

<b>Rivera v Consolidated Edison Co. of N.Y., Inc.</b>
2022 NY Slip Op 33471(U)
October 11, 2022
Supreme Court, New York County
Docket Number: Index No. 158106/2017
Judge: Leslie A. Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

ERICA RIVERA
Plaintiff,

INDEX NO. 158106/2017
MOTION DATE 01/28/2022
MOTION SEQ. NO. 002

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion for SUMMARY JUDGMENT

This action arises out of injuries allegedly sustained by plaintiff Erica Rivera (plaintiff) on May 25, 2017. Plaintiff alleges that, "she was burned/scolded [sic.] by steam emitting from and/or out of a manhole" located on the southeast corner of Reade Street and Broadway, New York, New York. Exhibit A, Notice of Claim, NYSCEF doc. no. 64 at 1. The City of New York and the New York City Department of Environmental Protection (DEP) (together, the City) move for summary judgment pursuant to CPLR 3212 seeking an order dismissing plaintiff's complaint and all cross-claims against it.

The City argues that it did not have notice of the alleged condition, as required by the Administrative Code of the City of New York § 7-201, nor did it cause and/or create the alleged condition. While the City admits that it owns the subject manhole, it maintains that it cannot be held liable for plaintiff's injuries unless she demonstrates that the injury was caused by the City's negligence.

Both plaintiff and defendant Consolidated Edison Company of New York (Con Edison) oppose the City's motion. Specifically, Con Edison argues that plaintiff's injuries were caused by a vapor

condition, not a steam condition as alleged by plaintiff and the City, and that Con Edison gave notice of such vapor condition to the City.

In support of its opposition, Con Edison submits the deposition testimony of Anthony Orofino, a Con Edison utility worker with Steam Operations. *See* Exhibit A, Orofino Examination Before Trial (EBT), NYSCEF doc. no. 86. Mr. Orofino testified that, based on his review of Con Edison's steam records, Con Edison installed a steam stack at the accident location due to a clogged catch basin, which created a vapor condition. *Id.* 33-35; *see also* Exhibit B at 4, Steam Operations Job Detail Report 201703676, NYSCEF doc. no. 87. According to Con Edison's records, the vapor condition continued from April 2017- July 2017, two months after plaintiff's alleged accident date. *See* NYSCEF doc. no. 87.

Con Edison argues that the clogged catch basin at the subject location caused the vapor that allegedly injured the plaintiff. Con Edison annexes to its motion the affidavit of Dominic Gencarelli, a Manager of Con Edison's Steam Distribution's Planning Section. *See* Exhibit C, NYSCEF doc. no. 88. Mr. Gencarelli attests that he is familiar with Con Edison's steam system and that he understands how the steam system connects with the City's underground systems. Mr. Gencarelli explains Con Edison's position as to the relationship between the vapor and the clogged catch basin:

When a [Department of Environmental Protection] catch basin is clogged, it causes a flooding condition that can inadvertently come in contact with the Con Edison Steam Distribution piping. When the sewer/storm water comes in contact with the underground steam piping, it will cause a vapor condition. This is not Con Edison steam being emitted through the catch basin. It is the sewer/storm water being heated and vaporized from the steam pipe that is in close proximity. *See* Exhibit C at ¶ 4.

Mr. Gencarelli attests that the Steam Distribution Department's records indicate that there is a history of clogged catch basins at plaintiff's alleged accident location. *See* Exhibit C at ¶ 6; *see also* NYSCEF doc. no. 87. Further, he avers that there is no record of a Con Edison steam leak for the two years prior to and including the date of the alleged accident for the location at issue. *See* NYSCEF doc. no. 88 at ¶ 3.

Mr. Gencarelli also attests that Con Ed notified DEP of the catch basin condition. *See* Exhibit C at ¶ 6, NYSCEF doc. no. 88. Con Edison claims that the City's own witness, Narendra Nerine, testified at

his deposition that the City had notice of the vapor condition as of June 2015, via a City complaint concerning clogged catch basins at the subject intersection. *See* Exhibit N, NYSCEF doc. no. 77 at 35-36. Mr. Narine also testified that the DEP maintains all of the catch basins in the City. *Id.* at 21, lines 5-7.

Plaintiff also opposes the City's motion for summary judgment, arguing that the location in which her alleged injury occurred has a history of clogged catch basins and that the City's records show that it had notice of the resulting vapor which caused her alleged injury.<sup>1</sup> Plaintiff states that triable issues of fact remain as to whether the clogged catch basin vapor was an ongoing condition of which the City had notice and failed to repair and whether the City caused and created the subject condition.

The City maintains that plaintiff alleges in her notice of claim and complaint that she was injured due to "...steam emitting from and/or out of a manhole," not vapor from a clogged catch basin. Exhibit A, Notice of Claim, NYSCEF doc. no. 64 at 1. The City reiterates that it had no notice of a steam condition from the subject manhole. Therefore, any notice Con Edison asserts the City may have had regarding the clogged catch basin is irrelevant, because plaintiff's injury involved a manhole. Moreover, the City argues that Con Edison's internal records indicate that a Con Edison employee responding to the clogged catch basin checked for vapor and found it "completely dry" upon inspection on April 18, 2017. *See* NYSCEF doc. no. 87 at 5. The City also clarifies that its witness, Mr. Narendra Nerine, testified that a clogged catch basin does not produce steam or heat, only flooding. *See* NYSCEF doc. no. 77 at 89-93. According to the City, even if a catch basin did produce steam or heat, such condition would have developed over time, and the City would not be liable for a condition that does not immediately result in a hazardous condition. *See Bielecki v City of New York*, 14 AD3d 301 (1st Dept 2004).

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<sup>1</sup> The City objects to the Court's consideration of plaintiff's belatedly filed affirmation in opposition. However, as the City had an opportunity to respond in its reply papers, the Court will consider the plaintiff's opposition. *See* Vapnyar Affirmation in Reply, NYSCEF doc. no. 95. Additionally, the Court notes that the plaintiff's opposition largely mirrors the arguments in Con Edison's opposition, which was timely filed.

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); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman*, 3 NY2d at 404. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf*, 153 AD2d at 521.

To hold the City liable for injuries resulting from an allegedly defective condition, a plaintiff must demonstrate that the City has received prior written notice of the subject condition. *See Administrative Code § 7-201; Amabile v City of Buffalo*, 93 NY2d 471 (1999). The only 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*, 93 NY2d 471.

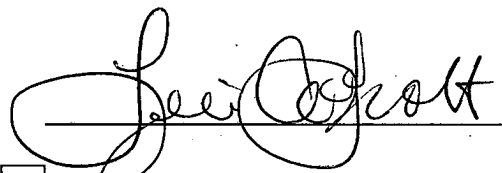
Viewing the evidence in a light most favorable to the opposing parties, triable issues of fact exist as to whether the City had notice of or caused and/or created the existence of steam or vapor at the accident location. Con Edison’s witnesses and supporting documentation raise questions of fact as to whether the City had notice of or caused and/or created a vapor or a steam that led to plaintiff’s injuries. *See* NYSCEF doc. no. 86 at 33-35, NYSCEF doc. no. 87; and NYSCEF doc. no. 88. Moreover, the parties’ papers raise questions as to whether the injury resulted from a manhole, clogged catch basin, grate, or other roadway hardware. Therefore, the City has not tendered sufficient evidence to show the absence of any material

issue of fact, including the dispositive issues of what defect caused the injury and whether the City had notice of or caused and/or created such defect.

Accordingly, it is

ORDERED that the City's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.



10/11/2022  
DATE

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