Levenson v Department of Envtl. 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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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:	HON. LORI S. SATTLER	PART	02TR	
	Justice			
	X	INDEX NO.	153262/2018	
SCOTT LEVENSON,		MOTION DATE	03/20/2023	
	Plaintiff,	MOTION SEQ. NO.	004	
	- 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,		DECISION + ORDER ON MOTION		
	Defendant.			
	X			
TIME WARN	ER CABLE NEW YORK CITY	Third-Party Index No. 595521/2020		
	Plaintiff,	1110EX 110. 333321/2020		
	-against-			
	ACOM & ELECTRICAL INC., HYLAN DATACOM CAL LLC, OLD HDE INC.			
Defendant. X				
	X			
	e-filed documents, listed by NYSCEF document nu , 148, 152, 154, 155, 156, 157, 158, 159, 160, 161,			
were read on	this motion to/forJU	JUDGMENT - SUMMARY		
In this personal injury action, Defendant C.A.C, Industries, Inc. ("CAC") moves for an				
Order pursua	nt to CPLR 3212 dismissing Plaintiff's Compla	int and all cross-cla	ms and	
counterclaims	s against it. Plaintiff Scott Levenson ("Plaintiff	") opposes the motion	on.	
This a	action was commenced to recover damages due	to a purported slip a	nd fall on	
March 15, 20	17. Plaintiff alleges that he tripped and fell in t	he road at the inters	ection of West	
55th Street ar	nd Seventh Avenue, in the County of New York	. Plaintiff asserts th	at his injuries	
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[* 1]

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

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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]).

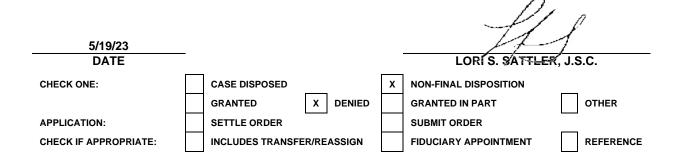
By producing the affidavit of CAC's risk manager, Ms. Windis-Rigos, stating that a search has been performed and no work occurred in the area, CAC has tendered sufficient evidence to demonstrate the absence of a material issue of fact. Thus, the burden shifts to Plaintiff. Plaintiff submits records submitted 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.

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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.



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