

Bah v City of New York
2022 NY Slip Op 31885(U)
June 15, 2022
Supreme Court, New York County
Docket Number: Index No. 152996/2015
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

-----X

OSMAN BAH,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ISLAND RESEARCH AND DEVELOPMENT CORPORATION D/B/A ISLAND TECHNOLOGY,

Defendants.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

OSMOSE UTILITIES SERVICES, INC.

Defendant.

-----X

INDEX NO. 152996/2015

MOTION DATE 02/08/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

Third-Party Index No. 595995/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion for SUMMARY JUDGMENT.

Plaintiff commenced this action on March 26, 2015, alleging that on November 17, 2014, he was driving his taxicab on Lexington Avenue and East 44th Street when an explosion underneath the street "caused debris, including a manhole cover, to fly up and crash into the taxi ... causing the plaintiff to sustain severe, serious and permanent personal injuries" (NYSCEF Doc. No. 3 [Am. Compl. at ¶52]). Plaintiff alleges, as relevant here, that the City owned, maintained,

operated, controlled, and repaired the street, and manhole at this location and had a duty to keep the street and manhole—including the area below ground under the manhole—free from obstructions and defects, and that its failure to do so led to the explosion causing plaintiff’s injury (Id. at ¶¶14-24).

Defendants the New York City Department of Transportation (“DOT”) and the City of New York (collectively, the “City”) now move, pursuant to CPLR § 3212, for an order granting summary judgment in favor of the City on the grounds that the City did not receive prior written notice of the “the allegedly defective Con Ed manhole condition.” Plaintiff opposes the motion¹.

In support of its motion, the City submits the Examination Before Trial (“EBT”) of Michael Donohue, a Con Ed engineer who was sent to the scene of the accident in the aftermath of the explosion to investigate (NYSCEF Doc. No 127 [Donohue EBT at. p. 25-27]). He testified that he went to the scene to collect information and did not perform a failure analysis to determine the cause of the explosion (Id. at p. 28). He further testified that he had no opinion as to the cause of the explosion (Id. at ¶¶60, 67).

The City also submits the affidavit of Charlene Mui, a DOT employee, attesting to her search of DOT records for the roadway segment of Lexington Avenue between East 44th Street and East 45th Street for two years prior to and including November 17, 2014, which revealed: one-hundred-and-eight permits, eighty-four hardcopy permits, eighty-four applications, six corrective action requests, four notices of violation, one-hundred-and-thirty-eight inspections, one in-house resurfacing record, seven maintenance and repair orders, one complaint, seven gangsheets for

¹ Three months after plaintiff filed his opposition, he submitted a letter presenting additional legal arguments with attached caselaw (NYSCEF Doc. No. 137-142). The Court declines to consider this untimely submission (See e.g., Ostrov v Rozbruch, 91 AD3d 147, 154 [1st Dept 2012 [“The problems created by open-ended supplemental submissions are manifest”]]).

roadway defects, one gangsheet for milling and resurfacing record, and one Big Apple Map (NYSCEF Doc. No. 129). The City also submitted these aforementioned records.

In opposition, plaintiff submits the EBT transcript of Larisa Dubina, a claims specialist at DOT assigned to Division of Legal Affairs, who detailed the manner in which DOT searches were performed and testified, among other things, that searches are conducted based on geographic location and not by condition such as an exploding manhole (NYSCEF Doc. No. 133 [Dubina EBT at p. 11]).

DISCUSSION

As a threshold matter, the Court is not persuaded by plaintiff's argument in opposition that the City's failure to comply with Uniform Rule 202.8-g in its statement of material facts mandates the denial of the motion; there is no evidence that the City's non-compliance has prejudiced plaintiff (See Meserole Hub LLC v Rosenzweig, 71 Misc 3d 1222(A) [Sup Ct, Kings County 2021]; but see Amos Financial LLC v Crapanzano, 145 NYS 3d 366 [Sup Ct, Rockland County 2021]). Accordingly, the Court addresses the City's motion on its merits.

"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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Here, the City contends that this action must be dismissed as against it because the City did not have prior written notice of any gas leaks or electrical cable malfunctions near the manhole on Lexington Avenue and East 44th Street as required by Administrative Code §7-201.

Section 7-201 of the Administrative Code of the City of New York provides, in pertinent part, that:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice...and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger, or obstruction complained of, or the place otherwise made reasonably safe.

(Administrative Code §7-201[c][2] [emphasis added]).

Even assuming, for the sake of argument, that a gas leak or electrical cable malfunction falls within the ambit of Administrative Code §7-201, the City has not established the cause of the explosion, let alone that it was caused by a gas leak or electrical malfunction. This failure mandates the denial of its motion—the City cannot establish its entitlement to summary judgment on the basis that it did not receive written notice of a condition that may have caused the subject explosion.

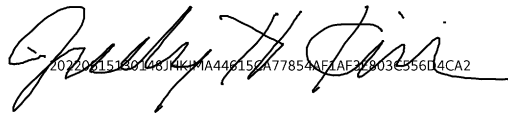
Accordingly, it is

ORDERED that the City's motion for summary judgment is denied; and it is further

ORDERED that within twenty days of entry, plaintiff shall serve a copy of this decision and order with notice of its entry upon defendants, the Clerk of the Court (60 Centre St., Room 141B), and the Trial Support Office (60 Centre St., Rm. 158M), 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 this court’s website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes the decision and order of the Court.



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6/15/2022

DATE

JUDY H. KIM, 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