

Curry v City of New York
2022 NY Slip Op 33477(U)
October 11, 2022
Supreme Court, New York County
Docket Number: Index No. 159927/2019
Judge: Leslie A. Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH Justice PART 52

DANIELLE J. CURRY, Plaintiff, INDEX NO. 159927/2019 MOTION DATE 01/13/2022 MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC., Defendant.

DECISION + ORDER ON MOTION

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC. Plaintiff,

Third-Party Index No. 595908/2021

-against-

CITYWIDE PAVING INC, SAFEWAY CONSTRUCTION ENTERPRISES LLC Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 68, 69, 70, 71, 72

were read on this motion to/for JUDGMENT - SUMMARY

This is an action to recover monetary damages for personal injuries sustained by plaintiff Danielle J. Curry (plaintiff) as a result of a trip and fall on July 26, 2018, due to a pothole in the southern crosswalk at the intersection of 11th Avenue and West 36th Street, New York, NY. First-party defendants the City of New York and New York City Department of Transportation (together, the City) move for summary judgment pursuant to CPLR 3212 (b) for an order dismissing the 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 or create the alleged condition. Plaintiff, defendant/third-party plaintiff Consolidated Edison Company of New York, Inc. (Con Ed), and third-party defendants Safeway Construction Enterprises, Inc. (Safeway) and Citywide Paving Inc. (Citywide) oppose the motion, arguing that issues of fact exist as to prior written notice and that the motion is premature.

I. Analysis

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 395 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.

In support of its motion, the City relies on a record search from the New York City Department of Transportation (DOT) (Exhibit J, NYSCEF doc. no. 46) and an affidavit of Sharabanti Aich, the DOT paralegal who conducted the search (Exhibit K, NYSCEF doc. no. 47). The DOT search revealed records regarding the subject intersection for the two years prior to and including the date of plaintiff's alleged incident, including two complaints; two resulting work orders; and a permit issued to EJ Electric, a City contactor for plaintiff's alleged accident location. *See* Exhibit J at 7, 9-16. The City avers that none of the records retrieved impute the City with prior written notice of the specific defect that caused plaintiff's accident. It is the City's position that all relevant documentary discovery has been exchanged and that no additional deposition testimony could alter the City's liability.

Plaintiff opposes the instant motion, arguing that triable issues of fact exist as to whether the City had prior written notice of the alleged defect or caused or created such defect. Plaintiff argues that the two complaints and work orders produced by the City provided notice to the City and evidenced that the City performed work at the subject crosswalk that led to the dangerous condition. Plaintiff maintains that the affidavits submitted in support of the City's motion fail to explain whether the work performed by DOT pursuant to the two work orders was at the subject location. Accordingly, plaintiff argues that the instant motion is premature, as additional discovery is required to clarify issues, and as no depositions have yet been held.

Defendant and third-party plaintiff Con Edison also oppose the motion. Con Edison asserts that the City's record search is incomplete and insufficient to meet the burden for summary judgment. Specifically, Con Edison alleges that it received additional records concerning non-

party EJ Electric's work through a Freedom of Information Law (FOIL) search. *See* Exhibit A, NYSCEF doc. no. 56. Con Edison indicates that the additional FOIL records include a permit to EJ Electric for a traffic signal repair on 11th Avenue and a sketch with a handwritten note on the top right-hand corner that states, "Damaged Conduit S/E/C to N/E/C ...Milling starts 10/2/17." *Id.* According to Con Edison, no roadway milling records or contracts were identified in the City's discovery response or the affidavit of Sharabanti Aich.

Third-party defendants Safeway and Citywide adopt plaintiff and Con Edison's arguments in opposition and maintain that questions of fact exist and that further discovery is needed.

Although the parties have engaged in discovery, the City's motion is premature. Plaintiff and Con Edison both allege that the City caused or created the condition at issue. Pursuant to CPLR 3212 (f), "[s]hould it appear from affidavits submitted in opposition to the motion [for summary judgment] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion..." Here, in response to a FOIL request, Con Edison obtained documentation not received through the course of discovery from movant the City for work done at the accident location prior to plaintiff's accident. Con Edison therefore identifies a key fact that is essential to opposing the motion, namely, whether roadway milling caused an immediate hazard that contributed to plaintiff's alleged accident. *See DaSilva v Haks Engineers, Architects & Land Surveyors, P.C.*, 125 AD3d 480 (1st Dept 2015); *A & W Egg Co. v Tufo's Wholesale Dairy, Inc.*, 169 AD3d 616 (1st Dept 2019).

Therefore, continuance to permit additional disclosure is granted here, where the movant has yet to be deposed, and plaintiff identifies an issue of fact that is essential to the determination of the motion. *See Figueroa v City of New York*, 126 AD3d 438, 439 (1st Dept 2015) (holding that

“this Court has held that a motion for summary judgment should be denied as premature where the movant has yet to be deposed”).

II. Conclusion

Accordingly, it appearing to the court from affidavits submitted in opposition to defendants’ motion for summary judgment pursuant to CPLR 3212 that facts essential to justify opposition may exist, but cannot now be stated, it is

ORDERED that the City’s motion is denied as premature.

This constitutes the decision and order of the Court.


LESLIE A. STROTH, J.S.C.

10/11/2022
DATE

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: