

Hawthorne v 177 Nostrand Corp.

2024 NY Slip Op 30975(U)

March 5, 2024

Supreme Court, Kings County

Docket Number: Index No. 23722/12

Judge: Lisa S. Ottley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----X
MARIA HAWTHORNE,

Plaintiff,

Index # 23722/12

-against-

Decision

Motion Seq. #s 24, 25, and 26.

177 NOSTRAND CORP., CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., PLUMBING WORKS,
INC., THREE STAR CONTRUCTION, WJL EQUITIES
CORP., MANETTA ENTERPRISES, INC., AND TRI-
MESSINE CONTRUCTION COMPANY, INC.,

Defendants.

-----X
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,

Third-Party Plaintiff,

-against-

MANETTA ENTERPRISES, INC., AND WJL EQUITIES
CORP.,

Third Party Defendants.

-----X
HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these Notice of Motions for Summary Judgment submitted on November 13, 2023.

Papers	Numbered
Notice of Motion and Affirmation	1, 2, and 3[Exh. A-K; A-G]
Affirmation/Affidavit in Opposition.....	4, 5, 6, 7, 8, 9, 10, 11, 12, [Exh. A-F; A-F; A-Z; A-Z; A-G]
Reply Affirmations.....	13, 14, 15, 16, 17, 18
Memoranda of Law.....	19, 20, 21[Exh. A-Z; A-Z]

Plaintiff, Maria Hawthorne, commenced this action due to a trip and fall as a result of a raised, depressed, holey, and/or uneven condition on a sidewalk, which occurred in front of the premises located at 177 Nostrand Ave., Brooklyn, New York on or about February 22, 2012. Third-

party plaintiff, Consolidated Edison Company of New York, Inc., (hereinafter, "Con Edison"), commenced a third-party action against third-party defendants, Manetta Enterprises Inc., (hereinafter, "Manetta"), and WJL Equities Corp. (hereinafter, "WJL"), for indemnification, breach of contract, and negligence.

Defendants, Tri-Messine Construction Company, Inc. (hereinafter, "Tri-Messine") and WJL, move pursuant to CPLR 3211(a)(1) for leave to renew and reargue their prior motions for summary judgment and pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims.

Defendant, WJL, moves pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims. Defendant/Third-party plaintiff, Con Edison, submitted affirmations in partial support and in partial opposition to the subject motions of Manetta and WJL. Defendant, 177 Nostrand Corp. (hereinafter, "177 Nostrand") submitted affirmations in opposition to the subject motions of Manetta and WJL on the grounds that they have failed to make a *prima facie* showing entitling them to summary judgment. Plaintiff opposes defendants' motions on the grounds that the defendants have failed to make a *prima facie* showing entitling them to summary judgment. Plaintiff opposes defendant, Con Edison's cross-motion applications for summary judgment (within affirmations in support) on the grounds that defendants, Manetta and WJL, have failed to make a *prima facie* showing entitling them to summary judgment.

Motions to renew and reargue

In support of the motions for leave to renew and reargue, defendants, Tri-Messine and WJL, pointed out that this court denied their initial motions for summary judgment as untimely. Said defendants further argued that their motions for summary judgment are now timely based upon the completion of discovery and all examinations before trial as evidenced by the new note of issue and certificate of readiness for trial being filed on May 15, 2023. Plaintiff argues that Tri-Messine and WJL failed to include an exhibit with all papers submitted on the original motion and a copy of the court's decision, which contravened this Court's Part Rules.

A motion for leave to renew or re-argue is addressed to the sound discretion of the Supreme Court. See, Central Mortg. Co. v. McClelland, 119 A.D.3d 885, 991 N.Y.S.2d 87 (2nd Dept., 2014). Notwithstanding, the failure to adhere to this Court's Part Rules, this court agrees that the motions for summary judgment are now appropriate due to the completion of discovery and all examinations before trial.

Tri-Messine's motion for summary judgment

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." See also, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the

motion. See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co., 168 A.D.2d 610 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. See, CPLR 3212[b]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986].

In the case at bar, the plaintiff, Maria Hawthorne, alleges that she tripped and fell as the result of a dangerous, holey, and uneven sidewalk in front of the premises located at 177 Nostrand Ave., Brooklyn, New York. According to the deposition testimony of plaintiff, on February 22, 2012, she was walking on Willoughby, turned onto Nostrand and fell there. She testified that her accident happened as she was walking along Nostrand on the sidewalk. Defendant, Tri-Messine, argues that there are no material issues of fact as they only performed asphalt paving of the roadway at or near 177 Nostrand Ave. during 2009, 2010, and 2011. In support, Tri-Messine relies on the affidavit of Tri-Messine's president, Alfonso Messina, whereby he states that Tri-Messine only specializes in permanent restoration of asphalt roadways, but does not perform any maintenance, repair, and/or renovation of sidewalks. Mr. Messina further states that Tri-Messine did not perform any sidewalk maintenance, management, inspection, supervision, control, repair, design, alteration, and/or renovation of the sidewalk located at, in front of and/or adjacent to 177 Nostrand Ave., Brooklyn, NY. Tri-Messine and Con Edison asserted in their respective examinations before trial that Con Edison ordered paving restoration, not sidewalk restoration. WJL asserted in their examination before trial that Tri-Messine does asphalt paving for Con Edison and that paving would be done on the street.

In opposition, plaintiff argues that factual issues remain because Tri-Messine worked in a reasonable proximity to the site of plaintiff's injury and failed to demonstrate that they did not cause the dangerous condition. In support, plaintiff refers to the affidavit of Tri-Messine's president in which it is confirmed that Tri-Messine performed asphalt paving of the roadway at the subject location. Plaintiff also points out that Tri-Messine's president admitted that Tri-Messine has records in its possession that relate to work performed at the subject location, such as files and works tickets for years 2009, 2010, and 2011, yet failed to attach said business records to the instant motion. According to the plaintiff, Tri-Messine failed to discuss the types of machines it used when working near the subject location and what safeguards it established to avoid causing the subject defect. Furthermore, Tri-Messine failed to explain how its work could have or could not have caused the defect and failed to offer any expert affidavit.

A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk. See, Pizzolorusso v. Metrol Mechanical, et. al., 205 A.D.3d 748, 168 N.Y.S.3d 103 (2nd Dept., 2022), citing, Sturm v. Myrtle Catalpa, LLC, 149 A.D.3d 1130, 53 N.Y.S.3d 356. Here, Tri-Messine has failed to establish a *prima facie* entitlement to judgment as a matter of law. Although Tri-Messine's president's states that Tri-Messine does not perform sidewalk renovation/restoration, the testimony did not address the fact that work was performed in proximity to the 177 Nostrand Avenue, and whether the work performed could have resulted in the defect which caused the plaintiff to fall.

This court finds that there is a material issue of fact as to whether Tri-Messine caused, created, or contributed to the subject sidewalk defect based on them performing work on the roadway in front of and/or adjacent to 177 Nostrand Avenue, in a reasonable proximity to the site of plaintiff's injury. See, Rosa v. City of New York, et. al., 215 A.D.3d 707, 187 N.Y.S.3d 685 (2nd Dept., 2023).

Accordingly, defendant, Tri-Messine's motion for summary judgment is hereby denied.

Manetta's motion for summary judgment

Defendant, Manetta, argues that there are no material issues of fact and Manetta could not have caused the subject sidewalk defect, because the sidewalk defect already existed in 2010, whereas Manetta performed sidewalk restoration services on January 9, 2012. According to Manetta, in 2010, plaintiff first observed the precise defect that caused her to trip and fall on February 22, 2012. To support this argument, Manetta has offered the deposition of its superintendent, Michael Calzolaio, who testified that he planned and oversaw the sidewalk restorative work that was started and completed on January 9, 2012. Manetta also offered the plaintiff's 2014 deposition testimony where she testified that she first saw the hole in the sidewalk in 2010 when she moved to the neighborhood with her daughter and the accident occurred in February 2012. Plaintiff further testified that she would see the hole every two weeks when she went shopping and the defective nature of the hole never changed from when she first observed it in 2010 to the time, she fell in 2012. As such, it is Manetta's contention that they could not have possibly created the alleged defect since it pre-existed Manetta's sidewalk restoration work in 2012.

