

Gonyo v City of New York

2023 NY Slip Op 30369(U)

February 7, 2023

Supreme Court, New York County

Docket Number: Index No. 109063/2008

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

MEGHAN GONYO,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK INC., EMPIRE CITY SUBWAY COMPANY, TRINITY COMMUNICATIONS CORP., TROCOM CONSTRUCTION CORP., and EN-TECH CORP.,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK,

Third-Party Plaintiff,

- v -

DANELLA CONSTRUCTION CORP., NICO ASPHALT, INC.

Third-Party Defendants

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by defendant Empire City Subway Company (Limited) i/s/h/a Empire City Subway Company (“ECS”), for summary judgment dismissing the complaint and all crossclaims against it is granted for the reasons set forth below.

The instant negligence action arises out of plaintiff’s April 15, 2007 trip-and-fall in a hole or divot in the crosswalk at the intersection of Essex Street and Rivington Street in New York, New York (NYSCEF Doc. Nos. 1 [Compl. at ¶¶42-49] and 23 [Gonyo EBT Tr. at pp. 39-41]).

Plaintiff asserts that ECS was negligent in improperly performing work at that location and/or failing to make necessary repairs, thereby creating the divot over which she tripped (NYSCEF Doc. Nos. 17 [Compl. at ¶¶42-49]). Co-defendants Trocom Construction Corp. and En-Tech Corp. interposed answers asserting crossclaims against ECS for contribution and indemnity (See NYSCEF Doc. No. 18 [Answers]).

ECS now moves, pursuant to CPLR §3212, for summary judgment, on the grounds that it neither created the subject divot in the crosswalk and did not own, occupy, control, or make special use of the crosswalk. In support of this motion, ECS relies principally on the affidavit of Denis Donovan, an Area Manager for Network Operations. In his affidavit, Donovan attests that:

I have reviewed the results of a records search for all ECS facilities and all jobs, installation, construction, excavation, paying, and/or work of any kind completed by ECS or on its behalf, at or near the location of plaintiff's alleged April 15, 2007 trip-and-fall accident in the crosswalk of the intersection of Essex Street and Rivington Street in New York, New York (the "Subject Location"), for a period of two years prior to and including the date of the alleged incident.

That search revealed two (2) jobs within the relevant time period: ECS Job Nos. 106411-SB and 105269-RT.

In connection with ECS Job No. 106411-SB, work was performed on Rivington Street wherein a one-inch plastic pipe (approx. 96 feet) was placed from the west of the manhole to the front of the building located at 111 Rivington Street. The manhole was located eight feet in the apex of the sidewalk of Rivington Street and Essex Street, in the southwest quadrant of the intersection. The work performed was to "dead-end" or cap the pipe. The job was completed in full prior to August 15, 2006. In connection with ECS Job No. 105269-RT, work was performed on Rivington Street between Essex and Ludlow Streets wherein 8-4" and 8-1.5" conduit was constructed to connect manhole number 127-681-6 (at Rivington Street and Southeast Ludlow Street) with manhole number 127-681-7 (at Rivington Street and Southeast Essex Street). The diagram associated with the work revealed that four cuts were made on Rivington Street and Essex Street (towards Ludlow Street), and the intersection of Ludlow Street and Rivington Street. The repaving was completed on August 15, 2006. Nico Asphalt performed all paving work in connection with this job. The job was completed in full on November 7, 2006.

Neither of these jobs involved the crosswalk of the intersection of Essex Street and Rivington Street in New York, New York, which is the Subject Location of Plaintiff's fall.

I have reviewed the attached photograph, in which Plaintiff marked the location of the alleged defect, and I can confirm that ECS's work did not occur at or near the crosswalk area where Plaintiff fell and that ECS never performed any work at that Subject Location ...

No jobs were completed or performed by ECS and no jobs were performed at ECS's direction in the crosswalk where Plaintiff allegedly fell. No installation, construction, excavation, paving, and/or work of any kind was completed by ECS at the Subject Location where Plaintiff fell.

(NYSCEF Doc. No. 31 [Donovan Aff. at ¶¶5-11]).

In opposition, plaintiff argues that:

[t]he hazard that caused Plaintiff to fall existed at the junction of a myriad of years worth of excavations, back-fills, pavings and repeated excavations, back-fills and pavings leading up to the date of Plaintiff's fall and injury. The defendants named in this lawsuit each participated in the foregoing. Although scheduled to take place in the next several months, the depositions of multiple parties remain outstanding. More specifically, the depositions of the following defendants remain En-Tech Corp., Danella Construction Corp. and Nico Asphalt, Inc. Accordingly, discovery is not complete and the information which Plaintiff requires to oppose defendant Empire City Subway's instant motion has not yet been discovered ... one of the three (3) remaining defendants to be deposed may very well offer testimony or documentary evidence that contradicts that denial, creates a factual issue and thereby necessitates the denial of the motion

(NYSCEF Doc. No. 43 [Gottfried Affirm. in Opp. at ¶¶5, 7, 9]). Defendant Consolidated Edison Company of New York, Inc., similarly argues, in opposition, that summary judgment is premature. In reply, ECS asserts that "the depositions of these three parties, two of whom plaintiff did not even commence direct action against, are wholly irrelevant as to whether or not ECS owed a duty to plaintiff" (NYSCEF Doc. No. 48 [Wright Reply Affirm. at ¶11]).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

ECS has met its prima facie burden through the undisputed facts set out in Donovan’s affidavit which establishes that ECS did not perform work at or near the location on Essex Street where plaintiff allegedly fell (See Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016]; see also Amini v Arena Const. Co., Inc., 110 AD3d 414, 415 [1st Dept 2013]). In opposition, plaintiff and Consolidated Edison have failed to raise a triable issue of fact. Their argument that information undercutting ECS’s prima facie case may be revealed during the depositions of other defendants amounts to an expression of hope or speculation that discovery might produce evidence giving rise to a triable issue of fact and does not provide a “basis for denial or continuance of the motion pursuant to CPLR §3212(f)” (DaSilva v Haks Engineers, Architects and Land Surveyors, P.C., 125 AD3d 480, 482 [1st Dept 2015] [internal citations omitted])

Accordingly, it is

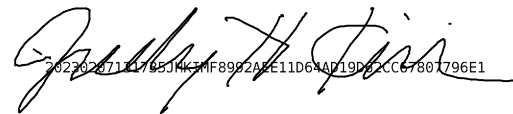
ORDERED that Empire City Subway Company (Limited)’s motion for summary judgment is granted; and it is further

ORDERED that, within twenty days of the date of this decision and order, Empire City Subway Company (Limited) shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as 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 enter judgment accordingly; 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 this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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2/7/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE