

Rodriguez v Accord Enter. Corp.

2022 NY Slip Op 34349(U)

September 19, 2022

Supreme Court, Richmond County

Docket Number: Index No. 151682/2019

Judge: Thomas P. Aliotta

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
JOHN RODRIGUEZ and MARIA RODRIGUEZ,

Plaintiffs,

-against-

ACCORD ENTERPRISE CORP., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., SAFECO
CONSTRUCTION CORP., CITY OF NEW YORK, NEW
YORK CITY DEPARTMENT OF TRANSPORTATION,
and NEW YORK CITY DEPARTMENT OF PARKS AND
RECREATION,

Defendants.
-----X

Part C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND
ORDER

Index No:151682/2019
Motion Seq. 001

The following e-filed documents, listed by NYSCEF as (Motion 1) document numbers 38-56 were marked fully submitted on July 28, 2022.

Defendant Consolidated Edison Company of New York, Inc., (herein Con Edison) moves for an order granting summary judgment pursuant to CPLR 3212, dismissing the complaint and any cross-claims against it, alleging there are no triable issues of fact or law as to Con Edison's liability in this action. Plaintiff and co-defendant City of New York oppose the motion. For the reasons below, Con Edison's motion is granted and the Complaint and all cross-claims are dismissed as to Con Edison.

This action is for personal injuries allegedly sustained by the plaintiff on July 27, 2016 in the roadway in front of 155 Memphis Avenue, Staten Island, NY as the result of a trip and fall due to a depressed, incomplete/unpaved portion of the roadway.

Con Edison moves for summary judgment alleging that contrary to the assertions in the complaint, they do not and did not own, operate, maintain or control the area where the

construction was, and the evidence demonstrates that Con Edison did not perform any excavation or repair work at the plaintiff's alleged accident location.

To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]).

However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*).

In support of their motion, Con Edison attaches portions of the deposition testimony of the plaintiff, dated June 6, 2019 and September 10, 2020. During his September deposition, plaintiff was shown a photo, previously marked at his June 2019 deposition. Plaintiff marked the photo where he fell with a rectangle and his initials.

In further support of their motion, Con Edison attaches the affidavit of Vicki Cheung, who has been employed by Con Edison since 2010 as a Specialist in the Legal Services

Department. She conducts searches of Con Edison's records and testified as to the records in depositions and trials.

Ms. Cheung states that Jennifer Grimm conducted a document search for Con Edison on or around October 6, 2020. The search was for opening tickets, permits, paving orders, emergency control tickets, corrective action requests and notices of violations created from July 27, 2014, up to and including July 27, 2016, for the roadway in front of 155 Memphis Avenue, Staten Island, New York. None of the records recovered in Con Edison's record search reflected any work performed relating to the excavation or repair at or near the roadway in front of 155 Memphis Avenue, Staten Island, New York. If Con Edison performed any work at the alleged accident location, the company would generate an opening ticket and paving order, which would have been included in the search. On January 19, 2021, Ms. Cheung appeared for a deposition and testified to the above.

The records search did reveal a permit #S01-2015247-B14 for work to be performed on Memphis Avenue from Lamoka Avenue to "the bend." The permit was valid from September 10, 2013 through October 10, 2013. Specifically, the permit specifies that the work is to be done in front of houses 164-176. The accident happened three houses away. A Google Map search attached to defendant Con Edison's Reply clearly confirms that where the work was or was to be performed is not the same area where plaintiff fell.

Additionally, there is no evidence that work was ever performed on the subject permit and if so, that it was connected in any way to plaintiff's fall (see *Schechter v. City of NY*, 17 AD3d 124, 125 [1st Dept 2005]).

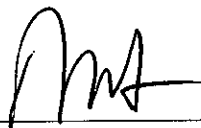
Defendant Con Edison has met its prima facie burden for summary judgment by presenting the pleadings, depositions, record searches and the affidavit of Vicki Cheung to show

that no work was performed by them where the plaintiff fell. Plaintiff and co-defendant City have failed to raise a triable issue.

Accordingly, it is.

ORDERED that defendant Con Edison's motion for summary judgment dismissing the Complaint and all cross-claims (001) is granted.

This constitutes the decision and order of the Court.



Hon. Thomas P. Aliotta, J.S.C.

Dated: September 19, 2022