

<b>Pelaez-Pineda v City of New York</b>
2022 NY Slip Op 32711(U)
August 11, 2022
Supreme Court, New York County
Docket Number: Index No. 153422/2014
Judge: Leslie A. Stroth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CITY PART 52

-----X  
FORTINO PELAEZ-PINEDA,

Plaintiff,

-against-

THE CITY OF NEW YORK and CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC.,

Defendants.  
-----X

Index No. 153422/2014

Motion Sequence No. 005

**DECISION & ORDER**

**LESLIE A. STROTH, J.S.C.:**

In motion sequence number 005, defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves for summary judgment, seeking to dismiss the amended verified complaint of plaintiff Fortino Pelaez-Pineda (Plaintiff) as asserted against it. Con Edison also seeks dismissal of “all cross-claims” asserted against it by its co-defendant, the City of New York (City and, together with Con Edison, Defendants). Plaintiff opposes, but City did not respond to Con Edison’s motion.

**I. Background**

Plaintiff, a Bronx County resident, alleges that, on October 28, 2013, at about 1:40 in the afternoon, he was physically injured while bicycling northbound on Tenth Avenue in Manhattan, in the northeastern quadrant of its intersection with West 37th Street. (See amended verified complaint, sworn to April 27, 2016 [NYSCEF Doc No. 79], ¶ 3 [describing location at issue as Tenth Avenue’s “northeast intersection with West 37th Street”]; see also Plaintiff’s verified bill of particulars, dated January 31, 2017 [NYSCEF Doc No. 81]). Plaintiff avers that he fell “violently” to the ground at that location when he rode onto a defective area of the roadway’s

surface (amended complaint ¶¶ 24-25) and that the defect was caused by Defendants' negligent maintenance (*id.* ¶ 23).

City answered the amended complaint, generally denied Plaintiff's allegations, and cross-claimed for contribution and indemnification against Con Edison (*see* answer to amended complaint [NYSCEF Doc No. 24]). In turn, Con Edison answered the amended complaint, generally denied plaintiff's allegations, asserted in defense of the cross-complaint that it acted solely under franchise or license of "proper municipal authorities," and cross-claimed for contribution and indemnification against City (verified answer to an amended complaint with cross complaint [NYSCEF Doc No. 25]).

Con Edison e-filed its motion *sub judice* on November 11, 2021 (*see* amended notice of motion [NYSCEF Doc No. 103]), seeking summary judgment, dismissing the amended complaint and the cross claims asserted by City against it. Con Edison asserts it is entitled to summary judgment because undisputed evidence establishes that it did not cause or create the condition that Plaintiff claims caused his injuries. Con Edison further asserts that it did not perform any work at the accident location identified by Plaintiff in the two years before his alleged injury, that it did not own any facilities or perform any work at the alleged accident location, and that it did not receive any actual or constructive notice of any defective or dangerous condition there.

In opposition, Plaintiff denies that Con Edison can demonstrate, based on documentary and testimonial evidence, that it did not cause or create the roadway's defect, or that the defect did not arise from work that Con Edison performed (affirmation of Andrew G. Sfougatakis, Esq., executed December 29, 2021 [Sfougatakis affirmation] [NYSCEF Doc No. 24], ¶ 33). Plaintiff's opposition is premised on the contention that material issues of fact remain with respect to whether

Con Edison performed work at the site of the alleged road surface defect prior to his accident.

## II. 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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) [internal citations omitted].

To prevail, the movants must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in their favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the movants have made their showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). Party affidavits and other proof must be examined carefully “because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment” (*id.*).

“To defeat this motion, plaintiff [has] to establish the existence of ‘facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred’” (*Flores v City of New York*, 29 AD3d 356, 358 [1st Dept 2006], quoting *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]). “However, such proof must permit a finding of proximate cause ‘based not upon speculation, but upon logical inferences drawn

from the evidence” (*id.*, quoting *Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744 [1986]).

At a 50-H hearing held on March 25, 2014, Plaintiff testified that although he did not see any defect in the roadway prior to his accident and did not return to examine the location afterward, he believes that his front wheel struck a pothole in the roadway, causing him to fall from his bicycle and sustain injury (Nguyen affirmation, exhibit D [Plaintiff’s March 25, 2014 50-H hearing transcript] [NYSCEF Doc No. 83], at 32:3-18).

