

Yurman v City of New York

2013 NY Slip Op 31257(U)

June 10, 2013

Supreme Court, New York County

Docket Number: 113945/10

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHERYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 113945/2010
YURMAN, SYBIL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT *Case # 100*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is


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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER
FILED**

JUN 14 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6-10-13
JUN 10 2013


HON. KATHERYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
SYBIL YURMAN,

Plaintiff,

-against-

DECISION/ORDER
Index No. 113945/10

THE CITY OF NEW YORK, RESTANI
CONSTRUCTION CORP., CONSOLIDATED EDISON,
WARREN GEORGE INCORPORATED, HARRIS
WATERMAIN & SEWER CONTRACTOR, EMPIRE
CITY SUBWAY COMPANY and NICO ASPHALT
PAVING, INC.,

Defendants.

-----X
EMPIRE CITY SUBWAY COMPANY,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 591149/10

NICO ASPHALT PAVING, INC.,

FILED

Third-Party Defendant.

JUN 14 2013

-----X
HON. KATHRYN E. FREED:

**NEW YORK
COUNTY CLERK'S OFFICE**

RECITATION, AS REQUIRED BY CPLR§2219(a), OF THE PAPERS CONSIDERED IN THE
REVIEW OF SEQUENCE 003.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	..1-3...
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....	..5...
REPLYING AFFIDAVITS.....	..6....
EXHIBITS.....
OTHER..... (X-MOTION).....	...4....

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE
REVIEW OF SEQUENCE 004.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	...1-3...
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....	..5...
REPLYING AFFIDAVITS.....	..6....
EXHIBITS.....
OTHER..... (X-MOTION).....	...4....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

It should be noted that motion sequence numbers 003 and 004 are consolidated for disposition.

In this case plaintiff Sybil Yurman (Yurman) alleges that she was injured when she stepped into a hole and fell on the street directly in front of a building located at 240 East 68th Street, New York, NY. According to Yurman, the hole was approximately three feet by three or four feet and approximately four to five inches deep.

In motion sequence number 003 defendant/third-party plaintiff Empire City Subway Company (ECS) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Defendant/third-party defendant Nico Asphalt Paving, Inc. (Nico) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party complaint and all cross claims against it.

In motion sequence number 004, defendant Consolidated Edison (Con Ed) moves, for summary judgment dismissing the complaint and all cross claims against it.¹ Defendant Harris Water Main & Sewer Contractors, Inc., s/h/a Harris Watermain & Sewer Contractor (Harris), cross-moves, pursuant to CPLR 3212, for summary judgment

¹ According to Con Ed's motion papers, it brings its motion pursuant to CPLR 3126. The court assumes that is a scrivener's error and the intended provision is CPLR 3212. The court only notes the error to suggest that counsel do a better job of proofreading their papers before submitting them to the court. Since the papers of several of the other parties also contain comparable errors, this suggestion applies to counsel for all of the parties.

dismissing the complaint and all cross claims against it.

Yurman's opposition to the motions and cross motions is based on the argument that permits issued to the various defendants for work performed during the two years prior to her accident on the block where she fell create questions of fact which preclude summary judgment.

Motion Sequence Number 003:

In support of its motion for summary judgment, ECS submits the affidavit of its employee, Calvin Gordon, whose duties include researching and searching for company records including records of facilities location, repairs, permits, and construction records. Gordon states that a search was made to determine whether ECS had performed any repairs, maintenance or excavation work in front of 240 East 68th Street during the two years preceding Yurman's alleged accident. According to Gordon's sworn statement, the records that were found included three permits relating to job order # 1191635B for work at 210 East 68th Street, not for the location where Yurman fell (permit numbers M01-2009005-145, M01-2009005-146, and M01-2009027-080). Gordon submits the job order with a diagram of the work, indicating that the excavation went from a manhole cover on Third Avenue, east to 210 East 68th Street, and then south to that building. According to Gordon, the work was carried out in February 2009, and did not extend to the area in front of 240 East 68th Street. Finally, Gordon states that ECS had no facilities in front of 240 East 68th Street.

ECS contends that its work, which was carried out on the block west of 240 East 68th Street where Yurman fell, could not have been the cause of her fall.

In her opposition to ESC's motion, Yurman relies primarily on the portion of the street opening permit issued by the City of New York which grants permission to open the roadway:

"from street: 2 Avenue
to: 3 Avenue."

