

Sears v S3 Tunnel Constr. AJV
2015 NY Slip Op 32056(U)
February 27, 2015
Supreme Court, New York County
Docket Number: 101748/12
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 2

Index Number : 101748/2012
SEARS, REBECCA
vs.
S3 TUNNEL CONSTRUCTION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002

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
ACCOMPANYING DECISION / ORDER**

FILED


MAR 16 2015

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

Dated: 2/27/15
FEB 27 2015


HON. KATHRYN FREED, J.S.C.
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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
REBECCA SEARS,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 101748/12
Seq. No. 002, 003

S3 TUNNEL CONSTRUCTION AJV,
A Joint Venture Between SKANSKA USA
CIVIL NORTHEAST, INC., J.F. SHEA
CONSTRUCTION, INC. and SCHIAVONE
CONSTRUCTION CO. LLC, SKANSKA USA
CIVIL NORTHEAST, INC., J.F. SHEA
CONSTRUCTION, INC., SCHIAVONE
CONSTRUCTION CO. LLC, METROPOLITAN
TRANSPORTATION AUTHORITY and RCN
TELECOM SERVICE OF NEW YORK, LP,
J. D'ANNUNZIO & SONS, INC. and
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendants.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

-----X
KATHRYN E. FREED, J.S.C.

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

PAPERS	NUMBERED
DEFENDANTS' NOTICE OF MOTION, AFF. IN SUPPORT, AND EXHIBITS ANNEXED.....	1, 2 (Exs. A-X)
RCN'S NOTICE OF MOTION, AFF. IN SUPPORT AND EXHIBITS ANNEXED.....	3, 4 (Exs. A-V)
PLAINTIFFS' AFFIDAVIT IN OPPOSITION AND EXHIBITS ANNEXED.....	5 (Exs. 1-7)
DEFENDANTS' REPLY AFF. AND EXHIBIT.....	6
RCN'S REPLY AFF.....	7

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

FILED

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NEW YORK

U.S. DISTRICT COURT OF S.D.N.Y.

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

In this personal injury action commenced by plaintiff Rebecca Sears, S3 Tunnel Construction AJV, A Joint Venture Between Skanska USA Civil Northeast, Inc., J.F. Shea Construction, Inc., and Schiavone Construction Co. LLC (“S3JV”), Skanska USA Civil Northeast, Inc. (“Skanska”), J.F. Shea Construction, Inc. (“Shea”), Schiavone Construction Co. LLC (“Schiavone”), Metropolitan Transportation Authority (“MTA”), and J.D’Annunzio & Sons, Inc. (“D’Annunzio”) (hereinafter collectively “the contract defendants”) move, pursuant to CPLR 3212 (motion sequence 002), for summary judgment dismissing the complaint and all cross claims against them. Defendant RCN Telecom Service of New York, LP (“RCN”) moves, pursuant to CPLR 3212, for the same relief (motion sequence 003).¹ After oral argument and a review of the motion papers applicable law, this Court **grants** the motion brought under motion sequence 002 as to all contract defendants except the MTA and **grants** the motion brought under motion sequence 003.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on February 22, 2011 in which plaintiff Rebecca Sears was allegedly injured when she tripped and fell after her foot was caught in a depression caused by a newly re-paved trench while she was crossing Second Avenue inside the northern crosswalk at the intersection of East 85th Street in Manhattan.

In her notice of claim, plaintiff claimed that she was injured due to the negligence of the

¹ All claims and cross claims against defendant Consolidated Edison Company of New York, Inc. have been discontinued.

MTA and its agents. Ex. A.²

Plaintiff commenced this action by filing her summons and complaint on February 17, 2012. Ex. B. Plaintiff served a supplemental summons on or about July 11, 2013. Ex. D. Plaintiff alleged that she was injured as a result of the negligence of the contract defendants and RCN. In her bill of particulars, plaintiff claimed that the contract defendants and RCN were negligent in creating the allegedly dangerous condition and in failing to properly maintain the intersection. Ex. E.

At her initial deposition on May 9, 2013, plaintiff testified that, on February 22, 2011, she was injured when she fell while attempting to cross Second Avenue from the northwest to the northeast corner of its intersection with East 85th Street. Ex. I, at 1, 17, 34, 36. Plaintiff was approximately halfway across Second Avenue when she felt the street sinking, fell to the ground, and felt pain in her ankle, knee, hip and lower back. *Id.*, at 34, 44, 49, 55, 68. Although she noticed after her fall that she was in a hole, she could not describe the hole, did not know how it was created, and did not know how long it existed before the incident. *Id.*, at 56-57. Although she testified that the area where she fell appeared to be re-paved, she did not know when asphalt may have been poured at the intersection prior to the incident. *Id.*, at 58-59.

Plaintiff testified that the photographs marked at her deposition fairly and accurately depicted the intersection as it existed on the day of the alleged incident. Ex. I, at 48-49. However, she could not identify from the photographs the precise location where she fell. *Id.*, at 50-52.

At her deposition on May 19, 2014, plaintiff was again asked to identify from photographs marked as exhibits where she fell but was unable to pinpoint the location of the accident. Ex. J, at

²Unless otherwise noted, all references are to the exhibits annexed to the affirmation in support of the contract defendants' motion for summary judgment.

26-27. However, in an errata sheet sworn July 7, 2014, plaintiff stated that she fell “somewhere within [the] trench depicted in the photograph.” Ex. 4 to Plaintiff’s Aff. In Opp. The reason she gave for correcting her testimony was that she was unable to answer the question as it was worded. Id.

Philip Rice testified at his deposition that he had been a vice-president at Parsons Brinckerhoff (“Parsons”), an engineering firm, for the past seven years. Ex. K, at 8. On the date of the alleged incident, Rice was Parsons’ construction manager on contract number C-26013 between the MTA and D’Annunzio for work on the Second Avenue subway project. Id., at 9. The work performed pursuant to the contract included utility relocation and road decking. Id., at 10-11. During February of 2011, work was performed pursuant to the contract on Second Avenue between 82nd and 88th Streets and Rice, who was at the site 2-3 times per week, saw excavation and re-paving work performed in that area. Id., at 14, 17-18. D’Annunzio was involved in this work but would not have performed any excavation in the area without the knowledge of someone at Parsons. Id., at 18, 36. The utility relocation was not performed at the intersection of Second Avenue and East 85th Street. Id., at 33. Although Rice said that the photographs identified by plaintiff appeared to show an area which had been excavated, he could not tell from the photographs whether the area was properly backfilled and compacted and did not recall seeing any entity paving in that area. Id., at 23-25.

Rice explained that S3JV, a joint venture of three contractors, entered into contract C-26002 with the MTA and that none of the work performed by S3JV or its component companies pursuant to that contract was on Second Avenue between 82nd and 88th Streets. Id., at 42.³

At his further deposition, Rice testified that Parsons Brinckerhoff was the MTA’s consultant construction manager on the Second Avenue subway project. Ex. L, at 8. In 2013, Rice performed

³As noted below, S3JV was comprised of Schiavone, Shea, and Skanska. Ex. X.

a search for any records relating to excavation work performed at the intersection of Second Avenue and East 85th Street and found none. *Id.*, at 9. He further stated that he never saw any excavation performed in the crosswalk of the intersection. *Id.*, at 9-10.

Sergio Couto, a project manager for D'Annunzio, testified at his deposition that any excavation work performed at the intersection of Second Avenue and East 85th Street would have been close to the curb and not in the middle of the roadway. *Ex. M*, at 13-14. D'Annunzio would not have any records reflecting who, if anyone, re-paved the intersection since plaintiff's accident was not within its work area. *Id.*, at 42. Couto was not aware of any work performed by D'Annunzio within "the box" of the intersection. *Id.*, at 55. He stated, however, that D'Annunzio made a "cutback" in the sidewalk of Second Avenue approximately 10-11 feet from the crosswalk. *Id.*, at 50-51.

Brian Crombie, a construction and engineering manager for RCN, testified that he did not know who created or backfilled the trench identified by plaintiff or when it may have been created. *Ex. N*, at 31-33. He admitted that RCN had been involved in excavation at the intersection in 1997 (*Ex. N*, at 12-16), but that no complaints were ever made about the work. *Ex. N*, at 19.

Plaintiff filed her note of issue and certificate of readiness on or about June 4, 2014. *Ex. G*.

The contract defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them. RCN moves for the same relief. In support of their motions, the movants submit, *inter alia*, pleadings, deposition transcripts, and photographs marked at plaintiff's deposition. RCN incorporates by reference into its motion portions of the evidence submitted by the contract defendants. Plaintiff opposes both motions.

