

Hartman v City of New York
2024 NY Slip Op 35442(U)
April 4, 2024
Supreme Court, Queens County
Docket Number: Index No. 709952/2018
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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Index No.:709952/2018

THOMAS HARTMAN,

Motion Date: 2/5/2024

Plaintiff,

Motion Cal. No.: 6

-against-

Motion Sequence No.: 12

THE CITY OF NEW YORK, THE CITY OF MEW YORK
DEPARTMENT OF SANITATION and THE BROOKLYN
UNION GAS D/B/A NATIONAL GRID, NEW YORK
PAVING INC. and CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Defendants.

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THE BROOKLYN UNION GAS D/B/A NATIONAL
GRID NY,

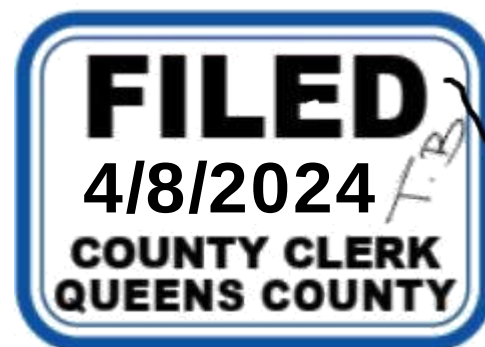
Third-Party Plaintiff,

-against-

NEW YORK PAVING INC. and CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,

Third-Party Defendants.

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The following efiled papers numbered 271-280, 317, 321-324, 332-344, 347-349, 353 submitted and considered by Defendants and Third-Party Defendants Consolidated Edison Company of New York, INC. (hereinafter “Con Ed”) seeking an Order against Plaintiff Thomas Hartman (hereinafter “Hartman”), pursuant to Civil Practice Law and Rules (CPLR) 3212, dismissing Hartman’s complaint and any and all cross-claims against Con Ed.

Motion Sequence 12

Papers
Numbered

Notice of Motion-Affirmation in Support-

Affidavits-Exhibits..... EF 271-280, 317

Affirmation in Opposition-Affidavits-Exhibits..... EF 321-324, 332-344

Affirmation in Reply-Affidavits-Exhibits..... EF 347-349, 353

Relevant Factual and Procedural Background

This motion originated out of a trip and fall accident. Hartman alleges to have tripped over an uneven pavement, on or about October 17, 2017, at the intersection of 75th Street and 69th Avenue, in Glendale, New York. Hartman attributes the cause to Con Edison's negligence.

Hartman initiated the action on June 28, 2018, against the City of New York and the New York City Department of Sanitation, with an amended complaint adding Brooklyn Union Gas Company d/b/a National Grid (hereinafter "National Grid") later filed. National Grid commenced a third-party action against New York Paving Inc. and Con Ed, which joined issue in late 2020. Hartman filed a separate action against New York Paving and Con Ed, which was consolidated with the original action for joint trial and discovery. A Note of Issue with Certificate of Readiness for Trial was filed by Hartman in July 2023. Con Ed moved for summary judgment, the Notice of Motion was filed on November 15, 2023.

In support, Con Ed contends that Con Ed's records show no work performed by them or their contractors at the accident location within the relevant time frame. National Grid's records indicate work performed in the area, but there is no evidence linking this work directly to Con Ed. This contention is supported by the testimony of Jennifer Grimm, Con Ed's record searcher, who testified that a thorough search of Con Ed's records for the two years preceding the accident revealed no work performed by Con Ed or its contractors at or near the accident location. This absence of any record of work eliminates the basis for claiming Con Ed caused or contributed to the defective condition Hartman alleges caused his injury. The testimony of both Hartman and his co-worker, Genaro Vasquez, who witnessed Hartman's fall, describe the accident location and conditions, but do not provide evidence of Con Ed's involvement in creating the hazardous condition. Hartman's testimony regarding the nature of the defect and the conditions at the time of the accident do not specifically implicate Con Ed in creating or contributing to the hazardous condition. Vasquez's testimony supports the notion that Hartman's fall was due to construction work, but there was no direct evidence linking this work to Con Ed. Con Ed further postulates that depositions from Con Ed and National Grid's representatives focus on the absence of Con Ed's work at the location and detail the work undertaken by National Grid and its contractors. Walter Stone, a consultant of National Grid, testified that the search records focus on work performed by National Grid and its contractors at the accident location. The evidence points towards National Grid's responsibility for work that could have created the hazardous condition, rather than Con Edison's. This includes excavation and

