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| <b>Hogan v City of New York</b>  |
| 2013 NY Slip Op 31556(U)   |
| July 12, 2013  |
| Supreme Court, New York County   |
| Docket Number: 106954/2011   |
| Judge: Kathryn E. Freed  |
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 5

Index Number : 106954/2011  
HOGAN, MARSHALL  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

*CALL # 40*

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

**DECIDED IN ACCORDANCE WITH  
ASSISTANT CLERK'S DECISION / ORDER**


# FILED

JUL 17 2013

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 7-12-13  
JUL 12 2013

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
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  
MARSHALL HOGAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, 301-303 WEST 125 LLC,  
CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., and EMPIRE CITY SUBWAY  
COMPANY (LIMITED),

Defendants.

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

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

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

**FILED**

**JUL 17 2013**

**COUNTY CLERK'S OFFICE  
NEW YORK**

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

Defendant Empire City Subway Company (Limited), (“Empire City”), moves for an Order pursuant to CPLR§ 3212, granting it summary judgment. Plaintiff and co-defendant 301-303 West 125 LLC oppose. No further opposition has been received from any other named party.

After a review of the papers presented, all relevant statutes and case law, the Court **grants** the motion.

Factual and procedural background:

Plaintiff seeks to recover monetary damages for injuries he allegedly sustained on February 15, 2011, while a pedestrian on a public sidewalk in front of the premises known as 2335, 2337 and 2339 Frederick Douglas Boulevard in New York County. The sidewalk caved in while plaintiff was stepping on it, resulting in his falling into a hole measuring 5 feet, 5 inches. Consequently, plaintiff filed a Notice of Claim dated February 18, 2011, alleging that said sidewalk was defective, unsafe, hazardous, negligent, and unrepaired, which defect consisted of an improperly laid, applied, maintained sidewalk that was broken, cracked, uneven and consisted of eroded concrete. As a result of this accident, plaintiff had to undergo spinal surgery, to wit: an anterior cervical discectomy and fusion.

Plaintiff then commenced the instant action against 301-303 West 125 LLC and co-defendant, the City of New York, via service of a Summons and Complaint on or about July 28, 2011. Issue was joined by service of 301-303 West 125 LLC's Verified Answer on August 25, 2011. Thereafter, plaintiff served a Supplemental Summons and Verified Complaint on or about August 23, 2012, naming Consolidated Edison of New York, Inc. ("Con Ed"), and Empire City, as defendants. 301-303 West 125 LLC served its Answer on September 4, 2012 and Empire City served its Answer on September 17, 2012.

It should be noted that 301-303 West 125 LLC incorporates the legal arguments and factual recitation contained in plaintiff's Affirmation in Opposition to the instant motion.

Positions of the parties:

Empire City argues that it is not a proper party to the instant suit, in that no evidence exists which shows with any certainty, that it created or caused the condition that allegedly caused plaintiff's accident, thereby necessitating the granting of summary judgment in its favor. In support

of its position, Empire City annexes as its Exhibit “D,” an affidavit of Calvin Gordon, employed by it as a “specialist.” In his affidavit, Mr. Gordon avers that his duties in this capacity include, *inter alia*, the researching and searching of company records including facilities location, repairs, permits and construction records. He also avers that he performed a search for any work records that would show whether Empire City did any repairs, maintenance, and/or excavation on Frederick Douglas Boulevard between 125<sup>th</sup> and 126<sup>th</sup> Streets for a two year period prior to and including the date of plaintiff’s accident, from February 15, 2009 up to February 15, 2011. This search would also include any work done on the sidewalk in front of the premises numbered 2335, 2337 and 2339 Frederick Douglas Boulevard. Mr. Gordon also avers that his search located three permits issued by the New York City Department of Transportation, with each having specific numerical designations. Mr. Gordon further avers that Empire City’s records do not indicate that any work was done under the aforementioned permits.

Additionally, Mr. Gordon avers that he examined Empire City’s facilities map which depicts all underground facilities it owns which are located on Frederick Douglas Boulevard ( a.k.a. Eight Avenue), between 125<sup>th</sup> and 126<sup>th</sup> Street. Said map indicates that Empire City does not have any facilities under the sidewalk in front of 2335, 2337 and 2339. Thus, any anticipated work that was contemplated under the aforementioned permits would have nothing to do with the sidewalk where plaintiff’s accident occurred. Empire City also annexes said permits as its Exhibit “E.”

Plaintiff proffers several arguments opposing the motion for summary judgment. First, he argues that the subject motion is premature in that he has not been afforded an opportunity to conduct the necessary deposition of Empire City. He annexes as his Exhibit “C,” an Order dated September 18, 2012, which states that the deposition of Empire City was to be conducted on January 10, 2012. However, for reasons unknown to the Court at this time, said deposition has yet to occur.

Plaintiff also argues that Empire City's alleged "search" as described in Mr. Gordon's affidavit, only included a two year period existing prior to the subject accident. Therefore, since discovery remains incomplete, it may be still be determined that Empire City might have performed faulty work to the sidewalk prior to this time period. Plaintiff further argues that the only deposition that has been conducted is that of Abraham Lopez, record searcher in the Office of Litigation Services of The New York City Department of Transportation. Plaintiff refers to and relies on specific segments of Mr. Lopez's testimony in an attempt to show that Mr. Lopez was devoid of the necessary knowledge regarding certain types of inspections relating to the aforementioned permits. Additionally, plaintiff argues that the work records Mr. Lopez testified about went back only two years, and could very well be the cause of the subject accident.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" ( *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1<sup>st</sup> Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985] ). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact ( see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1<sup>st</sup> Dept. 2008] ). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" ( *Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985] ). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied ( *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1<sup>st</sup> Dept. 2002] ).

The Court finds that Empire City has provided sufficient documentary proof which sufficiently established its prima facie entitlement to summary judgment. In opposition, the Court also finds that plaintiff and 301-303 West 125 LLC have failed to raise a triable issue of fact ( see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1989] ).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant Empire City Subway Company (Limited)'s motion for summary judgment is granted; and the complaint and any cross-claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendant Empire City Subway Company (Limited) is directed to serve a copy of this order on the remaining parties and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that a compliance conference is scheduled for September 17, 2013 at 2:00 pm in 80 Centre Street, Room 103; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: July 17, 2013

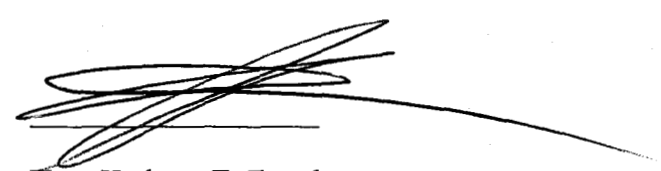
ENTER:

JUL 12 2013

**FILED**

JUL 17 2013

COUNTY CLERK'S OFFICE  
NEW YORK



Hon. Kathryn E. Freed  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**