

<b>Romero v 601 W. 135th St. Co. LLC</b>
2018 NY Slip Op 33298(U)
December 12, 2018
Supreme Court, New York County
Docket Number: 155480/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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LUIS ROMERO,

Plaintiff

Index No. 155480/2015

v

DECISION AND ORDER

601 WEST 135<sup>th</sup> STREET COMPANY LLC,  
WALLY'S DELI & GROCERY CORP.,  
CONSOLIDATED EDISON COMPANY OF NEW YORK,  
INC., AQUIFER DRILLING AND TESTING, INC.,  
and ZEBRA TECHNICAL SERVICES, LLC,

Defendant.

(and a third-party action)

MOT SEQ 001, 003, 004

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from a trip-and-fall accident, the defendants Aquifer Drilling and Testing, Inc. (Aquifer) (SEQ 001), Consolidated Edison Company of New York, Inc. (Con Edison) (SEQ 003), and Zebra Technical Services, LLC (Zebra) (SEQ 004), each move separately pursuant to CPLR 3212 for summary judgment dismissing the complaint, and all third-party claims and cross-claims for common law indemnification and contribution as against the moving defendant. The plaintiff and the defendants/ third-party plaintiffs 601 West 135<sup>th</sup> Street Company, LLC (601 West), and Wally's Deli & Grocery Corp. (Wally's Deli) oppose the motions.

For the reasons set forth below, the motions are granted.

## II. BACKGROUND

In his complaint, the plaintiff alleges that, on April 8, 2015, he tripped and fell on a metal plate located on a sidewalk adjacent to 3345 Broadway, in Manhattan, on the West side of the street. According to his verified bill of particulars, he claims that he was caused to fall due to a "dangerous sidewalk condition, a rectangular metal plate, measuring approximately 54 by 40 inches, with edges non-flush and raised approximately three and a half inches above the concrete surface." At his deposition, the plaintiff, who testified that he was the owner of a laundromat that operated at 601 West 135<sup>th</sup> Street, stated that the accident occurred while he was picking up clothing from a vehicle parked adjacent to the curb. The plaintiff alleged that during one of his trips from the laundromat to the parked vehicle, he tripped on a metal plate located on the sidewalk adjacent to Wally's Deli, and fell forward into a bicycle rack. The plaintiff did not know to whom the metal plate belonged, and had no conversations with any representatives of Wally's Deli or 601 West regarding the metal plate. As recalled by the plaintiff, the plate appeared approximately three months prior to the accident, and it never changed location throughout that period. The plate was removed approximately one month following

the accident. The plaintiff did not know who was responsible for its removal.

Hubert Sangil, a superintendent for 601 West, testified that he had been employed at the subject premises for 21 years, and that he had no recollection of seeing the rectangular metal plate on the sidewalk in front of 601 West 135<sup>th</sup> Street. Mubarak Hulaqa, a manager of Wally's Deli for approximately 5 years, likewise testified that he did not recall seeing a metal plate on the sidewalk in front of Wally's Deli at any time.

Paul Fleischmann, president and general manager of Zebra, testified that Zebra was engaged in the business of subsurface investigation and remediation, and that it collected soil samples and other types of data for environmental consulting firms. Fleischmann further testified that Zebra was a subcontractor to Weston Solutions (Weston) in connection with a project between Weston and the New York City Department of Design and Construction (NYCDDC) at Montefiore Park, which is located on the East side of Broadway, opposite the location of the plaintiff's accident. Pursuant to the subcontract, Zebra was to collect subsurface soil samples, a process which involved cutting a hole in the pavement and removing soil. The holes were to be 4 to 6 inches wide. Fleischmann averred that Zebra did not use any metal plates like the ones the plaintiff is alleged to have tripped over. Fleischmann also stated his opinion that documents

prepared by Weston indicated that holes were made in the vicinity of the plaintiff's accident. Joseph Claudio, a senior investigator employed by Terrier Claims Services, stated in an affidavit that he visited the site of the alleged accident on October 11, 2017, and with the aid of the Weston documents, measured the site and locations of the two holes indicated in the documents, neither of which was in front of Wally's Deli. Carlos Hernandez, the field technician for Zebra who performed work at the site, stated in an affidavit that Zebra did not perform any work at the accident location and did not use any metal plates in doing the work they did perform.

