

Goldstein v City of New York

2023 NY Slip Op 32963(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 150253/2017

Judge: J. Mabelle Sweeting

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

JEFFREY GOLDSTEIN, KELLIE GOLDSTEIN,
Plaintiffs,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., CAC INDUSTRIES, INC.,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

CAC INDUSTRIES, INC.

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596024/2017

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 104, 105, 106, 120, 122, 128, 129, 130, 131, 132, 135

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 107, 108, 109, 110, 121, 123, 133, 134

were read on this motion to/for

JUDGMENT - SUMMARY

In the underlying action, plaintiff Jeffrey Goldstein claims to have been injured on February 22, 2016 in the intersection of East 9th Street and 5th Avenue, New York, New York, when the tire of his motorized scooter came into contact with a defect in the street.¹

¹ Plaintiff Kellie Goldstein is the spouse of Jeffrey Goldstein, and alleges, *inter alia*, loss of services, earnings, consortium and society of Jeffrey Goldstein.

Plaintiffs filed this action against the City Of New York and the New York City Department of Transportation (collectively, the “City”); Consolidated Edison Company Of New York, Inc. (“Con Ed”); and CAC Industries, Inc. (“CAC”). Con Ed filed a third-party complaint against CAC.²

Now pending before the court are two motion sequences: Motion Sequence #003 where plaintiffs seek an order, pursuant to Civil Practice Law and Rules (“CPLR”) 3212, granting plaintiffs partial summary judgment on the issue of liability against Con Ed. In Motion Sequence #004 CAC seeks an order, pursuant to CPLR 3212, granting CAC summary judgment, dismissing plaintiffs’ Complaint and all cross-claims arising therefrom.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App.

² Con Ed also filed a third-party Complaint against CARLO LIZZA & SONS PAVING, INC. This third-party action was severed from the main action by order of the undersigned (NYSCEF Doc. 125) dated March 8, 2023.

Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and 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 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Motion Sequence #003 filed by Plaintiffs

Arguments Made by the Parties

In their motion, plaintiffs argue that it is well-settled law that the responsibility to monitor manhole covers and gratings on the street, including the surrounding twelve-inch radius, remains with the owner of the cover of the grating. Plaintiffs argue that here, the defect that caused the

accident was within a twelve-inch radius of a manhole cover designated as “Manhole 33561,” that is owned and maintained by Con Ed. Plaintiffs argue that Con Ed is therefore liable for the accident, and there are no issues of material facts in dispute. In support of this argument, plaintiffs submit ten exhibits (NYSCEF Doc. Nos. 76-85) that include images (NYSCEF Doc. Nos. 76, 85); deposition transcripts (NYSCEF Doc. Nos. 77, 78); and documents produced in response to a Freedom of Information Law (“FOIL”) request³ (NYSCEF Doc. No. 84).

The only opposition was filed by Con Ed, which does not dispute that they own the manhole cover located near the defect. Con Ed argues instead, *inter alia*, that plaintiffs’ motion must nevertheless be denied because plaintiffs failed to establish the critical fact that the alleged defect is within 12 inches of the manhole cover.

In Reply, plaintiffs argue:

8. The photographs make it undeniable that the hazard that caused Plaintiff’s injuries are within twelve (12) inches of the manhole cover owned by Con Edison. (See Exhibit 1).

9. Plaintiff had a drafted report from an expert confirming this and sadly passed away prior to the report being finalized. However, as it is so readily apparent in the photographs that the cracking and fracturing of the pavement is widespread around the manhole cover to the point of touching the cover in some points, Plaintiff is confident that the Court will see what is plainly shown in the photographs (See Exhibit 1).

10. Therefore, Defendant’s argument that no evidence exists to establish the defect is within twelve (12) inches is wrong as the photographs make this point beyond obvious.

[...]

21. [...] the cracking and fracturing of the area surrounding the Manhole is so extensive that it can be plainly seen to extend to the plate itself and is therefore within twelve (12) inches of the Manhole cover.

³ In their Memorandum of Law in support (NYSEF Doc. 75), plaintiffs state that these documents were produced by Con Ed, but the cover letter accompanying such documents shows that they were produced by the New York City Department of Transportation.

CONCLUSIONS OF LAW

As noted above, 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. Here, the crux of plaintiffs' argument for summary judgment is that Con Ed is liable because the defect that caused the accident was within a twelve-inch radius of a manhole cover owned and maintained by Con Ed. However, Con Ed does not concede that the defect was within 12 inches of the manhole cover, and the evidence submitted by plaintiffs fails to eliminate questions of facts as to this issue.

