SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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DEREK WIELAND,

Plaintiff,

-against-

CONSOLIDATED EDISON, INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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Index No. 114435/11

Mot. seq. no. 005

DECISION AND ORDER

BARBARA JAFFE, J.

For plaintiff:
Oliver Koppell, Esq.
Law Offices of G. Oliver Koppel & Assocs.
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New York, NY 10016
212-867-838

For defendants:
John Fox, Esq.
David M. Santoro, Esq.
4 Irving Pl., Rm. 1800
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By notice of motion, defendants move pursuant to CPLR 3212 for an order granting them summary dismissal of the complaint. Plaintiff opposes.

I. BACKGROUND

On February 5, 2009, plaintiff alleges that he was injured while riding his bicycle in Central Park from west to east along the 79th Street Transverse Road (road), which runs through Central Park from 81st Street and Central Park West on the west side to 79th Street and 5th Avenue on the east side of Manhattan. (NYSCEF 1).

At an examination before trial held on January 24, 2013, plaintiff testified as follows:

> The accident occurred at approximately 8:45 pm, as he was riding onto the road, approximately 150 feet down the road from the entrance of the road on 81st Street and Central Park West;
>
> He had observed a Consolidated Edison (Con Ed) truck parked at or by the

entrance of the road, which he passed when he rode into the park;

It was dark outside and the street was "fairly dim"; he did not have a front headlight on his bicycle;

The temperature was freezing, below 32 degrees, and dry;

He lost control of his bicycle when he rode over an "extremely thin" layer of black ice on the road;

After his fall, a Con Ed worker came to his aid within one to two minutes; he believed the worker was wearing a jacket identifying him as a Con Ed employee;

The Con Ed truck was in his view from where he fell;

After his accident, he left the park in the same direction from which he had entered, and passed the truck again;

He could not see what the employees near the truck were doing or what activity they were engaged in, and did not see them with any tools;

He had not seen the workers working with hoses or releasing liquid onto the ground in the location near the truck, or water running into the road near where his accident occurred; and

He believed that the ice was created by the Con Ed employees as there was no ice "on any other roadway that evening."

(NYSCEF 86).

On April 22, 2015, I directed defendants to conduct a search for all documents reflecting work done by defendants' employees, agents, and/or vehicles within a three-block radius of the alleged accident site on February 5, 2009. (NYCEF 23). After plaintiff deposed the employee who conducted the search, and allegedly discovered that the employee's search was incomplete, plaintiff served new discovery demands seeking further documents.

Contending that defendants had failed to respond to the demands, plaintiff moved to compel their response, and by decision and order dated September 28, 2015, I granted plaintiff's

motion to the extent of directing defendants to search for and produce the documents referenced in plaintiff's new discovery demands. (NYSCEF 31).

Plaintiff thereafter moved for an order finding defendants in contempt, and by decision and order dated February 29, 2016, I denied the motion in its entirety, finding that plaintiff had not shown that defendants did not comply with the discovery orders, and ordered plaintiff to file his note of issue within 30 days. (NYSCEF 61). On June 14, 2016, I denied plaintiff's motion for leave to reargue the February 2016 decision. (NYSCEF 79).

Numerous and mainly redundant searches conducted by Con Ed did not uncover documents indicating that defendants performed work at the location and on the day of plaintiff's accident. (NYSCEF 89, 90, 92, 94, 97).

II. CONTENTIONS

Defendants assert that none of their records reflect that they were performing work at the location and time identified by plaintiff, and that even if they had, that plaintiff fails to establish that their work caused or created the ice which caused him to fall. Having failed to allege or demonstrate that the employees released or were releasing any liquid onto the road before his fall, defendants contend that plaintiff's allegation that they created the ice is fatally speculative. (NYSCEF 83).

Plaintiff argues that defendants have not met their *prima facie* burden as they only point to alleged gaps in his evidence, rather than affirmatively establishing that they performed no work in the vicinity of his accident that created the ice. He contends that defendants' reliance on their attorney's affirmation as proof that none of its employees was working near the site of his accident is insufficient, and that they must establish that they were not negligent. Plaintiff also

maintains that further discovery is warranted and likely to lead to evidence showing that defendants performed work at the location and identifying the kind of work performed. (NYSCEF 87).

He relies on an Emergency Control Ticket created upon a caller's request that defendants perform work at 11 West 81st Street and Central Park West which indicates that defendants were scheduled to perform work within a three-block radius of the location of the accident and on the accident date (NYSCEF 96), and asserts that defendants' record searcher indicated at her deposition that defendants failed to search for records as to the work that was performed in response to the ticket.

Plaintiff also maintains that defendants may be held liable as the ice could only have been created by defendants and it is "improbable that any other entity had sufficient control over the roadway on that date to cause the ice to form." (*Id.*).

In reply, defendants observe that plaintiff's claim, based on the allegation that the mere presence of defendants' employees at the accident location suffices to establish that defendants created the ice, is not viable. (NYSCEF 107).

