Su v City of New York
2009 NY Slip Op 32979(U)
December 21, 2009
Supreme Court, New York County
Docket Number: 101495/07
Judge: Eileen A. Rakower
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SCANNED ON 12/22/2009

[* 1]

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

PRESENT: Rakower PART 5

Index Number : 101495/2007

SU, CHARM

vs

CITY OF NEW YORK

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

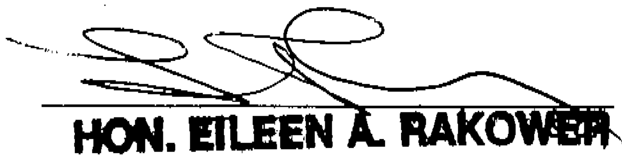
Upon the foregoing papers, it is ordered that this motion

FILED
DEC 22 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 12/21/09



HON. EILEEN A. RAKOWER

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

---X

CHARM SU,

Plaintiff,

Index No.101495/07

DECISION/ORDER

- against -

Sequence 007 and 008

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., DAMO CONSTRUCTION CO., INC., EMPIRE CITY SUBWAY COMPANY, HALCYON CONSTRUCTION CORP., LOOKING GLASS NETWORKS, INC. and TRIUMPH CONSTRUCTION CORP.,

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she slipped and fell "just off the curb" in the roadway near the intersection of West 15th Street and Ninth Avenue, New York, New York on November 22, 2005. Defendants Damo Construction Co., Inc., Empire City Subway Company, Halcyon Construction Corp., Looking Glass Networks, Inc. And Triumph Construction Corp. are no longer in the action. Consolidated Edison Company of New York, Inc. (Con Ed) brings this motion to dismiss all claims and cross claims as against it pursuant to CPLR 3212. Plaintiff opposes that motion. The City of New York s/h/a New York City Department of Transportation (City) brings a separate motion for the same relief. Both plaintiff and Con Ed oppose City's motion.

Con Ed, in support of its motion, provides the summons and complaint, it's verified answer, plaintiff's verified bill of particulars, a series of case scheduling order and stipulations, plaintiff's note of issue, prior motion practice, the transcript of an examination before trial of Charm Su dated July 28, 2009, the sworn affidavit of Angel O. Alcantara, an employee of plaintiff's attorney, along with a series of photographs of the accident location, the transcript of an examination before trial of Charm Su dated February 6, 2006, plaintiff's notice of claim, the sworn affidavit of George Canzaniello, administrative clerk in the contract administration section of Con

Ed, and supporting documentation relevant to a record search conducted by Mr. Canzaniello. Plaintiff describes that she stepped off the curb and came into contact with a plate in the street. The plate had "debris, gravel" on it, and she slipped. Con Ed asserts that it was not engaged in any work at the time of and in the area of plaintiff's accident such that it created a dangerous condition, debris or gravel, on the roadway.

Plaintiff, in opposition, provides only an attorney affirmation, asserting that it is Con Ed's "ownership and control of the box/plate [that] might impute liability upon it for work being performed by others upon its property." Con Ed, in reply, points out that, while it admits ownership of the plate, there is no evidence submitted that there was anything defective about the plate.

City, in support of its motion, provides the notice of claim, the summons and complaint, its answer, its response to the case scheduling order, inclusive of a big apple map, milling and paving gang sheets, permits and other records relevant to its search for a two year period prior to the accident date and for the accident location, a supplemental roadway search response, a transcript of the examination before trial of Abraham Lopez, a record searcher for City, a transcript of the examination before trial of Joseph Ajar, civil service supervisor with street maintenance for the department of transportation, records responsive to a department of transportation search, photographs of the accident site, and a transcript of the examination before trial of Charm Su dated February 6, 2006. City urges that it had no prior written notice of a defective condition at the subject location, and that any work it was doing in the area commenced after plaintiff's accident, so it could not have caused or created the condition.

Plaintiff, in opposition, provides her note of issue, the February 6, 2006 examination before trial of Charm Su, the notice of claim, the pleadings, the sworn affidavit of Angel O. Alcantara, photographs taken by Mr. Alcantar on November 22, 2005 of the accident location, the examination before trial of Joseph Ajar dated February 11, 2009, the examination before trial of Charm Su dated July 28, 2009, and records pertaining to the milling and resurfacing work done at or around the time of plaintiff's accident at the subject location. Plaintiff argues that records and photographs demonstrate that milling and resurfacing work had already commenced as of the time of plaintiff's accident. Therefore, at the very least, there is an issue of fact as to whether City caused or created the dangerous condition which is alleged to have caused plaintiff's fall.

Con Ed, in opposition to City's motion, provides the July 28, 2009 examination before trial of Charm Su, the affidavit of Mr. Alcantara with accompanying photographs, the affidavit of George Canzaniello and the records resulting from his search relevant to the time and location of plaintiff's accident. Con Ed points out that evidence shows milling was going on at the location of plaintiff's fall at the time of plaintiff's fall, and "there is an issue of fact as to whether the rocks and debris were caused by the City's milling."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Con Ed has established that, while it owned the plate on which plaintiff slipped, there is no evidence that it caused or created the pebbles or gravel which made it slippery. Indeed, it was engaged in no work at that location. Plaintiff provides no evidence in opposition which would raise an issue of fact. Rather, plaintiff submits only an attorney affirmation. Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]). Further, "the factual allegations of the moving papers, uncontradicted by plaintiff, are sufficient to entitle defendants to judgment dismissing the complaint as a matter of law." (*Tortorello v. Carlin*, 260 A.D.2d 201[1st Dept. 1999]).

Turning to City's motion, plaintiff argues first that the motion is untimely. Plaintiff points out that it is made some 162 days after the note of issue, exceeding the 120 day statutory limit. City calls its motion a "cross motion," despite it being processed as a motion.

Even if the motion were deemed timely, City fails to meet its burden of demonstrating that there is no issue of fact regarding whether it caused or created the condition on the roadway at the time of plaintiff's accident. While it meets its initial burden of showing it did not work at the location until after the accident, the opposition raises issues of fact by showing photographs taken of the location on the date of the accident which reveal milling work already in progress. Other records also support the opposition that City was engaged in "in house" milling work and such work was in progress prior to the date City urges it began. Thus, where there is an issue of fact for the trier of fact, summary judgment must be denied.

Wherefore, it is hereby

ORDERED that Con Ed's motion for summary judgment dismissing all claims and cross claims is granted, and the complaint is severed and dismissed as against defendant Consolidated Edison Company of New York, and the clerk is directed to enter judgment in favor of said party; and it is further

ORDERED that City's motion is denied, and the case continues as against it.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 21, 2009

Eileen A. Rakower, J.S.C.

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