

Silver v Consolidated Edison Co. of N.Y., Inc.

2022 NY Slip Op 33083(U)

September 13, 2022

Supreme Court, New York County

Docket Number: Index No. 154177/2019

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

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CRAIG SILVER,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., THE CITY OF NEW YORK, C.A.C. INDUSTRIES,
INC.,

Defendant.

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INDEX NO. 154177/2019

MOTION DATE 06/10/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 123 were read on this motion to/for JUDGMENT - SUMMARY.

This is an action for personal injuries allegedly sustained by the plaintiff on October 10, 2019, when plaintiff was biking on the roadway at the intersection of Broadway and West 87th Street, New York, NY. Plaintiff alleges he was “caused to strike a depression in the roadway located adjacent to metal placed in the roadway.” (See Exhibit A, Notice of Claim, NYSCEF doc. no. 94).

Defendant, the City of New York (the City) now moves for summary judgment seeking an order pursuant to CPLR 3212 dismissing the complaint. The City maintains that it is entitled to summary judgment as it did not have prior written notice of a defective condition on the roadway nor did it cause or create the defective condition. Although all parties entered into a stipulation adjourning the motion on consent from April 29, 2022 to June 10, 2022, no opposition was filed by any party. (See NYSCEF doc. no. 123).

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting

Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the opposing party to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so].” *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

In order to hold the City liable for injuries resulting from roadway defects, a plaintiff must demonstrate that the City has received prior written notice of the subject condition. *See Admin Code of the City of New York § 7-201(c)(2)*; *Amabile v City of Buffalo*, 93 NY2d 471 (1999). The only recognized exceptions to the prior written notice requirement are where the municipality itself created the defect through an affirmative act of negligence or where the defect resulted from a special use by the municipality. *See Yarborough v City of New York*, 10 NY3d 726 (2008); *Amabile v City of Buffalo*, 93 NY2d 471 (1999).

In support of its motion, the City relies on a record search conducted by an employee of the New York City Department of Transportation (DOT) (Exhibit O, NYSCEF doc. no. 107) and an affidavit of Henry Williams, a DOT record searcher (Exhibit O, NYSCEF doc. no. 108). The DOT search revealed voluminous records regarding the subject roadway for the two years prior to and including the date of plaintiff’s alleged incident. However, the City avers that no records retrieved impute the City with prior written notice of the specific defect that caused plaintiff’s accident. Thus, the Court finds that the City meets its initial prima facie burden, entitling it to

judgment as a matter of law, by submitting evidence that it did not have prior written notice of the alleged defect on the curb.

Therefore, in opposition, “the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule — that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality.” *Yarborough v City of New York*, 10 NY3d 726, 728 (2008). Neither plaintiff nor co-defendants submit opposition to defeat the City’s prima facie showing. Thus, plaintiff and co-defendants have failed to submit evidence demonstrating a triable issue of fact as to the applicability of an exception to Admin Code § 7-201 (c) (2). As a review of the applicable DOT records reveal that the City did not have prior written notice of the subject condition that allegedly caused Plaintiff’s accident, and there is no evidence that the City caused or created the subject condition, the City’s motion is granted, and the complaint is dismissed as against it.

Accordingly, it is

ORDERED that the motion of defendant, the City of New York, to dismiss the complaint and all cross-claims herein is granted, and the complaint and any and all cross-claims are dismissed in their entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General


Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; 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 "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this action, including any pending motions, is transferred to a general IAS Part, as Corporation Counsel no longer represents any parties to this action.

This constitutes the decision and order of the Court.

9/13/2022
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: