

Timmons v City of New York

2023 NY Slip Op 31138(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 155722/2019

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

LISA TIMMONS,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,

Defendants.

-----X

INDEX NO. 155722/2019

MOTION DATE 06/14/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion for JUDGMENT - SUMMARY.

On June 10, 2019, plaintiff commenced this negligence action alleging that on August 5, 2018, she tripped and fell on a "raised and uneven" condition within the westerly crosswalk at the intersection of West 129th Street and Eighth Avenue, New York, New York (NYSCEF Doc. Nos. 1 [Compl. at ¶¶6-7] and 16 [Notice of Claim]). At her General Municipal Law ("GML") §50-h hearing, plaintiff testified, in pertinent part, that she fell due to raised pavement entirely surrounding a manhole cover approximately two to three inches high, creating a "manhole hump" (NYSCEF Doc. No. 20 [GML §50-h Tr. at pp. 11-12]). Photographs submitted in connection with the instant motion depict a raised patch of asphalt surrounding a manhole cover at the edge of the subject crosswalk (NYSCEF Doc. 21).

The City now moves, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all crossclaims against it, on the grounds that it did not receive prior written notice of the defective condition as required by Administrative Code §7-201. In support of its motion,

the City submits the affidavit of Lorenzo Bucca, an employee of the New York City Department of Transportation (“DOT”), detailing the results of record searches he performed for the intersection of West 129th Street and Eighth Avenue and the roadway of West 129th Street between Eighth Avenue and St. Nicholas Avenue, for the two-year period prior to and including the date of the subject accident (NYSCEF Doc. No. 24 [Bucca Aff. at ¶¶3-5]).

The City attaches these records produced by Bucca’s search, including twelve permits, two CARs, four NOVs, thirteen inspections, nine maintenance and repair orders/records, fifty-three complaints (of which forty-one are CRAXS¹ photographs), six gangsheets for roadway defects, three gangsheets for milling and resurfacing records, and three Big Apple Maps (NYSCEF Doc. No. 23 [DOT Records]). Counsel for the City asserts that none of these records provided the City with prior written notice of the defect, as a matter of law (NYSCEF Doc. No. 14 [Igoe Affirm. at ¶¶21-39]).

As pertinent here, counsel for the City argues that most of the forty-one CRAXS photographs do not depict the subject crosswalk—as indicated by crosswalk striping, and the location of manhole covers—while others are of such low quality that no defective condition can be discerned (NYSCEF Doc. No. 14 [Igoe Affirm. at ¶¶29-30]).

Plaintiff and defendant Consolidated Edison Company of New York, Inc. (“ConEd”) oppose the City’s motion, arguing that records within the City’s DOT searches create an issue of fact as to whether the City received prior written notice. ConEd also argues² that the motion is premature because no City witness has been deposed or questioned about the records on which the

¹ Neither party offers insight into how these “CRAXS” records are created or stored.

² The City objects to the Court’s consideration of ConEd’s opposition, as it was served one day prior to the return date. As the City nevertheless responded to ConEd’s arguments on their merits, the Court discerns no prejudice in considering ConEd’s opposition on its merits (CPLR §2214).

City relies and that the City may not rely solely upon counsel's characterization of these records on the instant motion.

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]).

It is premature to grant summary judgment to the City, as facts essential to justify opposition to this branch of the City's motion may exist but are not currently known by plaintiff (See CPLR § 3215(f); see also Figueroa v City of New York, 126 AD3d 438, 439 [1st Dept 2015] [“summary judgment should be denied as premature where the movant has yet to be deposed”]). Specifically, plaintiff has not had the opportunity to depose a City witness with knowledge of the records produced in support of the motion, which deposition could reasonably reveal, “information relevant to the existence of both prior written notice and whether any work was conducted at the subject location is within the [exclusive] knowledge [and] control of the City” (Padilla v The City of New York, 2022 NY Slip Op. 33377[U], 5-6 [Sup Ct, New York County 2022] [internal citations and quotations omitted]).

In any event, the Court observes that the City has not met its prima facie burden, as issues of fact exist as to prior written notice. As one example, the CRAXS records raise an issue of fact

as to whether there was prior written notice, and the City may not reject these records out of hand based solely on the subjective characterization of these records by its counsel.

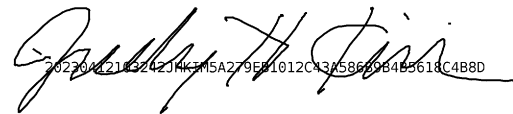
Accordingly, it is

ORDERED that the motion for summary judgment by defendant the City of New York is denied, as premature, without prejudice to its refileing at the conclusion of discovery; and it is further

ORDERED that within thirty days from entry of this order, counsel for plaintiff shall serve a copy of this order, with notice of entry, on all parties as well as 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); 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 “Efiling” 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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4/12/2023
DATE

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

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: