

Buck v 15 Broad St., LLC

2013 NY Slip Op 33122(U)

November 7, 2013

Supreme Court, New York County

Docket Number: 106606/2008

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 106606/2008
BUCK, DENNIS
vs.
15 BROAD STREET, LLC
SEQUENCE NUMBER : 009
RENEWAL CALIF

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

NOV 12 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-7-13
NOV 07 2013

[Signature], 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
DENNIS BUCK,

Plaintiff,

-against-

DECISION/ORDER
Index No. 106606/2008
Seq. No. 009

15 BROAD STREET, LLC and DOWNTOWN
CONDOMINIUM,

Defendants.

-----X
15 BROAD STREET, LLC,

Third-Party Plaintiff,

-against-

FILED

NOV 12 2013

NEW YORK
COUNTY CLERK'S OFFICE

JUDLAU CONTRACTING, INC., FELIX ASSOCIATES,
LLC, ALISA CONSTRUCTION CO., INC.,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., THE CITY OF NEW YORK, ALLIANCE FOR
DOWNTOWN NEW YORK, INC. and BOVIS LEND
LEASE CONSTRUCTION, INC.,

Third-Party Defendants.

-----X
KATHRYN E. FREED, JSC:

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.....1-2.(Exhs. C-G)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3(Exh. A)
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....
OTHER.....

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

Defendant Consolidated Edison Company of New York, Inc., (“Con Ed”), moves for an Order pursuant to CPLR§ 2221 permitting it to renew its motion for summary judgment and upon granting same, granting summary judgment pursuant to CPLR§ 3212, dismissing the Third-Party Complaint, all cross-claims and all counterclaims. Defendants/third-party plaintiff, 15 Broad Street, LLC (“15 Broad”) and Downtown Condominium (“Downtown”), oppose.

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

Factual and procedural background:

The instant action is for personal injuries arising out of an incident occurring on January 25, 2008, wherein as a result of a missing asphalt sidewalk flag or flags located adjacent to the east curb of Broad Street between Wall Street and Exchange Place, plaintiff tripped and fell, sustaining injuries. According to Con Ed, it initially made a motion seeking summary judgment, dismissing the third-party action by 15 Broad against Con Ed as well as all cross claims and counterclaims as against it. At that time, plaintiff had also moved to sever the second third-party action that had been recently brought by 15 Broad against two new second third-party defendants.

On or about February 19, 2013, the Court denied both Con Ed’s motion and plaintiff’s motion, with leave to renew both. In that Order dated February 19, 2013, the City was directed to conduct a search of Department of Transportation records for the period of four years prior to the date of the subject accident, within 60 days. Additionally, Con Ed and all non-City defendants were to conduct a search of their respective records for four years prior to the date of the accident, within 30 days. The various defendants were directed to appear at depositions in relation to the

aforementioned records. Con Ed asserts that the instant renewal motion is being made “because the Court ordered [it] to provide a longer search and to provide a witness to testify about it” (Motion, § 6).

Consequently, on or about April 25, 2013, Con Ed produced Mr. Patrick Keogh at a deposition to discuss the additional search performed from the period from January 25, 2004 to January 25, 2006. Mr. Keogh’s transcribed testimony is annexed to the motion as Exh. C. Mr. Keogh testified that he performed a record search concerning the instant accident on April 25, 2013. Said search encompassed the area of Broad Street between Wall Street and Exchange Place near 15 Broad Street (a/k/a 51 Exchange Place and 23 Wall Street). He testified that the search of a sidewalk would not generally include roadway work unless a permit specified both the roadway and sidewalk. His search also encompassed the period between January 25, 2004 and January 25, 2006.

Con Ed also asserts that Mr. Keogh testified that his full search did not reveal any existing records for the segment on Broad between Wall Street and Exchange Place from January 25, 2004 to January 25, 2006. When shown two color photographs previously marked, and asked if said area depicted within appeared to be the work of Con Ed or its contractor, he stated emphatically that it did not. Mr. Keogh testified that the subject area looked like a missing sidewalk flag and that there was no indication that Con Ed had any structures at or near this location. Additionally, Mr. Keogh searched for opening tickets reflecting excavation by Con Ed or any contractor working for Con Ed, for paving orders; for permits for excavation; for emergency tickets (complaints by Con Ed personnel or the general public), concerning a condition to be followed up by another department; for all corrective action requests (“CARS”); and notices of violations for the locations and period of two years prior to January 25, 2006. His search of the roadway and sidewalk revealed no records.

Con Ed also asserts that in accordance with the court order, Con Ed personnel in their Steam Department conducted a search for the additional period of January 25, 2004 to January 25, 2008 for records, emergency tickets and opening tickets. A copy of said search is annexed to the motion as Exh. S. The only opening ticket located which would reveal an excavation is PS 357564, which refers to New Street between Wall Street and Exchange Place. No opening ticket pertaining to the sidewalk of Broad Street was located. Con Ed now argues that since plaintiff has failed to prove that the subject defect on the sidewalk was caused or exacerbated by some action it may have taken, its motion for summary judgment must be granted.

15 Broad and Downtown argue that Con Ed has failed to meet its burden in establishing a prima facie entitlement to summary judgment. They refer to the photographs of the accident location annexed in their Aff. in Opp as Exh. A, arguing that said photographs clearly indicate that the alleged defect which plaintiff claims caused his accident was not the result of wear and tear, but was a deliberate cut in the sidewalk. 15 Broad and Downtown also argue that Con Ed only submits Mr. Keoghs's testimony as proof that it did not perform any work on the sidewalk. This is insufficient in that Mr. Keogh never personally visited the accident location and was never present during any of the work performed by Con Ed prior to the instant accident. Therefore, he cannot possibly possess any personal knowledge of the extent of work done by Con Ed or the type of equipment it may have utilized in its performance of said work. 15 Broad and Downtown further argue that Mr. Keogh could not testify as to whether or not any of Con Ed's equipment and/or its subcontractor's equipment may have damaged the sidewalk, by making the cut in the sidewalk that is depicted in the photographs.

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 [1st 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 fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.2d 535 [1st 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 [1st Dept. 2002]).

“A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it” (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]; see also *Petersel v. Good Samaritan Hosp. of Suffern, N.Y.*, 99 A.D.3d 880, 881 [2d Dept. 2012]; *Willis v. Galileo Cortlandt, LLC*, 106 A.D.3d 630 [2d Dept. 2013]; *Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 320 [1st Dept. 2006], *affd* 8 N.Y.3d 931 [2007]). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff’s opposition (see *Perez v. Rodriguez*, 25 A.D.3d 506 [1st Dept. 2006]).

In the case at bar, the Court finds that Con Ed has established its prima facie entitlement to summary judgment. Indeed, the Court finds that the search performed by Mr. Keogh which revealed that Con Ed did no work in the subject area, is sufficient to sustain summary judgment. Mr. Keogh's deposition testimony demonstrates his personal knowledge of the facts which is further substantiated by the results of his extensive search of the records available to him (see *Ellman v. Village of Rhinebeck*, 41 A.D.3d 635 [2d Dept. 2007], *lv denied* 9 N.Y.3d 812 [2007]; *Eisenberg v. Village of Cedarhurst*, 21 Misc.3d 1122(A), 2008 N.Y. Slip Op. 52138(U) (Sup Ct Nassau County 2008)).

Therefore, in accordance with the foregoing, third-party defendant Consolidated Edison Company Of New York, Inc.'s motion for summary judgment is granted and the complaint and any cross-claims against it are hereby severed and dismissed; and it is further

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

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

DATED: November 7, 2013


NOV 07 2013

FILED

NOV 12 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:


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