

<b>Ilku v City of New York</b>
2019 NY Slip Op 33213(U)
October 24, 2019
Supreme Court, New York County
Docket Number: 155698/2013
Judge: Julio Rodriguez III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ III

PART

Justice

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INDEX NO. 155698/2013

DAVID ILKU,

MOTION DATE 08/08/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON, EMPIRE CITY SUBWAY COMPANY LTD., ECS SUB SURFACE ADMINISTRATION, KEYSpan CORPORATION, NATIONAL GRID USA SERVICE COMPANY, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff commenced this action seeking damages allegedly sustained in an accident on May 5, 2012, at around 2:00 a.m., while riding his bicycle on East 10th Street between 3rd and 4th Avenues, New York, New York. Plaintiff allegedly hit an imperfection or pothole in the road, which caused him to fall from his bicycle and sustain various injuries.

On motion sequence 004, defendant Consolidated Edison ("Con Ed") moves for summary judgment. Defendant City of New York ("City") opposes the motion.

Parties' Positions - Con Ed's Motion for Summary Judgment

In support of its motion for summary judgment, defendant Con Ed attaches as exhibits copies of the pleadings, an order dated October 10, 2015, plaintiff's bill of particulars, the transcript of plaintiff David Ilku's deposition, photographs marked at said deposition, the transcript of defendant Con Ed's deposition by employee Yesenia Campoverde, and Con Ed records relating to the location at issue. Defendant Con Ed contends that it is entitled to summary judgment because the evidence in the record establishes that defendant Con Ed "did not perform any excavation or repair work at the plaintiff's alleged accident location; nor does [Con Ed] own, operate, maintain or control the subject roadway" (Simms aff in support at ¶ 5).

Defendant Con Ed relies on the testimony of its witness Ms. Yelenia Campoverde's description of its records to establish its entitlement to summary judgment. Defendant Con Ed contends that Ms. Campoverde testified that none of Con Ed's records pertained to the location of

the accident. Ms. Campoverde testified that defendant Con Ed's records pertained, instead, to the south side of East 10th Street or to the area near East 10th Street's intersection with 3rd Avenue.

In opposition, defendant City argues that Con Ed's reliance on Ms. Campoverde's testimony is insufficient to meet its prima facie burden. Defendant Con Ed reasons that because its records only show work either on the south side of East 10th Street or toward East 10th Street's intersection with 3rd Avenue, its work does not pertain to the area of plaintiff's accident. Defendant City argues that the evidence does not sufficiently refine the area of plaintiff's accident such that defendant Con Ed's evidence is exculpatory—that is, that Con Ed work records describe work within the area that plaintiff's accident may have occurred.

Moreover, defendant City argues that, assuming *arguendo* that defendant Con Ed carried its prima facie burden, questions of fact are raised by the following records: 1) a number of permits (including permits M01-2011091-157 and M01-2011125-015) which indicate that defendant Con Ed was permitted to perform work in the area; and 2) a notice of violation issued to defendant Con Ed on July 18, 2011, for work performed at 92 to 98 East 10th Street, which was unresolved as of the date of plaintiff's alleged accident. For these reasons, defendant City contends, defendant Con Ed's motion for summary judgment should be denied.

In reply, defendant Con Ed argues that the location of accident is established by plaintiff's testimony, in which plaintiff describes the defect as on the north side of East 10th Street. Additionally, defendant Con Ed annexes to its reply the police accident report, which indicates that the accident occurred in front of 85 East 10th Street. Defendant Con Ed's position is that its records relate to areas separate from the north side of East 10th Street in front of 85 East 10th Street, and therefore it is entitled to summary judgment. Defendant Con Ed further argues that 1) the issuance of a permit is insufficient to raise a triable issue of fact; and 2) the notice of violation was—according to a paving order dated August 9, 2011, which relates to work near the intersection of 3rd Avenue and East 10th Street—addressed and remedied.

#### Applicable Law – Summary Judgment Standard

The proponent of a motion for summary judgment must tender sufficient evidence to show its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, “the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so” (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]). A non-owner of property can establish its entitlement to judgment by making a *prima facie* showing that it did not cause or create the defective condition at issue (*Camacho v City of New York*, 135 AD3d 482 [1st Dept 2016]; see *Levine v City of New York*, 101 AD3d 419 [1st Dept 2012]).

## Discussion

In its motion, defendant Con Ed argues that certain of its documents refer to work performed “near the intersection of 3rd Avenue and East 10th Street” (Simms aff, at ¶ 10 [emphasis in original]) and implicitly reasons that work’s proximity to the intersection renders it irrelevant to the alleged accident. However, without first determining the location of the alleged defect in relation to the intersection (e.g. west side, center, or east side of the block, etc.), defendant Con Ed’s argument is flawed.

The only documents or information provided by defendant Con Ed in support of its motion that identify the location of plaintiff’s accident are plaintiff’s deposition testimony (Simms aff, exhibit F, at 15, 61, 111-112 [plaintiff testified accident occurred on East 10th Street between 3rd and 4th Avenues and that sinkhole was in bike lane on north side of street]), plaintiff’s complaint (Simms aff, exhibit A, at ¶ 19 [identifying accident location as “East 10th Street between 3rd and 4th”]), and plaintiff’s bill of particulars (Simms aff, exhibit E, at ¶ 2 [identifying accident location as “East 10th Street between 3rd and 4th Avenues”]). Accordingly, the evidence indicates that the area of plaintiff’s accident is the bike lane of East 10th Street between 3rd and 4th Avenues. Consequently, defendant Con Ed’s contention that it is exculpated by evidence of work on East 10th Street that is “near the intersection” with 3rd Avenue is unsupported. The court therefore finds that defendant Con Ed indeed failed to meet its prima facie burden. Without sufficiently specifying the location of the alleged defect that caused plaintiff’s accident, defendant Con Ed’s attempted method of establishing its entitlement to judgment—analysis of its work records *vis-à-vis* the accident location—fails.

The court declines to consider defendant Con Ed’s submission of the police accident report in an attempt to refine the location of plaintiff’s accident because the police accident report was submitted for the first time in reply (*see Kellogg v All Saints Housing Development Fund Co.*, 146 AD3d 615, 616 [1st Dept 2017] *citing Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]; *see also Holliday v Hudson Armored Car & Courier Service, Inc.*, 301 AD2d 392, 396 [1st Dept 2003] [on the admissibility of police reports generally]).

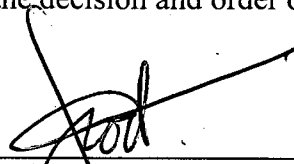
Moreover, even if it were considered, the police accident report identifies the “Place Where Accident Occurred” as “F/O [presumably “front of”] 85 E[ast] 10 St” and “100 ft W[est] of 3 Ave” (Simms aff in reply, exhibit A). Defendant Con Ed’s witness, Ms. Campoverde, testified *inter alia* that paving order PS647077, which relates to permit number M01-2011125-015, referred to a roadway opening “90 feet west of the west curb of Third Avenue” (Simms aff, exhibit H, at 19-21; *see* Simms aff, exhibit I, at 23 [PS647077 indicating cut diagonally across East 10th Street]; *see also* Simms aff, exhibit H, at 21-22 [“From cut two through five, there is no information”]). Even assuming defendant Con Ed met its prima facie burden, paving order PS647077 creates an issue of fact. Because on a motion for summary judgment the court must scrutinize the papers in a light most favorable to the non-moving party, defendant Con Ed’s motion must be denied even if the police accident report were considered because of the proximity of Con Ed’s work to the area identified on the police accident report.

In accordance with and upon the foregoing, it is ORDERED that defendant Consolidated Edison's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant Consolidated Edison shall serve a copy of this order with notice of entry within twenty days upon all parties.

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

October 24, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE