

Neal v City of New York
2014 NY Slip Op 31894(U)
July 17, 2014
Sup Ct, New York County
Docket Number: 114090/2008
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 : 114090/2008
NEAL, CARLA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 006

The following papers, numbered 1 to _____, were read on this motion tofor _____

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
ACCOMPANYING DECISION / ORDER**

RECEIVED
JUL 22 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL


FILED

JUL 22 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/17/14

 J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED
- 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

CARLA NEAL,

Plaintiff,

-against-

DECISION/ORDER
Seq. Nos 006,
Index No.:114090/2008

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., EMPIRE CITY
SUBWAY COMPANY, VERIZON NEW YORK, INC.,
PETROCELLI ELECTRIC CO., INC., SAFEWAY
CONSTRUCTION ENTERPRISES, INC., TRIUMPH
CONSTRUCTION CORP., NICO ASPHALT, INC. and
PIPELINE CONSTRUCTION, LLC,

Defendants.

-----x

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,

Third-Party Plaintiff,

-against-

FILED

JUL 22 2014

COUNTY CLERK'S OFFICE
NEW YORK

Index No.:590700/2010

TRIUMPH CONSTRUCTION CORP. and NICO ASPHALT,
INC.,

Third-Party Defendants.

-----x

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NICO'S NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1,2(Exs.A-Y)
CON ED's NOTICE OF MOTION AND AFFIDAVITS ANNEXED..	.3,4(Exs. A-J)
ANSWERING AFFIRMATIONS.....5,6.....
REPLYING AFFIDAVITS.....7.....

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

Motion sequence numbers 006 and 007 are consolidated for disposition. In motion sequence 006, defendant Consolidated Edison Company of New York (Con Edison) moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint and all cross claims against it. In motion sequence 007, defendant/third-party defendant Nico Asphalt Paving Inc. s/h/a Nico Asphalt, Inc. (Nico) moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint, cross claims, and counterclaims.

FACTUAL ALLEGATIONS

This action involves allegations of personal injuries which plaintiff Carla Neal sustained as a result of a trip and fall. Plaintiff alleges that on June 11, 2008, she was walking from the east side to the west side of Pearl Street in Manhattan, New York. Plaintiff testified that a bus stop was about six feet to the right of where she was standing, when she proceeded to walk three steps into the street.

Plaintiff testified that she was about six feet into Pearl Street, and was 70 feet from Robert F. Wagner, Sr. Place, when she tripped on a bump and fell forward. Plaintiff maintains that she tripped with her right foot and fell to the ground, injuring her right knee. The bump on which she fell was about 4-5 inches high and was about six feet from the sidewalk. Plaintiff testified that the bump was a "long hill" which ran parallel "up and down" Pearl Street. (Dole Affirmation, ex. D, at 33).

On October 20, 2008, plaintiff commenced an action alleging personal injuries against the City of New York, Con Edison, Empire City Subway Company, Verizon New York, Inc., Petrocelli Electric Co., Inc. (Petrocelli), and Safeway Construction Enterprises, Inc. Several of

the defendants moved for summary judgment. On October 27, 2009, Petrocelli was granted summary judgment; on May 11, 2012, Safeway Construction Enterprises, Inc., was granted summary judgment; and on April 2, 2013, Empire City Subway Company (Limited) s/h/a Empire City Subway Company, Verizon New York, Inc., defendants/third-party defendants Triumph Construction Corp., and Pipeline Construction, LLC, were granted summary judgment.

Defendants Con Edison and Nico, now separately move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross claims and counter-claims asserted against them.

DISCUSSION

The Court of Appeals has held that summary judgment is a drastic remedy which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

In motion sequence 006, Con Edison submits the testimony of two of its employees to support its motion. Con Edison submits the deposition testimony of George Canzaniello, a specialist who works at Con Edison. Canzaniello testified that he conducted a records search for the area of Pearl Street, Robert F. Wagner Sr. Place, and Madison Street, Manhattan, for the time period of June 11, 2006 through June 11, 2008. Con Edison argues that a search of its work tickets for that area reflects that it did not perform any work in the area where plaintiff had her

accident. Con Edison also submits an affidavit from Daniel Pellici, a field operations planner, who states that no steam structures owned by Con Edison were located on or beneath the roadway where the subject accident took place.

