

Simon v Neil Rick Constr.

2007 NY Slip Op 31221(U)

April 24, 2007

Supreme Court, Kings County

Docket Number: 0037953/2000

Judge: Sylvia O. Hinds-Radix

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April, 2007.

P R E S E N T:

HON. SYLVIA HINDS-RADIX,

Justice.

-----X

PATRICIA SIMON,

Plaintiff,

Index No. 37953/00

- against -

NEIL RICK CONSTRUCTION, et al.,

Defendants.

-----X

The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 _____
Opposing Affidavits (Affirmations) _____	2-3 _____
Reply Affidavits (Affirmations) _____	4 _____
Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Upon the foregoing papers, defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims as asserted against it.

Plaintiff Patricia Simon (plaintiff) commenced the instant action seeking to recover damages for personal injuries she allegedly sustained on August 6, 1999 when she tripped and fell in a "hole" in the public roadway. In the complaint, plaintiff alleges, among other

things, that the various defendants performed “repairs and/or construction work in a careless, reckless and negligent manner” thus creating the alleged defect that caused her to fall. In the bill of particulars, plaintiff claims that she fell in the roadway near the “curb” in front of the premises located at 63 Decatur Street in Brooklyn. At her deposition, plaintiff testified that the hole was located in the roadway between 61 Decatur Street and 63 Decatur Street. Plaintiff also testified that she had previously seen a Con Edison tent in the roadway near the front of 63 Decatur Street. In her affidavit, plaintiff states that she had seen the Con Edison tent and employees doing work in the roadway near the location of her accident about two weeks before it occurred.

In support of its motion, Con Edison submits the affidavit of Genevieve Martinez (a Senior Office Assistant-A), in which she explains that her job duties include performing “searches for records including opening tickets, paving orders and emergency tickets.” In her affidavit, Ms. Martinez avers that she performed a search for “opening tickets, paving orders and emergency tickets” of any work performed by Con Edison on the “sidewalk, curb and roadway in front of 63 Decatur Street” for a period of two years prior to and including August 6, 1999. Ms. Martinez further avers that she “did not locate any work records that would indicate excavation work by Con Edison or its subcontractors for the above address and time period.” As such, Con Edison argues that it is entitled to summary judgment as a

matter of law on the ground that no triable issue of fact exists as to whether it had actual or constructive notice, or that it created the alleged defect.¹

In opposition, defendant the City of New York (the City) contends that Con Edison's summary judgment motion should be denied in its entirety on the ground that triable issues of fact exist as to whether Con Edison caused or created the alleged defective condition in the roadway. The City proffers a street opening permit (#BO11999215-101) issued to Con Edison, valid from August 6, 1999 to August 20, 1999, permitting it "to open the roadway" on Decatur Street from Throop Avenue to Tompkins Avenue for the purpose of performing "electric/communications" repair.² Additionally, the City asserts that Con Edison has failed to establish its entitlement to judgment as a matter of law, thus preventing an award of summary judgment to it.

In opposition, plaintiff likewise argues that Con Edison has failed to submit sufficient evidence in admissible form to satisfy its initial burden of proof entitling it to judgment as a matter of law. In the alternative, plaintiff also argues that she has submitted sufficient evidence to raise a triable issue of fact preventing an award of summary judgment to Con

¹ Additionally, Con Edison submits a letter dated June 2, 2006 sent to plaintiff requesting production of certain discovery items, including the transcript of plaintiff's 50-H hearing. Con Edison claims that it has not yet received the requested items. However, in opposition to the motion, plaintiff's counsel states in his affirmation that his office has since provided Con Edison with the requested items and that it does not possess a copy of the 50-H transcript.

² At her deposition, plaintiff testified that she fell in front of 63 Decatur Street between Throop Avenue and Tompkins Avenue.

