

Berg v City of New York
2022 NY Slip Op 32405(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 153839/2018
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. JUDY H. KIM</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>MAURICE BERG,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>CITY OF NEW YORK, CARLO LIZZA & SONS PAVING, INC., TRIUMPH CONSTRUCTION CORP., JOHN P. PICONE, INC., EMPIRE CITY SUBWAY COMPANY LTD., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,</p> <p align="center">Defendants.</p> <p>-----X</p>	<p>PART</p> <p>INDEX NO. <u>153839/2018</u></p> <p>MOTION DATE <u>2/8/2022</u></p> <p>MOTION SEQ. NO. <u>010</u></p>
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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 227, 228, 229, 230, 231, 240, 241, 242, 243, 244, 245, 246 were read on this motion for SUMMARY JUDGMENT.

Plaintiff commenced this action to recover for injuries allegedly sustained on November 14, 2017, when he tripped and fell on raised, dark material on the pedestrian island in the northwest corner of East 23rd Street and First Avenue (NYSCEF Doc. Nos. 1 [Complaint at ¶¶5-6] and 116 [Bill of Particulars at ¶2]). Plaintiff’s complaint asserts negligence claims against, as relevant here, the Consolidated Edison Company of New York, Inc. (“ConEd”).

ConEd now moves, pursuant to CPLR §3212, for an order granting it summary judgment dismissing the complaint and all cross-claims against it. ConEd contends that it “has shown through employee testimony and affidavits that Con Edison did not perform any work upon the roadway at the location where [plaintiff] fell” (NYSCEF Doc. No. 157 [Memo. of Law in Supp. at ¶11]). In support of its motion, ConEd submits the Examination Before Trial (“EBT”) testimony of its employee, Specialist Vicki Cheung, in which she testified that her colleague, Jennifer

Grimm, conducted a search of ConEd's records related to work performed at the intersection of East 23rd Street and First Avenue—which search included the four corners of the intersection and thirty feet beyond—for the two-year period prior to and including the date of plaintiff's accident (NYSCEF Doc. No. 162 [Cheung EBT at pp. 10-15]).

ConEd submit the records produced in connection with Cheung's search, specifically: ECS, DOT Permit M012017173C03 Opening Ticket PS982425, Permit M012017158A71, Opening Ticket PS983722, Permits M012016032C15, M012016041A94, Opening Ticket PS671136, ECS Ticket ME17001548, NOV 0700883590, Permit M032017019A36, ECS Tickets ME17007025, ME17007620, NOV 0701042715, Permit M032017172A57, Permit M012014014067, CARs 20174470098-01, 20176040218-01, 20176040218-02, ECS Tickets ME1 7008364, ME17008390, Permit M012017278A01, CARs 20176030038-01, 20174470099-01, 20174470110-01, ECS Tickets ME16505443, MG15014020, MG16004747, MG16013033, MG17002784, MG1700 99, MS17001978 (NYSCEF Doc. No. 163).

During her testimony, Cheung testified that Opening Tickets PS671136, PI384885, and PS983722 concerned work performed at the northeast, southwest, and southeast corners of the subject intersection, respectively (Id. at pp. 26-28, 30-31, 34-35, 54-56, 65). She also testified that: (i) CAR 20174470099-01 pertained to broken asphalt around a gas valve box in the driving lane on East 23rd Street between 1st Avenue and Asser Levy Place, adjacent to a pedestrian crosswalk,; (ii) CAR 20176040218-01 and CAR 201744700098-01 pertained to a two-door Con Edison utility box in the driving lane on East 23rd Street between First Avenue and Asser Levy Place; and (iii) NOV E191429078 pertained to opening ticket PI384885 which represents work performed on 23rd Street and within the intersection (Id. at pp. 30-31, 36-39, 44, 48).

ConEd also submits the affidavit of Michael Chionchio, a Construction Representative in its Construction Management Department, who attests that:

I am also familiar with Con Edison Opening Tickets and paying orders as well as DOT Corrective Action Requests and Notices of Violation. I have reviewed Opening Ticket PS998036, Opening Ticket PS0004570, Corrective Action Request ("CAR") 20176520144-01, and Notice of Violation ("NOV") 0701199474 in connection with the above captioned action. Opening Ticket PS998036 and PS0004570 reference work that was performed in the parking lane on the westside of First Avenue between 22nd and 23rd Streets. None of this work extended to the northwest corner of 1st Avenue and 23rd Street ... Opening ticket PS998036 was completed to address a DOT Correction Action Request CAR 20176520144-01 and NOV 0701199474 was issued to Con Edison in connection with aforementioned work. The bike lane and crosswalk referenced in the CAR is located at the southwest corner of 23rd Street and First Avenue. Likewise, the NOV is for the same location. The photos attached to the NOV depict the work in opening tickets PS998036 and PS0004570. The crosswalk visible in the photograph is at the southwest corner. The trench depicted does not extend across 23rd Street to the northwest corner.

(NYSCEF Doc. No. 166 [Chionchio Aff.]).

Finally, ConEd submits an unrebutted Statement of Material Fact asserting that, inter alia, Permit M012015 301-D41 is associated with Opening Ticket PI271952 and the work referenced therein was performed within the intersection on the eastside of First Avenue, by Con Edison's contractor, Triumph Construction (NYSCEF Doc. No. 156 [Statement of Material Fact at ¶18]).

In opposition, plaintiff points to DOT Permit M01-2016041-A94 (NYSCEF Doc. No. 242), Corrective Action Requests ("CARs") 201744700098-01 and 201744700099-01 (NYSCEF Doc. Nos. 244 and 164 [ConEd Records at p. 10]), and 311 complaints from October 2017 (NYSCEF Doc. No. 245) and argues that these records create an issue of fact as to whether ConEd did, in fact, perform work at the subject pedestrian island. Plaintiff also notes that certain records related to work ConEd performed at the subject intersection—i.e., DOT Permits M01-2015301-D31 and M01-217278A00 as well as CAR 20176520144—were not produced by ConEd but only by co-

defendant the City of New York and asserts that ConEd's "search for documents and testimony was based upon incomplete records" (NYSCEF Doc. No. 227 [Grossman Affirm. in Opp. at p. 4]).

DISCUSSION

ConEd's motion is denied. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). "A defendant who moves for summary judgment in a trip and fall action has the initial burden of making a prima facie demonstration that it did not create the hazardous condition" (Briggs v Pick Quick Foods, Inc., 103 AD3d 526, 526 [1st Dept 2013] quoting Smith v Costco Wholesale Corp., 50 AD3d 499, 500 [1st Dept 2008]).

ConEd has not satisfied its burden here. ConEd's submission of various permits and related records of work performed at other parts of the subject intersection is insufficient, on its own, to establish that ConEd did not create the condition at issue on the pedestrian island. Moreover, ConEd fails to submit an affidavit from someone with personal knowledge stating that it did not perform work at the site of plaintiff's fall (See Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016]; see also Amarosa v City of New York, 51 AD3d 596, 597 [1st Dept 2008]). The affidavit of Chionchio, addressing only certain permits included in the record, does not satisfy this standard. It is also not clear that Cheung had sufficient knowledge about what work was actually performed pursuant to the permits and CARs such that she could establish that ConEd did no work at the subject location (Cf. Jones v Consol. Edison Co. of New York, Inc., 95 AD3d 659, 660 [1st Dept 2012] [deposition testimony of Con Edison employees who supervised

the project in question established that the trench that extended towards the maintenance hole in question stopped short of the cover established a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's complaint]).

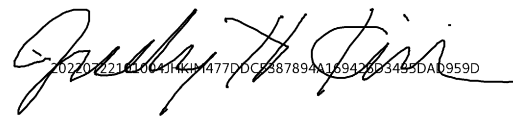
Accordingly, it is

ORDERED that the motion by defendant the Consolidated Edison Company of New York, Inc. for summary judgment dismissing the complaint and all cross-claims against is denied; and it is further

ORDERED that within thirty days from entry of this order, counsel for defendant Consolidated Edison shall serve a copy of this order, with notice of entry, on all parties, the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E filing" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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HON. JUDY H. KIM, J.S.C.

7/22/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: