

Callahan v City of New York

2023 NY Slip Op 32694(U)

August 4, 2023

Supreme Court, New York County

Docket Number: Index No. 157879/2016

Judge: J. Machelles Sweeting

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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. J. MACHELLE SWEETING PART 62

Justice

-----X

MARLENE DODES CALLAHAN,

Plaintiff,

- v -

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

Defendants.

-----X

THE CITY OF NEW YORK

Plaintiff,

-against-

CARLO LIZZA AND SONS PAVING, INC.

Defendant.

-----X

INDEX NO. 157879/2016
MOTION DATE 05/18/2023
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595305/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 95, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

In the underlying action, plaintiff alleges that she sustained personal injuries as a result of a trip and fall incident that occurred on November 30, 2015, at the crosswalk where East 90th Street intersects with Lexington Avenue in New York County, New York State.

In an earlier motion, (Motion Sequence #003), defendant Consolidated Edison Company of New York, Inc. (“Con Ed”) sought an order, pursuant to Civil Practice Law and Rules (“CPLR”) 3212, granting summary judgment and dismissing plaintiff’s Verified Complaint and all cross-

claims against Con Ed on the ground that there are no triable issues of fact against Con Ed. That motion (decision at NYSCEF Doc. 96) and found, in part:

This court finds, as plaintiff correctly argues, that Con Ed has failed to meet its burden. Here, it is undisputed that the City produced a permit, that had been issued to Con Ed for the accident location, yet this permit (M012013336024) did not appear in Con Ed's own search for records.

[Con Ed witness] Mr. Wu's testimony raises a number of material questions on whether documentation exists at Con Ed in situations where Con Ed obtained a permit but chose not to perform work under it; whether work occurred at the accident location that fell outside the scope of the records search that was performed; whether Con Ed maintains other types of documents, aside from the documents searched for, that could pertain to roadway paving work; and whether Con Ed maintains other types of documents that are created after work starts at a certain location.

As stated above, summary judgment will only be granted if there are no material, triable issues of fact, and the proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence of any material issues of fact. This court finds that Con Ed has not met its burden.

Now pending before the court is a motion where Con Ed seeks an order (1) pursuant to CPLR 2221(d) granting Con Ed's motion to renew and reargue the Order of this Court dated April 14, 2023 that denied Con Ed's motion for summary judgment (motion sequence #003); and (2) upon renew and/or re-argument, an Order reversing the prior Order of this Court and granting Con Ed's motion for summary judgment in its entirety.

Arguments Made by the Parties

The crux of Con Ed's argument is that the court erred in finding that Con Ed may have performed work at the accident location. Con Ed argues that the permit that had been produced by the City and not by Con Ed (Permit M012013336024) was not for the accident location. Specifically, Con Ed argues:

20. The City-issued permit in question, No. M012013336024, was obtained by Con Edison for work on East 90th Street, about **139 feet east of the east curb** of Lexington and East 90th Street. A copy of the permit and the associated opening ticket is annexed hereto as **Exhibit A**. Therefore, the Court erred in finding that a permit M012013336024 was issued to Con Ed for the accident location. That permit was for work done in the middle of 90th Street, between 3rd Avenue and Lexington. It was not issued for the location of plaintiff's alleged accident, the crosswalk. Therefore, it could not raise an issue of fact that Con Edison performed work in the subject crosswalk.

21. Permit M012013336024 is a continuation permit of permit numbered M0120133011. This was determined by the matching "layout number" of both the M012013336024 permit and the M0120133011 permit. The shared layout being S11-86056-M. (See **Exhibit B** annexed hereto.)

22. Because the Court mistook the location where the permit granted permission for Con Edison to perform work in the street, Con Edison's Summary Judgment motion should have been granted.

[...]

44. In this instance, Con Edison did not perform a search for the entire block of E. 90th Street, between 3rd Avenue and Lexington Avenue, and therefore, were unable to fully refute the claim that permit No. M012013336024 was somehow relevant to this case. However, *since the Court's decision was received, a search of permit No. M012013336024 was conducted* [emphasis added]. The permit was found along with the associated opening ticket. Both documents show that this work was nowhere near the location of the accident. As such, Con Edison can now fully refute the claim that permit No. M012013336024 somehow raises an issue of fact which would have justified denying Con Edison's Summary Judgment.

