

Nugent v City of New York

2019 NY Slip Op 30931(U)

March 27, 2019

Supreme Court, New York County

Docket Number: 155991/2012

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS PART 5

Justice

-----X
SYMONETTE NELSON NUGENT,
Plaintiff,

INDEX NO. 155991/2012
MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, NEW YORK
DEPARTMENT OF TRANSPORTATION,
THE NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
CONSOLIDATED EDISON, INC,
KEYSPAN ENERGY CORP, and
"JOHN DOE" CONSTRUCTION COMPANY,
Defendants.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff commenced this action seeking to recover for injuries allegedly sustained on February 29, 2012 when she was caused to trip and fall near the intersection of First Avenue and 21st Street, New York, New York. Defendants, the City of New York, The New York Department of Transportation, and the New York City Department of Environmental Protection (collectively "City"), move the court seeking summary judgment pursuant to CPLR § 3212 dismissing the complaint and all cross-claims against it.

Additionally, defendant Consolidated Edison, Inc. ("Con Edison") cross-moves seeking summary judgment and a dismissal of the complaint and all cross-claims again it.

The City maintains that it is entitled to summary judgment as it did not have prior written notice of a defective condition on the roadway nor did it cause or create the defective condition, and Con Edison argues that it did not perform work at the location where plaintiff fell and thus did not cause, create or contribute to the alleged defective condition.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320 (NY 1986) and *Winegrad v New York University Medical Center*, 64 NY2d 851 (NY 1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989).

In order to hold the City liable for injuries resulting from roadway defects, a plaintiff must demonstrate that the City received prior written notice of the subject condition. (See Admin Code of the City of New York § 7-201(c)(2); *Amabile v City of Buffalo*, 93 NY2d 471 [1999].) The only recognized exceptions to the prior written notice requirement are where the municipality itself created the defect through an affirmative act of negligence or where the defect resulted from a special use by the municipality. (See *Yarborough v City of New York*, 10 NY3d 726 [2008]; *Amabile*, supra.)

In support of its motion, the City provides the affidavit of Rebecca Ramnarine, a paralegal employed by the Department of Transportation. Ms. Ramnarine performed a search for records for the roadway located at the intersection of 1st Avenue and East 21st Street, New York, New York for the two years prior to and including the date of the incident. The search yielded eight permits, one hardcopy permit, two applications, six inspections, one contract information and/or resurfacing record, three complaints, one gangsheet for milling and resurfacing record, and one handwritten gangsheet for milling and resurfacing record.

Ms. Ramnarine conducted an additional search for the roadway located at East 21st Street between 1st Avenue and 2nd Avenue, New York, New York for the two years prior to and including the date of the incident. That search revealed fifteen permits, two hardcopy permits, two corrective action requests, one notice of violation, eight inspections, six maintenance and repair orders/records, eleven complaints, seven gangsheets for roadway defects and five handwritten gangsheet for roadway defects.

The City argues that the search results demonstrate that the City did not have prior written notice of the defect alleged. Specifically, the City claims that permits and applications do not constitute prior written notice. The City further contends that the inspections resulted in either a "passing" condition; an indication that the roadway was resurfaced; or indicated that no work was performed. Moreover, the City avers that both corrective action requests involved a defect at 339 East 21st street regarding a "cave in" which was not at the location of plaintiff's accident. The notice of violation pertained to a failed house hose 14 inches above ground at 315 East 21st Street, a condition different than what plaintiff alleges, to wit: a sunken and/or depressed condition in the roadway. Additionally, two complaints pertain to noisy plates in the roadway and one complaint concerned a defect near a square hydrant valve. Furthermore, the City asserts that while there were several 311 complaints for the parking lane on the north side of the street, these are unrelated as, plaintiff fell on the south side of the street, in the cross walk. One mosaic complaint revealed a defect on the opposite side of the street from where plaintiff fell, and the remaining complaints revealed defects that were repaired, inspected and found to be repaired, or inspected and no defect was found. These complaints purportedly involved pothole conditions, all of which were repaired or barricaded at least five months prior to plaintiff's accident.

The City does concede that it performed roadway work in the vicinity of the subject alleged defect, but maintains that the work was four months prior to plaintiff's accident and there is no evidence to establish that the City's repair work resulted in a defective condition that was immediately apparent, and therefore, plaintiff's theory of negligent repair would not prevail.

In opposition, plaintiff argues that the City's motion is defective as it fails to provide a complete set of the pleadings as Con Edison's answer is not annexed. Plaintiff also asserts that the Big Apple Map creates a triable issue of fact as to whether the City had prior written notice of the

alleged defect. Plaintiff contends that the City's assertion that the accident occurred in the roadway/crosswalk is incorrect because the Notice of Claim unambiguously states that the defective area causing plaintiff's fall was located where the "curb meets the street." Specifically, plaintiff claims that she was attempting to cross 21st Street and planned to walk uptown on 1st Avenue when the wheels of the stroller she was pushing got caught in the defect, which she describes as a hole where the curb should have met the street, causing her and the stroller to fall over. Plaintiff further maintains that she circled the exact defect in a photograph at her deposition which clearly depicts that the defect is in the area where the curb meets the street, and not in the crosswalk. On this point, plaintiff avers that the Big Apple Map depicts both sidewalk and curb area defects of the southwest corner of 1st Avenue and 21st Street and maintains that Big Apple Maps do in fact establish notice. Therefore, issues of fact remain as to whether the City had notice of the alleged defect.

