

Gilroy v City of New York

2023 NY Slip Op 32851(U)

February 7, 2023

Supreme Court, Queens County

Docket Number: Index No. 717240/2018

Judge: Kevin J. Kerrigan

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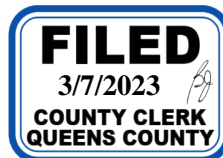
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10



-----X
Diane Gilroy,

Index
Number: 717240/18

Plaintiff,

- against -

Motion
Date: 1/30/23

The City of New York, Consolidated Edison
of New York Inc., and National Grid USA,

Motion Seq. No.: 7

Defendants.
-----X

The following papers numbered E146-E164 & E190-E204 & E207 read on this motion by defendant, National Grid USA ("Nat Grid"), for summary judgment; and cross-motion by plaintiff for an order to strike the answer of defendants due to the spoliation of evidence necessary to prosecute this matter.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E146-164
Notice of Cross-Motion-Affirmation-Exhibits.....	E190-203
Reply.....	E204
Affirmation in Opposition.....	E207

Upon the foregoing papers it is ordered that the motion by defendant, Nat Grid for summary judgment; and cross-motion by plaintiff for an order to strike the answer of defendants are decided as follows:

Motion by defendant, Nat Grid for summary judgment is denied.

This is an action for personal injuries allegedly sustained by plaintiff when she was caused to trip and fall on a defect in the road within the crosswalk of the northbound lanes of Union Turnpike between Burns Street and Markwood Place, County of Queens of November 4, 2017.

Counsel for movant annexes, inter alia, an attorney affirmation, deposition testimony of plaintiff Diane Gilroy, deposition testimony of Stacey Williams, a records researcher employed by the New York City Department of Transportation, deposition testimony of Jennifer Grimm, employed as a specialist in the law department of Consolidated Edison of New York Inc. ("Con Ed"), deposition testimony of Walter Stone, employed as a consultant for National Grid USA Service Company, Inc., and

deposition testimony of Lance Fitzgibbon, employed by New York City Department of Transportation as a highway repairer.

Counsel for Nat Grid avers that, based on a Google Map specifying the general intersection where the plaintiff identified as the accident location, the only evidence uncovered relating to a Nat Grid entity is a permit issued to The Brooklyn Union Gas Company d/b/a National Grid for work to be performed on the eastbound side of Union Turnpike between Park Lane and Grenfell Street, running west to east. Counsel notes that plaintiff's accident occurred crossing the westbound side of Union Turnpike, running north to south. Counsel concludes, directing the attention of the Court to a Google Image Map of the subject roadway, that "there has been no evidence in the record establishing any connection at all between National Grid and the subject accident location." The Court does not agree with counsel's conclusory averment.

In opposition to the motion plaintiff submits, inter alia, an attorney affirmation, and the expert affidavit of Himad Beg, a licensed professional engineer, who gave his professional opinion that, based on a review of, inter alia, the pleadings, deposition testimony, and 51 photographs of the accident site and the aforementioned Google Image Map of the subject roadway, the evidence reveals that certain under-roadway work was preformed and a trench dug at a time prior to the subject accident on Union Turnpike extending north from the premises known as Park Lane North, 118-17 Union Turnpike, Forest Hills, NY 11375 until the point of the subject pothole on Union Turnpike at its intersection with Markwood Place. Beg opined further that the Google Image Map reflects that the subject trench and trench closing performed on the Northbound lanes of Union Turnpike between Burns Street and Markwood Place, was performed at a time prior to August 2007 and that the red and yellow road markings seen in the photographs taken in 2017 indicate that certain gas and electrical lines extend under said roadway where the covered trench can still be seen in the photographs. Beg opined that the width of the trench also is indicative of gas and/or electrical lines existing below the roadway at the subject area. He concluded that it "is therefore my professional opinion within a reasonable degree of engineering certainty that the under-roadway work that was performed in this area was related to gas and/or electrical work performed by Consolidated Edison Company of New York, Inc., and/or National Grid US at a time prior to August 2007."

On this record there is a question of fact raised by the conflicting testimony of Williams, Grimm and Stone and the expert testimony of Beg regarding the area in which the accident occurred and whether Nat Grid or co-defendant Con Ed was authorized to work in the subject area, and the nature and scope of the work to be done, if any and by which entity.

Nat Grid has not made 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 [and the] [f]ailure to make such prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing papers (See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]).

The instant motion is based upon evidence annexed in the form of, inter alia, deposition and affidavit testimony, which do not conclusively establish that Nat Grid did not perform work at the subject location, and raise material issues of fact regarding the performance of work by Nat Grid at or near the subject roadway, and further fail to address the scope of work authorized or performed, as well as the location of the work.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]).

Nat Grid has failed to meet its burden; therefore the motion for summary judgment is denied.

Cross-motion by plaintiff for an order to strike the answer of defendant Nat Grid due to the spoliation of evidence necessary to prosecute this matter, is granted only to the extent that defendant Nat Grid is to provide plaintiff with work permit and/or authorizations searches covering the subject area, sufficient in scope and for a duration of five years prior to the subject accident, said searches to be conducted by an individual or individuals with the knowledge and research duties and responsibilities sufficient to provide the required information.

On this record the search parameter of two years prior to the subject accident, used by defendant Nat Grid in relation to permits for work which may have been performed in the subject area, is inadequate.

A party seeking sanctions for spoliation of evidence must show: (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, (2) that the evidence was destroyed with a "culpable state of mind," which would include negligence, and (3) that the destroyed evidence was relevant to, or would have supported, the seeking party's claim or defense. (See Crocker C. v. Anne R., 58 Misc. 3d 1221(A), 100 N.Y.S.3d 609 (N.Y. Sup. Ct. 2018))

Plaintiff has failed to establish that Nat Grid has an obligation to preserve any evidence being sought by plaintiff, that

Nat Grid, with a "culpable state of mind" destroyed any evidence over which it had or has control, or that any such evidence was relevant to, or would have supported, the seeking party's claim or defense. Therefore the Court does not make a finding of spoliation of evidence by Nat Grid, and does not impose any sanctions against Nat Grid, including any for spoliation of evidence.

Accordingly, the motion is denied and the cross motion is granted only to the extent stated above.

Dated: February 7, 2023



KEVIN J. KERRIGAN, J.S.C.

