

Santos v Consolidated Edison Co. of N.Y., Inc.

2024 NY Slip Op 34936(U)

December 30, 2024

Supreme Court, Bronx County

Docket Number: Index No. 33597/2019E

Judge: Elizabeth A. Taylor

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

-----X
PAOLA ALBA SANTOS

Index No. 33597/2019E

Plaintiff,

-against-

Hon. Elizabeth A. Taylor,
Justice Supreme Court

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., OLIVEIRA CONTRACTING, INC., HARRY
CONSTRUCTION GROUP CORP., E-J ENERGY, LLC,
MECC CONTRACTING, INC. EMPIRE CITY SUBWAY
COMPANY (LIMITED) and WELSBACH ELECTRIC
CORP.,

Defendants.

-----X

The following papers numbered ___ to ___ were read on this motion (NYSCEF Seq. No. 8)

Sequence No. 8	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	223-236
Answering Affidavit and Exhibits, Memorandum of Law	239-240, 246-248
Reply Affidavit	243-244

Upon the foregoing papers, the defendant’s motion for summary judgment is decided in accordance with the annexed decision and order.

Dated: DEC 30 2024

Hon. 
Elizabeth A. Taylor, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX : PART IA2

-----X
 PAOLA ALBA SANTOS

Plaintiff,

-against-

DECISION and ORDER

Index No. 33597/2019E

CONSOLIDATED EDISON COMPANY OF NEW
 YORK, INC., OLIVEIRA CONTRACTING, INC.,
 HARRY CONSTRUCTION GROUP CORP., E-J
 ENERGY, LLC, MECC CONTRACTING, INC. EMPIRE
 CITY SUBWAY COMPANY (LIMITED) and
 WELSBACH ELECTRIC CORP.,

Defendants.

-----X
 Elizabeth A. Taylor, J.

Defendant EMPIRE CITY SUBWAY (LIMITED) (“ECS”) moves for summary judgment dismissing the complaint and all crossclaims against it pursuant to CPLR 3212.¹

FACTS AND ARGUMENT

Plaintiff claims to have suffered personal injury on August 25, 2018, at approximately 11:00 pm, due to a trip and fall accident on the “public roadway and abutting/adjacent sidewalk” located in front of 417–419 East 180th Street in Bronx County. Photographs of the location depict a conduit constructed with wooden planks running adjacent to the curb. The top plank of the makeshift conduct appears to be missing at the accident location, exposing thick electrical cables lying adjacent to the curb.

Kenneth Clements, a research consultant for movant ECS, avers in an affidavit submitted in support of the motion for summary judgment that all the relevant work permits relating to ECS

¹ After a motion was brought by defendant WELSBACH ELECTRIC CORP., the action as to that defendant was dismissed by a decision dated July 1, 2021. After a motion was brought by defendant HARRY CONSTRUCTION GROUP CORP., the action was dismissed as to that defendant by a decision dated July 3, 2023.

for the general area where the accident occurred relate to test pits which do not involve any wires. Clements performed a search into all ECS facilities located near the subject accident location, as well as a search for all jobs, installation, construction, excavation, paving, and/or work of any kind completed by ECS or on its behalf, at or near the location of plaintiff's alleged trip and fall for a period of two years prior to and including the date of the alleged accident. Clements found no records of any ECS facilities located at or near the Subject Location within the subject time frame. Likewise, Clements did not find records of any jobs completed by ECS, or any jobs performed at ECS's direction, at the subject location within the subject time frame, except for certain test pits in accordance with the ECS Permits, the last of which was dug 11 months prior to plaintiff's accident.

According to Clements, all the ECS permits are for ECS job # 144451MU, in which ECS was retained by the City of New York to dig test pits for #HBX180. Such test pits are excavated to locate utilities when necessary. Based on the results of his investigation, test pits were dug pursuant to those permits on August 15, 2016, May 11, 2017, May 16, 2017, October 11, 2017, and October 12, 2017. Clements noted that test pits do not involve the use of any wires, such as the wires upon which plaintiff alleges she tripped on August 25, 2018, which was approximately eleven months after the last test pit was dug.

Defendant ECS argues that the evidence in the record indisputably establishes that ECS did not own or control the public sidewalk or street, or any facility embedded therein at the subject location. Further, despite evidence that ECS did conduct do some work near the accident location eleven months prior plaintiff's fall, ECS's work was not connected in any way to the electric wires and wooden box on which plaintiff tripped. Therefore, summary judgment should be granted as ECS did not create the alleged dangerous condition.

Plaintiff, in opposition, argues that summary judgment is premature, as depositions have not been concluded, and that the movant fails to establish a prima facie case.

Co-defendant CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (hereinafter "Con Edison"), in opposition, opposes ECS's motion for summary judgment insofar as the motion seeks the dismissal of Con Edison's crossclaims against ECS, which includes a crossclaim against ECS for indemnification. Con Edison similarly argues that the motion is premature.

DISCUSSION

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994].) "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]).

Summary judgment is appropriate where there are no material issues of fact. (*Sillman v. Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498 [1957].). Ultimately, summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. "An unfounded reluctance to employ this remedy will only serve to swell the trial calendar and thus deny to other litigants the

right to have their claims properly adjudicated.” (Andre v. Pomeroy, 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]).

Where the moving party has established entitlement to summary judgment, the opposing parties must either demonstrate the existence of an existing material issue of fact requiring a trial or tender an acceptable excuse for failing to do so. (Zuckerman v. New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 [1980]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 [1985].) Moreover, the adversaries’ evidence must be submitted in evidentiary form. (Id. See also Rubinfeld v. City of New York, 263 A.D.2d 448, 692 N.Y.S.2d 706 [2d Dep’t 1999] [holding that it is a function of the court and not the jury to determine whether a prima facie case of causation has been established]).

The present motion is not premature. A party asserting that a motion is premature must “make a showing that discovery might lead to relevant evidence supporting [its] claim.” (Cruz v. City of New York, 135 A.D.3d 644, 644 [1st Dep’t 2016]). “The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion.” (Flores v. City of New York, 66 A.D.3d 599, 600 [1st Dep’t 2009]). Neither plaintiff nor Con Edison makes a showing that further discovery would connect ECS to the wooden conduit, construction or wires which caused the plaintiffs accident.

ECS clearly established prima facie that the only work that it performed near the location of plaintiff accident was to dig test pits to locate underground utilities, which is clearly separate and apart to the cause of plaintiff’s fall, which per her BP, was “wires and a wooden box...upon the roadway and abutting/adjacent sidewalk preventing plaintiff from have a proper and safe passageway.” As the work ECS performed eleven months prior to the accident has nothing to do with the alleged defect, and as this prima facie case is unrebutted, summary judgment is warranted.

Based upon the foregoing, it is hereby

ORDERED that defendant EMPIRE CITY SUBWAY (LIMITED)'s motion is granted, and all claims and crossclaims against it are dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing all claims and crossclaims against defendant EMPIRE CITY SUBWAY (LIMITED), and amend the caption accordingly.

This is the Decision and Order of the Court.

Dated: DEC 30 2024

ENTER:



Hon. Elizabeth A. Taylor, J.S.C.