Lindenbaum v City of New York

2019 NY Slip Op 33443(U)

November 15, 2019

Supreme Court, New York County

Docket Number: 159992/2015

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS**, *Justice* — **PART** **IAS MOTION 5**

INDEX NO. 159992/2015

MOTION SEQ. NO. 001; 002

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DEBRA LINDENBAUM,
Plaintiff,

- against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 55, 56, 57, 58, 63, 65, 67

were read on this motion to/for **SUMMARY JUDGMENT**.

Plaintiff commenced this action to recover for personal injuries sustained from a trip and fall due to an allegedly defective condition located in the street/roadway on 75th Street between Second and Third Avenue, New York, NY.[1] Specifically, plaintiff alleges tripping on "a hole approximately six inches from a manhole located in the parking lane" at that location. Defendants, the City of New York and New York City Department of Transportation (DOT), hereinafter collectively "City," now move pursuant to CPLR § 3212 seeking an order for summary judgment dismissing the complaint on the grounds that the City did not receive prior written notice of the condition and did not cause or create the condition.[2]

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320 [NY 1986] and *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989].

In order to hold the City liable for injuries resulting from roadway defects, a plaintiff must demonstrate that the City received prior written notice of the subject condition. (See Admin Code of the City of New York § 7-201(c)(2); *Amabile v City of Buffalo*, 93 NY2d 471 [1999].) The only recognized exceptions to the prior written notice requirement are where the City's actions caused or created the defect through an affirmative act of negligence or where the defect

[1] See City's *Exhibit H*, (tr at 6 lines 6-9; at 8 lines 23-25).
[2] Motion Seq. No. 001.

resulted from a special use by the municipality. (See *Oboler v City of New York*, 8 NY3d 889 [NY 2007], quoting *Amabile*, supra.

In support of its motion, the City provides the affidavit of Omar Codling, a record searcher employed by DOT. Mr. Codling performed a roadway segment search which resulted in thirty-nine permits, twenty-eight hardcopy permits, twenty-eight applications, two notices of violation, sixty-three inspections, one maintenance and repair record, one gang sheet for roadway defects, and three Big Apple Maps. (See City's *Exhibit I.*) The City contends that none of the aforementioned search results show that the City had prior written notice of the defect alleged. The City asserts that the Big Apple Maps do not demonstrate prior written notice in that there are no markings to indicate a hole at the subject location and that the two violation notices, issued to Con Edison and Rigid Plumbing Contractors, Inc. respectively, were issued for locations that did not encompass the subject defect. (See City's *Exhibit J.*) Finally, the City also contends that it did not cause or create the condition as there were no permits issued by the City to any contractors to do work on behalf of the City. *Id.*

In opposition, plaintiff maintains that the City has failed to put forth sufficient evidence to demonstrate that it lacked prior written notice of the defect that caused plaintiff's injury and that a question of fact as to the City's liability remains. Specifically, plaintiff argues that the City owns the property upon which plaintiff was injured and thus, the City is liable and further, the documents submitted in support of the City's motion contain specific references to the roadway at and around the manhole covers located at 75th Street between Second and Third Avenues.

The Court finds that the City has made *prima facie* showing of entitlement to a summary determination which plaintiff has failed to refute. While it is undisputed that the City owns the roadway in which the alleged defect is located, ownership in and of itself is insufficient to prove liability as against the City pursuant to § 7-201(c)(2) of the Administrative Code which requires written notice of the specific defect. Moreover, plaintiff's argument that records located during the DOT search raises a question of fact as to the City's liability as they reference the subject location is unavailing as the subject defect is not specifically referenced in said records.

Additionally, defendant, Consolidated Edison Company of New York, Inc. (Con Edison) also moves the court seeking summary judgment.[3] Con Edison concedes that it owned the manhole cover and associated hardware adjacent to the subject defect but asserts that it, too, lacked prior notice of the defect and that it neither caused nor created same. Con Edison contends that on May 24, 2013, the manhole cover was inspected within the 5-year period required by the Public Service Commission[4] and there was no defect found or basis for repair of the manhole and the surrounding area. Further, Con Edison also contends that it did not perform work in the subject location between the inspection date and the date of the plaintiff's accident and thus, could not have caused or created the condition.

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[3] Motion Seq. No. 002.

[4] Con Edison avers that the Public Service Commission mandates an inspection of underground electric distribution equipment and surrounding area every five 5 years. (See *Exhibit L*, Reply, Motion Seq. 002.)

