

Newton v Brooklyn Union Gas Co.
2021 NY Slip Op 30550(U)
February 17, 2021
Supreme Court, Kings County
Docket Number: 507511/2019
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 17th day of February 2021.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X

KEVIN NEWTON,

Plaintiff,

Index No.: 507511/2019

DECISION & ORDER

-against-

THE BROOKLYN UNION GAS COMPANY D/B/A
NATIONAL GRID NY and KEYSpan ENERGY
CORPORATION,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed _____

NYSCEF Doc. No.:

10-31

Opposing Affidavits (Affirmations) _____

34-48

Reply Affidavits (Affirmations) _____

50-53

Defendants, Brooklyn Union Gas Company d/b/a National Grid NY and Keyspan Energy Corporation, moves by notice of motion, sequence number one, pursuant to CPLR § 3212 for summary judgment, dismissing the complaint against them. Plaintiff, Kevin Newton, opposes this application.

001

Plaintiff commenced the instant action for personal injuries by e-filing a summons and verified complaint on April 4, 2019. Plaintiff allegedly tripped and fell on construction plate with initials “KS” on December 13, 2018. According to plaintiff, the construction plate was placed in roadway in front of fire hydrant next to curb on 18th street, in Brooklyn, NY. Issue was joined by service of an answer on or about July 16, 2019.

Defendants met their burden and established that National Grid did not have a construction plate at the location in question on December 13, 2018. It is defendants’ contention that National Grid’s work performed at the accident location was completed by October 2018. Therefore, at the time of plaintiff’s accident in December of 2018, National Grid had no knowledge of any plates in that location. Rather, although the plate is identified as having previously belonged to Keyspan, there is a possibility that it could have been left at the location by another contractor.

In support of this contention, defendants provided the affidavit of Walter Stone, a National Grid contractor, sworn to on September 10, 2020, who searched the company’s record database and discovered work orders pertaining to the most recent work done in the accident location (*see* NYSCEF Doc. # 16). Data entry is completed by the crew members on site and kept in the normal course of business by National Grid. According to Stone, work order T102096979 documents the work done in the accident location in the roadway in front of 145 18th Street from July to October 2018 (*see* NYSCEF Doc. # 17).

I have reviewed the Auxiliary Operations Log Sheet - Plate Truck Activity and note that on October 6, 2013, one plate was picked up from 18th Street and 0 plates remained. This business record shows that after October 6, 2018, National Grid had no construction plates on the roadway. Further, my research did not reveal any Corrective Action Requests or Summons issued by The City of New York at any time following the completion of the work on October 8, 2018 and December 13, 2013. A Corrective Action Request was received on December 14, 2018 stating a National Grid plate was on the roadway. This was the first information National Grid had that a plate owned by National Grid was on the roadway. The plate was picked up on January 6, 2019.

(*id.* at ¶ 4).

In the course of their monthly inspections, the New York City Department of Transportation issued summons to National Grid on August 23, 2018 and September 30, 2018 at 145 18th Street between 3rd and 4th Avenue for failure to properly fasten construction plates (*see* NYSCEF Doc. # 23, 24). The plate which is the subject of the September 30, 2018 summons had “KS” on it. There is no evidence of summons issued between October 2018 and December 2018, the date of plaintiff’s accident.

Defendant further provided the affidavit of David Everett, field supervisor for National Grid, sworn to on September 9, 2020, who stated that these steel construction plates are brought to and from jobsites to cover an excavation, as needed (*see* NYSCEF Doc. # 20). They are usually left in the roadway near a fire hydrant or driveway where a car is not likely to park on them (*see id.*). After a job is completed, plates are usually picked up the next day, but never longer than a week or two (*see id.*). The “Auxillary Operations Log Sheet- Plate Truck Activity” shows that one plate was picked up from

18th Street between 3rd & 4th Avenue on October 6, 2018 and zero plates remained at that location (*see* NYSCEF Doc. # 19). Everett further stated that based on his review of the photograph in the summons issued by the City of New York, and the photograph of plaintiff's accident location, the two plates are different sizes.

