

Sabino v City of New York

2018 NY Slip Op 32359(U)

September 21, 2018

Supreme Court, New York County

Docket Number: 158383/2014

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

MARILEIA SABINO, Plaintiff, INDEX NO. 158383/2014 MOTION SEQ. NO. 003

- v -

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

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74 were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this trip and fall action commenced by plaintiff Marileia Sabino ("Sabino"), defendant Consolidated Edison Company of New York, Inc. ("Con Ed") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is denied.

FACTUAL BACKGROUND:

On January 18, 2014, plaintiff was walking in a crosswalk at the intersection of East 12th Street and University Place ("the crosswalk") in Manhattan when she fell into a depression in the ground and was injured. (Docs. 41 at 1, 44 at 10, 54 at 1-2.) Plaintiff alleges in her verified bill of particulars that the accident occurred "at a point in the crosswalk approximately 9 feet north of the southeast curb line of [the] intersection." (Docs. 41 at 1, 43 at 2.) Plaintiff subsequently

commenced this suit against defendants the City of New York and Con Ed alleging that they were negligent in their maintenance of the crosswalk. (Docs. 1, 8.)

Con Ed now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims.¹ (Doc. 40.) In support of its motion, Con Ed submits the deposition of Yesenia Campoverde (“Campoverde”), a record searcher whom it employs. (Doc. 46.) Campoverde testified at her deposition that she performed two record searches for any permits, opening tickets, paving orders, emergency tickets, corrective action reports, violation notices, and emergency tickets issued for the intersections and crosswalks at East 12th Street and University Place. (Doc. 41 at 2.) According to Campoverde, permits are issued by the City of New York (“the City”) and grant Con Ed permission to open a roadway or sidewalk. (Doc. 46 at 14.) Opening tickets are generated by Con Ed when the excavation work is performed. (*Id.*) Campoverde stated that Con Ed will generate a paving order when the contractor who does the repaving work is different than the contractor who did the excavation. (*Id.* at 16.)

Campoverde’s first record search was for the period from January 18, 2012 through January 18, 2014. (Doc. 41 at 2–3.) Her search identified two opening tickets for street openings in the area: opening tickets PS 701295 and PI 313104C. (*Id.*) Campoverde testified that ticket PS 701295 was generated for work that was performed 7 feet from the southwest corner of the intersection (*id.*), and that ticket PI 313104C was for work on the northwest corner of the intersection (*id.*). Campoverde’s second record search was for the period from January 18, 2010 to January 18, 2012. (*Id.* at 3.) This search did not reveal any further excavation work performed by Con Ed in the area. (*Id.*)

¹ By an order dated October 18, 2017, this Court (Tisch, J.) granted the City of New York’s motion for summary judgment dismissing plaintiff’s claims. (Docs. 73, 74.)

POSITIONS OF THE PARTIES:

Con Ed argues that it is entitled to summary judgment as a matter of law because it did not cause, create, or contribute to the condition that led to plaintiff's accident. It maintains that Campoverde's record searches confirm that Con Ed did not perform any excavation work in the area prior to plaintiff's accident. (*Id.* at 4.)

In opposition to the motion, plaintiff argues that, pursuant to a Freedom of Information Law ("FOIL") request it served on the City, it obtained two permits issued by the City which were not discovered during Con Ed's own document search. The first permit, M01-2011300-136, was issued for repair work 7 feet north of the southern curb of East 12th Street from Broadway to University Place. (Docs. 54 at 4, 60 at 2.) Although the permit was issued on October 29, 2011 (Doc. 60 at 2), the work area of that permit was near plaintiff's accident location (Doc. 54 at 4). The second permit discovered pursuant to the FOIL search, MNP2013584028,² reflects that a "corrective action report" and a "notice of corrective action" were issued due to broken asphalt at East 12th Street from Broadway to University Place. (Docs. 54 at 4, 61 at 2-3.) While the specific location of the broken asphalt was not identified, the corrective action report and notice of corrective action were issued on September 4, 2013, four months prior to plaintiff's accident. (Docs. 54 at 4, 61 at 2-3.) According to plaintiff, because these two permits authorized work in an area close to the crosswalk, were issued prior to the accident, and were not found during Con Ed's own document search, there is an issue of fact as to whether Con Ed caused or created the defective condition. (Doc. 54 at 6-7.)

² The second permit is not actually included in plaintiff's exhibits. However, plaintiff does include the corrective action report and the notice of corrective action, which reference permit MNP2013584028, in Exhibit B filed with NYSCEF as Document 61.

Plaintiff further argues that a triable issue of fact exists due to the inconsistency between Campoverde's deposition testimony regarding Con Ed's internal document search and the records that were found in plaintiff's FOIL search. According to plaintiff, Campoverde testified that, for every opening permit issued by the City, there should be a corresponding opening ticket that was generated by Con Ed for the work performed. (*Id.* at 7.) Specifically, plaintiff identifies three permits—M01-2013114-071, M01-2013164-006, and M01-2013168-008—as well as a “High Priority Work Request” issued to Con Ed in 2013 that have no accompanying opening tickets. (*Id.* at 4–5.) Due to these missing opening tickets, plaintiff claims that there is an issue of fact as to what work was performed by Con Ed regarding the permits and the high priority work request. (*Id.* at 7.) Additionally, although the high priority work request indicates that Con Ed completed work on the northwest and northeast corners of the intersection, plaintiff points out that markings on an accompanying diagram mistake the northeast corner for the southeast corner, which is where the accident occurred. (*Id.* at 5.) Plaintiff argues that this mislabeling gives rise to an issue of fact regarding whether Con Ed was responsible for the allegedly defective condition of the crosswalk. (*Id.* at 7–8.)

In reply to plaintiff's arguments, Con Ed performed another record search, this time searching specifically for the two permits that appeared in plaintiff's FOIL search but not in Con Ed's initial search. (Doc. 67 at 2.) Con Ed submits the affidavit of Jennifer Kim (“Kim”), a specialist in its legal services department, in reply. (Doc. 68.) With respect to permit M01-2011300-136, Kim states that she found associated records for work that Con Ed performed approximately 330 feet east of the southeast curb of the intersection. (*Id.* at 3.) In regard to permit MNP2013584028, Kim conducted a search for the corrective action report, CAR 2013-584-0047-01, and found an opening ticket that indicated excavation work approximately 256 feet

east of the intersection's southeast curb. (*Id.*) Con Ed therefore argues that neither permit creates an issue of fact precluding summary judgment since both permits do not pertain to the location of plaintiff's accident. (Doc. 67 at 2.)

With respect to the alleged inconsistency between Campoverde's deposition testimony and the three permits for which plaintiff was unable to locate opening tickets, Con Ed asserts that plaintiff misinterprets Campoverde's testimony. Specifically, Con Ed asserts that Campoverde did not testify that there should be an opening ticket for every permit that the City issues to Con Ed. (Doc. 67 at 2.) Thus, Con Ed argues that the absence of opening tickets for permits M01-2013114-071, M01-2013164-006, and M01-2013168-008 does not indicate that Con Ed performed work in the area where plaintiff fell. (*Id.*) Further, Con Ed claims that a mere issuance of a permit by the City is insufficient to raise a question of fact as to whether Con Ed actually did any excavation work in the subject area. (*Id.*) Finally, with respect to the mislabeling of the high priority work request, Con Ed claims that the request was for the "place[ment of] equipment other than a crane" and for the "occup[ation] of a roadway." (*Id.*, Doc. 65 at 4.) Thus, Con Ed maintains that the high priority work request does not raise an issue of fact since the work it authorized was not related to excavation. (Doc. 67 at 2.)

