# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

***Justice***

----------X

FREDERIC BURTZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY COMPANY (LIMITED),

Defendants.

----------X

**INDEX NO.** 154895/2014

**MOTION DATE** 04/27/2022

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

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

In the underlying action, plaintiff alleged that he sustained injuries after a trip and fall on a hole in a roadway at the intersection of East 59th Street and Lexington Avenue on March 7, 2013.

In a Decision and Order dated June 2, 2022, this court denied as premature a motion for summary judgment filed by defendant Empire City Subway Company (Limited) ("ECS"). A central issue in that motion sequence was whether plaintiff was able to properly identify the accident location at which he allegedly fell.

Instant Motions

Now pending before the court is a motion filed by Consolidated Edison Company of New York, Inc. ("Con Edison") seeking an order granting summary judgment in favor of Con Edison, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, and dismissing the complaint

and any and all cross-claims against Con Edison, as there are no triable issues of fact or law as to Con Edison's liability.

Also pending under this motion sequence number is a cross-motion filed by defendant The City of New York (the "City") seeking an order, pursuant to CPLR 3211(a)(7), dismissing plaintiff's complaint against the City for failure to comply with General Municipal Law ("GML") §§50-e(2) and 50-e(5).

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. 1st 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]).

Per the New York Court of Appeals, "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction […] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties with Respect to Con Edison's Motion

In its motion, Con Edison argues that it did not perform any excavation or repair work in the crosswalk of East 59th Street and Lexington Avenue, between the northwest ("NW") and southwest ("SW") corners of the intersection (hereinafter "Crosswalk 1") and that neither Con Edison nor its contractors were involved in any construction activity or projects where plaintiff's accident allegedly occurred.

In support of this argument, Con Edison submits the deposition transcript (NYSCEF Document #69) of Con Edison's Specialist, Vicki Cheung, who testified on September 11, 2019, about, *inter alia*, the results of a records search that had been performed by her colleague, Jennifer Grimm. Con Edison argued that the search was for DOT permits, Opening Tickets, Paving orders, Corrective Action Requests (CARs), Notice of Violations (NOVs), and Emergency system control tickets for the two-year period, prior to and including March 7, 2013. Con Edison argues that this search was for "the roadway between the northwest and southwest corners of East 59th Street and Lexington Avenue" and that the results of this search revealed that Con Edison was not involved in any construction activity for such roadway. Con Edison also submitted the that were the results of such search records (NYSCEF Document #70).

In opposition, plaintiff argues, first, that Con Edison had improperly limited its search to Crosswalk 1, when in fact Con Edison should have also searched for records pertaining to the crosswalk between the Northwest ("NW") and Northeast ("NE") corners (hereinafter "Crosswalk 2").

Plaintiff argues, second, that the records produced by Con Edison as a result of its own search show two different ticket numbers with respect to work performed by Con Edison at the Intersection: MEl1009894, received on May 14, 2011, and ME11010960, received on May 31, 2011.

In Reply, Con Edison argues that ticket ME11009894 concerns the southwest corner of the Intersection, and ME11010960 concerns the northeast corner of the Intersection. Con Ed argues that neither of these tickets could have been for the location where plaintiff's accident allegedly occurred, because plaintiff stated that he fell after taking only one step off the NW curb. Con Ed further argues that the search performed by Ms. Grimm had extended 30 feet outwards from Crosswalk 1, which means that even if plaintiff actually fell taking one step into Crosswalk 2, the search would have covered the accident location. In support of this argument, Con Edison attached a sworn affidavit by Jennifer Grimm, (NYSSCEF Document #94), who had performed the records search. The affidavit stated, in part:

> 4. On April 21, 2016, I completed a search of Con Edison documents in connection with this litigation. My search was for opening tickets, permits, paving orders, emergency control tickets, corrective action requests and notices of violation created from March 7, 2011, up to and including March 7, 2013, for the roadway between the northwest and southwest corners of East 59th Street and Lexington Avenue, New York, NY, as this was the location provided by plaintiff's attorney in their Bill of Particulars and accompanying photographs.
>
> *5. This search includes any work performed by Con Edison, 30 feet in all directions of the intersection of East 59th Street and Lexington Avenue.*
>
> […]
>
> 8. Con Edison's record search produced zero (0) records relating to any excavation work completed on the roadway between the northwest and southwest corners of East 59th Street and Lexington Avenue.
>
> *9. Additionally, the record search produced zero (0) records relating to any excavation work completed on the roadway between the northwest and northeast corners of East 59th Street and Lexington Avenue.*

10. Other than these records, there were no other Con Edison records for work or complaints for plaintiff's alleged accident location.

