

**Baruch v City of New York**

2024 NY Slip Op 34768(U)

July 5, 2024

Supreme Court, Queens County

Docket Number: Index No. 703720/2020

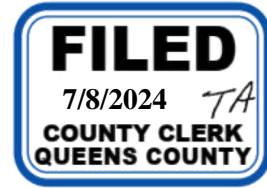
Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY



Present: HONORABLE CHEREÉ A. BUGGS

IAS PART 30

Justice

-----X  
BARBARA BARUCH,

Index No.:703720/2020

Motion Date: 5/6/2024

Plaintiff,

Motion Cal. No.: 5

-against-

Motion Sequence No.: 3

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION, UNITED  
METHODIST CHURCH, BAYSIDE, VERIZON NEW YORK  
INC., and CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.,

Defendants.

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The following efiled papers numbered 104-114, 137-140, 153-154, 158 submitted and considered on this motion by Defendant Verizon New York Inc. (hereinafter “VZNY”) seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 granting summary judgment, dismissing all claims, including cross-claims by Plaintiff Barbara Baruch (hereinafter Baruch) against them.

Motion Sequence 1	Papers <u>Numbered</u>
Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 104-114
Affirmation in Opposition-Affidavits Exhibits.....	EF 137-140, 153-154
Affirmation in Reply-Affidavits-Exhibits.....	EF 158

**Relevant Factual and Procedural Background**

This negligence-based action arises from an accident that occurred on March 25, 2019, when Baruch was walking on the sidewalk in front of the premises at 38-20 Bell Boulevard, Queens, New York. Baruch alleges she tripped and fell due to a defective concrete area between the curb and the sidewalk, which she describes as the remnants of a traffic light or streetlight base with protruding metal bolts and a metal pole. Baruch commenced this action on March 3, 2020, initially against The City of New York, New York City Department of Transportation, and United Methodist Church,

Bayside. Subsequently, she amended her complaint on September 21, 2020, to add Consolidated Edison of New York, Inc. (Con Ed) and VZNY as defendants.

United Methodist Church, Bayside, admitted ownership of the property adjacent to the accident site. VZNY, on its part, provided evidence indicating that its infrastructure on Bell Boulevard is on the east side of the roadway, opposite to the accident location. Specifically, VZNY's records, including a conduit map and work diagrams, demonstrate that any work performed by VZNY in 2010 was on the east side of Bell Boulevard and did not involve the west side where the defect is located. However, this Court finds that the 2015 diagram seems to show work done in the middle of the street, raising questions about the proximity of VZNY's activities to the defect.

Baruch and co-defendant The City of New York argue that summary judgment is premature due to the need for further discovery, including depositions of VZNY and examination of historical maintenance records, which could reveal a nexus between VZNY's work and the defect.

### **Law and Application**

CPLR §3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party

shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

“The movant 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” (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Summary judgment is a drastic measure that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]; *Doize v. Holiday Inn Ronkonkoma*, 6 A.D.3d 573, 774 N.Y.S.2d 792 [2nd Dept. 2004]). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]; quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d at 335 [2011]; *see also Moonilal v R.C. Church of St. Mary Gate of Heaven*, 225 AD3d 592, 593 [2d Dept 2024]).

VZNY moves for summary judgment on the grounds that it did not owe a duty of care to the Baruch, as it neither owns nor controls the subject property, and did not perform any work that could have caused or exacerbated the alleged defect. To support its motion, VZNY relies on affidavits and diagrams showing its infrastructure on the east side of Bell Boulevard, opposite the location of the defect.

In opposition, Baruch and The City of New York argue that the motion should be denied as premature under CPLR 3212(f), as essential facts to justify opposition exist but cannot be stated until further discovery is conducted. They assert that VZNY’s documents do not conclusively establish that its work did not affect the west side of Bell Boulevard. Specifically, the 2015 diagram showing work in the middle of the street, near the alleged defect, necessitates further investigation. Moreover, VZNY has not been deposed yet, and exclusive knowledge remains within its control.

Baruch’s affidavit and photographic evidence depict the defect as a significant hazard that could potentially be linked to VZNY’s activities, particularly given the nature of the remnants suggesting prior work involving significant infrastructure. Courts have repeatedly held that a summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence within the exclusive knowledge of the movant or a co-defendant (*see CPLR 3212[f]*; *Shah v MTA Bus Co.*, 201

AD3d 833, 833 [2d Dept 2022]; *Blake v City of New York*, 148 AD3d 1101, 1107 [2d Dept 2017]; *Gruenfeld v. City of New Rochelle*, 72 AD3d 1025, 1026 [2d Dept 2010]).

Here, the examination before trial of VZNY has yet to be conducted. The Courts have held that the summary judgment motion should be denied when the examination before trial of the plaintiff and/or the party seeking summary judgment has not been conducted (*see Groves v Land's End Hous. Co., Inc.*, 80 NY2d 978, 980 [1992]; *see also Churaman v C&B Elec., Plumbing & Heating, Inc.*, 142 AD3d 485, 486 [2d Dept 2016]; *Afzal v Bd. of Fire Com'rs of Bellmore Fire Dist.*, 23 AD3d 507 [2d Dept 2005]). Further, cross-examination of VZNY is especially important because there has been no evidence to confirm the assumption that the defect was the remnants of a traffic light or streetlight, leaving the nature of the condition speculative.

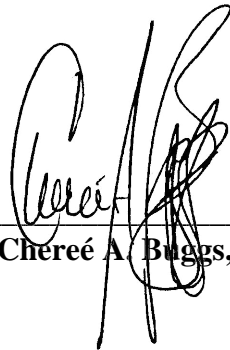
This Court finds that VZNY has established a prima facie case that it does not own or control the property adjacent to the defect, supported by United Methodist Church's admission of ownership. However, in light most favorable to Baruch, VZNY has not conclusively proven that its work did not exacerbate the defect, especially considering the proximity of the 2015 work site to the alleged defect and the lack of comprehensive evidence ruling out such a possibility. Moreover, the affidavit of James Julich and the diagrams do not sufficiently detail the nature and exact locations of the work performed in 2010 and 2015 to dismiss the possibility that their work exacerbates the alleged defect.

"A motion for summary judgment may be denied as premature where it appears that the facts essential to oppose the motion exist but cannot then be stated" (*see CPLR 3212[f]; Knowles v. 21-43 27th St., LLC*, 224 AD3d 737 [2d Dept 2024]). Here, further discovery is needed to determine the full extent of VZNY's activities and their potential impact on the alleged defect. This may include deposing VZNY's representatives and examining additional records. Baruch and The City of New York have demonstrated that discovery might lead to relevant evidence or that the facts essential to justify opposition are within VZNY's exclusive control (*see Id.* at 737). Accordingly, it is hereby:

**ORDERED**, that Defendant VZNY's motion for summary judgment is denied without prejudice to renew upon the completion of discovery, and it is further

**ORDERED**, that Defendant VZNY is to be noticed for deposition within fourteen (14) days from the date of this order and all parties are to exchange any remaining discovery within forty-five (45) days from the date of this order.

Dated: July 5, 2024

  
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Hon. Chereé A. Buggs, JSC