Plaintiff argues that Manetta failed to establish its *prima facie* entitlement to summary judgment because it created the defective condition and failed to establish that it neither caused or created the defective condition in the sidewalk nor properly barricaded the concrete. Plaintiff alleges that Manetta negligently caused, permitted, and allowed the defective condition, and that among other things, Manetta was negligent in failing to grade/concrete/macadam/pave in a good and workmanlike manner. Plaintiff further alleges that Manetta did not affirmatively establish where exactly on the sidewalk the work was performed in relation to where plaintiff testified, she fell. Manetta's witness, Michael Calzolaio, only reviewed documents prepared by other third parties and offered his own interpretation of them, but the Manetta employee who prepared a diagram of the work performed did not submit an affidavit in support of the motion. Plaintiff asserts that factual issues remain because Manetta worked within a reasonable proximity to the site of plaintiff's injury or performed the work directly on the subject sidewalk flag over which plaintiff tripped. Manetta failed to submit any admissible evidence to demonstrate that it properly secured the sidewalk while it tried to prevent someone or something from making the hole(s) that caused plaintiff's injuries. Manetta failed to provide an explanation for the defect and failed to discuss the types of machines used when working near the location. The plaintiff's deposition creates an issue of fact regarding whether Manetta created the subject defect. She testified at the first deposition on March 18, 2014, that the sidewalk defect existed in 2010. However, she testified at her second deposition on May 20, 2016, that she only lived in the area for a few months before the accident and can't recall if the holes in the sidewalk have always been there.

In partial opposition, Con Edison argues that if the court finds that there is still an issue of fact as to whether Con Edison, by its contractors, caused the subject condition and accident, then there is an issue of fact as to the contractual obligations of Manetta and WJL to Con Edison, such as contractual indemnification, additional insured status, and breach of contract. Accordingly, Con Edison has provided the opening ticket PS571573, which reflects that Manetta opened the sidewalk in front of 177 Nostrand Ave in January 2012, and the paving order PS571573, which reflects that WJL restored said sidewalk on February 13, 2012. Said documentation is bolstered and corroborated by the deposition testimony of a Con Edison record searcher, George Canzaniello. Con Edison also provided their standard terms and conditions of construction contracts. It is Con Edison's position that Manetta is obligated under their contract's unequivocal indemnification provision to indemnify Con Edison for its defense costs incurred in a lawsuit even if Manetta performed its work in a non-negligent manner. Secondly, Manetta failed to address the merits of Con Edison's claims and/or third-party action in its motion papers in a substantive manner. Manetta is contractually obligated to indemnify Con Edison for the costs it incurs defending the lawsuit, regardless of fault. Con Edison also contends that Manetta's motion should be denied because Manetta is contractually obligated to indemnify Con Edison due to breach of contract. In addition, Con Edison argues that as an additional insured on Manetta's applicable general liability policy, Con Edison is entitled to coverage for anything arising out of work as mandated by the contract with Manetta. Here, Con Edison's defense was tendered to the carrier, but the carrier has not picked up Con Edison's defense.

In opposition to Manetta's motion, 177 Nostrand argues that Manetta has failed to establish its *prima facie* entitlement to summary judgment with evidence in admissible form and there is a multitude of evidence that creates material issues of facts regarding whether Manetta was negligent and whether its negligence was the proximate cause of the accident and plaintiff's injuries. Specifically, Manetta has failed to establish that it did not cause, create, or permit the existence of the subject sidewalk defect. 177 Nostrand argues that Manetta negligently caused, permitted, and allowed the defective condition, and that among other things, Manetta was negligent in failing to grade/concrete/macadam/pave in a good and workmanlike manner. Manetta failed to attach or provide the court with construction documents related to the sidewalk. Furthermore, the plaintiff's deposition creates an issue of fact regarding whether Manetta created the subject defect. Plaintiff testified at the first deposition on March 18, 2014, that the sidewalk defect existed in 2010. However, she testified at her second deposition on May 20, 2016, that she only lived in the area for a few months before the accident and could not recall if the holes in the sidewalk have always been there.

It is further argued, that Manetta's own witness, Michael Calzolaio creates an issue of fact by admitting that Manetta worked on the sidewalk, yet not having personal knowledge where Manetta's work was performed in relation to where the accident occurred. Mr. Calzolaio admitted through deposition testimony that he does not know if he was personally involved in this job and that he has no personal knowledge of the work performed by WJL. He also admitted that each sidewalk flag was not designated with a number to enable one to know which entity restored the subject sidewalk flag. He acknowledged that Manetta installed a conduit under the sidewalk in front of 177 Nostrand but was unable to say what precautions were taken to guard the sidewalk while the concrete cured to prevent holes from being created. According to 177 Nostrand, their witness, Mr. Kestenbaum's testimony creates an issue of fact by corroborating that work was

performed in January and February 2012, which was close in time to the accident. According to 177 Nostrand, their witness, Mr. Gross's testimony creates an issue of fact by corroborating that the concrete work shown in the google maps image from June of 2011 was performed by Con Edison or Keyspan and that the work was ongoing for an extended period close in time to the accident.

Based upon the foregoing, the court finds that there are issues of fact which preclude summary judgment from being granted.

Accordingly, defendant Manetta's motion for summary judgment is denied in the entirety.

WJL's motion for summary judgment

Defendant, WJL, argues that summary judgment should be granted in its favor because the plaintiff cannot identify the cause of her fall without engaging in speculation. It is alleged that the plaintiff has no knowledge of the exact cause of the accident other than assuming what occurred after she saw her shoe in a hole in the sidewalk. Secondly, WJL argues that the plaintiff cannot establish a *prima facie* case of negligence against WJL through demonstrating that the defendants owed the plaintiff a duty, a breach of that duty, and that the defendant's breach was the proximate cause of plaintiff's injuries.

WJL claims it did own a duty to plaintiff predicated on ownership because WJL did not own, control, occupy, or make special use of the premises. WJL also claims it did not own a duty to plaintiff predicated on a contractor relationship. WJL contends that there is no contractual relationship between WJL and the owner of the subject premises, 177 Nostrand, and there is no evidence that WJL launched the force of harm. WJL further contends that there is no evidence that plaintiff acted or declined to act based upon a reliance on WJL's non-existent contract with 177 Nostrand, or that WJL's failure to comply with the non-existent contract resulted in plaintiff's injury. Lastly, there is no evidence WJL displaced 177 Nostrand's obligation to maintain the premises, let alone entirely displace its duties. WJL points out that the alleged defective condition was open and obvious, and the plaintiff testified that she frequently walked around them to avoid falling. WJL argues that the plaintiff should have employed a reasonable use of her senses to avoid the open and obvious condition that was present for a significant time prior to the commencement of the demolition work.

In opposition to WJL's motion, 177 Nostrand argues that WJL has failed to establish its *prima facie* entitlement to summary judgment as a matter of law, and there are material issues of fact regarding whether WJL was negligent and whether its negligence was the proximate cause of the accident. Specifically, WJL has failed to establish that it did not cause, create, or permit the existence of the subject sidewalk defect. 177 Nostrand alleges that WJL negligently caused, permitted, and allowed the defective condition, and that among other things, WJL was negligent in failing to grade/concrete/macadam/pave in a good and workmanlike manner. 177 Nostrand also contends that WJL failed to attach or provide the court with construction documents related to the sidewalk. In addition, 177 Nostrand argues that the plaintiff's deposition creates an issue of fact regarding whether Manetta created the subject defect. Plaintiff testified at the first deposition on March 18, 2014, that the sidewalk defect existed in 2010. However, she testified at her second

deposition on May 20, 2016, that she only lived in the area for a few months before the accident and cannot recall if the holes in the sidewalk have always been there. WJL's own witness/superintendent, William Lougheed, creates an issue of fact by admitting that WJL worked on the sidewalk but not having personal knowledge where WJL's work was performed in relation to where the accident occurred. Mr. Lougheed admitted through deposition testimony that he was not personally involved in this job yet authenticated documents which prove that WJL performed substantial amounts of work on the subject sidewalk prior to plaintiff's accident. He was also unable to say with personal factual knowledge if any precautions were taken to guard the sidewalk while the concrete cured to prevent holes from being created. According to 177 Nostrand, their witness, Mr. Kestenbaum's testimony creates an issue of fact by corroborating that work was performed in January and February 2012, which was close in time to the accident. According to 177 Nostrand, their witness, Mr. Gross's testimony creates an issue of fact by corroborating that the concrete work shown in the google maps image from June of 2011 was performed by Con Edison or Keyspan and that the work was ongoing for an extended period, close in time to the accident.

In opposition to WJL's motion for summary judgment, plaintiff argues that WJL failed to establish its *prima facie* entitlement to summary judgment because it failed to affirmatively demonstrate that it neither caused the dangerous condition nor had notice of it. WJL further failed to demonstrate that it properly secured the sidewalk while it dried to prevent someone or something from making the subject holes in the sidewalk. In support, plaintiff has asserted that WJL's superintendent, Mr. Lougheed did not recall doing any work at the subject sight during his deposition and WJL failed to submit any construction documents, photographs, or any other evidence to support its *prima facie* case. Moreover, WJL's suggestion that an animal could have walked onto the sidewalk flag while the cement is drying is speculation and does not establish a *prima facie* case without an expert witness or affidavit from someone with personal knowledge. Plaintiff argues that WJL's argument that the plaintiff does not know the cause of her accident is false. To the contrary, plaintiff testified at her first deposition that her foot got caught in the hole in the sidewalk flag and she identified the hole in photographs at said deposition. The plaintiff added at her second deposition that she knew it was the hole because her sneaker got caught in it and her sneaker was still in the hole after she fell.