Plaintiff submits a sur-reply, in which she asserts that a sur-reply is warranted based upon Con Ed's additional documentary submissions, i.e., the new submissions of Kim's affidavit as well as the records that she found during her search. (Doc. 70 at 1-2.) Plaintiff maintains that permits are not issued for only a single location, so it was possible that Con Ed still did excavation work where plaintiff was injured. (*Id.*) Moreover, plaintiff asserts that summary judgment should be denied because it is unclear what exact work Con Ed performed prior to her accident, since there are documents that plaintiff and Con Ed found in subsequent searches that

did not appear in Con Ed's initial document search. (*Id.* at 1–3.) Finally, plaintiff argues that there are issues of fact as to the documents that Kim found in her search because she did not assert in her affidavit that she is qualified to interpret those documents. (*Id.*)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Con Ed's Reply Affirmation and Plaintiff's Sur-reply.

As a preliminary matter, this Court determines that Con Ed's reply affirmation should not be considered to the extent that it introduced new documentary evidence. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion." (*All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015] (quoting *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]); *see also Valenti v*

Camins, 95 AD3d 519, 521 [1st Dept 2012] (refusing to consider a party's reply affirmation because of "new evidence".) Therefore, this Court will consider neither Kim's affidavit nor the documents that she found during her own search, i.e., the associated records with permit M01-2011300-136 and the opening ticket associated with CAR 2013-584-0047-01 and permit MNP2013584028. However, this Court will consider Con Ed's reply affirmation to the extent that it responded to plaintiff's arguments without introducing new evidence.

Given the foregoing, this Court need not consider the sur-reply, which plaintiff requested that this Court accept "based upon Con-Ed's new documentary submissions in [its] [r]eple papers." (Doc. 70 at 1.) As plaintiff herself has noted, the CPLR does not provide for a sur-reply. (*Id.*) (*See 430 E. 86th St. Tenants Comm. v State Div. of Hous. & Community Renewal*, 254 AD2d 41, 42 [1st Dept 1998].)

b. Whether a Triable Issue of Fact Exists.

This Court finds that Con Ed established its prima facie showing of entitlement to summary judgment as a matter of law. Campoverde's deposition testimony shows that she performed two record searches for documents pertaining to work that Con Ed performed in the area of the alleged accident from January 18, 2010 through January 18, 2014. (Doc. 46 at 13.) She testified that her first search yielded two opening tickets that Con Ed generated for excavation work at the intersection of East 12th Street and University Place. (*Id.* at 18-22.) According to Campoverde, the first opening ticket, PS 701295, relates to a permit for work performed 7 feet from the southwest corner of the intersection. (*Id.* at 21-22.) The second ticket, PI 313104C, was generated by Con Ed for a permit issued by the City for work on the northwest corner. (*Id.* at 22.) Although Campoverde found permits issued to Con Ed during her second

document search (*id.* at 26), there was no excavation work performed in connection with those permits and they did not involve any street openings (*id.* at 26–27). Therefore, this Court concludes that Con Ed satisfied its initial burden of showing that it did not cause, create, or contribute to the condition that led to plaintiff’s accident.

The burden then shifted to plaintiff to raise a genuine, triable issue of fact to defeat Con Ed’s motion for summary judgment. In attempting to meet this burden, plaintiff argued that there is a discrepancy between Campoverde’s deposition testimony and the records that were found during plaintiff’s FOIL search and Con Ed’s internal document search. According to plaintiff, Campoverde testified that, for every opening permit issued by the City, there should have been a corresponding opening ticket generated by Con Ed for the work it performed. (Doc. 54 at 7.) However, this Court finds that Campoverde did not testify as such. At her deposition, the following colloquy took place:

Q: Now, is it safe to say that for every street or sidewalk opening there would be a DOT permit, an opening ticket, and a paving order?

A: Sometimes there are no paving orders. It will depend on the kind of job we do.