In support of this argument, Con Ed submits the sworn Affidavit of Jennifer Grimm (NYSCEF Doc. 99), which includes the following:

1. I have been employed by defendant, Consolidated Edison Company of New York, Inc. (hereinafter "Con Edison"), since 2011. Currently, I am a Senior Specialist in the Legal Services Department. My duties include, but are not limited to, conducting searches of Con Edison's records and testifying to the records in depositions and trials.
2. In that capacity, I am fully familiar with Con Edison's practices and procedures concerning its work records, including opening tickets and paving orders and testifying to same.
3. Upon a request by Con Edison's Legal Services Department, I performed a search for permit No. M012013336024. As a result of my search, the permit was located as well as the associated opening ticket. A copy of such is annexed hereto as **Exhibit A**.
4. In reviewing permit No. M012013336024, and the associated opening ticket, pursuant to the permit, I discovered that permit M012013336024 is a continuation permit of permit number M012013301113. This was determined by the matching "layout number" of both the M012013336024 permit and the M012013301113 permit. The shared layout being S11-86056-M. The specific location of the work to be performed under these permits was 5 feet south of the north corner of E. 90th Street, and 170 feet east of the east corner of Lexington Avenue. The associated opening ticket, which shows the work performed under permits No. M012013336024 and M012013301113, was in the middle of the block, between 3rd Avenue and Lexington Avenue. Since this work is not near the crosswalk, it did not appear in Con Edison's search results for the crosswalk.
5. In this case, Con Edison's search parameters were for the crosswalk of E. 90th Street and Lexington Avenue. Any crosswalk search performed would also include an area of 40 to 50 feet in each direction of the crosswalk.
6. Additionally, as shown by the location of the permit itself and the opening ticket, no work was performed by Con Edison under this permit for the crosswalk where plaintiff's alleged accident took place, which is why it did not appear in our original search results. It was not because the search was performed improperly.

In opposition, plaintiff argues that the Court properly found in the original decision that there remain questions of fact as to whether Con Ed performed work at the accident location. Plaintiff also argues that Con Ed failed to provide any explanation as to what a "continuation permit" is and what its purported function is. Similarly, plaintiff argues, Con Ed offers no further explanation regarding what a "shared layout" is.

Conclusions of Law

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (*see* Schneider v. Solowey, 141 AD2d 813 [2d Dept 1988]; Rodney v. New York Pyrotechnic Products, Inc., 112 AD2d 410 [2d Dept 1985]). A “motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court” (*see* Pryor v. Commonwealth Land Title Ins. Co., 17 AD3d 434 [2d Dept 2005]; Simon v. Mehryari, 16 AD3d 664 [2d Dept 2005]).

Con Ed has failed to show that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law when rendering its prior decision. First, as plaintiff properly argues, it is unclear what a “continuation permit” and “shared “layout” mean, and Con Ed provides no explanation.

Second, the initial search run by Con Ed in support of its original motion was run by Yesenia E. Campoverde (Affidavit at NYSCEF Doc. 82), not by Jennifer Grimm. Although Ms. Grimm’s Affidavit shows that she has personal knowledge of Con Ed’s practices and procedures, this Affidavit does not show that Ms. Grimm has personal knowledge of the actual search that was performed by Ms. Campoverde. The Affidavit of Ms. Campoverde did not state that her search of the “crosswalk” was limited to the area of 40 to 50 feet in each direction of the crosswalk, and Ms. Grimm cannot now testify as to the parameters of a search performed by someone else.

Third, it is still unclear on this record as to the work location of the permit at issue (M012013336024). Ms. Grimm asserts, “The specific location of the work to be performed under these permits was *5 feet south* of the north corner of E. 90th Street, and *170 feet east* of the east


corner of Lexington Avenue” [emphasis added]. Yet, counsel for Con Ed argues in his Affirmation in Support that, “The City-issued permit in question, No. M012013336024, was obtained by Con Edison for work on East 90th Street, about *139 feet east* of the east curb of Lexington and East 90th Street” [emphasis added]. The statements made by Ms. Grimm and by counsel for Con Ed appear to be contradictory, which raise more questions.

More importantly, it is undisputed on this record that the search run by Ms. Grimm was run after the court’s prior decision, and the information contained in Ms. Grimm’s Affidavit was not submitted as part of the original motion (Motion Sequence #003). As noted above, a motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court. Here, the issue concerning the permit produced by the City (M012013336024) was explicitly raised in plaintiff’s opposition (NYSCEF Doc. 86) in the earlier motion sequence, and Con Ed had the opportunity at that time to submit, in Reply, information regarding the location of the permit. Con Ed failed to do this, and cannot now seek to reargue the prior motion based on new information.

Conclusion

In accordance with the findings herein, it is hereby:

ORDERED that this motion is DENIED.

<p><u>8/4/2023</u> DATE</p>			<p> _____ J. MACHELLE SWEETING, J.S.C.</p>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE
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