

Encalada v Brooklyn Union Gas Co.

2020 NY Slip Op 35394(U)

August 31, 2020

Supreme Court, Kings County

Docket Number: Index No. 520035/2017

Judge: Richard Velasquez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of AUGUST, 2020

PRESENT:
HON. RICHARD VELASQUEZ

Justice.

-----X
ROSA ENCALADA,

Plaintiff,

Index No.: 520035/2017
Decision and Order

-against-

BROOKLYN UNION GAS COMPANY d/b/a
NATIONAL GRID NY and CONSOLIDATED
EDISON COMPANY OF NEW YORK INC.,

Defendants,
-----X

KINGS COUNTY CLERK
FILED
2020 SEP -9 PM 1:32

The following papers NYSCEF Doc #'s 7 to 21 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	23-35; 38-44
Opposing Affidavits (Affirmations) _____	47; 49-52
Reply Affidavits _____	54; 57

After having heard Oral Argument on AUGUST 31, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant, BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY (hereinafter BUG) moves pursuant to CPLR 3212 for an order granting them summary

judgment and dismissing the complaint and all cross-claims. (MS#2). Plaintiff opposes the same. Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK INC. (hereinafter CON ED) move pursuant to CPLR 3212 for an order granting them summary judgment and dismissing the complaint and all cross-claims as against them. (MS#3). Plaintiff opposes the same.

This matter arises from a trip and fall that allegedly occurred on July 26, 2016 at the corner of 38th Street and 4th Avenue, in front of 980 4th Avenue in Brooklyn, New York.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). **However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.** A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment"

(*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the non-moving party and accord that party the benefit of every favorable inference (see *Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]).

Summary judgment is a drastic remedy that “should not be granted where there is any doubt as to the existence of such issues or where the issue is ‘arguable’; issue-finding, rather than issue-determination, is the key to the procedure” (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). “The court’s function on a motion for summary judgment is ‘to determine whether material factual issues exist, not resolve such issues’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]).

BUG contends that they have submitted sufficient evidence to establish that they had no involvement in, or relationship with the alleged location of the Plaintiff’s accident. However, BUG has submitted evidence showing, a street opening permit was issued to BUG on June 6, 2016 which expired on September 6, 2016. (See Defendants BUG Exhibit J, pg. 1). Mr. Stone, BUG’s witness testified that this was a permit for BUG to perform work at the subject location. (See Defendants BUG Exhibit I pg. lines 16 - 4). Specifically, the permit issued to BUG for the period of June 6, 2016 to September 6, 2016 was for the replacement of a gas main on 38th Street between Fourth Avenue and Third Avenue. (Id. at pg.13, line 19-25). Further, Mr. Stone testified that during this time period “eight-inch plastic, offset on sidewalk, tie into six-inch plastic in street” was installed (Id. at pg. 14, line 6-20). This testimony establishes that there was work being

done where the plaintiff's accident happened.

Next, defendant CON ED contends they have submitted evidence sufficient to establish they were not doing work at the subject locations. However, CON ED's witness testified that an opening ticket is a Con Ed document that is created when an excavation is performed. Therefore, based on the testimony of CON ED's witness, CON ED excavated on four occasions within a two-year period of the Plaintiff's accident at said location. Said excavation was done on June 28, 2016, a month before the Plaintiff was caused to trip and fall due to asphalt. Further, CON ED's witness testified that according to the paying order, the excavation completed on June 28, 2016 was backfilled on the same date. As such, there were numerous permits by CON ED, opening tickets and paving orders within a short period prior to Plaintiff's accident pertaining to the subject location. Including but not limited to, permit # BO1-2016165-A89 which was valid from June 13, 2016 to July 12, 2016 for the testing of pits, cores and boring to open the roadway and/or sidewalk and permit #B01-2016165. This establishes there was work being done where the plaintiff's accident occurred.

In the present case, issues of fact remain as to whether either defendant was performing work at the alleged location of the incident. Both defendants contend they were not working at the exact location the plaintiff fell but on other corners of the same block and location. However, both defendants had open permits that include the location in question at the time of plaintiff's accident. The court also notes each of the respective witnesses for both defendants were not at the site and did not conduct actual work at the site and have no personal knowledge of what was happening at each of the work sites. Clearly a he said she said situation. Both defendants annex self-serving

affidavits. Moreover, all of these contentions raise questions of fact as to both parties' credibility. Credibility is solely for the jury (*Sorokin v. Food Fair Stores*, 51 AD2d 592, 593, 378 NYS2d 492, 493; *Pertofsky v. Drucks*, 16 AD2d 690, 227 NYS2d 508; *Ellis v. Hoelzel*, 57 AD2d 968, 968, 394 NYS2d 91, 93 (1977)).

Accordingly, Defendant, BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY motion for summary judgment and dismissing the complaint and all cross-claims is hereby denied, for the reasons stated above. (MS#2). Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK INC. motion for summary judgment and dismissing the complaint and all cross-claims as against them, is hereby denied, for the reasons stated above. (MS#3).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
August 31, 2020


HON. RICHARD VELASQUEZ

So Ordered
Hon. Richard Velasquez

AUG 31 2020

2020 SEP -9 PM 1:32

KINGS COUNTY CLERK
FILED