(Doc. 46 at 15.) To say that Campoverde’s answer to that question was that there was to be an opening ticket for every work permit, when her answer was limited to the issuance of paving orders, is to stretch her testimony too far. Indeed, when asked about four permits that were all issued in May of 2013, Campoverde replied: “There are no street openings for these permits” (*id.* at 23) and “there are no opening tickets related to these permits” (*id.*). Therefore, the fact that some opening permits found in Con Ed’s internal document search do not have corresponding tickets is insufficient to raise a triable issue of fact.

Nevertheless, this Court finds that plaintiff raises a triable issue of material fact regarding the corrective action report and the notice of corrective action that were issued to Con Ed by the City. At her deposition, Campoverde said: “The corrective action request is generated when [a] condition needs to be corrected.” (*Id.* at 17.) The corrective action report and the notice of corrective action authorized work on East 12th Street from Broadway to University Place, but did not specify the exact location where Con Ed performed the work. (Doc. 61 at 2–3.) Further, the condition to be remedied was broken asphalt an inch-and-a-half beneath the roadway surface around a Con Ed gas valve. (*Id.*) These documents were issued to Con Ed in September of 2013, only four months before plaintiff’s accident. (*Id.* at 2.) Therefore, they suggest that Con Ed either failed to repave the broken asphalt or that it did so negligently. (*See Torres v City of New York*, 83 AD3d 577, 577 [1st Dept 2011] (denying summary judgment to Con Ed for an accident in 2006 where records from 2005 indicated that Con Ed performed work in area where plaintiff fell); *see also DeSilva v City of New York*, 15 AD3d 252, 254 [1st Dept 2005] (denying summary judgment to Con Ed where a permit to repair a gas line was issued three months before plaintiff’s incident).)

Con Ed’s position to the contrary is that, “[a]bsent some evidence connecting . . . defendant’s work to the situs of plaintiff’s injury, [defendant] is entitled to summary judgment.” (*Flores v City of New York*, 29 AD3d 356, 359 [1st Dept 2006].) However, this Court determines that the corrective action report and the notice of corrective action provide that connection: they not only authorized work for an area close to the crosswalk where plaintiff fell, but were also issued prior to her accident. (Doc. 61 at 2–3.)

Moreover, the cases that Con Ed relies on are inapposite. The court in *Bermudez v City of New York*, 21 AD3d 258, 258–59 (1st Dept 2005) granted summary judgment where the

defendant showed that, although it had obtained a permit from the City to perform work, it did not do so because its contract was cancelled. (*Id.*) Crucially, unlike in this case, the defendant in *Bermudez* kept an undisputed record of the work locations pursuant to the contract, which did not include the site of the *Bermudez* plaintiff's accident. (*Id.*) Here, Con Ed's work location is exactly what is at issue because all that is known from the corrective action report and the notice of corrective action is that Con Ed was to perform work somewhere along East 12th Street from Broadway to University Place. (Doc. 61 at 2–3.)

Con Ed, citing *Ingles v Architron Designers & Bldrs., Inc.*, 136 AD3d 605, 605 (1st Dept 2016) (granting summary judgment because the permits issued by the City to defendant were insufficient to raise an issue of fact), also argues that the “mere issuance of a street opening permit by [the City] to Con Ed is insufficient to raise a question of fact” (Doc. 67 at 2.) However, this misconstrues plaintiff's argument. Plaintiff's argument is not that a factual issue exists because Con Ed received permits from the City, but that it remains to be seen exactly what work, if any, Con Ed performed at the location of the accident because there were permits discovered as a result of plaintiff's FOIL request that were not found during Con Ed's own internal document search. (Doc. 70 at 2–3.) Moreover, unlike in *Ingles*, plaintiff in this case has produced more evidence than a street opening permit, specifically the corrective action report and the notice of corrective action, to raise an issue of fact. (Doc. 61 at 2–3.)

In accordance with the foregoing, it is hereby:

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

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

9/21/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	