At his later deposition, however, Plaintiff asserted that he returned to the intersection “some months” after the accident and found that the alleged defective condition had been “fixed” (*id.*, exhibit E [Plaintiff’s December 5, 2017 deposition transcript] [NYSCEF Doc No. 83], at 43:18-25). Plaintiff also stated that, at the time immediately preceding his injury, he was bicycling northbound, “toward the extreme right” side of Tenth Avenue (*id.* 32:3-18), and that there were no cars in the parking lane where his injury allegedly occurred (*id.* 32:7-9).

Jim Liriano, a research assistant and record searcher for the New York City Department of Transportation (DOT), in the transcript of his July 10, 2019 deposition (Liriano tr) (Nguyen affirmation, exhibit F [NYSCEF Doc No. 84]), testified that DOT performed two record searches in order to produce documents relevant to this action: one for the intersection of Tenth Avenue and 37th Street and one for the block known as Tenth Avenue between West 37th and West 38th Street, each for the two year period spanning October 28, 2011 and October 28, 2013 (*see* Nguyen affirmation, ¶¶ 25 and 29, and Liriano tr at 9:9-10:6, 11:3-17, 33:20-34:6). In his deposition, Liriano describes four Con Edison work permits involving the intersection of Tenth Avenue and 37th Street issued during the two-year period between October 28, 2011 and October 28, 2013, and related documents.

As to his intersection record search, Liriano first discussed permit # M02012172-120, issued by DOT on June 20, 2012, to make “major installation of high voltage” at the intersection of Tenth Avenue and West 37th Street (Liriano tr at 48:10-12). Liriano stated that DOT later inspected this location, after the permit had expired, and found that no work had been performed there (*id.* at 49:25-50-12).

Second, Liriano discussed DOT permit # M01-2013010-069, valid from January 19 to February 17, 2013, to make a “major installation of high voltage” at the subject intersection (*id.* at 50:13-23). DOT conducted an inspection on August 7, 2013, found that a trench had been cut on February 16, 2013, that the roadway had been restored by an independent contractor on February 22, 2013, and that no corrective action request (CAR) or notice of violation (NOV) was issued with respect to this work (*id.* at 51:24-52:19). Con Edison records specialist Jennifer Grimm testified that this second permit related to work performed five feet east of the *west* curb of Tenth Avenue, and 51 feet south of the north curb of West 37th Street (deposition transcript of Jennifer Grimm, dated July 16, 2019 [Grimm tr.] [Nguyen affirmation, exhibit G], at 17:8-15). Ms. Grimm added that the work had been performed “in the driving lane in front of 485 Tenth Avenue, which is [on] the *west* side of the street” (*id.* at 14:5-9) (emphasis added).

Third, Liriano discussed building permit # M02-2013156-031, issued to Con Edison on June 5, 2013, to “[p]lace equipment other than crane or shove[sic] one vehicle on location placement” (Liriano tr. at 51:20-52:5). DOT conducted an inspection of the intersection on June 13, 2013, which resulted in a “pass” grade for Con Edison, indicating no violation was found, because there was no equipment at the site and no CAR or NOV had been issued with respect thereto (*id.* at 52:6-17).

Fourth, Liriano describes building operation permit # M02-2013156-032, issued to Con Edison on June 5, 2013, “for the purpose of . . . [o]ccupancy of the roadway as stipulated” (*id.* 52:24-53:11). As with the third permit, DOT inspected the site on June 13, 2013, and gave Con Edison a “pass” grade, remarking “No roadway occupancy at this time,” and issued no CAR or NOV (*id.* 53:16-54:7).

