Mazzella v City of New York
2023 NY Slip Op 33273(U)
September 22, 2023
Supreme Court, New York County
Docket Number: Index No. 156935/2014
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** — *Justice* **PART 58**

---X

ERIC MAZZELLA,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, WELSBACH ELECTRIC CORPORATION,

Defendants.

---X

INDEX NO. 156935/2014

MOTION DATE 08/01/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179

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

By notice of motion, defendant Welsbach Electric Corp. moves for an order granting it summary judgment and dismissing plaintiff's claim and any cross-claims against it. Only third-party defendant, Network Infrastructure, Inc. (NT), opposes.

I. BACKGROUND

On November 1, 2013, plaintiff was injured when he tripped and fell on a hole in the street at the edge of Eighth Avenue and near 45th Street, in Manhattan (NYSCEF 170). Plaintiff sued defendants the City of New York and the City's Department of Transportation (collectively, the "City"); Consolidated Edison Company of New York, Inc. (Con Ed); and Welsbach (NYSCEF 2). Con Ed then commenced a third-party action against NT (NYSCEF 47).

In November 2016, Welsbach moved for summary judgment on substantially the same grounds as it does here. The motion was denied, without prejudice, for the following reasons:

(1) Issues of fact remained as to whether Welsbach performed any work at the subject location, as inspection reports contradicted its assertion that it did not work in that area;

(2) There was also a question as to the authenticity of the permits issued to Welsbach; and

(3) The motion was premature as no depositions had been taken and discovery was not complete.

(NYSCEF 166).

On January 23, 2018, the City's motion for summary judgment was granted, and the case was then transferred from a City Part to this Part. Discovery ensued, and a note of issue was filed.

II. MATERIAL FACTS

A. Statement of material facts

It is undisputed that plaintiff failed to file a statement of material facts, pursuant to 22 NYCRR 202.8-g, and instead relies on a recitation of the facts set forth in its counsel's affirmation (NYSCEF 158). 22 NYCRR 202.8-g(a) provides that the court may direct that a party moving for summary judgment annex to its motion papers a statement of material facts which, movant contends, are undisputed.

Here, the case was transferred to this Part in this midst of discovery, and no discovery order issued thereafter advises the parties that a statement of material facts is required. However, the Part's Rules, published on the court's website, provide that a statement of material facts is required. Nevertheless, the penalty for failing to comply with the Rule is left to the judge's discretion, and in this case, as Welsbach, in its counsel's affirmation, set forth facts based on

testimony and other evidence in the record, its failure to file a statement of material facts is excused, especially as NT does not assert that it was prejudiced by Welsbach's omission (*see Hart v City of Buffalo*, 218 AD3d 560 [4th Dept 2023] [excusing plaintiff's failure to submit counter-statement of material facts as its counsel's affidavit was functional equivalent of statement, and defendant was not prejudiced thereby]; *see also Cole v Hoover*, 217 AD3d 534 [4th Dept 2023] [moving party's failure to submit statement of material facts did not compel court to deny motion]).

B. Material facts

In an affidavit submitted in support of the motion, Welsbach's project manager states that Welsbach had a contract with the City to perform certain services, effective from March 2011 to October 2013 (NYSCEF 160). The project manager avers that he searched Welsbach's records for the location of plaintiff's accident beginning two years before and up to the accident date, and found that 15 street opening permits had been issued for the purpose of installing traffic signals and underground conduit. However, Welsbach did not perform any work at the accident location because Con Ed had put a hold on Welsbach's work there, and even though Welsbach obtained new permits and the hold was lifted, it did not send any employees there, nor did it perform any work there (*id.*).

Annexed to the affidavit are copies of the 15 permits, which cover the period July 14, 2012 through September 20, 2013, and expired more than a month before the accident occurred. The project manager states, and the permits confirm, that no work was performed on any of the permits (*id.*).

At his deposition, the project manager testified that if Welsbach had performed work at the location at issue, there would have been time and work records, and invoice and payment records, and he did not find any during his search of Welsbach's records (NYSCEF 171).