In motion sequence 007, Nico, a contractor that performs restoration for Con Edison, argues that summary judgment must be granted in its favor because plaintiff fails to produce any evidence which demonstrates that it caused or created a dangerous condition, that it had actual or constructive notice of a dangerous condition, or that it breached a duty owed to plaintiff which proximately caused her injuries. On October 18, 2011, Nico produced its superintendent and vice-president, John Dengall, for a deposition. Dengall testified that the paving work which Nico conducted for Con Edison was not at or near plaintiff's subject accident site.

In opposition to the motions for summary judgment, plaintiff argues that Canzaniello's deposition testimony raises questions of fact as to whether Con Edison and Nico worked in the subject area. Plaintiff maintains that, during his deposition, Canzaniello identified an emergency work ticket for the repair of a manhole located at Pearl Street and Robert Wagner Sr. Place. Plaintiff argues that the work ticket was a result of a segment search for the area where plaintiff was allegedly injured, specifically the area between Robert Wagner Sr. Place and Madison Street. Canzaniello testified that he was unsure what the specific location was of the manhole, but knew it was in the vicinity of Pearl Street and Robert Wagner Sr. Place. Canzaniello testified that he was unclear what work was done pursuant to the emergency work ticket, that he did not know how long the work took to complete, and that he was unsure whether the crew which serviced the specific area kept any records of its work.

Plaintiff also contends that it is unclear from the testimony of Canzaniello and Dengall

whether the work completed by Con Edison and Nico pursuant to opening ticket PS 452909, which is dated October 21, 2006, may have contributed to the alleged street defect in the location of plaintiff's accident. Con Edison contends that the two cuts identified in the ticket were made in the traffic lane on Pearl Street. The first cut was 63 feet north of Robert Wagner Sr. Place, and the second cut was 43 feet north of Robert Wagner Sr. Place on Pearl Street. Canzaniello testified that the first cut was 17 feet in length, 7 feet in width, .9 base depth, while the second cut was 12 feet in length, 7 feet in width, at .9 in service depth.

Plaintiff argues that, because she fell about 70 feet north of Robert Wagner Sr. Place, the work pursuant to this permit was within, or close to, the area in which she fell. Plaintiff maintains that the photographs of the accident site demonstrate that the bump spanned a larger area in length which may have extended into area covered by the permit. Plaintiff contends that the testimony of Canzaniello and Dengall fails to clarify with specificity whether the work completed by either entity pursuant to the permits may have created the alleged defect.

The Appellate Division, First Department, has held that "[i]n considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Here, the testimony of Canzaniello and Dengall is inconclusive and fails to address whether the specific work and cuts made pursuant to ticket PS 452909, actually impacted the surface of the street in the area where plaintiff fell. Furthermore, Canzaniello was not clear whether there was an existing manhole, removal of a manhole, or if a manhole was placed in the vicinity of the area for ticket PS 452909.

While Nico produced Dengall to testify regarding his personal knowledge of Nico's work on Pearl Street, Dengall was unable to identify photographs of the site of the accident and failed

to discuss whether Nico's work pursuant to ticket PS 452909 created or contributed to the bump on which plaintiff allegedly fell.

Therefore, because issues of fact exist as to whether defendants work in the vicinity contributed to the alleged defect where plaintiff fell, both Con Edison and Nico's motions for summary judgment must be denied.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant Consolidated Edison Company of New York, Inc.'s motion for summary judgment (sequence 006), is denied; and it is further

ORDERED that defendant/third-party defendant Nico Asphalt Paving Inc. s/h/a Nico Asphalt, Inc.'s, motion for summary judgment (sequence 007) is denied; and it is further

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

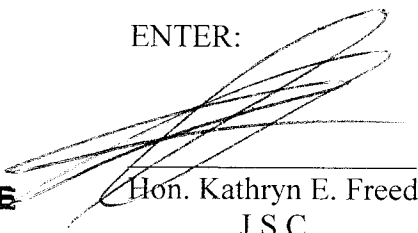
DATED: July 17, 2014

FILED

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JUL 22 2014

COUNTY CLERK'S OFFICE
NEW YORK


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