

Thomas v City of New York

2023 NY Slip Op 31095(U)

April 6, 2023

Supreme Court, New York County

Docket Number: Index No. 157521/2017

Judge: Judy H. Kim

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

JAMES THOMAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY COMPANY (LIMITED) D/B/A EMPIRE CITY SUBWAY CORP., WELSBACH ELECTRIC CORP., CITYBRIDGE, LLC, EXTENENT SYSTEMS, INC.,

Defendants.

-----X

INDEX NO. 157521/2017

MOTION DATE 10/04/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 94, 95, 96, 97, 98

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by defendant ExteNet Systems, Inc. ("ExteNet") for summary judgment dismissing the complaint and all crossclaims against it is denied for the reasons set forth below.

Plaintiff commenced this negligence action seeking damages for injuries allegedly sustained on May 24, 2017, when he tripped and fell in a pothole in the middle of the intersection of West 57th Street and Eighth Avenue in Manhattan (NYSCEF Doc. Nos. 73 [Compl. at ¶¶9, 11-13], 74 [GML §50-h Tr. at pp. 8, 10] and 75 [GML §50-h photos). ExteNet now moves for summary judgment on the grounds that it did not perform work at the location of plaintiff's fall.

In support of its motion, ExteNet submits the affidavit of Brian Kirk, its Vice President and Deputy General Counsel¹, in which he attests that:

Upon being notified of this lawsuit, I conducted a search of documents pertaining to work performed by ExteNet and/or its contractor(s) at the intersection of 8th Avenue and West 57th Street in the City, County, and State of New York (the “intersection”).

ExteNet has undertaken two projects near the intersection.

The first project involved the digging of a trench towards the northeast corner of the intersection. The work involving this trench was completed on July 21, 2016. Annexed hereto as Exhibit A is a copy of the permit drawing regarding this work.

The second project involved the digging of a trench on the southwest corner of the intersection. The work involving this trench was completed on October 26, 2016. Annexed hereto as Exhibit B is a copy of the permit drawing regarding this work.

...

[N]one of ExteNet’s work during either the first project or the second project included any work, whatsoever, in the middle of the intersection, including that area where Plaintiff testified his accident occurred.

Neither ExteNet nor any of its contractors were performing work at the intersection in May 2017, including on May 24, 2017.

(NYSCEF Doc. No. 70 [Kirk Aff. at ¶¶2-5, 7-8])

In opposition, plaintiff argue that this motion is premature because ExteNet has not responded to its discovery demands and because no depositions have been held. Plaintiff further argues that triable issues of fact remain, as plaintiff performed a public records search that uncovered relevant permits issued to ExteNet that ExteNet did not produce in discovery.

¹ Plaintiff notes that the Kirk Affidavit is executed out of this state without a certificate of conformity and argues that, as a result of this deficiency, it may not be considered by the Court. However, as ExteNet notes, “[t]he absence of such a certification is a mere irregularity, and not a fatal defect” (*Sebrow v Sebrow*, 205 AD3d 563, 564 [1st Dept 2022] [internal citations omitted]) and this irregularity was, in any event, cured by ExteNet in its reply papers (*See* NYSCEF Doc. No. 97).

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” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). “A defendant who moves for summary judgment in a trip and fall action has the initial burden of making a prima facie demonstration that it did not create the hazardous condition” (Briggs v Pick Quick Foods, Inc., 103 AD3d 526, 526 [1st Dept 2013] quoting Smith v Costco Wholesale Corp., 50 AD3d 499, 500 [1st Dept 2008]).

In light of the foregoing, ExteNet’s motion is denied. Plaintiff’s submission of permits related to ExteNet’s work in and around the subject intersection which were not included in ExteNet’s documentary production establishes that questions of fact remain as to the scope of ExteNet’s work at the subject intersection, leaving open the possibility that it may have performed work at the site of plaintiff’s fall (See e.g., Sabino v The City of New York, 2018 NY Slip Op 32359[U], 10-11 [Sup Ct, NY County 2018]; see also Curry v The City of New York, 2022 NY Slip Op 33477[U], 4-5 [Sup Ct, NY County 2022]).

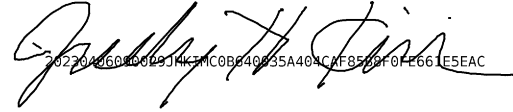
Accordingly, it is

ORDERED that ExteNet Systems, Inc.’s motion for summary judgment is denied without prejudice and with leave to renew at the conclusion of discovery; and it is further

ORDERED that within fifteen days from the date of this decision and order, counsel for plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 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.



0023040660002914431C0B40835A404CAF8588F0E661E5EAC

4/6/2023
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