

Stolarik v City of New York

2020 NY Slip Op 31138(U)

May 4, 2020

Supreme Court, New York County

Docket Number: 150970/2019

Judge: Laurence L. Love

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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:	<u>HON. LAURENCE L. LOVE</u>	PART	IAS MOTION 62
	<i>Justice</i>		
-----X		INDEX NO.	<u>150970/2019</u>
ROBERT STOLARIK,		MOTION DATE	<u>03/12/2020</u>
Plaintiff,		MOTION SEQ. NO.	<u>001</u>

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., CABLEVISION
SYSTEMS NEW YORK CITY CORPORATION, E.E. CRUZ
& COMPANY, INC., CROWN CASTLE NG EAST
LLC, CARLO LIZZA & SONS PAVING, INC., WELSBACH
ELECTRIC CORP., PINNACLE INDUSTRIES II,
LLC, LIGHTOWER FIBER NETWORKS I, LLC, CITYWIDE
PAVING INCORPORATED,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Plaintiff,

Third-Party
Index No. 595813/2019

-against-

CITYWIDE PAVING INC.

Defendant.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 76, 77, 78, 79, 80, 81, 94, 97, 98, 99, 100, 101

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action seeking to recover for injuries allegedly sustained in an accident when he fell from his bicycle on January 28, 2018 due to a defect in the roadway at or near the southeast corner of 7th Ave and Greenwich Avenue, New York, New York. Plaintiff commenced this action by filing an Amended Verified Complaint on or about March 18, 2019. Pinnacle Industries II, LLC (“Pinnacle”) served a Verified Answer with Cross-Claims to the

Amended Verified Complaint on or about July 10, 2019. Pinnacle now seeks summary judgment, dismissing this action as it did not perform any work in the subject roadway.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). 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. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (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. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, Pinnacle submits the affidavit of Joseph Mitrone, the owner of same, and the subcontract agreement pursuant to which Pinnacle performed work in the area, which establish as follows: In 2013, Pinnacle was retained to perform concrete superstructure work for a condominium project known as "West Village Residences Project" located on the former site of St. Vincent's Hospital. Pinnacle completed work in 2016 and payment was resolved in January of 2017. No work was performed by Pinnacle in the roadway or near the intersection of 7th Avenue

and Greenwich Avenue, where plaintiff alleges his accident occurred. Pinnacle did not create or have notice of any defect in the roadway at or near the intersection of 7th Avenue and Greenwich Avenue.

While a contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk. (*Cino v. City of New York*, 49 A.D.3d 796 [2d Dept 2008]). Here, Pinnacle has offered admissible evidence demonstrating that it performed no work on in the street that could have caused the complained of condition before plaintiff's accident, thus establishing, prima facie, that it did not create the defect which caused the accident. (See, *Amma v. City of New York*, 51 A.D.3d 596 [1st Dept 2008]; *Flores v. City of New York* 29 A.D.3d 356 [1st Dept 2006]; *Robinson v. City of New York*, 18 A.D.3d 255 [1st Dept 2005] [although contractors performed work on street, no evidence that work was performed at location of plaintiffs fall]). As such, Pinnacle has established a *prima facie* entitlement to summary judgment.

Plaintiff and Citywide Paving oppose Pinnacle's motion as premature on the basis that no discovery has been conducted. Plaintiff's opposition identifies Permit#: M02-2014015-129, Issued to Pinnacle 01/15/2014, valid from: 01/20/2014 to 01/26/2014 and copies of inspection records for same. A review of these documents reveals that Pinnacle was permitted to occupy the street (not perform any work on the street) and that all inspections resulted in a "pass." While the Court notes that all of the subject work occurred a year prior to plaintiff's alleged accident, the motion is premature as facts essential to opposing the motion may exclusively be within the movant's knowledge and control (see CPLR 3212[f]; *Espada v. City of New York*, 74 A.D.3d 1276, 1277 (2d. Dept. 2010)).

Pinnacle's motion is denied as premature, with leave to renew upon the completion of sufficient discovery.



5/4/2020
DATE

LAURENCE L. LOVE, J.S.C.

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