With respect to the block record search, Liriano testified that only one permit was found that related to Con Edison. That permit, # M01-2012164-082, valid from June 18 to July 15, 2012, was issued to Con Edison to “open the roadway in front of 485 10th Avenue between West 37th and West 38th Street. . . to construct or alter a manhole or ‘caustic’” (*id.* at 39:20-40:6), which Con Edison’s counsel interprets as “casting” (Nguyen affirmation ¶ 30). Liriano notes that the work under this permit led to repeated DOT inspections and issuances of CARs and NOVs, directing Con Edison to replace or repair loose and noisy utility access gratings it had installed in the roadway (*id.* 45:9-13). A final inspection on August 26, 2013 was a “pass,” finding that Con Edison had remedied the violation (Nguyen affirmation, exhibit G at 45:2-46:16). Con Edison asserts that, even if this had not been remedied months before Plaintiff’s October 28, 2013 accident, this defect could not have caused Plaintiff’s alleged injuries, as these loose and noisy gratings were not a pothole and 485 West 37th Street is on the west side of Tenth Avenue, the opposite side of the street from where Plaintiff fell (Nguyen affirmation, ¶ 31).

As noted, Grimm, Con Edison’s records specialist, testified regarding the second DOT permit Liriano discussed (# M01-2013010-069), under which repairs were performed five feet from the west curb of Tenth Avenue, on the opposite side of the street from where Plaintiff’s injury occurred (Grimm tr [Nguyen affirmation, exhibit G], 17:8-15). The other results to Grimm’s searches did not uncover any Con Edison roadwork that could have created the dangerous

condition Plaintiff describes. Con Edison also relies on the deposition testimony of its senior specialist, Joseph Massoni, dated September 27, 2021 (Massoni aff) (Nguyen affirmation, exhibit S [NYSCEF Doc No 97]) in support of these arguments.<sup>1</sup>

Among other matters, Grimm testified with respect to DOT permit # M02-2012266-015, issued on September 22, 2012. Grimm asserts that the permit and related work orders, issued to Con Edison for a safety inspection of a manhole and electrical services, and necessary repairs, were for work to be performed in the north parking lane in front of 449 West 37th Street, in the block between Dyer Avenue and Tenth Avenue (Grimm tr, 29:21-30:13; 75-77; *see also* exhibit G at 88 [first page of DOT Permit # MO1-2012266-015]).<sup>2</sup> Massoni states that, as reflected in the permit, Con Edison's work was to be performed "160 feet west of the east corner [of Tenth Avenue] and seven feet south of the north curb [of West 37th Street]" (Massoni tr, 25:21-26:15).

DOT's description of the work location appears to be in error, as the permit placed the work site on West 37th Street between Tenth Avenue and Dyer Avenue but the spot 160 feet *west* of the eastern corner of Tenth Avenue, also specified by the permit as the work site, would fall in the block of West 37th Street between Tenth and Eleventh Avenue,<sup>3</sup> on the other side of the intersection from where Plaintiff's injury allegedly occurred.

This discrepancy was apparently resolved by the time Con Edison issued its related "Opening Ticket" PS419685, which indicated that the work – four trenches to be cut – would be

---

<sup>1</sup> In paragraph 3, the Nguyen affirmation mistakenly designates the Massoni aff as exhibit T, switching it with the Note of Issue, dated September 14, 2021 (NYSCEF Doc No. 98).

<sup>2</sup> Exhibit G to the Nguyen affirmation includes both the Grimm deposition transcript and the deposition's exhibits. References to the transcript are cited by the page(s) and line(s) of the transcript itself. Copies of the deposition exhibits, annexed to the end of the transcript, are cited by page number(s) reflected in the .pdf reader.

<sup>3</sup> *See* [https://baruch.cuny.edu/nycdata/infrastructure/the\\_grid.html](https://baruch.cuny.edu/nycdata/infrastructure/the_grid.html) ("[T]he street design for Manhattan known as the grid [which] originated in 1811, is characterized by 12 north-south avenues and 155 east-west streets. The avenues are 100 feet wide. . .").

performed in the parking lane on the north side of West 37th Street, between Tenth and Ninth Avenues (Nguyen affirmation ¶ 42, citing Grimm tr, 31:4-32:10 and exhibit G at pages 78-79). These trenches were filled, and the roadway was repaired, by Con Edison's contractor, Nico Asphalt Paving, Inc., on October 11, 2012 (*id.*, citing Grimm tr 32:11-33:5 and exhibit G at 80 [paving order]), more than a year before Plaintiff's injury.