Con Edison relies upon the testimony of Jennifer Grimm, formerly known as Jennifer Kim, who performed a record search for the roadway of East 75th Street between Second and Third Avenues dating two years prior to and including the date of the plaintiff's accident. This search revealed DOT permits obtained by Con Edison; opening tickets reflecting any excavation within a sidewalk and/or roadway; paving orders; Emergency Control System tickets noting complaint, hazards, or defects of any sort to Con Edison property; Corrective Action Requests (CARS); and notices of violations (NOVs) issued by the City. Con Edison maintains that none of the aforementioned search results involved work or complaints of a hazard in the area specified by plaintiff. Con Edison provides the affidavit of Jennifer Grimm attesting same. Specifically, Ms. Grimm asserts that the opening tickets, including tickets PS822046, PS583349, PS642940, PS642944, PS701127, and PS882812, and their associated paving orders, permits, CARS, NOVs, and emergency control tickets involved work performed on the sidewalk or on the south side of East 75th Street, which is opposite the location of plaintiff's accident.

Con Edison also relies upon the testimony of Juan F. Rodriguez, a Con Edison Environmental Health and Safety Senior Specialist, who is responsible for supervising Con Edison employees and third-party contractors who inspect Con Edison roadway and underground facilities. Mr. Rodriguez testified concerning an Electric Distribution Information System "EDIS" report dated May 24, 2013. The EDIS report was prepared in conjunction with a field inspection of a service box located at the subject location and denoted that there were no defects found within a foot of the manhole cover. (See EDIS report annexed as *Exhibit B* to plaintiff's opposition, Motion Seq. 002.)[5]

In opposition, plaintiff asserts that Con Edison failed to adequately monitor and maintain the manhole and the twelve-inch surrounding area as required by 34 RCNY §2-07. Plaintiff contends that Con Edison's reliance on an inspection of the subject location two years prior to the date of the accident is erroneous as Con Edison had a continuous duty to maintain under 34 RCNY §2-07. Further, plaintiff also contends that the obligations imposed by the Public Service Commission, to inspect every five years, do not subvert Con Edison's obligations to maintain under 34 RCNY §2-07 and an inspection closer to the date of the accident would have made the subject defect immediately apparent. Finally, plaintiff argues that issues of fact remain as to whether the field inspection performed on May 24, 2013 was sufficient.

As Con Edison correctly points out, 34 RCNY §2-07 restricts Con Edison's obligations to defects that it created or of which it had prior notice. See *DiSanza v City of New York*, 47 AD3d 535 (1st Dept 2008). Con Edison has shown that it did not perform any work in the subject location; it did not receive a notification of defect from the May 24, 2013 inspection until the date of plaintiff's accident; and further, that Mr. Rodriguez clearly testified that the inspection included the twelve-inch surrounding area of the manhole cover in question. Plaintiff's attempt at raising an issue of fact, asserting that the May 24, 2013 inspection was insufficient, amounts to

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[5] When asked if "inspection [is] done of the manhole cover itself?" Mr. Rodriguez responded, "There's an inspection, a visual inspection of the manhole cover and its surroundings." (Tr. at 29 lines 14-19.) Mr. Rodriguez also testified that the inspection would be referenced on the EDIS report under "Does the structure require a regrade" and a regrade includes the "1-foot buffer from the manhole cover itself." (Tr. at 29 lines 20-25; at 30 lines 2-18; See EBT Testimony of Juan F. Rodriguez, annexed as *Exhibit J*, Motion Seq. 002)

an expression of hope which is insufficient to rebut Con Edison's proof. (See *Zuckerman v City of New York,* 49 NY2d 557[1980].) Accordingly, it is hereby

ORDERED that the City of New York and New York City Department of Transportation motion (Motion Seq. No. 001) for summary judgment is granted and the complaint and all cross-claims asserted against the City are dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Consolidated Edison Company of New York, Inc.'s motion (Motion Seq. No. 002) for summary judgment is granted and the complaint and all cross-claims asserted against Con Edison are dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgments for the above defendants accordingly; and it is further

ORDERED that the movants serve a copy of this order with notice of entry upon the Clerk of the Court and the Trial Support Office within twenty days of receipt of this order; and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is hereby denied.

November 15, 2019

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**	
	X	**GRANTED**	**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**	**REFERENCE**