Affirmation in opposition of Nicole N. Sinclair, Exh. A. Yurman argues that ESC's excavation may, in fact, have run from Second Avenue past the building at 240 East 68th Street to 210 East 68th Street, and therefore, may have caused the hole in the street where she fell.

She fails to respond to the work diagram submitted by ECS, however, which indicates that the excavation began on Third Avenue and traveled East to 210 East 68th Street, and did not reach 240 East 68th Street where Yurman fell. Furthermore, the same permit on which Yurman seeks to base her argument that the excavation started on Second Avenue and traveled eastward past 240 East 68th Street to 210 East 68th Street also specifies the work location as follows:

"Specific Location: Cutting from ECL to 210 East 210 St. ***
SUBMITTED AS :East 68 Street
3 AVENUE
2 AVENUE."

Sinclair affirmation, Exh. A. Thus, there is no reason to believe

that the order in which the avenues are listed on the permit indicates from which avenue the excavation was to proceed to 210 East 68th Street. Rather, the avenues merely identify the particular block of East 68th Street on which the excavation was permitted. The permit also indicates the maximum length of the cutting as 140 feet.

The diagram provided by ECS indicates an "L" shaped excavation measuring 93 feet 6 inches from Third Avenue to the bend, an excavation of 25 feet 6 inches from the bend to the building at 210 East 68th Street, and an excavation of 12 feet from the curb in front of 210 East 68th Street to the basement of the building, or a total of 131 feet which is within the 140 feet permitted. As Nico argues in support of its cross motion discussed below, had the excavation run from Second Avenue, past 240 East 68th Street where Yurman fell, and proceeded all the way down the block to 210 East 68th Street, it would have far exceeded the 140 feet permitted in the permit.²

Yurman also seeks to rely on a hand-drawn diagram contained in the repaving order issued by ESC to Nico, that was part of the job package apparently provided to Yurman in discovery by ECS. Stating that "a picture is worth a thousand words," Yurman's counsel, Nicole Sinclair contends that the repaving document indicates that the work was done in the middle of the block, therefore, it possibly reached as far as 240 East 68th Street where she fell.

² Nico did the repaving work at 210 East 68th Street, pursuant to a contract with ECS.

Sinclair affirmation, ¶17. She disregards the fact that the repaving order diagram, like the job order submitted by ECS, shows that the work began at Third Avenue, not Second Avenue, thus contradicting her other argument that the excavation began on Second Avenue. Finally, she also ignores the fact that the repaving order indicated that length of repaving from Third Avenue to the bend in the excavation in front of 210 East 68th Street was 85 feet, which is generally consistent with the measurements indicated on the excavation order, which indicated that the excavation led to the building at 210 East 68th Street, which is located at the western end of the block, and is not mid-block, as Yurman contends.

In light of the evidence submitted by ECS, Yurman's assertion that the excavation might have proceeded from Second Avenue, past 240 East 68th Street and terminated at 210 East 68th Street and her contradictory assertion that the excavation went from Third Avenue and proceeded all the way to 240 East 68th Street are mere conjecture and cannot overcome the evidence submitted by ECS. *Fotiatis v Cambridge Hall Tenants Corp.*, 70 AD3d 631, 632 (2d Dept 2010) ("Where the moving party has established prima facie that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation'" [citation omitted]). Nor is *Scott v City of New York* (88 AD3d 985 [2d Dept 2011]), relied on by Yurman, sufficient to overcome the evidence submitted by ECS, since there the court

found that the particular street opening permit at issue failed to eliminate questions of fact. Here, in contrast, when viewed in conjunction with the other documents relating to the job order that indicate where the excavation and paving work was done, this court concludes that the street opening permit is insufficient to raise a question of fact that would defeat summary judgment.

For these reasons, the ECS's motion for summary judgment is granted.

Also under motion sequence number 003, Nico cross-moves for summary judgment dismissing the complaint and all cross claims against it. Nico submits the affidavit of John Denegall, a Nico superintendent, who states that Nico is in the business of permanent restoration of asphalt roadways in Manhattan. Denegall states that he oversees paving crews, and that Nico performed the repaving work at 210 East 68th Street, pursuant to a contract with ECS. Denegall states that he searched Nico's records and that the search revealed no other paving work on East 68 Street between Second and Third Avenues during the two-year period prior to Yurman's submitted by ECS.