III. ANALYSIS

To prevail on a motion for summary judgment dismissing a cause of action, the defendant "bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action." (*Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). If the defendant meets this burden, the plaintiff must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or

assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A contractor may be held liable for an affirmative act of negligence that results in creation of a dangerous condition upon a public street. (*Zorin v City of New York*, 137 AD3d 1116 [2d Dept 2016]). The contractor-defendant meets its burden on summary judgment by demonstrating that it did not create the alleged dangerous condition. (*Zhilkina v City of New York*, 121 AD3d 975 [2d Dept 2014]).

Here, it is undisputed that more than four years of discovery, yielding at least three court orders and additional depositions, has failed to produce any evidence that: (1) defendants were present at the accident location on the date of the accident; (2) that defendants were performing work or otherwise active at the location that day; and (3) that defendants' work or activity created the ice on which plaintiff fell. Having sufficiently shown that no documents exist showing defendants' presence at the location on February 5, 2009, defendants have established, *prima facie*, that they did not create the icy condition. (*See eg Huerta v 2147 Second Ave.*, LLC, 129 AD3d 668 [2d Dept 2015] [contractor established that it did not create dangerous condition as evidence showed that it performed no work at site on accident date and never used fire hydrant which allegedly caused accident]).

Even if defendants' employees were at the entrance to the road at the time of plaintiff's accident, there is no indication that they were performing any work on the road or in the vicinity and/or that they were working with water or another substance which could have caused the ice to form. Defendants have thus established that they were not negligent in creating the icy condition, and plaintiff fails to raise a triable issue of fact. (*See e.g. Walton v City of New York*, 105 AD3d 732 [2d Dept 2013] [contractor established that it did not perform work in area where

accident occurred and therefore did not create dangerous condition]; *Lewis v City of New York*, 82 AD3d 1054 [2d Dept 2011] [contractor entitled to summary dismissal as it demonstrated that it did not perform work in road where accident allegedly occurred]; *see also DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623 [1st Dept 2015] [defendants entitled to summary judgment as nothing in record showed that they created or had notice of dangerous condition which caused accident]).

Defendants' mere presence at the road's entrance, some 150 feet away from the scene, does not constitute proof that they created the icy condition. (*See Minier v City of New York*, 85 AD3d 1134 [2d Dept 2011] [as only evidence offered by plaintiff was permit issued to contractor for particular location, which did not compass area where plaintiff fell, it would be mere speculation to conclude that dangerous condition was caused by contractor's affirmative act of negligence]; *Kruszka v City of New York*, 29 AD3d 742 [2d Dept 2006] [contractor submitted proof that it did not work in area of plaintiff's fall, and plaintiff's speculative assertion that work performed on opposite side of street from area of fall was cause of defect insufficient to raise triable issue]; *Maloney v Consol. Edison Co. of New York, Inc.*, 290 AD2d 540 [2d Dept 2002] [plaintiff's speculative allegation that defendant created dangerous condition through its work lacked evidentiary foundation]).

Moreover, the road on which plaintiff fell was not only open to the public but was heavily trafficked. Thus, there is no evidence that defendants had exclusive control of it. (*See Bodnarchuk v State*, 49 AD3d 581 [2d Dept 2008], *lv denied* 10 NY3d 714 [evidence did not support allegation that defendant had exclusive control over area where grate was located, as plaintiff-worker and public had access to area]; *Capuccio v City of New York*, 174 AD2d 543 [1st

Dept 1991], *app denied* 79 NY2d 751 [plaintiff did not establish that uncovered sidewalk vault located on "well-travelled center island" of Manhattan street was within defendant's exclusive control]; *see also Zimbler v Resnick 72nd St. Assocs.*, 79 AD3d 620 [1st Dept 2010] [res ipsa loquitor inapplicable as door was located in heavily trafficked area and intended to be used by public and thus not in defendants' exclusive control]; *Hardesty v Slice of Harlem, II, LLC*, 79 AD3d 472 [1st Dept 2010] [no evidence of exclusive control as defective chair was located in restaurant open to public and numerous patrons had access to it]).

The address referenced in the emergency control ticket relied on by plaintiff is neither the scene of the accident nor the location where plaintiff claims defendants' truck was parked. He thus does not show that further discovery is warranted, especially as numerous record searches were performed and numerous depositions of the searchers were taken. (*See e.g. Hewitt v Liverpool Cent. School Dist.*, 134 AD3d 1507 [4th Dept 2015] [motion should not have been denied based on need for further discovery as defendant provided its file to plaintiff and defendant's employee was deposed]; *Austin v CDGA Nat. Bank Trust*, 114 AD3d 1298 [4th Dept 2014] [no basis for assertion that deposing additional employees would reveal information about ice on premises, especially as three employees already deposed]).

That plaintiff may be left without a party to take responsibility for his fall is unfortunate, but not unheard of.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendants upon submission of an appropriate bill of costs; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE

DATED: June 26, 2017
New York, New York