

Winsten v Consolidated Edison of New York, Inc.

2009 NY Slip Op 30028(U)

January 5, 2009

Supreme Court, New York County

Docket Number: 106044/00

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden

PART II

Index Number : 106044/2000

WINSTEN, LORRAINE

vs.

CONSOLIDATED EDISON

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

ice

INDEX NO. _____

MOTION DATE 9-25-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

ad on this motion to/for Summary Judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

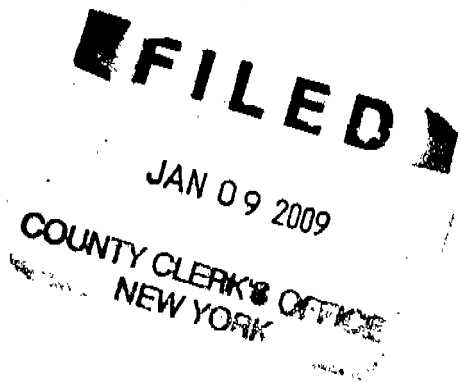
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached Memorandum Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



Dated: January 5, 2009

[Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
LORRAINE WINSTEN,

Plaintiff,

Index No. 106044/00

-against-

CONSOLIDATED EDISON OF NEW YORK, INC.,
And FELIX INDUSTRIES, INC.,

Defendants.

-----X

-----X

CONSOLIDATED EDISON OF NEW YORK, INC.,

Third-Party Plaintiff,

Index No. 591176/00

-against-

FELIX INDUSTRIES, INC.,

Third-Party Defendant.

-----X

Joan A. Madden, J.

FILED
JAN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendant Felix Industries, Inc. ("Felix") moves for summary judgment dismissing the complaint and all cross-claims against it as well as the third-party complaint. Consolidated Edison of New York, Inc. ("Con Ed") cross moves for summary judgment dismissing the complaint and all cross claims against it. Plaintiff does not oppose Felix's motion but opposes Con Ed's cross motion. For the reasons below, the motion and cross motion are granted.

Background

Plaintiff sues for injuries she allegedly sustained on

October 13, 1999, at the intersection of Third Avenue and 60th Street in Manhattan, when she tripped on a bulge in the street. The complaint identifies the area plaintiff fell as "75 feet north of the northeast corner of Third Avenue and 60th Street, approximately 8-12 feet from the curb, adjacent to a Ben & Jerry's ice cream store."

Plaintiff testified at her deposition that she had a green light to cross the street and proceeded to go around a truck that was blocking the cross walk, and fell just before the center of the roadway, when her foot got caught in the bulge causing her to fall forward. Felix contracted with Con Ed to perform excavation work on Third Avenue and that the record shows that work was performed between 59th Street and 61st Street in 1998 beginning in March and ending in May.

Felix's motion for summary judgment is based on evidence that the work it performed did not result in a bulge in the roadway and was not done in the area where plaintiff fell. Specifically, Felix relies on the deposition testimony of Felix's superintendent Charles Argo, who testified that the cuts or openings made by Felix in 1998 were restored to their normal condition, and that he took photographs of the area where the work was performed showing that the restored street was in perfect condition. Felix also relies on an affidavit from Tom Miller its Director of Risk Management and the testimony of Mario

Smith, a Con Ed record searcher, indicating that the work performed by Felix was not in the specific location where plaintiff fell.

Con Ed, which contracted with Felix to perform the work at issue, relies on the evidence submitted by Felix to support its cross motion for summary judgment. In addition, Con Ed relies on Smith's deposition testimony that his search of records for the time period two years before the accident showed that no work was performed by Con Ed or on Con Ed's behalf at the specific location where plaintiff fell.

Plaintiff does not oppose Felix's motion. However, plaintiff argues that Con Ed's cross motion is untimely and that there exist triable issues of fact as to Con Ed's liability. Specifically, plaintiff points out that the City of New York issued numerous permits to Con Ed for repair and renovation work at or near the accident site, and submits a printout of street opening permits issued to Con Ed for Third Avenue and 60th Street for the five year period prior to the accident. Plaintiff also states that a deposition witness for Con Ed provided incomplete deposition testimony as to "in house" paving performed by Con Ed, but provides no copy of the deposition transcript. In addition, plaintiff notes that photographs of the accident site show a circular manhole cover belonging to Con Ed's predecessor entity.

In reply, Con Ed asserts that its cross motion is timely

since the note of issue was not filed at the time it was made. Con Ed also asserts that the list of permits is not evidence that work was actually performed in the area, and notes that the print out shows that permits were also issued to Empire City Subway and Judlau Contracting. Additionally, Con Ed asserts that plaintiff never sought additional discovery regarding Con Ed's in-house paving and that the purportedly incomplete deposition testimony of its witness in this regard is insufficient to raise an issue of fact as to whether Con Ed created the defect at issue.

Discussion

On a motion for summary judgment, the proponent "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. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Here, both Felix and Con Ed have made a prima facie showing entitling them to summary judgment based on evidence that they were not responsible for work at the specific location where plaintiff fell. As plaintiff does not oppose Felix's motion, Felix is entitled to summary judgment dismissing all claims and

cross-claims against it.

As for Con Ed's cross motion, which was made on or about July 1, 2008, plaintiff's assertion that it was untimely is unavailing. While the note of issue was originally filed in March 2001,¹ this action was subsequently stayed for years based on a bankruptcy petition filed by Felix. After the case was restored, the parties entered into a stipulation dated December 17, 2007, which permitted plaintiff to file a note of issue on or before April 23, 2008, and provided that summary judgment motions were to be made within 120 days of filing the note of issue. However, the court records indicate that note of issue was not filed until October 20, 2008, which is after the cross motion was made by Con Ed. Thus, Con Ed's cross motion is timely.

Next, plaintiff has failed to provide evidence sufficient to raise a material issue of fact as to whether Con Ed caused or created the condition on which plaintiff fell. Specifically, the existence of permits for Con Ed to do work in the general area where plaintiff fell does not raise an issue of fact in this regard, particularly as the issuance of a permit is not evidence that work was performed. Bermudez v. City of New York, 21 AD3d 258 (1st Dept 2005). In addition, the existence of a manhole cover belonging to Con Ed's predecessor in the area where

¹Notably, defendants' depositions were taken after the initial note of issue was filed.

plaintiff fell does not raise an issue of fact in the absence of evidence connecting the manhole cover to the defect at issue.

Finally, with respect to the deposition testimony of Con Ed's witness regarding "in house" paving performed by Con Ed, there is no evidence that such paving work caused the defect on which plaintiff fell, and plaintiff does not assert that it ever sought discovery to obtain such evidence.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by Felix Industries, Inc. is granted, and the complaint, all cross-claims and the third-party complaint are dismissed, and it is further

ORDERED that the cross motion for summary judgment by defendant Consolidated Edison of New York, Inc. is granted and the complaint and all cross claims against it are dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: ~~December~~, 2008

January 5, 2009

[Signature]

J.S.C.

FILED
JAN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK