

<b>Peterson v City of New York</b>
2022 NY Slip Op 33137(U)
September 12, 2022
Supreme Court, New York County
Docket Number: Index No. 161741/2014
Judge: J. Machelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. J. MACHELLE SWEETING PART 62**

*Justice*

-----X

ANNTINETTE H. PETERSON,  
Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON OF  
NEW YORK, INC., GALASSO TRUCKING & RIGGING,  
INC.,

Defendants.

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INDEX NO. 161741/2014

MOTION DATE 05/31/2022,  
05/31/2022,  
05/31/2022

MOTION SEQ. NO. 007 008 009

**DECISION + ORDER ON  
MOTIONS**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 216, 217, 222, 231

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 218, 219, 223, 226, 227, 228, 230

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 220, 221, 224, 229

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

In the underlying action, plaintiff seeks monetary damages for personal injuries allegedly sustained as a result of a trip and fall on January 12, 2014, in the street located near the intersection of West 190th Street and Wadsworth Avenue in Manhattan, between 617 W. 190th Street and 620 W. 190th Street, New York..

Now pending before the court are three motion sequences:

The first is Motion Sequence #007 wherein defendant Consolidated Edison Of New York, Inc. (“Con Edison”) seeks an order for summary judgment pursuant to CPLR §3212, and dismissing all direct, cross-claims and any other claims of any nature against Con Edison.

The second is Motion Sequence #008 wherein plaintiff seeks an order, pursuant to CPLR 3212, for summary judgment against defendant THE CITY OF NEW YORK (the “City”) and in favor of plaintiff on the limited issue of notice.

The third is Motion Sequence #009 wherein defendant Galasso Trucking & Rigging, Inc. (“Galasso”) seeks an order, pursuant to CPLR 3212, granting summary judgment, and dismissing, with prejudice, any cross-claims, counter claims or any claims of any nature against Galasso.

### Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1<sup>st</sup> Dept. 1985]). 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 (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Motion Sequence #007 filed by Con Edison

In its motion, Con Edison argues that it did not work in the area of the street where plaintiff fell and in fact, more than three years of records show that any Con Edison work was done on the “other side of the block” from the accident location. As such, Con Edison argues, no question of fact can be raised as to whether its work created the defect in question.

As Con Edison properly notes in its Reply, no opposition was filed to this motion. Accordingly, this motion is GRANTED as unopposed.

Motion Sequence #009 filed by Galasso

In its motion, Galasso argues that it did not own, lease, operate, possess, or control the roadway at West 190th Street where plaintiff fell. Galasso argues that it had placed a crane at 601 West 190th Street, but that location is “200-300 feet away” from the site of the alleged accident at 620 West 190th Street. As such, Galasso argues, there is no triable issue that can be raised to show that Galasso caused the defect in question.

As Galasso properly notes in its Reply, no opposition was filed to this motion. Accordingly, this motion is GRANTED as unopposed.

Motion Sequence #008 filed by Plaintiff

Notably, in this motion, plaintiff is not seeking summary judgment on the issue of liability, but merely seeking summary judgment on the limited issue of notice. Specifically, plaintiff asks the court to find that the City had proper prior notice of the roadway condition at issue.

Plaintiff argues that a 311 complaint made on December 8, 2010 and assigned SR #1-1-612826425 (memorialized in writing at NYSCEF Document #193), shows that the City’s Department of Transportation (the “DOT”) had first-hand knowledge of the existence and dangerous nature of the condition that caused plaintiff’s fall. Plaintiff argues that in addition to a complaint being made, the DOT had (a) inspected the location; (b) confirmed the existence of the condition; (c) described the condition as a “Failed Street Repair;” and (d) issued a written acknowledgement of the existence and dangerousness of the condition in the form of a Corrective Action Repair.

In opposition, the City argues that plaintiff cannot prove that the alleged roadway condition that she allegedly fell on is the specific condition addressed in SR #1-1-612826425. The City argues that plaintiff alleges she tripped and fell in a “pothole,” whereas the inspection report notes a “failed street repair.” Further, the City argues that the locations are different, as plaintiff’s notice of claim notes the subject defect to be between 617 West 190th Street and 620 West 190th Street, whereas the complaint documents a failed street repair specifically at 620 West 190th Street.

Here, as noted above, the function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination. Plaintiff maintains that the subject of the 311 complaint is the defect over which plaintiff fell, whereas the City argues the opposite. The record in this case is insufficient to determine whether the defect addressed in SR #1-1-612826425 is the same as the “pothole” located between 617 W. 190th Street and 620 W. 190th Street that plaintiff claims caused her to fall. Accordingly, summary judgment cannot be awarded here.

Finally, plaintiff argues that she should be awarded summary judgment because “pursuant to the common law doctrine of spoliation and/or the equitable principle of estoppel, [the court should] preclude Defendant City from arguing that it lacks prior written notice.” Plaintiff argues that the City has “lost or destroyed the HIQA inspection report, the CAR that was allegedly issued, and other documents which would have constituted written acknowledgement of the defect.” However, no motion for spoliation sanctions has been filed, and plaintiff did not provide further details to support her claim that the City failed to maintain and produce additional documents that would have been adequate to establish liability against the City. Accordingly, the court declines to award summary judgment to plaintiff on these grounds.

Conclusion


For all the reasons set forth herein, it is hereby

**ORDERED** that Motion Sequence #008 granting summary judgment in plaintiff’s favor as against defendant The City of New York is **DENIED**; and it is further

**ORDERED** that Motion Sequence #007 dismissing all direct, cross-claims and any other claims against Con Edison is **GRANTED** as unopposed; and it is further

**ORDERED** that Motion Sequence #009 granting summary judgment and dismissing, with prejudice, any cross-claims, counter claims and any claims of any nature against defendant Galasso is **GRANTED** as unopposed; and it is further

**ORDERED** that the caption shall be amended to remove Consolidated Edison of New York (“Con Ed”) and Galasso Trucking & Rigging, Inc, as named defendants in this action.

<u>9/12/2022</u>					
DATE			J. MACHELLE SWEETING, J.S.C.		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> X OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN				