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| <b>Taylor v City of New York</b>   |
| 2018 NY Slip Op 31366(U)   |
| June 24, 2018  |
| Supreme Court, New York County   |
| Docket Number: 161042/13   |
| Judge: Lynn R. Kotler  |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

SHAKAI TAYLOR

INDEX NO. 161042/13

- v -

MOT. DATE

MOT. SEQ. NO. 003 and 004

THE CITY OF NEW YORK et al.

Table with 2 columns: Document type and NYSCEF DOC No(s). Rows include Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits, Notice of Cross-Motion/Answering Affidavits — Exhibits, and Replying Affidavits.

This is a personal injury action. In motion sequence number 003, defendant Harris Watermain & Sewer Contracting ("Harris") moves for summary judgment and alternatively to dismiss (CPLR §§ 3212, 3211). In motion sequence number 004, defendant Consolidated Edison Company of New York ("ConEd") also moves for summary judgment. Plaintiff opposes both motions. Defendant The City of New York (the "City") is no longer a party to this action (see decision/order of the Honorable James d'Auguste dated 6/23/17). Defendant Rigid Plumbing Contractors, Inc. has not taken a position with respect to the motions.

The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

In this action, plaintiff seeks to recover for injuries he sustained after he fell off a skateboard while on the road. According to his Notice of Claim to the City, plaintiff's accident occurred on July 19, 2013 at approximately 5:30pm "at or near the corner in the roadway at West 122nd & Malcolm X Blvd (a/k/a Lenox Avenue)" New York, New York. Plaintiff further alleged therein that the "was caused to slip, trip and fall... as a result of the obstructed, cracked, uneven, raised, depressed, missing and/or deteriorated roadway and roadway area..."

At his §50-h hearing on November 22, 2013, plaintiff testified that he fell closer to 123rd Street than 122nd Street, and approximately a bus length away from the intersection. Further, plaintiff stated that there was a bus stop on the right of the roadway defect which caused his accident. Plaintiff described the accident as follows:

Q. How did the accident happen?

A. I was skateboarding. I was skateboarding down Lenox Avenue. I hit

Dated: 6/24/18

HON. LYNN R. KOTLER, J.S.C. (with signature)

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

something in the street and then I went off the board and I hit the ground.

...

Q. As you sit here today, do you know what caused you to stop or what it was that the skateboard came into contact with?

A. I found out that same day what happened. Because the witnesses all – witnesses showed me. And then the next day I came back, I found out what happened to confirm it.

...

Q. What did the witness show you?

A. And the board stopped – huh?

Q. What did the witness show you?

A. Oh, where my board was at.

MR. GOLDSTEIN: She's trying to find out what caused you to fall. She's asking you what was it that caused you to fall off the skateboard.

THE WITNESS: The street. The street stopped me from – it stopped my skateboard in its tracks and I went off my skateboard.

Q. What was it about the street?

A. The street was not fully fixed. The street was not fully fixed.

Q. Can you explain what you mean. Can you describe it.

A. Okay. See how this is smooth (indicating). It was like dug in. It wasn't – seeing like what was supposed to be put down, wasn't put down, so my board wheels went in, which it was supposed to just keep going over.

Plaintiff did not see the roadway defect before his accident. Plaintiff further described the "dug in" area to be approximately half the width of the street and didn't know how long it was. Plaintiff explained that the wheels on his skateboard were approximately two inches long and that the wheels sunk into the "dug in" area.

#### Parties' arguments

Both movants argue that the roadway defect was not caused or created by them nor did they have actual or constructive notice of same. Indeed, both movants claim that they did not perform any work on the roadway at the location of plaintiff's fall.

The defendants concede that there is a discrepancy between plaintiff's notice of claim and his §50-h hearing testimony regarding the location of his accident. They maintain, however, that the conflict is resolved by photographs annexed to plaintiff's notice of claim along with satellite images of the location from Google Maps. Movants therefore claim that plaintiff fell on the southbound portion of roadway on Lenox Avenue between 121st Street and 122nd Street in front of BLVD Bistro Restaurant located at 239 Lenox Avenue, New York, New York.

Both movants have submitted affidavits in support of the motions. Harris has submitted the affidavit of Steven Kogel, its President. Kogel maintains that although Harris performed plumbing work in front of

the building located at 226 Lenox Avenue, New York, New York, which is “on the opposite side of the street from where plaintiff’s accident is alleged to have occurred” (emphasis removed). Harris has provided a copy of an agreement between it and 226 Lenox Avenue, LLC, for the subject to work, along with a copy of the permit to open the roadway in front of 226 Lenox Avenue. Harris maintains that its work did not extend into the southbound lane of travel on Lenox Avenue. Harris has also provided a copy of a print-out from the NYC Department of Transportation’s Dynamic Access System for HIQA which indicates that on September 6, 2012, the closed roadway in front of 226 Lenox Avenue passed inspection.

Meanwhile, ConEd has submitted the sworn affidavit of Yesenia Campoverde, a Specialist in its Legal Department and a record searcher. Campoverde claims that she conducted a search for opening tickets, paving orders and complaints for the area where plaintiff’s accident occurred for two years prior. Campoverde claims that “[i]f an excavation were performed, [ConEd] would have generated an opening ticket and an associated paving order.” According to her search results, Campoverde represents that ConEd did not perform any work on the subject road.

In opposition to the motion, plaintiff’s counsel argues that it is premature because neither movant has been deposed. Plaintiff otherwise claims that the movants’ did not meet their burden because the affidavits in support are conclusory and/or the search conducted was only for two year prior to the accident.

On reply, both movants contend that plaintiff’s opposition should be rejected because it was only filed one business day prior to the return date of each motion. Both replies were also filed late.

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court’s function on these motions is limited to “issue finding,” not “issue determination” (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Here, both movants have established *prima facie* entitlement to judgment as a matter of law. They have established, through admissible evidence, that they did not perform any work in the area where plaintiff’s accident occurred. Therefore, they have demonstrated that they neither caused nor created the defective condition. In turn, plaintiff’s opposition is insufficient to defeat either motion. Although plaintiff’s counsel argues that the motions are premature (CPLR § 3212[f]), he has failed to identify what information is in either movants’ exclusive possession which would enable him to rebut their claims. Plaintiff merely claims that depositions and discovery will bolster his claims, but there is no proof on this record that such discovery would shed any additional light on the issue of whether movants performed work at the location of plaintiff’s accident. Moreover, this action was commenced in 2013, and plaintiff has had ample time to engage in discovery. Therefore, the motions are not premature.

For the reasons already stated, the court rejects plaintiff’s counsel’s argument that the affidavits and other proof submitted in support of each motion are insufficient. Nor has plaintiff raised a triable

issue of fact. Plaintiff cannot demonstrate that either movant performed any work in the area where his accident occurred.

In light of the court's substantive consideration of plaintiff's opposition, the court declines to address movants' arguments regarding its timeliness as moot.

**CONCLUSION**

In accordance herewith, it is hereby:

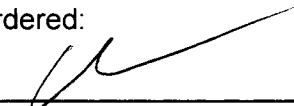
**ORDERED** that motion sequence number 003 and 004 are granted in their entirety; and it is further

**ORDERED** that plaintiff's claims against Harris and ConEd are hereby severed and dismissed; and it is further

**ORDERED** that since plaintiff's claims against Rigid Plumbing Contractors, Inc. remain, the remaining parties are directed to appear for a status conference to address any outstanding discovery on August 14, 2018 at 9:30am in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 6/24/18  
New York, New York

So Ordered:  
  
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Hon. Lynn R. Kotler, J.S.C.