

Roth v City of New York

2007 NY Slip Op 31994(U)

June 22, 2007

Supreme Court, Queens County

Docket Number: 0017407/2005

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

RENEE ROTH,

Plaintiff,

- against -

THE CITY OF NEW YORK, CONSOLIDATED
EDISON, PETROCELLI ELECTRIC COMPANY,
INC., EMPIRE CITY SUBWAY CO., LTD.,
AND NICO ASPHALT PAVING, INC.

Defendants.

-----X

EMPIRE CITY SUBWAY COMPANY (LIMITED)

Third Party-Plaintiff

- against -

NICO ASPHALT PAVING, INC.,

Third Party-Defendants.

-----X

The following papers numbered 1 to 26 read on this motion by defendant Consolidated Edison for summary judgment dismissing the complaint and all cross-claims as against it, cross-motion by defendant/third-party defendant NICO Asphalt Paving, Inc. for summary judgment dismissing the complaint and all cross-claims as against it and cross-motion by defendant/third-party plaintiff Empire City Subway Co., Ltd., for summary judgment dismissing the complaint and all cross-claims as against it.

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Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendant Consolidated Edison and cross-motions by defendant/third-party defendant NICO Asphalt Paving, Inc. and defendant/third-party plaintiff Empire City Subway Co., Ltd., for summary judgment dismissing the complaint and all cross-claims as against them are denied.

Plaintiff allegedly sustained injuries as a result of slipping and falling upon ice on the roadway at the southeast corner of West 27th Street and 7th Avenue in New York County on February 16, 2003. Plaintiff alleges that as she stepped off the curb to cross from the southeast corner to the northeast corner of the street, she slipped on a large patch of thick, rough, black ice. Plaintiff further alleges that the ice was present as a result of, inter alia, the improper leveling or grading of the roadway which caused a pooling of water at that location.

In order to obtain summary judgment, the movant must make a prima facie showing that it is entitled to said relief, by tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Movants and cross-movants have failed to meet their initial burden.

Con Edison contends that it is entitled to summary judgment because there is no evidence that it created the icy roadway condition that caused plaintiff's accident. In support of its contention, it relies upon the deposition testimony of Emilio Rodriguez, a Department of Sanitation supervisor, and John Terlecki, Con Edison's chief construction inspector.

Rodriguez testified that sometimes, especially when there is a big snowfall, there is a build-up of ice along the curb at the corners, known as a "corner cap." This occurs because the snow plows are unable to swing in and clear the curbs. It is the responsibility of the Sanitation Department to remove ice from corner caps by sending out crews with picks to clear the ice.

Terlecki, in his deposition, acknowledged that Con Edison performed road work in 2001 on 7th Avenue between 26th and 27th Streets. He also stated that it was the responsibility of Con

Edison's paving inspector to make certain that the paving was graded properly. When asked if he knew how far the work was performed from the southeast curb line of 27th Street, he answered in the negative, saying that he could not be specific. When pressed on the point, he stated that it was probably three to five feet off the curb line.

Whether or not it was the responsibility of the Department of Sanitation to clear the ice from the subject location has no bearing on whether Con Edison caused or contributed to the ice formation by virtue of an improper paving of the street.

Moreover, the deposition testimony of Terlecki does not support the conclusory assertion of Con Edison's counsel that the work "did not encompass the curb line where plaintiff slipped on the ice." In the first instance, Terlecki is not certain how far from the curb line the work by Con Edison was performed. He merely opines that the work probably was performed 3 to 5 feet from the curb line. Even had he demonstrated that the excavation and paving work that Con Edison performed was located at said distance, the record on this motion and the cross-motions fails to establish precisely how far from the curb line the area where plaintiff slipped was located and thus fails to show that the area where plaintiff slipped was not where Con Edison performed work. Moreover, Terlecki's admission that the work performed by Con Edison probably came as close as three feet to the general location where plaintiff slipped raises a question of fact as to whether the ice accumulation was, in fact, causally related to the road work.

Therefore, Con Edison has failed to proffer any evidence to show that it did not perform any work at the subject location. On the contrary, its own submissions raise a question of fact as to whether the work it admits performing was a substantial factor in causing the formation of ice at the location where plaintiff fell.

Likewise, the submissions of Empire City Subway (ECS) in its cross-motion raises rather than eliminates questions of fact as to whether it created or contributed to the condition that caused plaintiff's alleged injuries. In his deposition, Heshan Asaia, project manager of ECS, testified that ECS was issued a permit to excavate the roadway to install conduit at the intersection of West 27th Street and 7th Avenue extending from the southwest corner of West 27th Street to the southeast corner of West 27th Street in March 2000. He testified that the work was, in fact, performed. He also testified that the trench that was dug came within two feet of the curb line at the southeast corner of West 27th Street and that it was a possibility that it was as close as one foot. He stated that ECS performed all the work except the paving after it was done by Nico. However, it was the responsibility of the ECS foreman to make sure that the area that was excavated was brought

back to the correct street level to match the existing conditions. ECS installs the subgrade and the concrete base and Nico then restores the top part of the paving, which is the asphalt. When asked, "So everything below the asphalt ECS is responsible to bring that to the proper levels, is that correct?" Asaia replied, "To match existing condition, yes." He also stated that both ECS and Nico perform a joint inspection. "If the trench appears to be level, no depressions, no high point, the foreman accepts the job."

Moreover, the photographs of the subject area annexed to the cross-motion clearly reveal a large pooling of water at the corner, which plaintiff testified corresponded in area to the frozen patch upon which she slipped. This pooling of water at that spot indicates that either the grading, level or slope of the street, or a depression prevented rainwater from draining properly. This Court is of the opinion that it does not require expert testimony to point out what is clearly visible to a layperson.

Likewise, Nico has failed to establish a prima facie entitlement to summary judgment as a matter of law. Since Nico admittedly performed the asphalt paving at the subject location in 2000, there is a question of fact as to whether it caused or contributed to the condition of the roadway that led to the pooling and subsequent freezing of water resulting in plaintiff's slip and fall accident. Nico merely adopts the same arguments as proffered by Con Edison in its motion. In addition, Nico relies upon the deposition testimony of its superintendent, John Denegall, who admitted that Nico performed the paving work for ECS and admitted that Nico's foreman is present at the work site from beginning to end and inspects the completed work. He also stated that an inspector from ECS also is present and performs an inspection. If the ECS inspector sees that the work was not being done properly, he has the authority to tell Nico's work crew to redo the work. Nico points out that the ECS inspector signed the paving order and argues that if he were not satisfied with Nico's work, he would not have signed off on it. This argument clearly does not rise to the level of prima facie evidence that eliminates all questions of fact.

Therefore, since movant and cross-movants have failed to establish a prima facie entitlement to summary judgment as a matter of law, this Court need not consider the sufficiency of plaintiff's opposition papers(see Marquez v. Oballe, 14 AD 3d 667 [2nd Dept 2005]).

Dated: June 22, 2007

KEVIN J. KERRIGAN, J.S.C.