III. DISCUSSION

It is well settled that a party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [*citations omitted*]). In considering such a motion, the court must view the facts in the light most favorable to the non-moving party (*See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the movant fails to meet this burden, the motion must be denied despite the sufficiency of the opposing papers. If the movant meets its burden, it becomes incumbent on the non-moving party to raise a material issue of fact (*See*, *Vega*, *supra*). "The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]).

A. Contentions

Welsbach relies on its project manager's affidavit and testimony and the permits to establish that it performed no work at the location of plaintiff's accident before the accident. It contends that records resulting from an inspection made by the New York City Department of Transportation, called Highway inspections and Quality Assurance (HIQA) records, of work done pursuant to a permit are irrelevant as they do not constitute proof that any work was performed (NYSCEF 159).

Moreover, Welsbach observes that NT's witness testified at his deposition that NT exclusively performed work at the accident location before the accident, and that Welsbach only

performs work within street intersections and plaintiff testified that he fell in an area outside of an intersection (*id.*).

NT argues that as Welsbach's prior summary judgment motion was denied based on the same grounds at issue here, this motion too should be denied. It also maintains that the HIQA records, which indicate that Welsbach's work had passed inspection (NYSCEF 177), raise a triable issue as to whether it performed work at the accident location (NYSCEF 176).

In reply, Welsbach asserts that its project manager's testimony is unrebutted, that NT's testimony establishes that only NT performed work in the area of the accident, and that HIQA records are insufficient proof that Welsbach performed work at the location (NYSCEF 178).

B. Analysis

A contractor moving for summary judgment in a trip and fall case has the burden of showing that it did not cause or create the dangerous condition at issue (*Pizzolorusso v Metro Mech., LLC*, 205 AD3d 748 [2d Dept 2022], and/or that it did not perform work at the location of the accident (*Downing v J. Anthony Enter., Inc*., 189 AD3d 1541 [2d Dept 2020]).

Here, Welsbach's project manager's testimony that he found no records establishing that Welsbach performed work at the subject location, along with the permits which all reflect that no work was performed pursuant to the permits, sufficiently demonstrate, prima facie, that Welsbach did not cause or create the dangerous condition (*see Flores v City of New York*, 29 AD3d 356 [1st Dept 2006] [contractor established entitlement to dismissal based, in part, on deposition testimony of its project manager that search of company's records did not show that it did any work at subject location during two years before accident]; *Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [contractor made prima facie showing for dismissal as its manager's search of company records found no records of work performed at location before

accident, and timesheets showed employees worked in different location during month before accident]).

The HIQA records are insufficient to raise a triable issue, as they do not show that Welsbach performed work at the accident location (*see Rolon v City of New York*, 2013 WL 5309556 [Sup Ct, New York County 2013] [HIQA record was not evidence that work was performed under permit]). Moreover, NT's witness testified that only NT performed work at the location before plaintiff's accident. NT thus fails to raise a triable fact in opposition.

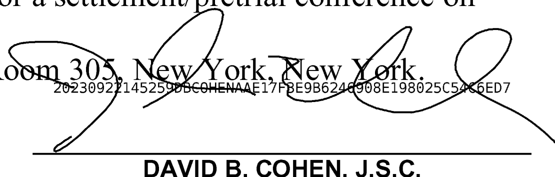
Finally, there is no merit to NT's argument that the denial of Welsbach's summary judgment constitutes the law of the case or compels the denial of the instant motion (*see 47 E. 34th St. (NY) L.P. v Bridgestreet Worldwide, Inc.,* 2023 WL 6150416 [1st Dept 2023] [denial of summary judgment motion is not adjudication on merits, and thus law of case did not apply]; 97 NY Jur 2d, Summary Judgment, Etc. § 86 [2023] [denial of summary judgment establishes nothing except that summary judgment was not warranted at that time]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by Welsbach Electric Corp. is granted, and the complaint and all cross-claims asserted against it are severed and dismissed, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remaining parties appear for a settlement/pretrial conference on October 25, 2023, at 11:00 a.m. at 71 Thomas Street, Room 305, New York, New York.



9/22/2023
DATE

DAVID B. COHEN, J.S.C.

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