As to Con Edison's cross-motion for summary judgment, Con Edison argues that it performed a search for records of work performed on the subject location for two years prior to and including the incident and that no work was performed in that area. In support of its avowal, Con Edison relies upon the affidavit of its record searcher George Canzaniello, who testified that Con Edison did not perform any work in the vicinity of the plaintiff's accident. Con Edison also asserts that it did not cause, create, or contribute to the defect and further that there is no evidence to indicate that Con Edison or any of its contractors performed work at the subject location.

Plaintiff opposes Con Edison's cross-motion arguing that it is defective as the City's answer is not annexed and therefore the full set of pleadings is not accounted for as required by the CPLR. Plaintiff further contends that Con Edison's cross-motion is conclusory and unsupported by evidence. Here, Con Edison relies upon the statement of George Canzaniello who testified at his deposition that no work was performed by Con Edison near plaintiff's location. Plaintiff argues that Con Edison has mischaracterized the testimony of Mr. Canzaniello who also testified that Con Edison was granted a segment permit which encompassed the area of plaintiff's accident but that an additional search is required to ascertain ensuing work orders which would indicate whether work was performed at the exact location of plaintiff's fall. Plaintiff avers that the segment permit gave Con Edison access to work at or around the southwest corner of 1st Avenue and 21st Street with a fifty-nine-foot latitude without parameters and permitted Con Edison to dig up the roadway or curb within the segment. Hence, plaintiff argues that issues of fact remain as to whether or not Con Edison performed work at or near the location of plaintiff's fall.

In reply, Con Edison relies upon the affidavit of Jennifer Grimm who completed a search of Con Edison documents associated with permit "M012009034008" who claims that the work performed pursuant to the permit was 119 feet west of the southwest curb of E. 21st Street and 1st Avenue and thus eliminates any question of fact that plaintiff asserts.

A review of the documents submitted reveals questions of material fact. The City performed its search for records pertaining to the roadway located at the intersection of 1st Avenue and East 21st Street and the roadway located at East 21st Street between 1st Avenue and 2nd Avenue but it is unclear whether the search results encompass the area where the curb meets the street at the southwest corner of East 21st and 1st Avenue where plaintiff alleges is the location of the defect causing her to fall. Furthermore, the City's assertion that the work it performed four months prior to the accident could not have resulted in the defect is conclusory and unavailing as the record search fails to indicate whether work was performed at the exact location of the fall and/or whether the work performed in the roadway included the area plaintiff describes subject location.

As to Con Edison's motion, the testimony of Mr. Canzaniello indicates that additional searches are required to ascertain whether work was done at the location of plaintiff's fall and moreover whether the work performed in connection with the segment permit included the area of the alleged defect. The affidavit of Jennifer Grimm annexed to Con Edison's reply is not sufficiently specific inasmuch as it does not indicate whether the permit searched is in fact the segment permit which was raised during Mr. Canzaniello's deposition and by plaintiff in its opposition papers.

After consideration of the arguments advanced and the documents submitted, including the Big Apple map and the photographs of the accident location which plaintiff marked at her deposition, it is clear that issues of fact remain as to whether work performed by the City and/or Con Edison caused or created the defect causing plaintiff's fall. Furthermore, issues of fact remain as to whether the City received notice of the defect insofar as the arguments advanced by the City indicate that the record search included the intersection and the cross walk but does not indicate whether the exact area of the plaintiff's fall was included in the search. Based upon the foregoing, it is

ORDERED that the City of New York, The New York Department of Transportation and the New York City Department of Environmental Protection's motion for summary judgment is denied; and it is further

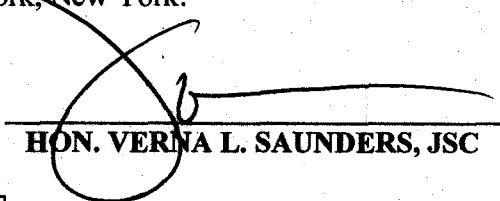
ORDERED that defendant, Consolidated Edison Inc.'s cross-motion for summary judgment is denied; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied; and it is further

ORDERED that the City serve a copy of this order with notice of entry upon all parties and upon the Clerk of the General Clerk's Office and the Trial Support Office days within fifteen days from the date herein; it is further

ORDERED that the parties appear for an Early Settlement Conference on April 30, 2019 at 9:30 A.M., Part DCM, Room 106, 80 Centre Street, New York, New York.

March 27, 2019


 HON. VERNA L. SAUNDERS, JSC

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