

Langston v MFM Contr. Corp.
2021 NY Slip Op 31693(U)
May 20, 2021
Supreme Court, New York County
Docket Number: 155255/2014
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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INDEX NO. 155255/2014

ERIN LANGSTON, ALAN ZIEGLER,

Plaintiff,

MOTION DATE N/A, N/A

MOTION SEQ. NO. 006 007

- v -

MFM CONTRACTING CORP., THE CITY OF NEW YORK,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,CONSOLIDATED EDISON, INC.,T. MORIARTY &
SON, INC.,FELIX ASSOCIATES, LLC., THE TRUSTEES OF
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 182, 184, 185, 186, 187, 188, 189, 190, 197, 199, 202, 203

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 191, 192, 193, 194, 195, 196, 198, 200, 201

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

This is an action for personal injuries allegedly sustained by the plaintiff, Erin Langston, on September 4, 2013, when she was walking in the intersection of St. Clair Place and 12th Avenue County, City, and State of New York. Plaintiff alleges she tripped and fell on a roadway defect.

Defendant, the City of New York (“City”), moves for summary judgment seeking an order pursuant to CPLR § 3212 dismissing the complaint. 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. Defendants. Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. (“Con Ed”), move for summary judgment on the

grounds that it did not cause or create the defect. Plaintiff opposes the instant motions and cross-moves to amend the notice of claim.¹ For the reasons, set forth below Con Ed's motion is granted, the City's motion is denied, and plaintiff's cross-motion is granted without opposition.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination" (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). As such, 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 NY2d 320 [NY 1986] and *Winegrad v New York University Medical Center*, 64 NY2d 851 [NY 1985]). Courts have also recognized that 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 (*Ropog Cab Corp.*, supra).

In order to hold the City liable for injuries resulting from roadway defects, a plaintiff must demonstrate that the City has 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 v City of Buffalo*, 93 NY2d 471[1999]).

The City's Motion

In support of its motion, the City relies on a record search conducted by an employee of the New York City Department of Transportation (DOT). The DOT search revealed voluminous

¹ The plaintiff seeks to add the claim of loss of consortium to the notice of claim. The City in its papers stated that it did not oppose this amendment.

records; however, the City avers that no records retrieved impute the City with prior written notice of the *specific defect* that caused plaintiff's accident. In opposition, plaintiff argues that there is a complaint for a pothole at the location of the accident and that the complaint was closed and timestamped earlier than the document indicates, and that this is sufficient to raise a triable issue of fact as to whether the City received prior written notice. In response, the City contends that the defect the plaintiff alleges caused her accident is a street cut and not a pothole; thus, the complaint regarding a pothole does not give the City prior written notice of the defect.

After a thorough review of the photographs and the DOT records the Court finds that there is a question of fact as to whether the City had prior written notice of the defect that caused plaintiff's accident. The Court declines to rule that as a matter of law the defect is not a pothole and finds that this is an issue for a finder of fact. Accordingly, the City's motion is denied.

Con Ed's Motion

Con Ed has established its *prima facie* entitlement to judgment as a matter of law. Con Ed has established, through undisputed admissible evidence, that it did not cause or create the defect. The arguments of the plaintiff on this issue without expert testimony or information to back up such arguments, are speculative. Accordingly, it is hereby

ORDERED that defendants', Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc., motion for summary judgment (motion sequence 7) is granted in its entirety; and it is further

ORDERED that the complaint including any and all cross-claims is dismissed in its entirety as against said defendant, and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ADJUDGED that the motion of defendant the City of New York for summary judgment (motions sequence 6) is denied; and it is further

ORDERED that plaintiff’s cross-motion is granted without opposition and the proposed amended notice of claim annexed to the plaintiff’s moving papers is deemed served timely *nunc pro tunc*.

5/20/2021

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE