

Carson v Consolidated Edison Co. of N.Y., Inc.

2013 NY Slip Op 33513(U)

November 13, 2013

Supreme Court, New York County

Docket Number: 102532/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

MARY CARSON,

INDEX No. 102532/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 005

CONSOLIDATED EDISON CO. OF NEW YORK, INC.
And FELIX ASSOCIATES, LLC,

FILED

Defendants.

MOTION CAL No. _____

NOV 14 2013

The following papers, numbered 1 to _____ on this motion for summary judgment.

NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 2

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 11/13/13

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X

MARY CARSON,

Plaintiff,

Index No.

-against-

FILED

102532/11

CONSOLIDATED EDISON CO. OF NEW YORK, INC., and FELIX ASSOCIATES, LLC, NOV 14 2013

Defendants.

**NEW YORK
COUNTY CLERK'S OFFICE**

DONNA MILLS, J. :

In this personal injury case, defendant Consolidated Edison Co. Of New York ("Con Ed") moves for summary judgment pursuant to CPLR §3212 dismissing the Complaint. Plaintiff, Mary Carson opposes the motion.

Plaintiff is claiming that she was injured on March 11, 2008, at approximately 12:00 P.M. when she was stepping from the curb to the street to enter her parked vehicle. More specifically, plaintiff alleges that she was stepping off a curb located on the South-Southwest side of 116th Street, between 5th Avenue and Madison Avenue, in front of 18 East 116th Street in New York County. Plaintiff further contends that she stepped into a hole and/or broken pavement around a Con Edison manhole at the aforementioned location.

Con Edison seeks summary judgment dismissing the Complaint on the grounds that the plaintiff cannot establish that Con Edison created the defect that caused her injuries. Additionally Con Edison argues that the subject defect is more than twelve inches from the Con Edison facility.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court

must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

On January 14, 2013, Con Edison record searcher Jennifer Teasley testified to the Company's search for any excavation work, complaint, and DOT violations on East 116th Street between Madison and Fifth Avenues for a three year period prior to and including the date of the accident by Con Edison and/or any of its contractors. According to the records, Ms. Teasley testified that there was no work performed by Con Edison and/or its contractors in the roadway in front of 18 East 116th Street.

In further support of Con Edison's motion, is includes an affidavit by Russell N. Harris, Construction Representative for Con Edison's Construction Management. Mr.

Harris states that he personally inspected the work and after reviewing the records, attests that the only work Con Edison performed near the accident location was 122 feet west from the accident location. Additionally, Con Edison submits an affidavit from its investigator William Ahrens who states that he performed a site inspection at the location and measured the distance between the area where plaintiff fell to be much more than twelve inches away from the manhole cover.

New York City Department of Transportation Highway Rule 34 (RCNY § 2-07), which governs the maintenance and repair of sidewalk grates, places maintenance and repair responsibilities on the owners of covers or gratings (see Cruz v. New York City Tr. Auth., 19 A.D.3d 130, 795 N.Y.S.2d 589 [2005]). Indeed, 34 RCNY § 2-07(b)(1) states that “[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware” (*id.* at 130-131, 795 N.Y.S.2d 589). Further, 34 RCNY § 2-07(b)(2) requires that “[t]he owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating.”

The documents and deposition testimony submitted by Con Edison in support of its motion do not eliminate the possibility that the defect that caused plaintiff's accident was further than twelve inches from the perimeter of the manhole cover. A movant's failure to establish a prima facie case mandates denial of a summary judgment motion without regard for the sufficiency of the opposing papers (see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]). Having failed

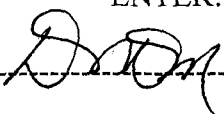
to sustain its burden of making a prima facie showing, plaintiff is not entitled to judgment as a matter of law.

Accordingly, it is

ORDERED that Con Edison's motion for summary judgment is denied.

DATED:

ENTER:



A handwritten signature in black ink, appearing to read 'D. Mills', is written over a horizontal dashed line.

J.S.C.

DONNA M. MILLS, J.S.C.

FILED

NOV 14 2013

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