Plaintiff asserts that Con Edison's motion must be denied because material issues of fact remain regarding work it performed under three DOT permits. As to the first, DOT permit # MO1-2012266-015, Plaintiff argues that a related Con Edison Emergency Control System (ECS) ticket, memorializing the safety inspection of a manhole and several services boxes "near 457 West 37th Street" (*see* Sfougatakis affirmation, ¶ 25 and exhibit F [Grimm tr] 23:7-27:18) (emphasis added), establishes that this work occurred where the pothole caused his fall, that is, in the northeast quadrant of the intersection of Tenth Avenue and West 37th Street.

To support this contention, Plaintiff submits a one-page exhibit of Google Maps' images taken of the northeast corner of that intersection (*id.* exhibit J [NYSCEF Doc No. 116]). As Con Edison points out, however, the page heading indicates that the building located there is not 457 West 37th Street but 482 Tenth Avenue (Nguyen reply affirmation, executed January 12, 2022 [NYSCEF Doc No. 117], ¶ 8). Moreover, the permit itself indicates that the work was to be performed in the north parking lane in front of 449 West 37th Street (Grimm tr, 29:21-30:13; Nguyen affirmation, exhibit G at 75-77), not within the intersection of Tenth Avenue and West 37th Street. This is also borne out by the Opening Ticket PS419685 which shows that four cuts

were to be made in the north parking lane of West 37th Street, well clear of the intersection (*id.* 31:4-13, Nguyen affirmation, exhibit G at 78-79).<sup>4</sup>

The second and third DOT permits Plaintiff raises, # MO1- 2012172-120 and MO1- 2012172-098, relate to two halves of the same proposed project, traversing the intersection (*see* Grimm tr, 37:5-38:19). Plaintiff argues questions of fact exist as to whether Con Edison had performed any work under these “intersection permit[s],” issued “for major installation of high voltage to ‘install conduit’” (Sfougatakis affirmation, ¶¶ 30-31 and exhibit I, at 6), noting that Massoni did not know whether work had been performed at these locations (*id.*, citing exhibit H [Massoni tr], 28:19-25). Con Edison, however, presented testimony from both Grimm and Liriano, asserting that no work had been performed on this project because no additional documents relating to the project had been generated (Nguyen reply affirmation, ¶ 14, citing Nguyen affirmation exhibit F [Liriano tr] 50:5-12, and G [Grimm tr] 39:17-40:21]).

Plaintiff identified the northeast quadrant of the intersection of Tenth Avenue and West 37th Street as the location of his bicycle accident. In support of its motion. Con Edison has presented competent evidence to show that it did not perform any excavation or roadwork where Plaintiff asserts that he fell. In opposition, Plaintiff has failed to raise a triable issue of fact as to whether Con Edison performed any work at that location. In the absence of “some evidence connecting this defendant’s work to the situs of plaintiff’s injury” (*Flores*, *supra*, 28 AD3d at 359

---

<sup>4</sup> The form on which Con Edison Opening Ticket PS 419685 was written is denominated “REPORT OF STREET AND/OR SIDEWALK OPENINGS – STREET SEGMENT” (Nguyen affirmation, exhibit G at 78). Permit # M01-2013010-069, related to work performed “five feet east of the west curb of Tenth Avenue” (Grimm tr. 16:21-17:14), on the west side of the intersection of Tenth Avenue and 37th Street (*see* Nguyen affirmation, exhibit G, 66-68). Its related Opening Ticket is denominated “REPORT OF STREET AND/OR SIDEWALK OPENINGS – INTERSECTION” (*id.* 69).

[citation omitted]), Con Edison is entitled to summary judgment with respect to Plaintiff's cause of action for negligence.

As noted, Con Edison also moves for summary judgment, seeking dismissal of all cross claims that City has asserted against it. Considering its failure to oppose Con Edison's motion, City's cross claims against Plaintiff must also be dismissed (*Esponda v Ramos-Ciprian*, 179 AD3d 424, 426 [1st Dept 2020] [failure to oppose summary judgment motion deemed concession that no question of fact exists requiring trial] [citations omitted]).

### III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the branch of Con Edison's motion seeking summary judgment dismissing Plaintiff's cause of action against it for negligence is hereby granted; and it is further

ORDERED that the branch of Con Edison's motion seeking summary judgment, dismissing the cross claims asserted against it by defendant City, is hereby granted; and it is further

ORDERED that the balance of the action is severed and continued.

Dated: August 11, 2022

ENTER:



LESLIE A. STROTH, J.S.C.