Yurman makes no arguments regarding Nico that differ from those that she makes with respect to ECS.

In reply, Nico submits the affidavit of Marlon Weingrad, an investigator for Premier Investigations, Inc. He states that at the request of counsel for Nico, he measured the distances relative to 210 East 68th Street and 240 East 68th Street in relation to both Second and Third Avenues. Annexed to Weingrad's affidavit is a

detailed diagram drawn by him of the buildings and distances between buildings located on East 68th Street. Weingrad's diagram indicates that there are 10 buildings between 210 and 240 East 68th Street and that there is a distance of 175 feet between the eastern building line of 210 East 68th Street and the western building line of 240 East 68th Street. This evidence, in addition to that provided by ESC and Nico makes it quite clear that the permit, that provided for a total excavation of 140 feet, did not intend that the excavation would begin on Second Avenue, pass in front of 240 East 68th Street and proceed all the way to 210 East 68th Street, the western most building on the block, as Yurman speculates, for according to the Weingrad diagram, such a route would have far exceeded the permitted 140 feet.

Therefore, for the same reasons that ECS's motion for summary judgment dismissing the complaint is granted, Nico's motion to dismiss the complaint and the third-party complaint is also granted.

Motion Sequence Number 004:

In support of its motion for summary judgment, Con Ed submits the affidavit of George Canzaniello, a specialist at Con Ed who is responsible to search for records on behalf of Con Ed's law department. Canzaniello states that he could not locate any documents for opening tickets, paving orders, permits and "Emergency Control Tickets" for the roadway at 240 East 68th Street. In a separate affidavit he states that he was also asked to search

for opening tickets and paving orders in connection with the following permits issued by the city: M01-2009063-014, M01-2009089-054, M01-2009058-124, and M01-2009170-005.

According to Canzaniello, permit number M01-2009063-014, permitting Con Ed to open the roadway at 226 East 68th Street, was in effect from March 7 - April 5, 2009. Canzaniello did not find any opening tickets or paving orders in connection with that permit. He did, however, find an opening ticket (PS 545400) in connection with permit number M01-2009089-054. That opening ticket indicated three cuts in front of 226 East 68th Street, one in the south sidewalk and two in the south parking lane. The cuts in the parking lane were five feet by two feet and four feet by four feet. According to the paving order, those cuts were paved on June 9, 2009. As the diagram annexed to the affidavit of Marlon Weingrad (provided by Nico) indicates, there are six buildings (numbers 228, 230, 232, 234, 236 and 238 East 68th Street) between the building where Con Ed made the cuts and where Yurman states that she fell. Canzaniello states that it is "self-evident" that those cuts in front of 226 East 68th Street were not in front 240 East 68th Street, where Yurman allegedly fell, and were not wide or long enough to have extended to the roadway area where she fell. Affidavit of George Canzaniello, ¶ 5, motion for summary judgment of Con Edison, Exh. K.

Canzaniello also notes that in addition to the opening ticket for 226 East 68th Street, there is a corrective action request and a notice of violation, however those concern a missing color code

in the parking lane at 226 East 68th Street and reference a need for sidewalk restoration at the same location, and do not reference 240 East 68th Street.

According to Canzaniello, permit M01-2009170-005 also related to cuts of five feet by two feet and four feet by four feet also in front of 226 East 68th Street along with a similar corrective action request and notice of violation regarding a missing color code and need for restoration of a sidewalk flag around a gas box. None of the documents reference 240 East 68th Street.

Permit M01-2009170-005 is for final restoration of the same area in front of 226 East 68th Street.

Permit M01-2009058-124, which was in effect from March 4, 2009 to April 4, 2009 was for work at 232 East 68th Street. That permit was for work that was to be a maximum length of three feet for pavement cores. Canzaniello did not find an opening ticket for that permit, but according to Weingrad's diagram of the 68th Street buildings submitted by Nico, there are three buildings (numbers 234, 236 and 238 East 68th Street) between 232 and 240 East 68th Street. Therefore, even assuming work was done pursuant to that permit, there is no evidence indicating that it could have reached the roadway in front of 240 East 68th Street where Yurman fell.

