

Six v City of New York
2021 NY Slip Op 32113(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No. 154785/2017
Judge: J. Mabelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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LAURIE SIX,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION BUREAU OF WATER AND SEWER OPERATIONS, EMPIRE CITY SUBWAY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Defendant.

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INDEX NO. 154785/2017

MOTION DATE 10/07/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

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

In the underlying action, plaintiff Laurie Six alleges that she sustained personal injuries as a result of an accident which allegedly occurred on the roadway adjacent to 54 Pearl Street, New York, NY, due to an alleged defect in the roadway. Plaintiff originally commenced this action against defendants Empire City Subway (“ECS”); Consolidated Edison Company Of New York, Inc. (“Con Edison”); and the City Of New York, New York City Department Of Transportation, New York City Department Of Environmental Protection, New York City Department Of Environmental Protection Bureau Of Water And Sewer Operations (collectively referred to herein as the “City”).

On or about July 10, 2017, defendant Con Edison filed their Verified Answer to plaintiff's Summons and Complaint, asserting cross-claims for indemnification against the City and against ECS.

Pending now before the court is a motion (Motion Sequence #002) filed by ECS seeking an order, pursuant to CPLR 3212, granting ECS summary judgment and dismissing the cross-claims filed against ECS by Con Edison. Attached to ECS's motion was a "Stipulation of Discontinuance" (NYSCEF Document # 48) that discontinued the action against ECS by plaintiff and the City, but the stipulation was not signed by Con Edison.

Standard for Summary Judgment

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 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 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 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 [Sup. Ct. App. Div. 1st Dept. 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 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

ECS’s *prima facie* case

ECS argues that they did not perform work, or hire anyone to perform work, in the subject area; did not own or maintain facilities in the subject area; and did not cause or create the subject pothole that allegedly caused plaintiff’s accident. In support of their motion, ECS attaches an Affidavit from Dan Tergesen (NYSCEF Document # 47), which states, in part:

1. I am currently employed as a Construction Manager Consultant for EMPIRE CITY SUBWAY COMPANY (LIMITED) ("ECS").

[...]

5. I have reviewed the results of a records search for all ECS facilities and all jobs, installation, construction, excavation, paving, and/or work of any kind completed by ECS or on its behalf, at or near the location of plaintiff's trip and fall accident which is adjacent to 54 Pearl Street, New York, NY, specifically located on the roadway of Pearl Street between Broad Street and Coenties Slip (the "Subject Location"), for a period of two years prior to and including the date of the alleged incident.

6. ECS's search revealed no records of any ECS facilities located at or near the Subject Location.

7. ECS's search revealed no records of any jobs completed by ECS, or any jobs performed at ECS's direction, at the Subject Location.

8. ECS's search revealed no records of any installation, construction, excavation, paying, and/or work of any kind completed by ECS or on its behalf, at the Subject Location.

With respect to Con Edison's cross-claims for indemnification against ECS, ECS argues that there is no evidence on the record to support Con Edison's allegation of contractual indemnification owed by ECS, as Con Edison has no contract with ECS relating to the subject location. Specifically, ECS argues that ECS did not have a contract with Con Edison for any work, or for any use or occupation of any facilities, at the subject location, as ECS has no facilities in the subject area; and did not complete or hire any third-party to complete any jobs in the subject location.

Given the above, including the Affidavit of Mr. Tergesen, the court finds that ECS has made a *prima facie* case in support of summary judgment, and the burden now shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

Opposition

In its opposition, Con Edison argues that the motion should be denied as premature, as discovery is incomplete. Con Edison argues that they should be able to depose Mr. Tergesen with respect to his search, stating:

The search they provided is not complete, nor did they include the search parameters. They appear to have conducted a segment search and not an intersection search which, as the alleged defect is by the crosswalk, an intersection search is required needed to rule out any questions of fact. Therefore, ECS's motion to dismiss should have been denied.


Contrary to Con Edison's assertion, Mr. Tergesen stated in his Affidavit that he conducted a search for "all ECS facilities and all jobs, installation, construction, excavation, paving, and/or work of any kind completed by ECS or on its behalf, at or near the location of plaintiff's trip and fall accident which is adjacent to 54 Pearl Street, New York, NY, specifically located on the roadway of Pearl Street between Broad Street and Coenties Slip." The court finds that this is a sufficient search to meet movant's burden to make out a *prima facie* case. Further, Con Edison failed to offer any evidentiary basis upon which to suggest that discovery may lead to relevant evidence. See DaSilva v. Haks Engineers, Architects & Land Surveyors, P.C., 125 A.D.3d 480 (Sup. Ct. App. Div. 1st Dept. 2015) ("Contrary to plaintiff's contention, defendants' motions were not premature although discovery was incomplete. A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence).

Finally, with respect to Con Edison's cross-claims for indemnification with respect to ECS, Con Edison did not dispute ECS's contention that ECS did not have a contract with Con Edison for any work, or for any use or occupation of any facilities, at the subject location.

Accordingly, given the above, it is hereby

ORDERED that (Motion Sequence #002) filed by ECS seeking an order, pursuant to CPLR 3212, granting ECS summary judgment and dismissing the cross-claims filed against ECS by Con Edison. is **GRANTED**; and it is further hereby

ORDERED that the Complaint, and any and all cross-claims, are dismissed with prejudice with respect to ECS.

<u>10/28/2021</u> DATE		 _____ J. MACHELLES SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE