

Friedman v City of New York

2023 NY Slip Op 34442(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 158622/2014

Judge: Judy H. Kim

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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LIBBY FRIEDMAN, ANN FREDLIN,
Plaintiffs,

INDEX NO. 158622/2014

MOTION DATE 01/09/2023

MOTION SEQ. NO. 006

- v -

CITY OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and CONSOLIDATED EDISON COMPANY OF NEW YORK,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant Consolidated Edison Company of New York's motion, pursuant to CPLR §3212, for summary judgment is denied for the reasons set forth below.

Plaintiffs bring this action to recover for injuries allegedly sustained by plaintiff Libby Friedman on April 1, 2014 after she tripped and fell in the crosswalk extending between the northeast and southeast corners of the intersection of West 17th Street and Tenth Avenue due to a hole containing an uncovered water valve box—a chamber embedded in the street through which one accesses a valve to shut off water (NYSCEF Doc. No. 1 [Compl. at ¶¶29-31]). Plaintiffs assert negligence claims against the City of New York and its Department of Environmental Protection and Department of Transportation (collectively, the "City") as well as ConEd, alleging that these defendants caused and created the defective condition and failed to remedy same.

ConEd now moves for summary judgment dismissing the complaint as against it, arguing that it owed no duty to plaintiffs because it did not own, control, or make special use of the subject roadway or the subject valve box and did not cause or create the defective condition. In support of its motion, ConEd submits the examination before trial (“EBT”) testimony of Vicky Cheung, a ConEd specialist, who testified that her colleague’s search of ConEd records for DOT permits, opening tickets, paving orders, notices of violations, corrective action requests, or emergency control system tickets for the intersection of West 17th Street and Tenth Avenue for the two-year period prior to and including the date of plaintiff’s accident produced no results (NYSCEF Doc. Nos. 117 [Cheung EBT at pp. 10-11] and 118).

ConEd also submits the EBT testimony of John Cagney, ConEd’s Fields Operations Planner (NYSCEF Doc. No. 119 [Cagney EBT at p. 8]). During his EBT, Cagney reviewed a Google Maps image of the subject intersection dated October 2014 and testified that the cover of the subject valve box, as pictured therein, bore the letters “WSNY” (Id. at pp. 27-28). Cagney testified that, from his experience, these letters represent a City-owned facility and that ConEd’s facilities do not bear these letters but instead generally display the word “gas” on their covers (Id. at pp. 23-28).

In opposition, plaintiffs note that the City’s production includes an April 10, 2012 permit issued by the City to ConEd to open the roadway at 457 West 17th Street between Ninth and Tenth Avenue and argues that this permit raises an issue of fact as to whether ConEd caused and created the defective condition. Plaintiffs further argue that ConEd failed to establish that it did not own the valve box at issue.

In reply, ConEd asserts that this April 10, 2012 permit related exclusively to work performed by ConEd in and around the intersection of West 17th Street and Ninth Avenue—“one

entire avenue away from where the plaintiff allegedly had her accident”—and therefore does not raise an issue of fact as to whether ConEd created the subject defect.

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]).

Under the Rules of the City of New York Department of Transportation (34 RCNY) §2-07,

[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad” and must “replace or repair any cover or grating found to be defective [as well as] ... any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating

(34 RCNY §2-07[b]). 34 RCNY §2-07 is applicable to “cover plate[s] for gas service shut off valve” (Vanderhorst v CA 5-15 W. 125th LLC, 2016 NY Slip Op 30384[U], *5 [Sup Ct, NY County 2016]).

Here, ConEd has failed to establish that it did not own the valve box at issue such that it bears no liability under 34 RCNY §2-07. Cagney’s EBT testimony, based on his review of a Google Maps image taken approximately six months after the date of plaintiff’s fall, that the valve box is owned by the City rather than ConEd establishes, at most, that the valve box was not owned

by ConEd in October 2014 and therefore has no bearing on whether it was ConEd's property at the time of plaintiff's accident (See Concepcion v City of New York, 2019 NY Slip Op 30964[U], 4 [Sup Ct, NY County 2019]; see also Vega v The City of New York, 2016 NY Slip Op 32580[U], 3 [Sup Ct, New York County 2016]).

Even ignoring the foregoing, summary judgment would be denied as an issue of fact remains as to whether ConEd caused or created the subject defect. Contrary to ConEd's claim, plaintiff's submission of the April 10, 2012 permit issued to ConEd to open the roadway at 457 West 17th Street between Ninth and Tenth Avenue raises an issue of fact as to whether work performed pursuant to this permit resulted in the removal of the cover of the valve box at issue (See e.g., Plana v Coalition for the Homeless, Inc., 2013 NY Slip Op 32321[U] [Sup Ct, NY County 2013]).

ConEd's assertion that this permit only contemplates work performed an avenue away from the site of plaintiff's fall is belied by the permit itself, which includes the entire block between Ninth and Tenth Avenues. ConEd submits no documentary evidence or testimony establishing the precise location of the work performed pursuant to this permit (or that no work was performed at all) sufficient to establish its lack of liability (Cf. Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016]), and ConEd's counsel's assertion, in his affirmation, that work performed by ConEd pursuant to this permit did not occur at the site of plaintiff's fall, is insufficient to do so (See Aranovich v City of New York, 2008 NY Slip Op 33760[U], *3 [Sup Ct, NY County 2008] [Assertion in affirmation of plaintiff's counsel that "work was being performed ... in an area immediately at or very close to the area where plaintiff's accident occurred" inadequate to rebut defendant's prima facie case]).

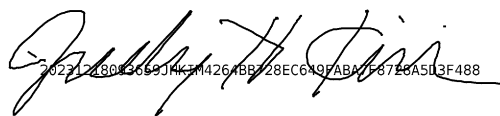
In light of the foregoing, it is

ORDERED that Consolidated Edison Company of New York’s motion for summary judgment is denied; and it is further

ORDERED that, within fifteen days of the date of this decision and order, counsel for the plaintiff shall serve a copy of this decision and order, with notice of entry, on defendants as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 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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12/18/2023

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