Terry Hebert, project manager for Aquifer, testified that Aquifer was retained by the NYCDDC to perform reconstruction work in Montefiore Park. He further testified that prior to the plaintiff's accident, Aquifer had performed work that included the digging of "test pits" in the vicinity of the accident location, on the East side of Broadway. Hebert stated that when a test pit was left overnight without being filled, Aquifer on occasion would cover the pit with a metal plate, usually stamped with the acronym, "ADT." William A. Poupis, a general manager of Aquifer, averred in an affidavit submitted in support of Aquifer's motion, based on his review of the corporate records and his own personal knowledge, that Aquifer was hired to perform safety drilling and testing in and around Montefiore Park, that

Aquifer began work on July 22, 2014, and that Aquifer concluded work on August 7, 2014. Poupis also stated that Aquifer never performed any work or placed any materials on the West side of the street, where the plaintiff's fall occurred, that Aquifer did not utilize any kind of metal plates or slabs of the type the plaintiff described throughout the course of the project, and that Aquifer did not return to the site at any point between August 7, 2014, and April 8, 2015.

Jennifer Kim, Con Edison's record searcher, testified that she performed a search for opening tickets, paving orders, permits, emergency tickets, NYC DOT Corrective Action Requests, and Notices of Violation for the area where the plaintiff was injured that were created in the two-year period prior to and including April 8, 2015. She stated that no records of excavation were found for either the sidewalk or the roadway at or near the subject accident. As to a Notice of Violation, a Corrective Action Request, and related permits that were marked at Kim's deposition, the subject of those records was revealed as Con Edison Service Box 27855. Eric Michelstein, a designer in Con Edison's Engineering Planning Manhattan Electrical Engineering Department, averred in an affidavit annexed to Con Edison's moving papers that the distance between the Con Edison Service Box and the accident location is approximately 89 feet.

The moving defendants argue that they bear no liability for

the accident because they performed no work at the alleged accident location. Aquifer and Zebra also argue that they did not use metal plates of the type the plaintiff alleges he tripped over. Thus, the defendants claim that they neither caused nor created the defective condition. The plaintiff, 601 West, and Wally's Deli oppose the motion, arguing that there are triable issues of fact as to the ownership of the metal plate and whether one of the moving defendants was responsible for placing the metal plate at the accident location.

### III. DISCUSSION

#### A. SUMMARY JUDGMENT STANDARD

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985) (citations omitted). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012). Once the movant meets its burden, it is incumbent upon the

non-moving party to establish the existence of material issues of fact. See id. A movant's failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See id.

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" De Paris v Women's Natl. Republican Club, Inc., 148 AD3d 401, 403-404 (1<sup>st</sup> Dept. 2017); see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480 (1<sup>st</sup> Dept. 1990). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense. See Koulermos v A.O. Smith Water Prods., 137 AD3d 575 (1<sup>st</sup> Dept. 2016); Katz v United Synagogue of Conservative Judaism, 135 AD3d 458 (1<sup>st</sup> Dept. 2016).

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1<sup>st</sup> Dept. 1992).

B. AQUIFER'S MOTION FOR SUMMARY JUDGMENT

A defendant in a trip-and-fall case establishes its entitlement to summary judgment dismissing the complaint by demonstrating that it did not cause or create the dangerous condition that led to the plaintiff's injuries, or that it did not have actual or constructive notice of the defective condition. See Arnold v New York City Hous. Auth., 296 AD2d 355 (1<sup>st</sup> Dept. 2002).

The Appellate Division, First Department, has stated that where the record fails "to reveal any connection whatsoever" between a defendant that performed construction work in the vicinity of an accident and the defect which caused the accident, summary judgment dismissing the complaint as against that defendant must be granted. Manson v Consolidated Edison Co. of New York, 220 AD2d 347 (1<sup>st</sup> Dept. 1995). Stated succinctly, "[o]ne who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site." Kenney v City of New York, 30 AD3d 261 (1<sup>st</sup> Dept. 2006); see Edelman v O This Way Up, Inc., 117 AD3d 640 (1<sup>st</sup> Dept. 2014); Bluestone v J. Tortorella Heating & Gas Specialists, Inc., 122 AD3d 534 (1<sup>st</sup> Dept. 2014).

Aquifer, through its submission of the deposition testimony of Terry Hebert and the affidavit of William Poupis, along with a work map depicting its drilling sites around Montefiore Park and

daily job and site investigation reports, establishes that it never performed any work at the location of the plaintiff's accident. Rather, the drilling work Aquifer performed was across the street from the accident location. Moreover, while Aquifer's project manager stated that Aquifer used metal plates to cover excavation sites on rare occasions, he also stated that the plates used by Aquifer were not like the one depicted in photos of the plaintiff's accident scene. Aquifer's general manager averred in an affidavit that Aquifer neither performed any work nor placed any materials on the West side of the street, where the plaintiff was injured, and that Aquifer did not utilize any kind of metal plates throughout the course of the project. Significantly, Aquifer completed its construction work in August 2014, five months prior to the time when the plaintiff states he first noticed the metal plate.

Aquifer thus establishes, *prima facie*, its entitlement to judgment as a matter of law. In response, the plaintiff and the defendants 601 West and Wally's Deli fail to raise a triable issue of fact. The record does not support a finding that Aquifer placed a metal plate on the West side of the street, at the location of the plaintiff's accident, approximately three months prior to the accident. The fact that Weston, the general contractor, may have performed work in the area in early 2015, does not alter this conclusion. Weston is not a party this

action. Accordingly, the complaint and third-party complaint, as well as the cross claims of the defendants 601 West and Wally's Deli, are dismissed as against Aquifer.

C. CON EDISON'S MOTION FOR SUMMARY JUDGMENT

Con Edison likewise establishes that it is entitled to judgment as a matter of law. The testimony of Con Edison's record searcher indicated that in the two years prior to the plaintiff's accident, no work was performed at the location of the accident, and that Con Edison did not own the metal cover involved in the accident. In response to Con Edison's showings, the defendants 601 West and Wally's Deli speculate that because Con Edison had permits to perform work related to a Con Edison Service Box approximately 89 feet away from the location of the accident, the metal plate over which the plaintiff fell could have belonged to Con Edison. The plaintiff similarly argues, after the close of discovery and the filing of the Note of Issue, that because Con Edison did not provide "Cut Forms" documenting the work it did in relation to the service box, it is possible that Con Edison performed work at the location of the plaintiff's injury and that the work involved metal plates. This speculation is insufficient to raise a triable issue of fact. Accordingly, Con Edison's motion is granted in its entirety.

D. ZEBRA'S MOTION FOR SUMMARY JUDGMENT

Zebra's submissions, including the deposition testimony of its president and general manager, an affidavit of the field technician who performed work in the vicinity of the accident location, and an affidavit of a third-party investigator, establish that Zebra did not perform work at the location of the plaintiff's accident. Its submissions also show that the work it was subcontracted by Weston to perform in connection with the Montefiore Park project involved the cutting of holes only 4 to 6 inches wide, and that it was not Zebra's practice to use any metal plates in its work.

In light of the foregoing, even if the court were to credit the argument of the defendants 601 West and Wally's that the affidavit of Joseph Claudio, which stated that the location of the holes indicated in a set of Weston documents did not match the accident location, lacks merit because Claudio did not allege that he is competent to interpret the Weston documents and visited the site over two years after the accident, there is no connection whatsoever between Zebra and the metal plate that actually caused the accident. Since none of the parties opposing Zebra's motion raise a triable issue of fact, the complaint and third-party complaint, as well as the cross claims of the defendants 601 West and Wally's Deli, are dismissed as against Zebra.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motions for summary judgment of the defendants Aquifer Drilling and Testing, Inc. (SEQ 001), Consolidated Edison Company of New York, Inc. (SEQ 003), and Zebra Technical Services, LLC (SEQ 004), are granted and the complaint is dismissed as against Aquifer Drilling and Testing, Inc., Consolidated Edison Company of New York, Inc., and Zebra Technical Services, LLC; and it is further,

ORDERED that the third-party action commenced by the defendants 601 West 135<sup>th</sup> Street Company, LLC, and Wally's Deli & Grocery Corp., is dismissed as against all third-party defendants; and it is further

ORDERED that the cross-claims against Aquifer Drilling and Testing, Inc., Consolidated Edison Company of New York, Inc., and Zebra Technical Services, LLC, by defendants 601 West 135<sup>th</sup> Street Company, LLC, and Wally's Deli & Grocery Corp., are dismissed; and it is further,

ORDERED that the foregoing claims against the defendants Aquifer Drilling and Testing, Inc., Consolidated Edison Company of New York, Inc., and Zebra Technical Services, LLC, are severed and the balance of the action shall continue; and it is further,

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Aquifer Drilling and Testing, Inc.,

Consolidated Edison Company of New York, Inc., and Zebra Technical Services, LLC, and dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the court.

Dated: December 12, 2018

ENTER: Nancy M. Bannon

J.S.C.

**HON. NANCY M. BANNON**