

Bianco v Consolidated Edison Co. of N.Y.
2015 NY Slip Op 31764(U)
August 20, 2015
Supreme Court, Bronx County
Docket Number: 301503/10
Judge: Norma Ruiz
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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-22

TARRYN BIANCO,

Plaintiff,

-against

**MEMORANDUM
DECISION/ORDER**
Index No.: 301503/10

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., EMPIRE CITY SUBWAY COMPANY (LIMITED) and
NICO ASPHALT PAVING, INC.,

Defendants.

HON. NORMA RUIZ
NORMA RUIZ, J.S.C.

Defendant, Consolidated Edison Company of New York, Inc. ("Con Edison"), moves for an order, pursuant to CPLR§3212, dismissing all direct, cross-claims and any other claim of any nature against it. Defendant, Nico Paving Asphalt, Inc. ("Nico"), moves for an order, pursuant to CPLR§3212, granting Nico summary judgment dismissing plaintiff's complaint and all cross-claims against it. Defendant, Empire City Subway Company (Limited) ("Empire"), cross-moves for an order, pursuant to CPLR§3212, dismissing plaintiff's complaint and all cross-claims against it. None of the defendants oppose the relief sought by the co-defendants. The motions are consolidated for disposition and decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained by her on November 1, 2009, as a result of her tripping and falling on an allegedly defective roadway condition (a hump of asphalt) located on West 14th Street, in the parking lane adjacent to the south curb, approximately 50 feet from the corner of 8th Avenue at the same approximate distance from

8th Avenue at the bus stop, New York, New York.

As a preliminary matter, plaintiff asserts that Nico's motion for summary judgment is untimely because Nico's motion was filed on January 31, 2014. Plaintiff further asserts that Empire's cross-motion for summary judgment is untimely because Empire's motion was filed on February 5, 2014. This contention lacks merit. Pursuant to CPLR§3212(a), a summary judgment motion, to be timely, must be made within 120 days of the filing of the Note of Issue. Plaintiff filed her Note of Issue on October 2, 2014. Accordingly, Nico's motion and Empire's cross-motion were required to be made on or before January 30, 2014, the 120th day subsequent to October 2, 2013. CPLR§2211 provides that a motion is made when served. The motion and cross-motion for summary judgment of Nico and Empire were both served on January 30, 2014, and are thus timely.

At plaintiff's deposition, she described the hump of asphalt where she tripped as being approximately 8 inches wide by 7 inches long and approximately 2 inches in elevation from the roadway surface. Plaintiff identified a photocopy of a photograph (Exhibit D of Con Edison's motion) as being a fair and accurate picture of what the hump looked like. She circled the approximate area of the hump and placed her initials outside the circle.

John Denegal ("Denegal") testified at his deposition, that he was employed by Nico for 14 years as a superintendent. His job duties included overseeing all asphalt paving crews. He made contact with Nico's clients, made sure the crews knew exactly what they had to do and what rules they had to follow. Depending on the size of the job, he had involvement in physical inspections of the work done by Nico. Nico performed "street work." They handle the permanent restoration of asphalt roadways. Primarily, they are responsible for the restoration of the top 3 inches and if the utility

requests, they can handle the base. When Nico crews arrive at a work area, the area would be down anywhere from 1 to 3 inches. Nico then installs (pours) virgin asphalt (hot asphalt from a New York City certified asphalt plant). It is impermissible to leave ridges or bumps. If there is a defect he will have one of the crews correct it. An inspection is done, sometimes by the utility sometimes by Nico. The City of New York also inspects. When this is done, the job is finished and the area is returned to the public.

At his deposition, Denegal was shown photographs of the roadway defect identified by plaintiff. Denegal identified the defect as a hummock (asphalt that has been pushed up or displaced from its ordinary area due to weight or heat or a combination). More specifically, he described it as the beginning of a young hummock, which is caused by continuous pressure, such as the movement of a bus in a continuous manner with the right heat conditions. Hummocks grow only in the summer time, when the asphalt is hot, not in winter. Hummocks do not shrink once the warm weather passes. He had seen conditions like this before, primarily located in parking lanes near bus stops.

Based upon the foregoing, a *prima facie* entitlement to summary judgment has been demonstrated that the defendants neither caused nor created the alleged defect in the roadway, and that the sole proximate cause of plaintiff's accident was a young hummock. In opposition to the motion, plaintiff has failed to raise a triable issue of fact by producing expert testimony to controvert Denegal's testimony that plaintiff's alleged accident and injuries were caused by a young haddock. Having found that the young haddock was the sole proximate cause of plaintiff's accident, the Court need not address the defendants' contentions that they did no work at the site of plaintiff's accident.

The motions and cross-motion for summary judgment are granted, and plaintiff's complaint is

dismissed in its entirety. The cross-claims of each defendant are also dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: 8/20/15



NORMA RUIZ, J.S.C.

NORMA RUIZ, J.S.C.