Ordinarily, a defendant moving for summary judgment in a trip and fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. See, Adzej v. Edward Builders, et al., 221 A.D.3d 639, 198 N.Y.S.3d 755 (2nd Dept., 2023). However, the defendant can make its *prima facie* showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation. See, Weldon v. Wal-Mart Stores East, LP, 219 A.D.3d 1558, 196 N.Y.S.3d 554 (2nd Dept., 2023).

In viewing the evidence in light most favorable to the plaintiff, the court finds that WJL failed to establish, *prima facie*, that the plaintiff was unable to identify the cause of her fall without resort to speculation. The plaintiff testified that she had observed the holes in the sidewalk, and that she tripped and fell because her foot/sneaker became caught in the hole in the sidewalk, which raises an issue of fact as to whether the plaintiff tripped and fell in the alleged hole. See, Hughes

v. Tower Crestwood 2015, LLC, 197 A.D.3d 633, 153 NY.S.3d 2021 (2nd Dept., 2021), In *Hughes v. Tower Crestwood*, the plaintiff's foot got caught in the blacktop near a curb in a parking lot and the court held a triable issue of fact existed as to the cause of the accident, and that the defendants failed to establish prima facie, that they lacked constructive notice of the alleged defective condition. Specifically, the court held that "a defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it reasonably could have been discovered and corrected.

Regarding WJL's argument that the defect is open and obvious, plaintiff counters that there are issues of fact as to whether the subject defective condition was open and obvious based on the size/shape/ location of the hole and plaintiff's testimony as to where her attention was directed.

The defendants bear the initial burden of making a *prima facie* showing that it neither created nor possessed actual or constructive notice of the alleged hazardous condition. See, *Spano v. Apogee Retail N.Y. LLC*, 164 A.D.3d 1495, 84 N.Y.S.3d 203 (2nd Dept., 2018). To constitute constructive notice, a condition must be visible and apparent for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it. See, *Gordon v. American Museum of National History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986). To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to plaintiff's fall.

The court finds that none of the defendants have met the initial burden of showing that they did not create, possess actual or constructive notice of the alleged hazardous condition.

Accordingly, the motions for summary judgment are denied in the entirety.

Con Edison's Request that the Court Search the Record and Grant Summary Judgment

As pointed out by 177 Nostrand, from a procedural standpoint, Con Edison did not file a notice of cross-motion or a formal cross-motion. Instead, within their affirmations in support of Manetta and WJL's motions for summary judgment, Con Edison requested that the court search the record and grant it summary judgment.

In support of the Manetta's motion, Con Edison agrees that Manetta cannot be liable for a defect that may have existed before its work was started and completed. Con Edison is requesting that the court search the record and grant summary judgment to Con Edison, if Manetta's summary judgment motion is granted. Con Edison also argues that to impose liability on Con Edison, plaintiff must prove that Con Edison created the defect or had actual or constructive notice of the defect. According to Con Edison, the record is devoid of any such evidence and the only work performed on the sidewalk at or near the plaintiff's accident location was done by Manetta and WJL.

In support of the WJL's motion, Con Edison agrees that the plaintiff has no knowledge of the exact cause of the accident. Con Edison is requesting that the court search the record and grant summary judgment to Con Edison, if WJL's summary judgment motion is granted.

Plaintiff and 177 Nostrand have opposed Con Edison motion for summary judgment on the grounds that Con Edison failed to submit any evidence to affirmatively demonstrate that Tri-Messine, Manetta, and/or WJL all performed their work in a non-negligent manner, that Con Edison did not cause any dangerous condition, and/or that it had no notice of any defective conditions.

A court may search the record and grant summary judgment in favor of a non-moving party only with respect to a cause of action or issue that is the subject of the motions before the court. *See, Williams v. County of Suffolk*, 215 A.D.3d 893, 187 N.Y.S.3d 307 (2nd Dept., 2023). Based upon the arguments before this court, this court finds that there are material issues of fact which preclude summary judgment from being granted. In addition, Con Edison failed to establish its *prima facie* entitlement to summary judgment.

Accordingly, defendants' motions for summary judgment are hereby denied in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
March 5, 2024


HON. LISA S. OTTELEY, J.S.C.

HON. LISA S. OTTELEY

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