The deposition transcripts submitted by plaintiffs include the deposition of plaintiff Jeffrey Goldstein (NYSCEF Doc. No. 77) and the deposition of Con Ed witness Tomas Fitzgibbon (NYSCEF Doc. No. 78). As Con Ed properly argues, neither witness's testimony supports plaintiffs' assertion that the defect is within 12 inches of a Con Ed manhole. Plaintiff testified that he was caused to fall when the wheel of his scooter hit a "pothole," but plaintiff provided no testimony as to the location of the pothole in relation to any Con Ed manhole. Plaintiff also marked photos during his deposition, but it is unclear if the photos plaintiff marked correspond to the photos that plaintiffs submitted in support of this motion (discussed further below). There is also some colloquy between counsel as to the location of the pothole, but the colloquy does not specify whether the pothole is within 12 inches of the manhole.⁴ With respect to the deposition of Con Ed witness Mr. Fitzgibbon, he testified that he observed defects in the pavement near Manhole 33561, but does not establish in his testimony that any of the defects he observed were the same defect

⁴ See, e.g., transcript p. 68:

MR. WEISBERG: For the record, the plaintiff has circled next to what looks to be a manhole.

MR. ARNOLD: A Con Ed manhole.

that caused plaintiff to fall. Notably, in their Reply, plaintiffs do not dispute that neither witness testified that the defect is within 12 inches of a Con Ed manhole.

The documents produced in response to a FOIL request (NYSCEF Doc. No. 84) include dozens of permits that were issued for locations at or in the vicinity of the accident location, but none of the documents establish that the defect is within 12 inches of a Con Ed manhole. Again, plaintiffs do not dispute this in their Reply.

Finally, plaintiffs submit photos that purport to show the defect and argue that “The photographs make it undeniable that the hazard that caused Plaintiff’s injuries are within twelve (12) inches of the manhole cover owned by Con Edison;” “it is so readily apparent in the photographs that the cracking and fracturing of the pavement is widespread around the manhole cover to the point of touching the cover in some points;” “the photographs make this point beyond obvious”: and “the cracking and fracturing of the area surrounding the Manhole is so extensive that it can be plainly seen to extend to the plate itself and is therefore within twelve (12) inches of the Manhole cover.” Contrary to plaintiffs’ contention, the court does not find that these photos make it clear that the subject defect is within 12 inches of the manhole.

The first set of photos (NYSCEF Doc. No. 76) (Exhibit 1) is labelled on NYSCEF as “Photos of Defect” and is described in plaintiffs’ supporting Memorandum of Law merely as “photographs of the location.” The Memorandum of Law does not state who took these photos, if they were marked⁵ and who marked them, or what any marking is supposed to show. Hence, there is a question of whether these photos have been properly authenticated for this record. More

⁵ The first photo appears to have been marked with a black marker.

importantly, there are no measurements in these photos or anything to show which defect is the subject defect, or that the subject defect is within 12 inches of any Con Ed manhole.⁶

The second set of photos (NYSCEF Doc. NO. 85) (Exhibit 10) is labelled on NYSCEF as “Google Maps Image of Defect in 2014.” In plaintiffs’ supporting Memorandum of Law, plaintiffs state, “see Exhibit 10 a google maps image of the subject manhole 33561 in June of 2014 showing a similar condition found in February 2016.” Given that the accident happened in February 2016, it is unclear what these photos from June 2014, almost two years before the accident, are supposed to show. Further, there are no measurements or scale in these photos or anything to show that the subject defect is within 12 inches of any Con Ed manhole.

The lack of probative value provided by these photos is further evidenced by the fact that plaintiffs had intended to submit an expert report and would have done so had said expert not passed.

Further, there are also questions of fact as to, *inter alia*, whether the prior paving work undertaken by CAC in the area of the accident caused or created the defect (discussed below, with respect to Motion #004).

⁶ Plaintiffs seem to have made an attempt to authenticate these photos, in a document titled, Statement of Material Facts Pursuant to Section 202.8(g)(a) (NYSCEF Doc. 74). This document states: *3. At Plaintiff's deposition a photograph of the defect was shown to Mr. Goldstein and was marked on the record. The marked area depicts a defect in the pavement that is within 12 inches of "Manhole 33561." (See Exhibit 1).*

However, this statement of facts was submitted pursuant to PART 202. Uniform Civil Rules For The Supreme Court & The County Court, which provides:

Section 202.8-g Motions for Summary Judgment; Statements of Material Facts.

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

Here, this statement can not serve to authenticate the photos in Exhibit 1 because, as discussed, Con Ed does not concede that the defect was within 12 inches of a Con Ed manhole, and in fact Con Ed’s primary argument is that plaintiffs failed to establish this critical fact.

Because plaintiffs have not established the critical fact that the subject defect is within 12 inches of any Con Ed manhole, plaintiffs' motion seeking partial summary judgment on the issue of liability as against Con Ed is DENIED.

Motion #004 filed by CAC

Arguments Made by the Parties

In its motion, CAC argues that the defect over which plaintiff fell was the responsibility of Con Ed, as it was within 12 inches of Manhole 33561 which was owned and operated by Con Ed. CAC argues that it performed work in the vicinity of 5th Avenue and 9th Street from March 7, 2015, through October 18, 2015, and such work ended months before plaintiff's accident on February 22, 2016. CAC argues that its work was "adjacent to the manhole cover," but that such work was "not on the side of the manhole where there was a noticeable defect shown." CAC argues that it also "would never perform work directly over a manhole cover."

In support of its motion, CAC submitted, *inter alia*, the transcript of the deposition of Ralph Rocco, a supervisor at CAC (NYSCEF Doc. No. 97) and photographs (NYSCEF Doc. No. 98) that, according to CAC, were "marked by the plaintiff as showing the area where his motor scooter was involved in an accident." With respect to the photos, CAC further argues:

The photographs show a defect running around the entire circumference of the Con Edison manhole and which was deepest on the size *[sic]* marked by the plaintiff, and which clearly was the responsibility of Con Edison to have repaired. The court should therefore find that Con Edison was solely responsible for this accident and dismiss all claims as asserted against CAC Industries.

The only opposition was filed by Con Ed., which does not dispute that they own the manhole cover located near the defect. However, Con Ed. does not concede that the defect was within 12 inches of the manhole. Con Ed argues, *inter alia*, that in fact, it was CAC who created the defect when CAC re-paved the roadway. Con Ed argues that the work was done improperly,

causing the asphalt to crumble and creating the defect, and that the testimony, photographs and the inspection records in this case raise multiple questions of fact as to the scope and effect of CAC's work. Further, with respect to CAC's argument that the defect was on one side of the manhole while the defective condition was on the other side, Con Ed argues that this argument is unsupported by testimony and is contradicted by the photographs that show paving all the way around the manhole.

CONCLUSIONS OF LAW

The court finds that the evidence submitted by CAC fails to eliminate questions of fact as to CAC's central assertion that the defect was located within 12 inches of a Con Ed manhole.

With respect to the deposition transcript, Mr. Rocco's testimony did not provide any information as to where the defect was located in relation to the manhole, and it is unclear if Mr. Rocco even knew which defect was the subject defect. Further, Mr. Rocco's testimony included the following:

p. 28

Q: [...] To your knowledge, were any of these cuts, cuts number eight, nine and eleven made [by CAC] near or at the location of that casting in the roadway that you reviewed before coming to the deposition today?

[...]

A: They are adjacent to it but not directly over the casting [the manhole].

Q And the casting that you reviewed in the photographs, do you know who owns that casting?

A Con Edison owns the casting manhole structure.

p. 44

Q: Can you estimate for me how close you were working to the manhole in question?

A: To be honest, the street is a mess, so I really can't.

Given that Mr. Rocco was unable to estimate the distance between the manhole cover and the cuts made into the asphalt by CAC, this calls into question CAC's assertion that CAC had performed work near the manhole cover, but had not itself caused the subject defect.

With respect to the photos, it is unclear to the court if what was "marked" by plaintiff, as the markings are similar in color to the color of the asphalt on the street, and hence the markings are unclear. In any event, there is no scale in these photos, so it is not clear whether the subject defect is actually within 12 inches of the manhole cover.

Further, CAC argues: "The photographs show *a defect running around the entire circumference of the Con Edison manhole*" [emphasis added] (NYSCEF Doc. No. 100, p. 3), and also argues: "CAC Industries performed work adjacent to the manhole cover owned by Con Edison but not on *the side of the manhole where there was a noticeable defect shown*" [emphasis added] (NYSCEF Doc. No. 87, p. 6). It is unclear on this record if CAC is arguing that the defect runs around the entire manhole, or is limited to one side of the manhole. If the defect indeed runs around the entire manhole, then it is unclear to the court how CAC can argue that it did not perform work "on the side of the subject manhole where the defect is."

CONCLUSION

It is hereby:

ORDERED that Motion Sequence #003 filed by plaintiffs is **DENIED**; and it is further

ORDERED that Motion Sequence #004 filed by CAC is **DENIED**.

8/28/2023

DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: