

**Dennis v City of New York**

2015 NY Slip Op 32140(U)

October 16, 2015

Supreme Court, Bronx County

Docket Number: 301343/11

Judge: Elizabeth A. Taylor

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.

1

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, I.A.S. PART 2

DELIA DENNIS,

Plaintiff,

Index No. 301343/11

-against-

DECISION/ORDER

Present:

HON. ELIZABETH A. TAYLOR

THE CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC.,  
CONSOLIDATED EDISON, INC., STEP-MAR  
CONTRACTING CORP., TRI-MESSINE  
CONSTRUCTION COMPANY, INC. and EMPIRE  
CITY SUBWAY COMPANY (LIMITED),

Defendants.

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC.,

Third-Party Plaintiff,

Index No. 84114/11

-against-

STEP-MAR CONTRACTING CORP. and  
TRI-MESSINE CONSTRUCTION CO.,

Third-Party Defendants.

The following papers numbered 1 to \_\_\_ read on this motion, \_\_\_\_\_

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-3, 4-5
	Answering Affidavit and Exhibits-----	6, 7, 8
	Replying Affidavit and Exhibits-----	9, 10
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers, this motion has been referred to me for disposition by the Supreme Court Justice at IAS Part 3, pursuant to the published rules of IAS Part 3 and the Administrative Judge.

Motion pursuant to CPLR 3212 for an order dismissing the complaint against the City, on the grounds that it neither created or had notice of the alleged defect; and motion pursuant to CPLR 3212 for an order granting summary judgment and dismissing the third-party complaint against Tri-Messine are consolidated herein for decision and

granted.

Plaintiff commenced this personal injury action for alleged injuries she sustained as a result of her fall due to an "obstructed cracked, uneven, raised, depressed, missing, and/or deteriorated roadway" located at the intersection of Starling Avenue and Purdy Street in Bronx County on November 19, 2009. Plaintiff testified that she was crossing Starling Avenue at the intersection of Purdy Street when her right foot got caught in a hole in the roadway that was approximately four inches wide and four inches deep. At her deposition, plaintiff circled the area where she fell.

The City argues that the motion should be granted because it did not have prior written notice of the specific defect on the roadway that allegedly caused plaintiff's accident, and there is no evidence to support an exception to the prior written notice law, *to wit*, that the City caused or created the condition.

In support of its motion, the City submitted, among other things, the affidavits of Fulu Bhowmick, Jeremy John and Michelle Lee. Department of Transportation record searcher Fulu Bhowmick conducted a roadway intersection search for November 19, 2009 and two years prior to. Ms. Bhowmick also searched the Big Apple Maps and the most recent map was served on DOT at least 15 days prior to the accident. Department of Transportation record searcher Jeremy John performed a search for paper records, including complaints and violations, for the intersection. This search encompassed a period of two years prior to and including November 19, 2009. Mr. John also searched for Big Apple Maps for an area that included the intersection.

Department of Environmental Protection paralegal Michelle Lee performed a search for DEP sewer and water records for the intersection for a period of two years prior to and including November 19, 2009. The search results do not reveal that the City was on notice of the alleged defect in this case. The searches reveal that the City did not perform any repair work at the subject location that could have created the alleged dangerous condition. The City argues that the complaint should be dismissed against it, as none of the complaints or maintenance repair orders have identified the specific location of the alleged accident.

The City met its prima facie burden to demonstrate that it did not create or was on notice of the alleged defect.

Plaintiff joins in Con Edison's opposition to the City's motion. Rather than dispute the City's proof, Con Edison argues that the motion is premature as discovery is incomplete, without explaining how discovery would lead to competent evidence to defeat the motion. The mere hope of evidence to refute plaintiff's motion is insufficient.

In support of its motion for summary judgment, Tri-Messine submits, among other things, the deposition transcripts of Alfonso Messina, its owner, Mario Jcovino, President of Step-Mar, and George Canzaniello, a records searcher on behalf on Con Edison. Mr. Canzaniello testified that a trench was excavated, back-filled and based by Step-Mar on January 11, 2008. He further testified that Tri-Messine performed the paving of the same trench, and Tri-Messine's work was inspected by Con Edison on February 6, 2008 and then approved by Con Edison's Chief Construction inspector on

February 8, 2008. Mr. Jocovino testified that the work it performed on behalf of Con Edison was not in the area where plaintiff tripped and fell. Specifically, Mr. Jacovino testified that Step-Mar excavated a portion of the roadway located on the opposite side of the manhole from where plaintiff allegedly fell. Mr. Messina testified that Tri-Messine performed paving in the same trench previously excavated, based and backfilled by Step-Mar.

In opposition, Con Edison does not deny that Tri-Messine's work in question was performed in the same trench that Step-Mar worked on.

On March 18, 2014, Justice Stinson granted summary judgment and dismissed the complaint and third-party complaint against Step-Mar, finding "that Step-Mar did not perform work at the site of the accident where plaintiff Dennis claims she fell." As it is undisputed that Tri-Messine work was performed in the same trench that Step-Mar prepared, the law of the case dictates that the complaint and third-party complaint be dismissed against Tri-Messine.


It is noted that the parties filed with the Bronx County Clerk a stipulation of discontinuance against defendant Empire City Subway Company (Limited), however, there is no indication that the stipulation was served on the Trial Support Clerk.

Upon receipt of a copy of this order with notice of entry, the Clerk shall: 1) dismiss the complaint against the City of New York and Tri-Messine Construction Company, Inc.; and 2) dismiss the third-party complaint against third-party defendant Tri-Messine Construction Company, Inc., and amend the caption accordingly. It is

noted that Justice Stinson's order dated March 18, 2014 dismissed the complaint and third-party complaint against Step-Mar Contracting Corp. Therefore, the Clerk shall dismiss the complaint and the third-party complaint against defendant/third-party defendant Step-Mar Contracting Corp. and amend the caption to reflect such dismissal.

The foregoing shall constitute the decision and order of this court.

Dated: OCT 16 2015

  
\_\_\_\_\_  
A.J.S.C.