

Berg v City of New York
2022 NY Slip Op 32404(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 153839/2018
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

Justice

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MAURICE BERG,

Plaintiff,

- v -

CITY OF NEW YORK, CARLO LIZZA & SONS PAVING,
INC., TRIUMPH CONSTRUCTION CORP., JOHN P.
PICONE, INC., EMPIRE CITY SUBWAY COMPANY LTD.,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,

Defendant.

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INDEX NO. 153839/2018

MOTION DATE 02/08/2022

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 204, 205, 206, 207, 208, 209, 210, 239 were read on this motion for SUMMARY JUDGMENT.

Plaintiff commenced this action to recover for injuries allegedly sustained on November 14, 2017, when he tripped and fell on raised, dark material on the pedestrian island in the northwest corner of the intersection at East 23rd Street and First Avenue (NYSCEF Doc. Nos. 1 [Complaint at ¶¶5-6] and 116 [Bill of Particulars at ¶2]). Plaintiff asserts negligence claims against, as relevant here, defendant Empire City Subway Company Ltd. (“ECS”).

ECS now moves, pursuant to CPLR §3212, for an order dismissing all claims and cross-claims against it. In support of its motion, ECS submits the Examination Before Trial (“EBT”) testimony of Daniel Tergesen, a construction manager for ECS. Tergesen testified that in May 2017 ECS performed work at East 23rd Street and First Avenue but did not perform work at the pedestrian plaza where plaintiff fell (NYSCEF Doc. No. 180 [Tergesen EBT at pp. 41, 63]). After

reviewing a photo of the subject intersection, Tergesen identified a dark black rectangle in the road as the site of ECS's work (NYSCEF Doc. Nos. 180 [Tergesen EBT at p. 41] and 182).

In opposition, the plaintiff makes three arguments. First, plaintiff refers to a different photo of the subject intersection (NYSCEF Doc. No. 207) and notes that there is a patch of asphalt closer to the pedestrian plaza than the one identified by Tergesen and asserts that ECS worked with asphalt at this, closer, location. Plaintiff also submits a Notice of Violation ("NOV") issued by the New York City Department of Transportation on July 30, 2017 for ECS's failure to address a Corrective Action Report ("CAR") issued on May 30, 2017 for excess asphalt in the driving lane (NYSCEF Doc. No. 209). Finally, plaintiff submits a schematic of ECS facilities at the subject intersection (NYSCEF Doc. No. 210) referenced in Tergesen's testimony. Plaintiff notes that this schematic has a square marked "vault" which "shows a conduit line running from a circle in the area shown by the prior work area rectangles to a vault which is right next to the location of the crosswalk through which plaintiff was walking when the accident occurred" (NYSCEF Doc. No. 204 [Grossman Affirm. in Opp. at p. 3]).

DISCUSSION

"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]). ECS has satisfied its prima facie burden through the testimony of Tergesen that ECS did not perform work at the subject pedestrian plaza (See Melcher v City of New York, 38 AD3d 376 [1st Dept 2007]).

In opposition, plaintiff has failed to raise an issue of fact. Plaintiff's claim that ECS performed work closer to the subject pedestrian island than Tergesen testified is entirely speculative and therefore insufficient to defeat summary judgment (See Robinson v City of New York, 18 AD3d 255, 256 [1st Dept 2005] ["speculative assertions by plaintiff are insufficient to raise a question of fact about whether the repair and excavation work performed by these defendants ... in the curb lanes, away from the location of plaintiff's fall as identified by plaintiff herself in photographs at her deposition, caused her injuries"]). Neither does the NOV submitted by plaintiff raise a question of fact, as it references a CAR issued for "excess asphalt" in the "driving lane" rather than on the pedestrian island. Finally, plaintiff fails to explain how the schematic map he submits raises an issue of fact as to ECS's liability here, particularly in light of Tergesen's testimony that the vault noted on the schematic map was not owned or controlled by ECS (NYSCEF Doc. No. 180 [Tergesen EBT at pp. 19-20]).

In light of the foregoing, it is

ORDERED that Empire City Subway Company, Ltd.'s motion for summary judgment dismissing the complaint and all cross-claims against is granted, and they are hereby dismissed against it; and it is further

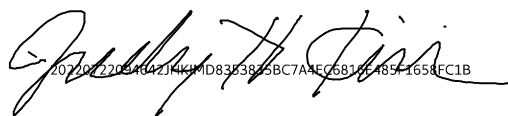
ORDERED that within thirty days from entry of this order, counsel for defendant Empire City Subway Company, Ltd. shall serve a copy of this order, with notice of entry, on all parties, the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); 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

“Efiling” page on this court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.



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7/22/2022

DATE

HON. 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