Arguments Made by the Parties with Respect to the City's Motion

In its motion, the City argues that plaintiff failed to comply with GML §50-e (2). Specifically, the City argues that plaintiff's testimony at his 50-h hearing and at his deposition, conflicts directly with the location described in his Notice of Claim. The City contends that plaintiff failed to adequately identify the location at which his alleged accident occurred, and despite several years of litigation, plaintiff failed to identify the condition or defect that allegedly caused the accident. Additionally, the City argues that plaintiff's failure to adequately provide the location of his alleged March 7, 2013 accident prejudiced the City in that it conducted a timely investigation of the wrong location and was deprived of preparing a timely defense based on the correct location. Further, plaintiff's failure to identify with specificity what caused his accident, makes it impossible for the City to render a defense.

In opposition, plaintiff's counsel admits that plaintiff made errors in his testimony, and argues that plaintiff is vision impaired, so the court should disregard these errors. Counsel stated:

> 9. At his deposition, Mr. Burtz mistakenly testified that he was crossing Lexington Avenue and walking east at the time of his accident. […]
>
> […]
>
> 16. There is no need for Mr. Burtz to submit an affidavit in this action to confirm that the Notice of Claim and prior pleadings are correct.
>
> 17. Unfortunately but admittedly, there may be an issue as to Mr. Burtz's accuracy at his deposition and, therefore, his credibility. […]

Conclusions of Law

Here, the alleged accident occurred more than nine years ago, on March 7, 2013, and the complaint was filed more than eight years ago, on May 19, 2014. Despite the ample passage of time, the location of the accident remains unclear on this record.

The Notice of Claim and the complaint each provide that the accident occurred in Crosswalk 1. Yet, plaintiff testified under oath, and on two different occasions that he was walking "east" at the time he fell, which would place him in Crosswalk 2. Plaintiff has failed to address the conflict that exists on this record between plaintiff's pleadings and plaintiff's testimony. Plaintiff did not correct his testimony at the 50-h hearing or at the deposition, and plaintiff did not submit an errata sheet after either transcript was issued. Plaintiff has not provided further clarifying testimony; submitted a sworn affidavit to clarify the accident location; submitted photos to clarify the accident location; submitted a map to clarify the accident location; or taken any other action to clarify the location of the accident. Plaintiff's counsel cannot now, through his own Affirmations, attempt to clarify, amend, or change plaintiff's sworn testimony, as counsel has no personal knowledge of the accident and counsel's own version of where the accident occurred constitutes inadmissible hearsay.

The record shows that this lack of clarity regarding the location has prejudiced the defendants, as they have no way to proceed in this action without knowing the exact location of the alleged accident. This is evidenced by the fact that when Con Edison filed a motion for summary judgment on the basis that Con Edison performed no work on Crosswalk 1, plaintiff opposed said motion, in part, on the grounds that the accident didn't necessarily occur in Crosswalk 1, and may have occurred in Crosswalk 2. Specifically, plaintiff argued in counsel's Affirmation in opposition to Con Edison's motion:

> 5. Defendant's Motion for Summary Judgment should be correctly denied […]
>
> 6. By its own admission, Defendant, CON ED, performed a search for DOT permits, Opening Tickets, Paving orders, Corrective Action Requests (CARs), Notice of Violations (NOVs), and Emergency system control tickets for the two-year period, prior to and including March 7, 2013, for the roadway located between the northwest and southwest corner of East 59th Street and Lexington Avenue, New York, NY. […].
>
> […]
>
> 11. On June 2, 2022, this Court issued a Decision and Order denying the motion for summary judgment made by Defendant, ECS, in this matter. […]
>
> 12. In its decision, this Court identified that there were two (2) possible crosswalks in which this accident could have occurred based on the evidence adduced thus far in discovery. […]
>
> 13. *Based on this Court's aforementioned decision, Plaintiff, at a minimum, will need to conduct further discovery regarding "Crosswalk 2," which would be the crosswalk between the northwest and northeast corners of the subject intersection. Plaintiff would require from Defendant, CON ED, search for and production of DOT permits, Opening Tickets, Paving orders, Corrective Action Requests (CARs), Notice of Violations (NOVs), and Emergency system control tickets for the two-year period, prior to and including March 7, 2013, for the roadway located between the northwest and northeast corner of East 59th Street and Lexington Avenue, New York, NY. Thereafter, an additional deposition of Defendant, CON ED, would be necessary relating to this search and production.*

"The requirements of General Municipal Law § 50–e(2) that a notice of claim set forth 'the place where the claim arose,' are met when the notice describes the location with sufficient particularity to enable the defendant to locate the alleged defect and to conduct a meaningful investigation so as to assess the merits of the claim." (Miles v City of New York, 173 AD2d 298 [1st Dept 1991]). Here, as noted above, the alleged accident occurred more than nine years ago; the complaint was filed more than eight years ago; and the 50-h hearing at which plaintiff testified that he was walking "east" occurred more than seven years ago. Moreover, plaintiff's deposition, at which plaintiff's counsel admitted he made errors in testifying was held more than six years ago. In a previous Decision and Order, this court determined that the accident location was unclear. Now, three months later, the record remains unchanged in that plaintiff's pleadings and

testimony remain in conflict, and plaintiff has taken no steps to resolve the conflict despite having had ample time to do so.

Finally, plaintiff's counsel argues, "This Court must also take into consideration that Mr. Burtz is legally blind and the applicable case law." Counsel cites Clark v. Jay Realty Corp., 94 A.D.3d 635 (1st Dept. 2012), Narvaez v. 2914 Third Ave. Bronx, LLC, 88 A.D.3d 500(1st Dept. 2011), and Tiles v. City of New York, 262 A.D.2d 174 (1st Dept. 1999). Here, there is no dispute that plaintiff is vision impaired, and in fact, shortly before the accident, plaintiff had left the Lighthouse, which, according to plaintiff, is an organization that assists those with vision impairments. However, as the City correctly argues, the cases cited by plaintiff's counsel are ones where the plaintiffs are unable to identify with certainty the *type* of defect that caused their injury, but there is no argument over the *location* where the accident occurred. In contrast, in the current action, what is at issue is the location where plaintiff fell.

This court finds that plaintiff has failed to comply with the notice requirement of GML §50-e. *See also* Taylor v New York City Hous. Auth., 40 AD3d 481 (1st Dept 2007) (where the First Department found that defendant was unable to conduct a timely investigation, in part because plaintiff testified, at his General Municipal Law § 50–h hearing and his deposition, as to the wrong accident location; the First Department found that such circumstances warranted denial of the motion to amend and dismissal of the complaint); Rodriguez v City of New York, 38 AD3d 268 (1st Dept 2007) (where the First Department upheld dismissal of the complaint in part because the injured plaintiff's § 50–h testimony was "vague," and the "obscure" photographs provided by her two years after service of the notice of claim failed to provide any assistance in identifying the location); Reyes v City of New York, 281 AD2d 235 (1st Dept 2001) (where the First Department held that the action was properly dismissed as against defendants City and MTA, in part because

plaintiff's § 50–h hearing testimony, taken some four months after service of the notice of claim, was "vague," and "the obscure photographs produced thereat" failed to offer any assistance in identifying the correct location of the accident); Roberson v New York City Hous. Auth., 89 AD3d 714 (2nd Dept 2011) ("While there is nothing in the record to indicate that the original notice of claim was prepared and served in bad faith, the inconsistent and varying descriptions of the nature of the claim and manner of the accident contained in the original notice of claim, the plaintiff's testimony at the municipal hearing, the complaint, the proposed amended notice of claim, and the plaintiff's affidavit in support of her motion, prejudiced the defendant's ability to conduct a meaningful and timely investigation […] Accordingly, the Supreme Court should have denied the plaintiff's motion for leave to amend the notice of claim and should have granted the defendant's cross motion for summary judgment dismissing the complaint for failure to comply with General Municipal Law § 50–e(2)"); Harper v City of New York, 129 AD2d 770 (2nd Dept 1987) ("Significantly, the plaintiff's original notice of claim, which described the alleged defect as a 'hole in the street' was materially contradicted by the plaintiff's testimony at the Comptroller's hearing in which she described the alleged defect as a raised crack around a manhole. Thereafter, the plaintiff's Comptroller's hearing testimony was permitted to stand in contradiction to her original notice of claim for a period of five years […] considering the material discrepancies among the plaintiff's descriptions of the alleged defect, we find that the defendant will be prejudiced if the plaintiff's application for leave to serve an amended notice is now granted").

Conclusion

For all of the aforementioned reasons, it is hereby:

**ORDERED** that, the City's cross-motion dismissing the complaint, with prejudice, as against the City for failure to comply with General Municipal Law §§50-e is GRANTED; and it is further

**ORDERED** that, consistent with the findings made herein, Con Edison's motion dismissing the complaint and all cross-claims against it is GRANTED; and it is further

**ORDERED** that this case, and any pending or subsequent motions and proceedings are transferred to a General IAS part, as the City is no longer a defendant in this action and no parties, to the extent that any are remaining, are represented by the New York City Law Department, the Office of the Corporation Counsel.

**9/22/2022**
**DATE**

**J. MACHELLE SWEETING, J.S.C.**

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