

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

2016 NY Slip Op 31151(U)

May 2, 2016

Supreme Court, Bronx County

Docket Number: 307269/10

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA- 24

-----X
MIRNA SINGH,

Plaintiff(s)

- against -

INDEX NO: 307269/10

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., STEP MAR CONTRACTING
CORP., and TRI-MESSINE CONSTRUCTION,
INC.,

DECISION/ORDER

Defendant(s)

-----X
HON. SHARON A.M. AARONS

Defendant's motion for summary judgment is decided as follows:

Plaintiff alleges that on April 2, 2010 at 5:00pm she was crossing a crosswalk at the East Fordham Road and Grand Concourse intersection, Bronx, New York, when she stepped into a "footprint shaped" hole, resulting in a fall. Specifically, plaintiff alleges that the brick-paved road had been excavated by defendant Consolidated Edison Company of New York (Con Edison) and subsequently paved with asphalt on November 7, 2007, resulting in a hole located within the 12 inch perimeter of two separate Con Edison manhole covers.¹

Con Edison seeks summary judgment on that ground that it did not perform any work at the accident location, but had contracted with defendants Tri Messine

¹ RCNY at Title 34 § 2-07(b) provides "[t]he owners of covers or grating 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."

and Step Mar who performed back fills and paving work in the vicinity of the accident location. Con Edison argues that it did not owe a duty to plaintiff since it did not create the defective condition that is alleged to have caused plaintiff's accident.

In support of its motion, Con Edison submits the deposition testimony of Patrick Keogh, a Con Edison record searcher, who testified that he conducted a work record search, which revealed that work was conducted in front of 148 East Fordham Road, near a bus pad, at the East Fordham Road - Grand Concourse intersection. He testified the work was done in the intersection and there were never any complaints made to Con Edison regarding this area.

In opposition, plaintiff argues that Con Edison was responsible for the work performed. Pursuant to the Rules of the City of New York (RCNY) at Title 34, §2-07(b), the owner of street covers or gratings has a duty to monitor and maintain the street areas extending twelve inches outward from the perimeter of the covers or gratings. Plaintiff argues that the "foot print" shaped hole in which plaintiff fell, was within the 12-inch perimeter of the Con Edison manhole cover.

Plaintiff submits color photographs of the crosswalk in question, which depict the hole to be within 12 inches of the manhole cover, and an expert affidavit of Charen Singh, a general contractor, who did a field inspection of the crosswalk on May 17, 2013. This expert opined that the area in question was originally paved as an interlocking joint using standard 3-1/8" concrete bricks in a herringbone pattern, which is most effective for surfaces bearing vehicular traffic. Further, he opined that the brick pattern was disturbed by the excavation and repair work.

Plaintiff further argues that although the repair of the intersection was not performed by Con Edison employees themselves, Con Edison field inspectors were at the work sites daily checking the progress of the contractors. On this issue, plaintiff submits the deposition testimony of Jacob Edwards, Con Edison's Chief Construction Inspector, who testified that as an inspector it was his duty to oversee contractors and ensure that the work was performed in accordance with company specifications and safety guidelines. He testified that the Con Edison inspector made the decision as to the materials to be used in the final restoration of an excavation. He further stated that he observed at the site in issue that Con Edison needed to be aware of special surface conditions in the area in accordance with "like and kind" restoration rules (RCNY Title 34 § 2-11[e]).² Plaintiff asserts, however, the next Con Edison inspector who took over directed Tri-Messine to pave asphalt over the area in question. This same Con Edison Inspector testified that he directed defendant Tri-Messine to pave asphalt over the area in question, which work was performed on November 7, 2007.

Plaintiff argues that Con Edison's decision to use asphalt in a brick crosswalk having a high volume of traffic caused a visible hole to develop within 1 ½ years, resulting in a hazardous condition in the crosswalk.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

² "Whenever any street is excavated the permittee shall restore such street in like and kind as to the material, type,...."

to demonstrate the absence of any material issues of fact. *Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.* See Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Here, even assuming that Con Edison made a prima facie showing of entitlement as a matter of law that it was not responsible for the work performed by its contractors following the excavation, plaintiff established that there are triable issues of fact as to whether Con Edison directed and oversaw the backfills and paving work performed by the contractors. Further, there are triable issues of fact as to whether Con Edison owed a duty to maintain and inspect the area in question.

Accordingly, Con Edison's motion is denied.

This constitutes the decision and order of the Court.

Dated: May 2, 2016



Sharon A.M. Aarons, J.S.C.