

Strong-Bastien v City of Yonkers

2019 NY Slip Op 34558(U)

April 8, 2019

Supreme Court, Westchester County

Docket Number: Index No. 62509/16

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

To commence the 30 day statutory time period for appeals, as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

PAULA STRONG-BASTIEN,

Plaintiff,

-against -

CITY OF YONKERS, JAMAICA KITCHEN,
PATRICK HUDSON and CONSOLIDATED
EDISON OF NEW YORK,

Defendants.

-----X

LUBELL, J.

The following papers were considered in connection with Motion Sequence 1 by City of Yonkers and Motion Sequence 2 by Consolidated Edison of New York for an Order pursuant to CPLR Section 3212 granting summary judgment to the defendants and dismissing plaintiff's complaint and all cross claims:

PAPERS	NYSCEF
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-K	35-48
NOTICE OF MOTION/AFFIRMATION	49-58
AFFIRMATION IN OPPOSITION/EXHIBITS A-L/ AFFIDAVIT/EXHIBITS A-B	62-75
REPLY AFFIRMATION	76,77
AFFIRMATION IN REPLY	78,79

Plaintiff brings this personal injury action in connection with a July 24, 2015, 6:30 p.m., trip and fall on a sidewalk which consisted of a main cement surface, next to which there was a strip of decorative red brick pavers known as "a brick amenity strip". The strip was installed within defendant City's right of way on the east side of North Broadway as part of the Getty Square Downtown Streets Improvement Program, Phase 1. As part of the project, brick pavers had been installed around a

pre-existing square shaped Con-Edison gas curb valve.

Plaintiff testified at her deposition that it was the metal utility box surrounded by the City's pavers against which she caught her foot.

Plaintiff's transcript (Exhibit H attached to the City's motion), reads as follows:

Q: Do you know what caused you to trip?

A: I didn't but - -

MR. FREY: You're pointing to the box, the rectangular box? The square box?

THE WITNESS: This rectangular.

Q: The rectangular box in the photograph?

A: Yes.

MR. FREY: Square, it's a square box.

(Exhibit H, page 32, lines 16 through 22).

Q: Now, you had already said that you tripped as opposed to a slip, they're two different things. What I want to ask you about is, how specifically did you trip? What I mean by that, there's different possibilities, you could catch your foot on something, your toe could hit something, your ankle could twist, so what specifically happened to you that made you fall?

A: This thing here.

Q: The square object in the sidewalk?

A: My foot caught it and I went over.

(Exhibit H, page 38, lines 14 through 24).

Furthermore, upon being asked by her own attorney, the following took place:

Q: And was it while you were on the brick portion of the sidewalk that you had this tripping accident that involved your right toe being caught in the square box?

A: Yes.

(Exhibit H, page 46, lines 18 through 22).

It is only now, in opposition to the City's motion, that she submits an affidavit saying for the first time that the toe of her sneaker hit the edge of the bricks, thereby changing the alleged cause of her fall. Reference is also made to her affidavit which reveals that plaintiff actually does not know whether the cause of her fall was the utility box or the bricks. More precisely, plaintiff asserts that, after being helped to her feet by a stranger, "I looked down and saw a square cut-out in the bricks." In sum, plaintiff is hard pressed to identify whether it was the utility box or the bricks, if either, which caused her to trip and fall.

Both defendants now move for summary judgment dismissing the action.

As against the City, plaintiff claims that, upon installation, the City affirmatively created the defective sidewalk condition over which she tripped. As the owner of the sidewalk, plaintiff claims that the City had the nondelegable duty to users of the sidewalk to keep and maintain it in a reasonably safe condition and that it was legally responsible for its contractor's negligent design and installation work which immediately created the dangerous elevation differential. Prior written notice is not at issue.

Where, as here, a plaintiff submits an affidavit in opposition to a defendant's motion for summary judgment which is clearly at odds with her sworn deposition testimony as to the specific cause of her fall, such must be rejected by the Court as the creation of a feigned issue of fact intended to defeat the motion for summary judgment (see, Kokin. Kev Food Supermarket. Inc., 90 A.D.3d 850 [2d Dept 2011]; Freiser v. Stop & Shop Supermarket Co., 84 A.D.3d 1307 [2d Dept 2011]). As such, the City's motion for summary judgment dismissing the action as against it is granted.

Summary judgment is also granted in favor of defendant Con


Edison (see Kobet v. Consolidated Edison Co. of NY, 176 A.D. 785, 575 N.Y.S. 2d 114). Here, as in, Kobet, the gas valve box was installed prior to the municipality's reconstruction of a sidewalk with decorative bricks. Con Edison is under no legal duty to maintain the municipal sidewalk surrounding the gas valve box and there is no evidence that the sidewalk was constructed in a special manner for Con Edison's use (see, Kobet v. Consolidated Edison Co. of NY, 176 A.D. 785).

Based upon the foregoing, it is hereby

ORDERED, that the case is dismissed as against both defendants.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
April 8, 2019



HON. LEWIS J. LUBELL, J.S.C.

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