

**Hansel v City of New York**

2022 NY Slip Op 34157(U)

December 6, 2022

Supreme Court, New York County

Docket Number: Index No. 153374/2020

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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STEPHANIE HANSEL,

Plaintiff,

INDEX NO. 153374/2020

MOTION DATE 04/08/2022

MOTION SEQ. NO. 005

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC, RMSK CONTRACTING  
CORPORATION, A-1 UNDERGROUND PLUMBING  
CONTRACTORS CORP., CARLO LIZZA & SONS PAVING,  
INC, LAWRENCE EXTERIOR RESTORATION CORP.,  
TRIUMPH CONSTRUCTION CORP.

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 121, 122, 123

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

This is an action to recovery monetary damages for personal injuries allegedly sustained by plaintiff Stephanie Hansel (plaintiff) as a result of a trip and fall on May 13, 2019 in the crosswalk located at the intersection of Pine Street and William Street in New York, NY. Defendant Triumph Construction Corp. (Triumph) seeks an order dismissing all claims and cross-claims against it. Defendant Consolidated Edison Company of New York, Inc. (Con Ed) and plaintiff oppose the motion.

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.

Here, Triumph argues that it is entitled to summary judgment in its favor because it owed no duty of care to plaintiff. Specifically, Triumph claims that it did not perform any work that extended to the location of the subject incident and no evidence or testimony has been submitted that supports plaintiff's allegations that Triumph created or caused the subject defect which caused plaintiff's trip and fall. In support of its motion, Triumph submits the affidavit of its Senior Project Manager George Mathews, who states that he reviewed Triumph's records with respect to any work performed in the crosswalk located at the intersection of Pine Street and William Street during the two years prior to plaintiff's incident. *See* NYSCEF doc. no. 105 at ¶ 3.

Mr. Mathews attests that his search revealed that Triumph worked on an emergency water main replacement for the New York Department of Environmental Protection "approximately 18 feet and 6 inches from the corner of William Street and Pine Street and in particular on Pine Street, not William Street." NYSCEF doc. no. 105 at ¶ 3; "As-Built Drawing," NYSCEF doc. no. 104. He states that the photographs that plaintiff provided show that she fell while crossing William Street. Thus, according to Mr. Mathews, Triumph could not have caused the alleged defect, because it did not perform any work on William Street. Triumph maintains that no records have been produced by any other party demonstrating otherwise. Therefore, Triumph argues that it has established its *prima facie* entitlement to summary judgment by providing admissible proof

demonstrating that it did not create, cause, or exacerbate the alleged defect that caused plaintiff's incident.

Con Ed opposes Triumph's motion, asserting that Triumph's work in relation to the location of plaintiff's incident is a material question of fact that should preclude summary judgment. It claims that summary judgment would be premature, as depositions have not been held, the City has not produced its search results concerning Triumph's work permits, and that Mr. Mathews' affidavit is insufficient to warrant summary judgment.

Plaintiff also opposes Triumph's motion, asserting that Mr. Mathews' affidavit is insufficient. In fact, it argues that Mr. Mathew's affidavit *raises* material questions of fact, because he references to records with markings that point directly to the corner of William Street and Pine Street, which is where plaintiff allegedly fell. Plaintiff argues that granting the motion would be improper without allowing plaintiff the opportunity to depose Mr. Mathews regarding his statements. Plaintiff's counsel also affirms that she obtained documentation via a Freedom of Information Law (FOIL) request demonstrating that Triumph had a permit to perform work on Pine Street from Pearl Street to William Street to repair the water main. *See* NYSCEF doc. no. 113. Furthermore, plaintiff asserts that Triumph has not replied to discovery requests, that depositions have not been held of any party in this matter, and that the City has not produced its search results to verify Triumph's permits near the location of plaintiff's incident.

In reply, Triumph argues neither Con Ed nor plaintiff has proffered any admissible evidence that would warrant denial of the motion and that Mr. Mathews' affidavit sufficiently proves that Triumph did not perform work at the location of plaintiff's incident. Triumph maintains that the lack of discovery should not warrant denial of the motion, because the parties have personal knowledge of the facts allowing them to sufficiently oppose the motion. Lastly, Triumph

asserts that it provided responses to plaintiff's discovery demands, which consist of the same records Mr. Mathews reviewed in preparation of his affidavit.

Here, the New York City Department of Transportation (DOT) permit submitted by plaintiff in opposition to the motion indicates that the City gave Triumph a permit to open the roadway on Pine Street, from Pearl Street to William Street. See Plaintiff's Exhibit 1, Permit, NYSCEF doc. no. 113 at 1. While Triumph maintains that it performed work on Pine Street about 18 feet away from the corner of William Street, the "As-Built Drawing" provided by Triumph is not sufficiently clear to conclusively demonstrate that Triumph did not perform work on William Street. See Triumph Records, NYSCEF doc. no. 104. Therefore, Triumph has failed to tender sufficient evidence to show the absence of any material issue of fact as to whether Triumph performed work at the location of plaintiff's incident and could have caused or created the subject defect.

Accordingly, it is hereby

ORDERED that Triumph Construction Corp.'s motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

The foregoing constitutes the decision and order of the Court.

12/6/2022  
DATE

  
LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER  
 FIDUCIARY APPOINTMENT  REFERENCE

CHECK IF APPROPRIATE: