

Herbst v City of New York

2011 NY Slip Op 33181(U)

December 9, 2011

Sup Ct, NY County

Docket Number: 103365/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: _____
Justice

PART 52

Index Number : 103365/2010
HERBST, SARELLE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 103365/10
MOTION DATE _____
MOTION SEQ. NO. 03

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED

DEC 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/9/11

PK _____, J.S.C.
CYNTHIA S. KERN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
SARELLE HERBST,

Plaintiff,

Index No. 103365/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK, TULLY CONSTRUCTION
CO., INC., EMPIRE CITY SUBWAY COMPANY
(LIMITED) and CONSOLIDATED EDISON, INC.,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

FILED

DEC 12 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on a metal sewage grate in the crosswalk near the northeast corner of Fifth Avenue and East 36th Street, New York, New York on January 4, 2009. Defendant Empire City Subway (“ECS”) now moves for summary judgment dismissing plaintiff’s complaint and all cross-claims against it on the ground that ECS did not create the alleged defect. Defendant Consolidated Edison, Inc. (“Con Ed”) cross-moves for summary judgment dismissing the complaint and all cross-claims against it on the grounds that it did not

create the alleged defect and that it did not own the metal grate. For the reasons set forth below, both ECS's motion and Con Ed's cross-motion are granted.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, ECS is entitled to summary judgment as it has made out its prima facie case that it did not perform any work at the accident location prior to the date of the accident, and thus, did not create the alleged defect. As set forth in the sworn testimony of Cynthia Howard, a record searcher for the New York City Department of Transportation, a two year search was performed for work records at the location of plaintiff's accident. Ms. Howard testified that seventeen permits were found but none of the permits were issued to ECS. Additionally, as set forth in the affidavit of Calvin Gordon, Specialist for ECS, ECS only performed work west of the location where plaintiff's accident occurred. Specifically, ECS conducted trench work five feet north of the southerly crosswalk at Fifth Avenue and 36th Street. According to ECS records, ECS's trench work did not involve any activity in the northeast corner of the intersection where plaintiff alleges her accident took place. In response, plaintiff fails to raise a triable issue of material fact as to whether ECS performed work at the location where

plaintiff's accident occurred. Thus, ECS's motion for summary judgment is granted.

Con Ed is also entitled to summary judgment as it has made out its prima facie case that it did not create the alleged defect nor did it own the metal grate at issue. As set forth in the sworn testimony of Jennifer Teasley, Specialist for Con Ed, a two year search was performed for work done in the area where plaintiff's accident occurred, which included the general vicinity north, south, east and west of the intersection at issue. Ms. Teasley attested that no records were found that showed Con Ed work or facilities at or around the location of plaintiff's accident at the northeast corner of the intersection of Fifth Avenue and 36th Street. In response, plaintiff has failed to raise a triable issue of material fact as to whether Con Ed performed work at the location where plaintiff's accident occurred or whether Con Ed was in any way responsible for the maintenance of the metal grate. Thus, Con Ed's cross-motion for summary judgment is granted.

Although plaintiff asserts that both ECS's motion and Con Ed's cross-motion are premature as discovery is incomplete, such argument is without merit. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Davila v. New York City Transit Auth.*, 66 A.D.3d 952, 953-54 (2nd Dept 2009); *see also Brown v. Bauman*, 42 A.D.3d 390, 392-93 (1st Dept 2007). In the instant case, both ECS and Con Ed assert by persons with personal knowledge of the material facts that a two year search was conducted for any records of work done in the area where plaintiff tripped and fell. Both defendants assert that no records were found of any work done for two years prior to and including the date of plaintiff's accident.

Accordingly, ECS's motion for summary judgment is granted and Con Ed's cross-motion for summary judgment is granted. Plaintiff's complaint and any cross-claims are dismissed

