

**Ellington v Consolidated Edison, Inc.**

2013 NY Slip Op 32082(U)

September 4, 2013

Supreme Court, New York County

Docket Number: 116834/05

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

REBECCA B. ELLINGTON,  
Plaintiff,

INDEX NO. 116834/05

-against-

MOTION SEQ. NO. 008

CONSOLIDATED EDISON, INC., EMPIRE CITY  
SUBWAY COMPANY (LIMITED), WARREN  
GEORGE INC., MITCHELL CONSTRUCTION  
CORP., GREEN ISLE CONTRACTING OF  
BELLEROSE INC. and D & S RESTORATION, INC.,  
Defendants.

The following papers, numbered 1 to 4, were read on this motion by defendant for summary judgment.

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

PAPERS NUMBERED

1,2

Answering Affidavits — Exhibits (Memo)

**FILED**

3

Reply Affidavits — Exhibits (Memo)

SEP 06 2013

4

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Rebecca B. Ellington (plaintiff) brings this personal injury action against the Consolidated Edison, Inc., Empire City Subway Company Ltd. (Empire City), et al. (collectively defendants) to recover for injuries allegedly sustained when she tripped and fell on a raised and uneven condition on the sidewalk of 68<sup>th</sup> Street 30 yards west of Lexington Avenue, New York, NY (the premises). Discovery is not complete and the Note of Issue has not been filed. Before the Court is a motion by Empire City for summary judgment, pursuant to CPLR 3212, dismissing the complaint as asserted against it. Plaintiff has responded in opposition to the motion.

BACKGROUND

In support of its motion, Empire City submits the Affirmation of its attorney Darrell John, plaintiff's amended Summons and Complaint, Empire City's Verified Answer, plaintiff's Verified

Bill of Particulars (BP), Examination Before Trial (EBT) of Plaintiff, EBT of Consolidated Edison, Inc., EBT of Warren George Inc., EBT of Greenisle Contracting, EBT of D&S Restoration, Inc., photographs submitted by defendant of 68<sup>th</sup> Street, New York, NY, Affidavit of Calvin Gordon, and a Google Maps photo printout of the premises.<sup>1</sup>

The relevant portion of plaintiff's complaint alleges that moving defendant's negligence, carelessness and recklessness caused her alleged injury. Plaintiff alleges the premises was in a dangerous and unsafe condition and defendants negligently and carelessly permitted the premises to be and remain in an unsafe and dangerous condition in allowing and/or causing and creating the concrete pavement of said sidewalk to be raised, uneven, and separated (Amended Verified Complaint at ¶¶45-47). Plaintiff testifies that she was exiting the West Building of Hunter College and crossing 68<sup>th</sup> street towards the North Building at the time of incident (Notice of Motion, exhibit E, ¶¶16).

In response to plaintiff's claims, Empire City avers the claim against it should be dismissed because it did not do work on the premises or own a facility there. On August 3, 2010, Marc Soto (Soto) testified on behalf of Empire City. Empire City holds franchises in the City of New York to maintain a system of manholes and conduits for telecommunication companies to run their telecommunication cables (see EBT of Soto, exhibit J, p. 19). Soto testified that Empire City performed a search for work records for the intersection of 68<sup>th</sup> Street and Lexington Avenue including each block north, south, east, and west of the intersection for the period of three years prior to and including the date of the accident (*id.* at p.8-9). Soto further testifies that Empire City did not locate any work records as a result of the search (*id.* at p.10). Thereafter, Calvin Gordon (Gordon), an employee of Empire City, performed his own

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<sup>1</sup> At oral arguments on April 3, 2013, Empire City made an oral application to withdraw exhibit M, which is a Google Maps photo printout, without opposition. The Court granted this application and the exhibit M was not considered in deciding this motion.

search of Empire City's records (Notice of Motion, exhibit L). Gordon avers that the only Empire City located on the south side of the block of 68<sup>th</sup> Street that is west of the intersection of 68<sup>th</sup> Street and Lexington, is a conduit that was installed in 1929. Specifically, Gordon testifies that the conduit enters the Hunter College building 6 foot 4 inches west of the eastern building line, after running under the south sidewalk for a length of 42 feet south of the southerly curb line of 68<sup>th</sup> Street.

In opposition, plaintiff submits an Affirmation in Opposition and a Response to defendant's Combined Demands. In reply, Empire City avers that plaintiff's opposition papers are not sufficient to raise any triable issues of fact.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth*

*Centruy-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

#### DISCUSSION

The Court finds that through the submission of documentary evidence, Empire City has met its *prima facie* burden of establishing that it has not done any work in the premises where the plaintiff fell. Plaintiff's Verified BP states that she tripped on the south side of 68<sup>th</sup> Street, about 30 yards from the Southwest Corner of 68<sup>th</sup> Street and Lexington Avenue (see Notice of Motion, exhibit D, No. 6 and 8). There is no evidence before the Court, however, that establishes Empire City has done work at this location. Gordon, a Specialist at Empire City, avers that he conducted a search of Empire City records for any construction work performed on the block of 68<sup>th</sup> Street, and he only found a facility located on the south side of the block of 68<sup>th</sup> Street, where a conduit was installed in 1929. Moreover, this conduit enters the Hunter College building 6 feet 4 inches west of the east building line after running under the south sidewalk for a length of 42 feet south of the southerly curb line of 68<sup>th</sup> Street.

In opposition, the evidence plaintiff puts forth, including a permit issued to Empire City in 1993 for conduit work in the area of the intersection of Lexington Avenue and 68<sup>th</sup> Street, is insufficient to raise an issue of fact. Specifically, the uncontroverted evidence shows that Empire City did not perform any work at the aforementioned location of the accident under the permit and did not have any facilities in the location because Empire City's conduit is not located where the plaintiff tripped, thus establishing that Empire City owed no duty of care to the plaintiff (see *Scurti v City of New York*, 40 NY2d 433, 438 [1976]). Further, there is evidence that the Dormitory Authority of the State of New York did sidewalk replacement on the

south side of 68<sup>th</sup> Street between Lexington Avenue and Park Avenue in 1998, after the installation of Empire City's conduit in 1929 (see Notice of Motion, exhibit I, p.20-21). As such, Empire City's motion for summary judgment dismissing the complaint is granted.

CONCLUSION

For these reason and upon the foregoing papers, it is,

ORDERED that defendant Empire City Subway Company's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint and any cross-claims asserted against it is granted; and it is further,

ORDERED that counsel for Empire City Subway Company is directed to serve a copy of this Order, with Notice of Entry, upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly; and it is further,

ORDERED that the remaining parties are directed to appear at the already scheduled Status Conference at 11:00 a.m. on September 25, 2013, at 60 Centre Street, Part 7, Room 341.

This constitutes the Decision and Order of the Court.

Dated: *Sept. 4, 2013*

**FILED**  
SEP 06 2013  
NEW YORK  
COUNTY CLERKS OFFICE  
*Paul Wooten*  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: :  DO NOT POST  REFERENCE