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| Ercegovic v Zoltan Trans LLC |
| 2022 NY Slip Op 32113(U) |
| July 1, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 158389/2013 |
| Judge: Dakota D. Ramseur |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M
Justice

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MARIJANA ERCEGOVIC, INDEX NO. 158389/2013
Plaintiff, MOTION DATE 09/27/2021,
06/24/2022
- v - MOTION SEQ. NO. 005 006

ZOLTAN TRANS LLC, ABDOUL BAH, THE CITY OF NEW YORK,
Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 105, 106, 107
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125
were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff, Marijana Ercegovic (plaintiff), commenced this action for damages stemming from a July 8, 2012 motor vehicle accident at the intersection of 2nd Avenue and 35th Street, in the City, County, and State of New York. In motion sequence 005, co-defendant Carlo Lizza & Sons Paving, Inc. (Carlo Lizza), now moves pursuant to CPLR 3212 for summary dismissal of the complaint. In motion sequence 006, co-defendant Consolidated Edison Company of New York, Inc (Con Ed), now moves pursuant to CPLR 3212 for summary dismissal of the complaint. Both motions are opposed. For the following reasons, both motions are granted.

FACTUAL BACKGROUND

Plaintiff was injured when the bicycle she was riding collided with a motor vehicle operated by co-defendant Abdoul Bah (Bah). Plaintiff testified that she was bicycling southbound on 2nd Avenue while in the bike lane on the date of the incident. Plaintiff further testified that she observed a green fence on her left side as she approached the intersection of 2nd Avenue and 35th Street. According to plaintiff, she entered the intersection traveling southbound when the bicycle she was riding collided with Bah’s vehicle traveling westbound. Bah, a New York City Taxi driver, testified that when the accident occurred, he was already within the crosswalk on the east side of the subject intersection.

Robert D’Arpa (D’Arpa), who was employed by Carlo Lizza from 1992 through 2003 and from July 2016 onward, testified that part of his responsibilities included serving as the custodian for Carlo Lizza’s records for legal claims. According to D’Arpa, Carlo Lizza

performed milling work on May 10, 2012 on the road from 35th Street from Madison Avenue up to 2nd Avenue but did not perform any work in the intersection where the incident occurred. D'Arpa testified that he reviewed a document entitled the "Weekly Milling Report," which reveals the dates and locations Carlo Lizza performed milling work. D'Arpa also reviewed a photograph of the subject intersection depicting construction equipment on the east side of the intersection. D'Arpa testified that the construction equipment in the picture is not owned by Carlo Lizza.

According to Gregory Knabbe (Knabbe), an employee of co-defendant The Joint Venture of John P. Picone, Inc., Schiavone Construction Co. LLC, Frontier-Kemper Constructors, Inc., and Dragados USA, Inc. (the Joint Venture), the Joint Venture performed roadwork at the subject intersection, including placing barriers and a chain link fence around their worksite. Knabbe further testified that the worksite depicted in the photograph of the intersection belongs to the Joint Venture.

John McCluskey, an employee of the New York City Department of Environmental Protection, testified that co-defendant the City of New York sponsored and conducted two construction projects at the northeast intersection of 2nd Avenue and 35th Street. McCluskey further testified that the joint venture constructed or placed the fences and barricades at the subject northeast corner of 2nd Avenue and 35th Street.

Vicki Cheung, a record searcher employed by Con Ed, testified that her duties include searching for records and testify as to the results. Cheung testified that a search performed on behalf of Con Ed for records of DOT permits, Opening Tickets, Paving orders, Corrective Action Requests (CARs), Notice of Violations (NOVs), and emergency system control tickets for the two-year period, prior to and including July 8, 2012, for the intersection of 2nd Avenue and East 35th Street revealed that Con Ed did not perform any work at the premises prior to plaintiff's incident.

