

Noble v City of New York
2021 NY Slip Op 32753(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 154061/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

JEAN NOBLE,

Plaintiff,

- v -

INDEX NO. 154061/2018

MOTION DATE _____

MOTION SEQ. NO. 002

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, THE NEW
YORK CITY DEPARTMENT OF SANITATION,
CONSOLIDATED EDISON COMPANY OF NEW
YORK INC.,

Defendants.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37-51, 66, 68, 69, 71-75, 77, 80

were read on this motion for summary judgment.

Defendant Consolidated Edison (movant), the sole remaining defendant, seeks the summary dismissal of this action as against it. Plaintiff opposes.

I. PERTINENT BACKGROUND

Plaintiff alleges in her complaint that on or about December 29, 2017, as she was walking in the crosswalk at East 57th Street and First Avenue in Manhattan, she was caused to fall due to movant's negligence. (NYSCEF 39).

II. DEPOSITION TESTIMONY

At her deposition, plaintiff testified that on that day, which was cold, sunny, and windy, she was walking south on First Avenue at approximately 10:45am. The street was dry. (NYSCEF 44).

As plaintiff entered the crosswalk between the northeast and southeast corners of East

57th Street, on the side of the crosswalk closest to First Avenue, she saw ahead of her in the crosswalk a white substance that looked like street salt; it was “slurry, and slippery” and there was no snow or slush; the salt appeared to be “sitting in a slurry.” (*Id.*). A steam stack spouting steam was surrounded by a barricade located one to two feet to plaintiff’s right and a warm mist was in the air. Proceeding in a straight line, without trying to avoid the substance, and before reaching the steam stack, plaintiff stepped in the substance, slipped, fell, and injured her right wrist. That day, at approximately 12pm, plaintiff’s son photographed the intersection (NYSCEF 45). (*Id.*).

A search of movant’s records for the two years preceding plaintiff’s accident disclosed:

- (1) two tickets relating to a gas leak at the southwest corner of 57th Street and First Avenue;
- (2) ticket for the same southwest corner, 11 feet east and 15 feet north therefrom;
- (3) ticket for the intersection of “East 24 57th Street and First Avenue and related to a fire”;
- (4) ticket issued for a smoking manhole at 400 East 57th Street;
- (5) ticket issued for First Avenue and East 56th Street in relation to a manhole fire;
- (6) ticket issued for a gas leak request’
- (7) ticket issued for First Avenue and East 57th Street, 46 feet south of the north curb of East 57th Street and 75 feet west of the west curb of First Avenue;
- (8) ticket issued for a complaint regarding an unsecured metal plate at 401 East 57th Street;
- (9) ticket issued for a complaint regarding steel plates at 360 East 57th Street;
- (10) corrective action report (CAR) issued for a noise complaint at 400 East 57th Street regarding a Con Edison steam utility access cover; and
- (11) four notices of violation (NOV) issued for the noise complaint at 400 East 57th Street regarding a Con Edison steam utility access cover. (NYSCEF 46).

Movant's steam field operations planner testified that when vapor visibly emanates from a manhole, steam stacks are used to vent the underlying structure and protect the public from burning by steam. The base of a stack is more than 32 inches wide. Movant may place crystallized salt around the base of a steam stack to prevent condensation from freezing around it. Salt is scooped from a bag with a cup and spread around the stack. Traffic and pedestrians may spread the salt around. (NYSCEF 49).

According to the planner, at around the time of plaintiff's accident, movant performed work at First Avenue and 57th Street. After being shown a photograph taken of the site of the accident, the planner recognized the salt, which looked like the kind movant used for its steam stacks. It had been placed around the steam stack in the intersection, although he did not know who had placed it there. He identified three records resulting from a steam search:

- (1) jump tracking system (JTS) record showing that at 358 East 57th Street, between the Queensboro Bridge and First Avenue, there was a lot of vapor escaping from various structures;
- (2) JTS record for 400 East 57th Street reflects vapor entering the crosswalk; and
- (3) JTS record for 407-413 East 57th Street for a broken service valve in a manhole. (*Id.*; NYSCEF 50).

At his deposition, the operating supervisor of defendant Department of Sanitation (DOS) testified that work records for the two weeks preceding and including the date of plaintiff's accident reflect that DOS applied salt at or near the location of plaintiff's accident on December 14, 2017 during a snow storm, but that the salt appearing in the photograph shown to him did not appear to be the kind used by the DOS, which was of a darker color. Again referencing the photograph, he maintained that DOS does not dump salt in a crosswalk "like that." Rather, "it gets spread out all over." (NYSCEF 51).

III. CONTENTIONS

According to movant, none of the records disclosed by either search pertain to plaintiff's accident, thereby proving that movant neither caused nor created the allegedly hazardous condition. Nor did movant owe plaintiff a duty absent evidence suggesting that it caused or created the condition, derived a special use from the property, or was under a legal duty to maintain and clean the condition. It observes that there is no nonspeculative evidence that it placed the salt in the area, and that in any event, the act of placing salt on the ground to prevent ice formation cannot be evidence of negligence. Thus, it argues, it has demonstrated, *prima facie*, its entitlement to judgment as a matter of law. (NYSCEF 38).

Plaintiff argues that movant fails to sustain its burden of showing, *prima facie*, that no material issues of fact exist, relying on the testimony of movant's steam field operations planner who she claims conceded a duty to maintain the area around the steam stack. She also asserts that movant is liable for the hazardous condition it created, including the discharge of liquid and its interaction with the salt.

According to plaintiff's expert, the slippery condition that caused plaintiff to slip and fall was the result of movant's application of excessive amounts of rock salt around the steam stack. In his opinion, movant should have prepared a manual for personnel on the application of rock salt or standard procedures for its application around steam stacks, including warnings against the application of excessive amounts of rock salt. The expert also opines that the steam stack should have been insulated to prevent the discharge of liquid from the stack. (NYSCEF 71, 72).

In reply, movant alleges that plaintiff mischaracterizes the testimony of movant's planner, as its duty does not extend beyond 12 inches of its equipment, and the barriers around the steam stack were within that perimeter. And, it maintains, having testified that she was one to

two feet from the steam stack when she fell, plaintiff thereby acknowledges having been outside the zone of movant's duty. (NYSCEF 80).

According to movant, plaintiff's speculation that it created the hazardous condition by placing salt around the steam stack does not withstand scrutiny, as a matter of law, because even had movant placed the salt, it was open and obvious and not inherently dangerous, and that the obvious nature of a condition pertains to plaintiff's comparative negligence only where the landowner was under a duty to remedy it which is not the case here. And as the use of salt is an accepted and safe practice, movant maintains that the condition was not inherently dangerous. It moreover observes that after perceiving the white substance, plaintiff did nothing to avoid it. (*Id.*).

Movant also takes issue with the opinions of plaintiff's expert, as they are based on photographs taken hours after the accident, when the transient condition had likely changed as a result of heavy pedestrian and vehicle traffic. Absent an accurate image of the condition at the time of the accident, and in light of the expert's reliance on plaintiff's speculation that the white substance in the photographs was placed there by movant, and as the location of the substance was outside the zone of movant's duty, movant argues that the opinions are not probative. In any event, even had movant placed the salt there, movant cannot be held liable absent a duty to plaintiff with respect to the open and obvious condition. (*Id.*).

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form

demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

[A] party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons where, as relevant here, it launches a force or instrument of harm, such as by negligently creat[ing] or exacerbat[ing] a dangerous condition.

(*Brown v Garda CL Atl., Inc.*, 150 AD3d 542, 543 [1st Dept 2017], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140–143 [2002]).

Here, movant offers no evidence that it did not place salt around its steam stack. Rather, it acknowledges that it does so, and while it is a salutary practice to place salt around a steam stack, it must be done prudently. That movant’s employees use a cup to place salt around steam stacks does not prove that the amount of salt placed around the stack in this instance was not so great as to spread well beyond the 12-inch zone of movant’s duty. Consequently, there are triable issues as to whether movant caused or created the dangerous condition, and if so, that it owed plaintiff a duty of care.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that Consolidated Edison’s motion for summary judgment is denied; and it is further

ORDERED, that the parties contact the court jointly by email to cpaszko@nycourts.gov to schedule a settlement conference with Justice Jaffe.

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12/23/2021
DATE

BARBARA JAFFE, J.S.C.

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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
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