

Callahan v City of New York

2023 NY Slip Op 31224(U)

April 14, 2023

Supreme Court, New York County

Docket Number: Index No. 157879/2016

Judge: J. Mabelle Sweeting

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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. J. MACHELLE SWEETING PART 62

Justice

-----X

MARLENE DODES CALLAHAN,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,

Defendants.

-----X

THE CITY OF NEW YORK

Third-Party Plaintiff,

-against-

CARLO LIZZA AND SONS PAVING, INC.

Third-Party Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595305/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

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

In the underlying action, plaintiff alleges that she sustained personal injuries as a result of a trip and fall incident that occurred on November 30, 2015, at the crosswalk where East 90th Street intersects with Lexington Avenue in New York County, New York State.

In an earlier Decision dated March 9, 2021 (NYSCEF Doc. 64), the undersigned denied, as premature, Motion Sequence #002 filed by defendant Consolidated Edison Company of New York, Inc. (“Con Ed”).

Pending now before the court is Motion Sequence #003, in which Con Ed again seeks an order, pursuant to CPLR 3212, granting summary judgment and dismissing plaintiff's Verified Complaint and all cross-claims against Con Ed on the ground that there are no triable issues of fact against Con Ed.

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]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Con Ed argues that it did not own, control or repair the roadway abutting the subject property where the alleged accident took place, and that Con Ed has shown, through the testimony of its employees, that Con Ed did not perform any work at the subject incident location prior to or contemporaneously with the accident. As such, Con Ed argues, it should not be held liable for plaintiff’s alleged injuries. In support of these arguments, Con Ed submits, *inter alia* the sworn Affidavit of Yesenia E. Campoverde (NYSCEF Doc. 82), which states, in part:

3. In connection with the above-captioned action, a record search was conducted for work performed at the intersection of Lexington Avenue and East 90th Street in New York, New York, more specifically the crosswalk running north to south connecting 90th Street. for a two (2) year period prior to and including the date of incident: November 30, 2013 to November 30, 2015.

4. After reviewing the records, I attest there were no records recovered to indicate that neither Con Edison nor its contractors performed any work on the crosswalk at the aforesaid location for the stated time period.

Con Ed also submits the deposition transcript of Jefferson Wu, who was deposed on August 15, 2022 (NYSCEF Doc. No. 83). Mr. Wu testified that Con Ed had performed a records search for “DOT permits, opening tickets, paving orders, corrective action requests (“CARS”); notices of violations (“NOVs”) and emergency control system tickets” (p. 10).¹ Mr. Wu testified that the results of the search consisted of only “one DOT permit” (p. 10), and that “the permit that was found by Con Edison is M012014023012” (p. 30). Mr. Wu testified that there was no “opening ticket,” which meant that even though the permit was issued to Con Ed, there was no work actually performed under the permit (p. 12-13).

Mr. Wu was shown a copy of a document, (Bates Stamp Number 176), from the City’s discovery response (p. 27-28). Mr. Wu testified that he had not seen the document before (p. 28), and agreed that the City document indicated that there was an inspection on November 14, 2015 for permit number M012013336024, with the permittee as Con Edison (p. 28), for location details “East 90th Street, 3rd Avenue, Lexington Avenue” (p. 29). Mr. Wu agreed that this permit, produced by the City, did not appear in Con Ed’s own records searches (p. 28) and that he did not know why the City’s search for records would show different permits than Con Ed’s search for records (p. 28-29).

Mr. Wu also testified that the Con Ed records search was performed by Yesenia Campoverde and not by Mr. Wu himself (p. 9-10). Mr. Wu did “not know” why no work was performed under permit M012014023012 (p.13). Mr. Wu also did “not know” whether any type of documentation existed at Con Ed in situations where Con Ed obtained a permit but chose not to perform work under it (p. 13). Mr. Wu was asked, “Would there be any work that could have occurred at this location, the location that was searched for by Con Edison, which was outside the

¹ The page numbers referenced herein are to the deposition transcript NYSCEF Doc. No. 83.

scope of the search that was performed?,” and Mr. Wu replied, “I don’t know” (p. 13-14). Mr. Wu was asked, “Besides those documents that you searched for, does Con Ed maintain any other types of documents that could pertain to roadway paving work?,” and Mr. Wu replied, “That I don't know” (p. 22). The following exchange also occurred (p. 25-26):

Q. Besides the corrective action and the notice of violation, do you ever see any other types of documents that are created after the work starts?

A. Not to my knowledge.

Q. Do you know if that is because Con Edison does not maintain those document or if it's -- or is that because it's outside the scope of the results of your search?

A. I don't know.

Plaintiff argues in opposition that the above deposition testimony raises questions of fact as to whether Con Ed actually performed work at the accident location. Specifically, plaintiff argues that the records searches performed by Con Ed were incomplete, because they did not include the permit that had been issued to Con Ed and that had been produced by defendant City of New York (the “City”). Plaintiff also argues that Mr. Wu’s own testimony, establishes that additional records may exist with respect to work performed by Con Ed at the accident location.

This court finds, as plaintiff correctly argues, that Con Ed has failed to meet its burden. Here, it is undisputed that the City produced a permit, that had been issued to Con Ed for the accident location, yet this permit (M012013336024) did not appear in Con Ed’s own search for records.


Mr. Wu’s testimony raises a number of material questions on whether documentation exists at Con Ed in situations where Con Ed obtained a permit but chose not to perform work under it; whether work occurred at the accident location that fell outside the scope of the records search that was performed; whether Con Ed maintains other types of documents, aside from the documents

searched for, that could pertain to roadway paving work; and whether Con Ed maintains other types of documents that are created after work starts at a certain location.

As stated above, summary judgment will only be granted if there are no material, triable issues of fact, and the proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence of any material issues of fact. This court finds that Con Ed has not met its burden.

Accordingly, it is hereby

ORDERED that Con Ed’s motion is DENIED.

<u>4/14/2023</u>			
DATE		J. MACHELLE SWEETING, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		