Edison. Plaintiff relies upon her deposition testimony that prior to her accident she saw Con Edison workers in the roadway near the location of her accident. In addition, plaintiff proffers her own affidavit in which she avers that, two weeks prior to her accident, she saw “a tent with a Con Edison logo” along with “Con [Edison] employees were doing work” at the location where she fell. Plaintiff also submits the deposition testimony of Sherry Johnson (a principal administrative associate with the City), who testified that her office conducted a search of the City’s records for two years prior to and including the date of plaintiff’s accident and discovered that a permit, valid from August 6, 1999 to August 20, 1999, had been issued to Con Edison “to open the roadway and/or sidewalk at Decatur Street between Troop Avenue [sic] and Tomkins [sic] Avenue for the purposes of repair electrician/communications.”

In reply, Con Edison proffers the affidavit of Lou Sandoli (an employee of Con Edison’s Law Department). In his affidavit, Mr. Sandoli avers that he conducted a search of Con Edison records for “any work performed under permit No. BO11999215-101” and he discovered that Layout 399-14093B detailed the referenced work.³ According to Mr. Sandoli, the Layout revealed that the work performed under the permit was “to replace a defective transformer in manhole TM1457, to replace primary cable in the above manhole and in manhole 3214.” Mr. Sandoli further avers that he went to “the site of 61 Decatur Street on June 16, 2006 in order to measure the area of plaintiff’s fall and determine if it was

³ Con Edison submits a copy of the Layout.

near the work in” performed as described in the Layout. Using the description of the location of the accident in plaintiff’s bill of particulars and photographs marked at her deposition, Mr. Sandoli claims that he “located manhole No. 3214, and determined that it was east of manhole 1457, adjacent to the south curb of Decatur Street and 31 feet west of Throop Avenue.” Mr. Sandoli states that, based upon his investigation, he determined that the site of the work performed by the Con Edison workers was “43 feet away” from the location of plaintiff’s fall. Mr. Sandoli further states that the work detailed in the layout indicated that it was performed “in the middle of the roadway and extended east on the south side of Decatur” whereas plaintiff alleges that she fell in front of 63 Decatur Street, which is closer to its north curb. Con Edison submits a copy of plaintiff’s notice of claim in which she avers that she fell in front of 65 Decatur Street. Con Edison points out this discrepancy and asserts that it is permitted to rely upon plaintiff’s description of the location of her accident as stated in her deposition testimony, bill of particulars and affidavit. Finally, Con Edison argues that plaintiff and the City have failed to submit any evidence in admissible form demonstrating that it created the alleged defect adjacent to the north curb at 63 Decatur Street and, as such, it is entitled to judgment as a matter of law.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (*see* CPLR 3212[b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557,

562 [1980]). Failure to make a prima facie showing of entitlement to judgment as a matter of law requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). “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” (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing to *Zuckerman*, 49 NY2d at 562). In determining the motion, a court must be mindful that “summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978], quoting *Moskowitz v Garlock*, 23 AD2d 943, 944 [1965]). Moreover, the evidence must be considered in the light most favorable to the party opposing the motion (*see Henderson v City of New York*, 178 AD2d 129, 130 [1991]). Finally, a party seeking summary judgment may not merely point to gaps in the opponent’s proof but rather must adduce affirmative evidence of its entitlement to that relief (*see Torres v Industrial Container*, 305 AD2d 136 [2003]).

Notably, “[t]o establish a prima facie case of negligence in a trip and fall case, a plaintiff is required to present proof that the defendant created, or had actual or constructive notice of, the defective condition which allegedly caused the fall” (*Labella v Willis Seafood*, 296 AD2d 382, 382 [2002]; *see also Robinson v Lupo*, 261 AD2d 525, 525 [1999]; *Katsoris v Waldbaum, Inc.*, 241 AD2d 511, 512 [1997]).

Based upon a review of the record submitted by the parties, the court finds that Con Edison has satisfied its initial burden of proof. However, in opposition, plaintiff and the City submitted sufficient evidence in admissible form to raise a triable issue of fact. The permit issued to Con Edison and valid from the date of the accident, permitted it to open the street on the block where plaintiff allegedly fell. While Con Edison has proffered Mr. Sandoli's affidavit describing the layout detailing the work performed under the permit, it has failed to demonstrate that the work on the two manholes identified in the layout was confined to an area solely outside of the location of plaintiff's fall. Accordingly, Con Edison's motion for summary judgment dismissing the complaint and any cross claims asserted against it is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. SYLVIA O. HINDS-RADIX, JSC