

Levenson v Department of Env'tl. Protection

2023 NY Slip Op 31682(U)

May 19, 2023

Supreme Court, New York County

Docket Number: Index No. 153262/2018

Judge: Lori S. Sattler

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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. LORI S. SATTLER PART 02TR

Justice

-----X

SCOTT LEVENSON,

Plaintiff,

- v -

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
DEPARTMENT OF TRANSPORTATION, THE CITY OF
NEW YORK, TIME WARNER CABLE NEW YORK CITY,
C.A.C. INDUSTRIES INC., CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC,

Defendant.

-----X

TIME WARNER CABLE NEW YORK CITY

Plaintiff,

-against-

HYLAN DATACOM & ELECTRICAL INC., HYLAN DATACOM
& ELECTRICAL LLC, OLD HDE INC.

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595521/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 141, 142, 143, 144, 145, 146, 147, 148, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

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

In this personal injury action, Defendant C.A.C, Industries, Inc. (“CAC”) moves for an Order pursuant to CPLR 3212 dismissing Plaintiff’s Complaint and all cross-claims and counterclaims against it. Plaintiff Scott Levenson (“Plaintiff”) opposes the motion.

This action was commenced to recover damages due to a purported slip and fall on March 15, 2017. Plaintiff alleges that he tripped and fell in the road at the intersection of West 55th Street and Seventh Avenue, in the County of New York. Plaintiff asserts that his injuries

were sustained due to a hole in the roadway near a catch basin on the northeast corner (NYSCEF Doc. 144).

In a decision dated September 12, 2022 (Kim, J.), summary judgment was granted in favor of the City of New York, the Department of Environmental Protection (“DEP”) and the Department of Transportation of the City of New York (“DOT”). Thereafter, this matter was transferred to a general IAS part. Although CAC tried to seek summary judgment in the prior judgment, the Court found that a purported cross-motion was the improper vehicle to seek relief against Plaintiff, a non-moving party (NYSCEF Doc. 132).

CAC contends that Victoria Windis-Rigos, a risk manager for the company, had performed a search of CAC’s work records and found that CAC did not perform any work at or near the location of the alleged accident. It therefore claims that Plaintiff is unable to demonstrate that it caused or created the alleged defect or that there was any negligence on the part of CAC in Plaintiff’s accident.

Plaintiff opposes the motion. He contends that depositions have not been completed and that CAC only produced an affidavit of Ms. Windis-Rigos. He further points to DOT and DEP records annexed to the prior summary judgment motion regarding the location of the accident. Plaintiff asserts that these records and claims undermine CAC’s contention that it never worked at West 55th Street and Seventh Avenue between March 15, 2015 and March 15, 2017. Plaintiff notes that Ms. Windis-Rigos did identify projects that CAC performed for Con Edison, some at 55th Street between Fifth and Sixth Avenues and others between Eighth and Ninth Avenues. She further located information that work was conducted at 162 West 56th Street between Sixth and Seventh Avenues. Plaintiff contends that the City’s records contradict Ms. Windis-Rigos’s

affidavit because they “amply” demonstrate that CAC performed work at West 55th Street and Seventh Avenue.


On a motion for summary judgment, the movant “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 issue of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If this initial showing is made, the burden shifts to the opposing parties “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact” such that trial of the action is required (*Alvarez*, 68 NY2d at 324). A court’s function on summary judgment is issue finding rather than issue determination (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Summary judgment is “considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Lebedev v Blavatnik*, 193 AD3d 175 [1st Dept 2021], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

By producing the affidavit of CAC’s risk manager, Ms. Windis-Rigos, stating that a search has been performed and no work occurred in the area, CAC has tendered sufficient evidence to demonstrate the absence of a material issue of fact. Thus, the burden shifts to Plaintiff. Plaintiff submits records submitted in the prior summary judgment motion which show that several permits were issued to CAC to perform work “TO OPEN THE ROADWAY AT” Seventh Avenue and West 55th Street and West 55th Street between Sixth and Seventh Avenues (NYSCEF Doc.163). In reply, CAC contends that the issuance of a permit does not mean that work was performed at the location in question. It claims there are no records showing that work was performed there, no witnesses, and no city inspection reports that work was performed by CAC. It further asserts that the issuance of a permit for the work does not “amply demonstrate” that work was ever performed pursuant to such permits.

The Court finds that there is an issue of fact as to whether CAC did perform work in the area where Plaintiff fell, requiring denial of the motion. This is demonstrated by the production of work permits for work to be performed in the area in question during the relevant time period. Plaintiff has indicated that he has not had the opportunity to depose Ms. Windis-Rigos. In a decision dated February 2, 2023, this court extended the date to file the Note of Issue until September 29, 2023. Accordingly, the parties are directed to appear for a conference on June 20, 2023 at 9:30 am at 60 Centre Street, Room 212 so that any outstanding discovery issues may be addressed.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

<p>5/19/23 DATE</p>					 <hr/> <p>LORI S. SATTLER, J.S.C.</p>
<p>CHECK ONE:</p>	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER	
<p>APPLICATION:</p>	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
<p>CHECK IF APPROPRIATE:</p>	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	