DISCUSSION

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; see also *Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 881 [2d Dept 2012]; *Willis v Galileo Cortlandt, LLC*, 106 AD3d 630 [2d Dept 2013]; *Branham v Lowes Orpheum Cinemas, Inc.*, 31

AD3d 319,320 [1st Dept 2006], *affd* 8 NY3d 931 [2007]). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff's opposition (*see Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

Here, Carlo Lizza demonstrates, *prima facie*, its entitlement to summary dismissal of the complaint by establishing that it did not place the subject barrier at the intersection or otherwise have responsibility for the alleged barrier that plaintiff alleges to have contributed to the incident. As demonstrated in the uncontroverted testimony, plaintiff's accident occurred on the east side of the intersection, whereas Carlo Lizza's milling work ended on the west side of the intersection. Further, there is no proof that Carlo Lizza performed any work where plaintiff's accident occurred.

In opposition, plaintiff fails to raise an issue of fact. Plaintiff does not dispute that Carlo Lizza did not perform milling work into the intersection where the incident occurred. Instead, plaintiff contends that D'Arpa's testimony concerning the incident should not be considered on the basis that he did not have personal knowledge of the work Carlo Lizza performed at the subject intersection because he was not employed with Carlo Lizza at the time of the incident. Plaintiff further argues that the D'Arpa's testimony concerning Carlo Lizza's work at the intersection relies entirely on the Weekly Milling Report, which plaintiff argues, constitutes inadmissible hearsay.

"To establish a foundation for the admission of a record under the business record exception to the hearsay rule, the proponent of the record must satisfy the requirements identified in CPLR 4518 (a)" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2nd Dept 2020]). A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (*see Palisades Collection, LLC v Kedik*, 67 AD3d 1329 [2009]; *West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [2002]; *Citibank, N.A. v Cabrera*, 130 AD3d 861 [2d Dept 2015]). Here, D'Arpa's testimony establishes the admissibility of the Weekly Milling report under the business records exception to the hearsay rule. D'Arpa testified that Weekly Milling Report he referenced in his deposition was stored Carlo Lizza's main office with their former legal consultant's files. D'Arpa further testified that the report is a document customarily generated by KS Engineering (KS), engineers hired by the DOT oversee the milling work. D'Arpa explained that KS directed Carlo Lizza as to when to open a road, close the road, any construction follow-up, any and all aspects of the job. D'Arpa further testified that the report shows, as relevant here, each location Carlo Lizza Milled, the beginning and end dates, and when the DOT paved the road. Accordingly, as plaintiff fails to rebut Carlo Lizza's *prima facie* showing, Carlo Lizza's motion for summary dismissal of the complaint is granted.

Con Ed also establishes their *prima facie* showing of entitlement to dismissal of the complaint. Con Ed demonstrates that it did not perform any work at the alleged accident location within the two years prior to and including the alleged date of accident and that Con Ed did not erect the fences and barricades at the alleged accident location. In opposition, plaintiff fails to raise an issue of fact as to whether Con Ed placed the barriers/fencing at the location of the incident. The court notes that plaintiff fails to present any evidence to counter the testimony that Con Ed neither performed work at the premises, nor erect the subject fences. Plaintiff's

contention that Con Ed’s search for records for work performed at the premises is inadequate is speculative and unsupported by the record. Indeed, plaintiff fails to present any proof that the search would not have revealed that Con Ed performed work at the premises. Plaintiff’s argument that Con Ed’s reliance on an “incomplete” emergency ticket is misplaced, since a review of the testimony reveals that the subject ticket corresponded to the west side of 2nd Avenue. Thus, Con Ed’s motion for summary dismissal of the complaint is granted.

Accordingly, it is hereby

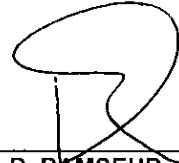
ORDERED that Carlo Lizza’s motion pursuant to CPLR 3212 for summary dismissal of the complaint is granted and the complaint is dismissed as against Carlo Lizza; and it is further

ORDERED that Con Ed’s motion pursuant to CPLR 3212 for summary dismissal of the complaint is granted, and the complaint is dismissed as against Con Ed; and it is further

ORDERED that the parties shall appear for a status conference on July 26, 2022 at 11:00 a.m.; and it is further

ORDERED that counsel for Carlo Lizza shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



7/1/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | REFERENCE |