While we do our best to keep a record of our plates, it is not uncommon for one of our plates to come into the possession of another contractor or utility, either intentionally or unintentionally especially when several companies are working in the same area. We do not involve the police. When it comes to our attention that someone has one of our plates, we simply take it back. Here, we had no knowledge that a National Grid plate was on 18th Street after October 6, 2018. We received no notice from The City of New York or anyone else that a plate was on the street. It is my understanding that the plate was in a different location when photographed following December 13, 2018 than it was on December 13, 2018, when plaintiff allegedly fell. As the plates are very heavy and cannot be moved without equipment, the plate was clearly being used by someone at the location. As National Grid had no work on 18th Street at the time, the only logical conclusion that can be drawn is someone had possession of one of our plates, placed it in the roadway on December 13, 2018 and moved it to a different position by the time plaintiff returned to take a photograph.

(*id.* at ¶ 6).

According to defendant, the City issued a Corrective Action Request (CAR) dated December 11, 2018, with a print/email date of December 14, 2018, the day after the alleged accident, requesting that National Grid remove an unpinned and unramped steel plate from the location. National Grid received this CAR the day after the accident and picked up the plate on January 4, 2019. Based on the foregoing, defendants established

that National Grid had no knowledge of a plate at the accident location prior to the date of plaintiff's accident.

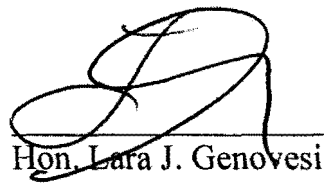
In opposition, plaintiff raised a triable issue of fact. Plaintiff provided a NYC Open Data record which shows that National Grid filed a permit extension for the accident location from October 13, 2018 to November 12, 2018 (*see* NYSCEF Doc. # 41). Plaintiff further provided defendant's response to plaintiff's first set of post EBT demands, wherein defendant indicates that no work was done in the accident location between October 8, 2018 and December 13, 2018 (*see* NYSCEF Doc. # 39 at ¶ 9). However, annexed thereto is a record from the "Distribution Project Management System Review Permit Panel", which shows work at 145 18th Street, between 4th and 5th Avenue, issued 10/14/18, which states "WK START 08 08 18" and "WK END 11 12 18", "ORDERED: 10 03 18", which states "plate needed" (*id.*). Plaintiff further cites to Everett's deposition testimony that truck drivers sometimes fail to log their plate pick-ups and drop-offs, and that it is hard to keep track of the plates (*see* NYSCEF Doc. # 40).

In Reply, defendant maintains that National Grid's work was completed on October 8, 2018, that the permit extension notes that it is valid from October 14, 2018 through November 12, 2018, and that the additional paving did not take place until 2019. However, defendant failed to adequately address that the record, which stated "WK END 11 12 18" appears to indicate that work ended on November 12, 2018. Therefore questions of fact exist as to whether additional work was performed by National Grid after October 2018. Further, it is unclear whether National Grid brought another plate to

the accident location after October 2018, or whether, as defendant theorizes, a different contractor brought and left a Keyspan plate at the location prior to December 2018.

“While the ultimate burden of proof at trial will fall upon the plaintiff, a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form” (*Gomez v. City of New York*, 186 A.D.3d 1494, 131 N.Y.S.3d 94 [2 Dept., 2020], citing *Collado v. Jiacono*, 126 A.D.3d 927, 6 N.Y.S.3d 116 [2 Dept., 2015]). “On a summary judgment motion, a moving defendant does not meet its burden of affirmatively establishing its entitlement to summary judgment by merely pointing to gaps in the plaintiff’s case; rather, it must affirmatively demonstrate the merit of its defense” (*Katz v. Beil*, 142 A.D.3d 957, 39 N.Y.S.3d 157 [2 Dept., 2016]). Accordingly, the defendant’s motion for summary judgment is denied. The foregoing constitutes the decision and order of this Court.

ENTER:


Hon. Lara J. Genovesi
J.S.C.

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