y.*, 25 AD3d 579, 580-81, 807 NYS2d 414, 416-17 [2006]; *Shvartsberg v. City of New York*, 19 AD3d 578, 798 NYS2d 85; *Verdes v. Brooklyn Union Gas Co.*, 253 AD2d 552, 677 NYS2d 168; *Curci v. City of New York*, 240 AD2d 460, 659 NYS2d 775). The speculative assertions by plaintiff are insufficient to raise a question of fact about whether the repair and excavation work performed by these defendants many months prior to and a distance away from the location of plaintiff's fall as identified by plaintiff herself in photographs at her deposition, caused her injuries. At best, plaintiff demonstrated that these parties were present in the general area about ten (10) months prior to plaintiff's fall, which is insufficient to raise a triable issue of fact as to whether they worked in the crosswalk where plaintiff alleges she fell (*see, Flores v. City of New York*, 29AD3d 356 [1st Dept 2006]; *Tepper v. City of New York*, 13 AD3d 124, 786 NYS2d 449 [1st Dept 2004]). Absent some evidence connecting Con-Edison's work to the situs of plaintiff's injury, Con-Edison, MECC and Tri-Messine are entitled to summary judgment (*Robinson v. City of New York*, 18 AD3d 255, 794 NYS2d 378 [1st Dept 2005]; *see, Cibener v. City of New York*, 268 AD2d 334, 334-335, 701 NYS2d 405 [2000]).

Finally, contrary to MECC's contentions, Con Edison is entitled to be indemnified for attorney's fees and costs incurred in the defense of this action. Pursuant to the contract between MECC and Con Edison, MECC agreed to defend and indemnify Con-Edison for all claims arising out of MECC's "actual or alleged acts or omissions." The plain and unambiguous terms of the contract do not condition MECC's obligation for attorneys' fee and costs on a finding of fault (*see, Sand v. City of N.Y.*, 83 AD3d 923, 926, 921 NYS2d 312, 315; *Barnes v. New York City Hous.*

Auth., 43 AD3d 842, 845, 841 NYS2d 379; *McCleary v. City of Glens Falls*, 32 AD3d 605, 609, 819 NYS2d 607; *Pope v. Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523, 524-525, 690 NYS2d 632; *DiPerna v. American Broadcasting Cos.*, 200 AD2d 267, 269-270, 612 NYS2d 564). Accordingly, Con Edison is awarded summary judgment as to those damages.

Cross Motion by Brooklyn Union Gas d//b/a National Grid NY

National Grid established its entitlement to judgment as a matter of law by submitting evidence that it did not create the roadway defect that allegedly caused the plaintiff's fall. Specifically, George Mirtsopolous testified on behalf of National Grid that he performed a search in connection with the subject accident for two (2) years prior to and including the date of the accident; and that the only records he found related to work performed at 108-27 63rd Avenue, which is 299 feet east of the east curb of 108th Street, where plaintiff allegedly fell. To be clear, National Grid's undisputed evidence indicates that it did not perform work at the intersection of 63rd Street and 108th Avenue, but that the work it performed was done two (2) years prior to plaintiff's accident and 299 feet away from where plaintiff testified she tripped and fell. Absent some evidence connecting National Grid's work to the situs of plaintiff's injury, this defendant is entitled to summary judgment (*see, Robinson v. City of New York*, 18 AD3d 255, 256 [1st Dept 2005]; (*see, Flores v. City of New York*, 29 AD3d 356, 359 [1st Dept 2006]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's speculative assertion that National Grid created the dangerous condition is without evidentiary foundation (*see, Stern v. Incorporated Vil. of Flower Hill*, 278 AD2d 225, 716 NYS2d 918; *Verdes v. Brooklyn Union Gas Co.*, 253 AD2d 552, 677 NYS2d 168; *Palazzo v. City of New Rochelle*, 236 AD2d 528, 654 NYS2d 612). Plaintiff's claim that National Grid's maintenance of a high pressure gas pipe in the general vicinity supports a conclusion that National Grid created the alleged defect, is speculative (*see, Schneider v. Kings Highway Hosp. Ctr.*, 67 NY2d 743; Perez v. Morse Diesel, Inc., 258 AD2d 428, 429, 685 NYS2d 723 [1999]; *Silva v Village Sq. of Penna*, 251 AD2d 944).

Plaintiff submitted no evidence in opposition. Instead plaintiff contends that there are outstanding documents in the exclusive control of National Grid which might establish their liability. Essentially, plaintiff is arguing that the motion of National Grid is premature. Since plaintiff has not offered anything beyond mere hope and speculation that further discovery might lead to relevant evidence sufficient to defeat the motions

for summary judgment, the court rejects her argument that National Grid's motion for summary judgment is premature (*see, Torres v. Beth Israel Med. Ctr.*, 134 AD3d 1097, 1097, 24 NYS3d 108, 109 [2d Dept 2015]; *Leak v. Hybrid Cars. Ltd.*, 132 AD3d 958, 19 NYS3d 534; *Williams v. Spencer-Hall*, 113 AD3d 759, 760-761, 979 NYS2d 157).

Cross Motion by Plaintiff

The cross motion by plaintiff to strike National Grid's answer is denied as moot, and otherwise on the merits.

On or about April 19, 2016, plaintiff served post EBT demands on National Grid for the production of "any and all" documents pertaining to work performed at the accident scene. On or about April 28, 2016, a court order was issued directing National Grid to respond to plaintiff's post EBT demands within thirty (30) days. National Grid objected to plaintiff's request. Plaintiff now moves to strike National Grid's answer for failure to answer the demand.

The motion to strike National Grid's answer pursuant to CPLR 3126 for failure to comply with a discovery demand is denied. Although CPLR 3101 provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]), "'unlimited disclosure is not required, and supervision of disclosure is generally left to the trial court's broad discretion' " (*H.R. Prince, Inc. v. Elite Envtl. Sys., Inc.*, 107 AD3d 850, 850, 968 NYS2d 122, quoting *Palermo Mason Constr. v. Aark Holding Corp.*, 300 AD2d 460, 461, 751 NYS2d 599; *see, Matter of Greenfield v. Board of Assessment Review for Town of Babylon*, 106 AD3d 908, 908, 965 NYS2d 555).

Here, defendant correctly argues that plaintiffs' notice is overly broad. The observation that "[t]he alternative use of 'all', 'any', or 'any and all' renders the notice for discovery and inspection improper", is applicable within the context of this case (see, *Matter of Greenfield v. Board of Assessment Review for Town of Babylon*, 106 AD3d at 909, 965 NYS2d 555; *Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc.*, 78 AD3d 752, 753, 910 NYS2d 654; *Latture v. Smith*, 304 AD2d 534, 536, 758 NYS2d 135; *see generally, H.R. Prince, Inc. v. Elite Envtl. Sys., Inc.*, 107 AD3d at 850, 968 NYS2d 122). "Where discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it" (*Matter of Greenfield v. Board of Assessment Review for Town of Babylon*, 106 AD3d at 909, 965 NYS2d 555 [internal quotation marks omitted]; *see, Board of Mgrs. of the Park Regent Condominium v. Park Regent*

Assoc., 78 AD3d at 753, 910 NYS2d 654; *Latture v. Smith*, 304 AD2d at 536, 758 NYS2d 135).

Moreover, plaintiff failed to make a clear showing that National Grid's failure to comply with the discovery demand was willful or contumacious, as required to support the drastic remedy of striking an answer (*see*, *Scorzari v. Pezza*, 111 AD3d 916, 916-17, 976 NYS2d 140, 141 [2013]; *Pinto v. Tenenbaum*, 105 AD3d 930, 931, 963 NYS2d 699; *Laskin v. Friedman*, 90 AD3d 617, 617-618, 933 NYS2d 872; *Weber v. Harley-Davidson Motor Co., Inc.*, 58 AD3d 719, 722, 871 NYS2d 698).

Conclusion

The motion by VP Construction for summary judgment in its favor is denied as untimely.

The motion by MECC for summary judgment dismissing the complaint, insofar as asserted against MECC and Con Edison, is granted.

The motion by Tri-Messine for summary judgment in its favor is granted.

The branch of the motion by Con Edison which is for summary judgment in its favor is granted. The branch of the motion by Con Edison which is for summary judgment on its claims for contractual indemnification for attorney's fees and costs incurred in the defense of this action from MECC, is granted.

The cross motion by National Grid for summary judgment in its favor is granted.

The cross motion by plaintiff to strike the answer of National Grid, is denied as moot, and otherwise on the merits.

Dated: March 27, 2017

.....
Howard G. Lane, J.S.C.