In response, Yurman references two additional permits not mentioned by Canzaniello, numbers M01-2007181-075 and M01-2009082-005. She does not, however, provide a copy of the first of the two permit numbers. Permit number M01-009082-005, which she does submit, permits Con Ed to open five feet of roadway at 226 East 68th

Street.

In reply, Con Ed submits the affidavit of Jennifer Teasley, a specialist with Con Ed whose duties include searching for permits, emergency tickets and paving orders, and who searched for opening tickets and paving orders referencing permit number M01-009082-005. According to Teasley, she found an opening ticket for work in front of 226 East 68th Street that indicated work in connection with a manhole regrade for manhole M-12509. Teasley states that the opening, which was in the parking lane, was six feet long by five feet wide and was located 110 feet west of where Yurman fell. Teasley's statement is consistent with the Weingrad diagram, which indicates that there are six buildings (numbers 228, 230, 232, 234, 236, and 238 East 68th Street) between 226 East 68th Street and 240 East 68th Street, and further indicates a distance of 140 feet between 240 East 68th Street and 224 East 68th Street.

Therefore, Yurman's contention that questions of fact exist with respect to Con Ed's responsibility for the hole in the street in front of 240 East 68th Street is again based on mere speculation, and is insufficient to defeat summary judgment.

Finally, Harris cross-moves for summary judgment dismissing all claims and cross claims against it. Harris submits the affidavit of its president, Steven Kogel, who states that a search was made of Harris's records and that no records were found for work by Harris at 240 East 68th Street. Records were found indicating that within the two years prior to Yurman's accident, Harris had performed a job at 250 East 68th Street. Harris's "Cut

Form" indicates that three openings were made in the roadway in front of 250 East 68th Street (permit number M01-2008119-061). According to the Weingrad diagram, there are four buildings (numbers 242, 244, 246 and 248 East 68th Street) between 240 East 68th Street, the site of the accident, and 250 East 68th Street, where Harris's work occurred.

In opposition, Yurman also submits permit number M01-2008121-015 to open the roadway and/or sidewalk at 246 East 68th Street, permitting an opening of a maximum length of 15 feet. Counsel for Yurman describes the work done pursuant to the permit as occurring "a few doors down" and "literally steps away" from the site of Yurman's accident. Affirmation in opposition of Nicole N. Sinclair, ¶ 15.

In reply, Harris submits another affidavit by Kogel stating that the company made an additional search in connection with that permit and found that Harris had indeed entered into an agreement with the owner of the building at 246 East 68th Street to repair a leak in the water main. According to Kogel, an opening was made 16 feet from the curb at 246 East 68th Street which ran 3 feet 6 inches along the curb and was 6 feet 1 inch across the roadway. Again Kogel stated that at no time did Harris perform work in front of the building located at 240 East 68th Street, or at any other locations (other than the work at 250 East 68th Street, discussed above).

According to the Weingrad diagram, there are two buildings (numbers 242 and 244 East 68th Street) between 240 and 246 East 68th

Street. Yurman asserts that the hole in which she fell was three feet one inch by six feet one inch, and was in front of the building located at 246 East 46th Street. Since the accident site was separated from the work done by Harris by the width of two buildings, the contention of Yurman's attorney, that Harris's work site was mere "steps away" from the cite of Yurman's accident, is inadequate to create a question of fact defeating Harris's motion for summary judgment.

Accordingly, it is hereby

ORDERED under motion sequence number 003 that the motion of Empire City Subway for summary judgment dismissing the complaint and all cross claims against it; and the cross motion of Nico Asphalt Paving for summary judgment dismissing the complaint, the third-party complaint, and all cross claims against it are granted and the complaint and third-party complaint are dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

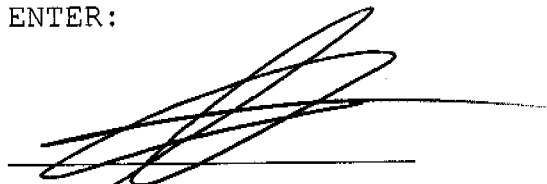
ORDERED under motion sequence number 004 that the motion of Consolidated Edison and the cross motion of Harris Water Main & Sewer Contractors for summary judgment dismissing the complaint and all cross claims against them are granted and the complaint is dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 10, 2013

JUN 10 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED
JUN 14 2013
NEW YORK
COUNTY CLERK'S OFFICE