POSITIONS OF THE PARTIES:

The contract defendants maintain that they are entitled to summary judgment since they did not perform any work in the area where plaintiff fell. In support of their motion, they submit, inter alia, pleadings, the bill of particulars, and deposition testimony. They also submit the affidavit of Alaeden Jlelaty, a Senior Project Manager for Skanska, who avers that S3JV, which was comprised of Skanska, Shea and Schiavone, did not perform or supervise any work at the subject intersection (Ex. X), and “as built” drawings reflecting that no work pursuant to the contract was performed in the area where plaintiff fell. Exs. V and W.

RCN argues that it is entitled to summary judgment dismissing the complaint and all cross claims against it because it last worked at the intersection in 1997 and plaintiff has failed to adduce any evidence establishing that RCN’s work caused her accident. In support of its motion, RCN submits, inter alia, the plaintiff’s expert disclosure, dated June 5, 2014. Ex. V to RCN’s motion. In the expert disclosure, plaintiff alleges that her expert, engineer Richard Balgowan, will testify, inter alia, that plaintiff’s accident occurred because a “recently re-paved trench” marked “RCN” was improperly backfilled by RCN. Id. RCN alleges that there is no basis for Balgowan’s conclusion.

In an affidavit in support of RCN’s motion, Crombie states that RCN performed no recent work at the intersection of Second Avenue and 85th Street and that it last worked at that location in 1997. Ex. T to RCN’s motion.

In an affirmation in opposition, plaintiff argues that both motions for summary judgment must be denied. Plaintiff argues that RCN failed to establish its prima facie entitlement to summary judgment and, even if it did, Balgowan’s affidavit raises material issues of fact regarding whether RCN’s backfilling was proper which preclude summary judgment. Plaintiff further asserts that the

contract defendants' motion must be denied since the "sidewalk cutback excavation" made near the intersection "typically involves the use of saws, backhoes, pavement breakers and jackhammers" which cause a great deal of vibration and which may have caused the hazardous condition of the ground where plaintiff fell. Plaintiff's Aff. In Opp., at par. 33.

In opposition to the motions, plaintiff submits, inter alia, the affidavit of Richard M. Balgowan, P.E., a licensed professional engineer. Balgowan states that his opinions are "based upon a review of plaintiff's entire file in this matter." Plaintiff's Aff In Opp., at Ex. 1., par. 4. He opines, within a reasonable degree of engineering certainty, that plaintiff's accident occurred because the area was improperly backfilled by RCN in 1997, and that compacted soil should be able to withstand shocks and vibrations caused by heavy construction equipment. *Id.*, at pars. 7, 13. Although Balgowan notes that there is no evidence that the defendants excavated or re-paved the area in question (*Id.*, at par. 11), he states that a "massive tunnel-boring device" used by S3JV caused vibrations which created a void under the asphalt where plaintiff fell. Ex. 1 to Plaintiff's Aff. In Opp., at par. 21.

In their reply affirmation, the contract defendants argue that, until she opposed this motion, plaintiff did not allege that the incident was caused by vibration created by heavy construction equipment. Therefore, urge the defendants, this theory must be disregarded. Annexed as Ex. A to the defendants' reply affirmation is the plaintiff's expert disclosure, discussed above. In the expert disclosure, plaintiff represents that Balgowan will testify that her accident occurred because a "recently re-paved trench" marked "RCN" was improperly backfilled by RCN. *Id.* Plaintiff further alleges that D'Annunzio was negligent in creating the trench since it was the only entity with a street opening permit valid "for the place and time in question." However, urge the contract defendants,

there is no mention of vibration as a cause of the incident or of the type of equipment used by them at or near the site. Nor is there any proof of excavation at the site by D'Annunzio. Thus, maintain the contract defendants, Balgowan's opinion is speculative and conclusory.

In its reply affirmation, RCN also argues that plaintiff cannot rely on a new theory of liability in its opposition to a motion for summary judgment and that the conclusions reached by Balgowan have no evidentiary basis and are speculative. RCN further asserts that plaintiff's errata sheet is a transparent attempt to avoid the dismissal which would occur if she could not pinpoint the location of her fall.

LEGAL CONCLUSIONS:

“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). If the movant fails to make this showing, the motion must be denied regardless of the sufficiency of the opposing papers. *Id.* 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.3d 557 (1989); *People ex rel Spitzer v. Grasso*, 50 A.D.3d 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 (2d Dept. 1985).

The Motion By The Contract Defendants

Despite the argument by the contract defendants that they are all entitled to summary judgment because they “did not do any work whatsoever” at Second Avenue and East 85th Street (Contract Defendants’ Aff. In Support, at par. 6), they submit no evidence specifically addressing the MTA’s involvement, or lack of involvement, at the subject intersection. Thus, they have failed to prove that the MTA did not cause and/or contribute to the alleged incident. Rice testified that he searched for, and found, records reflecting that no excavation work was performed at Second Avenue and East 85th Street (Ex. L, at 9). However, he did not say which records he searched for, whether they included MTA records, or what time period the records covered. Additionally, although he said that he did not observe excavation at that intersection (Ex. L, at 10), he did not say whether he saw any re-paving there and, if so, whether MTA was involved in the work.

Defendants S3JV, Skanska, Shea, Schiavone, and D’Annunzio have established their prima facie entitlement to summary judgment dismissing the complaint and all cross claims against them by submitting evidence that they did not perform work in the crosswalk where plaintiff fell.⁴ Rice, an employee of Parsons, testified at his deposition that, in his role as construction manager, he was at the site 2-3 times per week and saw excavation and re-paving work performed on Second Avenue between 82 and 88th Streets. Ex. K, at 17-18. Although D’Annunzio was involved in this work, it would not have performed any paving or excavation in the area without the knowledge of someone

⁴As noted above, plaintiff testified at both of her depositions that she could not identify the area where she fell in photographs marked as exhibits. In an errata sheet executed after her second deposition, plaintiff clarified that she fell in a trench at the intersection. Although RCN asserts, in effect, that the errata sheet should be disregarded and the complaint dismissed due to plaintiff’s inability to identify the location of the incident, this Court rejects that argument based on the fact that the location was sufficiently described by the complaint and bill of particulars. *See Sacco v City of New York*, 92 AD3d 529 (1st Dept 2012).

at Parsons, and he had no recollection of the company doing such work at Second Avenue and East 85th Street. *Id.*, at 18, 33, 36. Couto testified that the subject intersection was not within D'Annunzio's work area, but that D'Annunzio made a "cutback" in the sidewalk of Second Avenue approximately 10-11 feet from the crosswalk. *Id.*, at 42, 50-51.

Rice further stated that neither S3JV nor any of its component companies (which Jlelaty averred were Schiavone, Shea, and Skanska [Ex. X]) did any work on Second Avenue between 82nd and 88th Street. Ex. K, at 42.

The Motion By RCN

RCN established its *prima facie* entitlement to summary judgment by showing that it last performed work at the subject intersection in 1997, 14 years before the accident, thereby undermining plaintiff's claim that RCN was negligent in its *recent* re-paving of the area. Additionally, Crombie testified that no complaints were ever made about RCN's 1997 work at the site. Ex. N, at 19.

In opposition to the motions for summary judgment, plaintiff failed to raise an issue of fact. The merits of plaintiff's theory that the alleged hazard resulted from vibration caused by heavy construction equipment cannot be considered by this Court since it is raised for the first time in opposition to the motions. *See Matter of Keilany B. v City of New York*, 122 AD3d 424, 425 (1st Dept 2014), citing *Ostrov v Rozbruch*, 91 AD3d 147, 154; *Abalola v Flower Hosp.*, 44 AD3d 522 (1st Dept 2007). This theory was not mentioned in the complaint or amended complaint, the bill of particulars, or in Balgowan's expert disclosure pursuant to CPLR 3101(d). Exs. B, D, and E; Ex. A to Defendants' Reply Aff. In any event, there is no basis for Balgowan's conclusion that heavy

equipment caused such vibration. In reaching this conclusion, Balgowan relies on “[p]laintiff’s file.” Ex. 1 to Plaintiff’s Aff. In Opp., at par. 21. However, he does not state any specific basis for stating that such equipment was used. Although the affirmation of plaintiff’s counsel annexes as Exhibit 5 articles from the New York Times and Wikipedia mentioning that heavy equipment was used in the area of the alleged incident, the articles are inadmissible. *See Chong Min Mun v Soung Eun Hong*, 109 AD3d 732 (1st Dept 2013). Since Balgowan’s opinion regarding the vibration as a cause of the accident is based on this inadmissible evidence, his opinion regarding this theory is of no probative value. *See Briggs v 2244 Morris L.P.*, 30 AD3d 216 (1st Dept 2006); *Avella v Jack La Lanne Fitness Centers, Inc.*, 272 AD2d 423 (2d Dept 2000). Given that Balgowan’s opinion was nothing more than speculative and conclusory, it cannot raise an issue of fact defeating the motions for summary judgment. *See Zapata v Sutton*, 84 AD3d 521 (1st Dept 2011); *Azzaro v Super 8 Motels, Inc.*, 62 AD3d 525 (1st Dept 2009); *Saborido-Calvo v New York City Trans. Auth.*, 11 AD3d 216 (1st Dept 2004).

Similarly, Balgowan’s conclusion that D’Annunzio was somehow liable for plaintiff’s injuries is based on mere speculation, as there is no evidence that it entity excavated or re-paved the intersection. *See Zapata, supra; Azzaro, supra; Saborido-Calvo, supra.*

Although plaintiff’s counsel argues that the creation of a sidewalk cutback, such as that located near the subject intersection, “typically involves the use of saws to cut through concrete, backhoes, pavement breakers, jackhammers” and other “various types of compacting equipment” which cause a great deal of vibration and which may have weakened the condition of the ground where plaintiff fell (Plaintiff’s Aff. In Opp., at par. 33), there is no factual basis for this contention. Since it is well settled that the affirmation of an attorney with no personal knowledge of the facts

cannot be used to raise an issue of fact, counsel has failed to defeat the defendants' prima facie entitlement to judgment as a matter of law. *See Thelen LLP v Omni Contracting Co., Inc.*, 79 AD3d 605 (1st Dept 2010).

Plaintiff has also failed to raise an issue of fact regarding whether defendants and RCN recently backfilled the area and were negligent in doing so. Balgowan's opinion that defendants and RCN were negligent in this fashion is also unsupported by the record. First, there is nothing in the motion papers reflecting that the area was recently backfilled. Although plaintiff's counsel stated at oral argument that it seemed *to him*, based on *his* review of photographs, that the area was recently backfilled, it is beyond peradventure that his opinion does not constitute admissible evidence. *See Guntur v Jetblue Airways Corp.*, 2011 NY Misc LEXIS 4735 (Sup Ct New York County 2011), *aff'd* 103 AD3d 485 (1st Dept 2013).

It is undisputed that Balgowan did not visit the accident site and, although he refers to photographic evidence which he reviewed in reaching his opinion, he does not state that any such photographs depicted the condition of the area in question and enabled him to analyze how the incident occurred. *Cf. Samuels v City of New York*, 7 Misc 3d 68 (App Term 2d Dept 2005) (plaintiff's expert properly relied on appearance of the area as basis for his opinion that method of backfilling was improper where he visited the site at which plaintiff was injured, testified regarding specific aspects of photographs of the site which supported his opinion, and facts on which he relied could be fairly inferred from the photographs). Therefore, Balgowan's opinion that the area was improperly backfilled is without probative value and fails to defeat the motions. *See Azzaro, supra* at 526; *Saborido-Calvo, supra*, at 254-255; *Avella, supra* at 424.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants S3 Tunnel Construction AJV, A Joint Venture Between Skanska USA Civil Northeast, Inc., J.F. Shea Construction, Inc., and Schiavone Construction Co. LLC, Skanska USA Civil Northeast, Inc., J.F. Shea Construction, Inc., Schiavone Construction Co. LLC, Metropolitan Transportation Authority, and J.D'Annunzio & Sons, Inc. (motion sequence 002) is granted as to all movants except the Metropolitan Transportation Authority, and all claims and cross claims against all movants except the Metropolitan Transportation Authority are hereby severed and dismissed; and it is further,

ORDERED that the motion for summary judgment by defendant RCN Telecom Service of New York, LP (motion sequence 003) is granted, and all claims and cross claims against that defendant are hereby severed and dismissed; and it is further,

ORDERED that the complaint is dismissed as against all movants except the Metropolitan Transportation Authority, with costs and disbursements to the successful movants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the remainder of the action shall continue as against the defendant Metropolitan Transit Authority; and it is further,

ORDERED that the caption is to be amended accordingly; and it is further,

ORDERED that the parties remaining in this action shall appear for a settlement conference on April 8, 2015 at 80 Centre Street, Room 280, at 2:30 p.m.; and it is further,

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

Dated: February 27, 2015

ENTER:

FILED

MAR 16 2015

**NEW YORK
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KATHRYN E. FREED, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

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