temporary binder work conducted in the months leading up to Hartman's accident. Con Ed further argues that the photographs and city records indicate that work was performed by National Grid, as evidenced by the presence of white circular decals in restorations, indicating gas facilities, which are markers used by National Grid, not Con Edison (which uses light blue markers). This distinction further supports the argument that Con Edison did not perform work at the location. Regarding the manhole present at the site of the accident, Con Ed asserts that without evidence to prove the manhole involved in the accident is Con Edison's, there is no basis to hold Con Edison responsible for any conditions around it. Con Ed cited to the contracts between National Grid and its contractors outlining responsibilities for safety precautions and restoration quality, indicating that National Grid and its contractors were responsible for maintaining safety and restoring the roadway, which implies that any failure in these areas would be their responsibility, not Con Edison's.

Law and Application

As an initial matter, this Court notes that Con Ed did not submit a statement of material facts. 22 NYCRR 202.8-g provides that:

(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...

(e) In the event that the proponent of a motion for summary judgment fails to provide a statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may deny the motion without prejudice to renewal upon compliance, or may take such other action as may be just and appropriate. In the event that the opponent of a motion for summary judgment fails to provide any counter statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent's statement to be admitted for purposes of the motion, or may take such other action as may be just and appropriate.

Here, this Court finds that notwithstanding Con Ed's failure to submit the statement of material facts, the records it submitted sufficiently established the facts; accordingly, the Court herein shall rule on the merits of the case.

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.

34 RCNY § 2-07(b)(2) provides:

The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street

condition found within an area extending twelve inches outward from the perimeter of the cover or grating. Such owner must obtain a permit to maintain a steel plate that is covering such cover or grating or such street condition.

“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” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once a prima facie 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” (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]). “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” (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, after reviewing the records, this Court finds that while Con Ed established prima facie that they did not cause or contribute to the defective condition with the testimonies and record searches, they failed to establish prima facie that they are not the owner of the manhole adjacent to the accident location, or that Hartman did not fall within 12 inches of the manhole. According to 34 RCNY § 2-07(b)(2), the owner of a manhole has a non-delegable duty to repair and replace any defective street condition within a twelve-inch area extending from the manhole (see *Fajardo v City of New York*, 197 AD3d 456, 458 [2d Dept 2021]; *Nyack v City of New York*, 153 AD3d 1266, 1266 [2d Dept 2017]; *Shehata v City of New York*, 128 AD3d 944, 945 [2d Dept 2015]). Contrary to Con Ed’s contentions that there is no evidence showing they are the owner of the manhole, the Google Images (efile document number 279) submitted by them show the manhole in question, and the engravings on the manhole cover bear Con Ed’s trademark. The design of the manhole cover also resembles other manholes of Con Ed. The marked photos (efile document number 275) filed by Con Ed and marked by Hartman showing where he fell also shows that the accident location is in close proximity to the manhole in question. Based on these photos, this Court finds that there exists a triable issue of fact as to whether Con Ed owns the manhole adjacent to the accident location, as well as whether the manhole in question is within 12 inches of where Hartman’s accident happened.

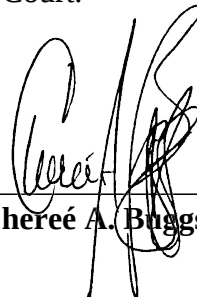
Furthermore, to prove constructive notice, “a dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it” (see *Shehata v City of New York*, 128 AD3d 944, 946 [2d Dept 2015]). Here, although Con Ed argues that no evidence indicates that they had constructive notice of the defect, it is their duty as the movant for summary judgment to provide evidence showing prima facie that they didn’t have constructive notice. The evidence submitted by Con Ed did not demonstrate that

the uneven pavement did not exist for a sufficient length of time to permit them to discover and remedy it. Hence, Con Ed failed to make a prima facie case that they did not have constructive notice of the alleged defect. Accordingly, it is hereby

ORDERED, that Con Ed's motion for summary judgment is denied in its entirety.

This constitute the decision and Order of the Court.

Dated: April 4, 2024



Hon. Chereé A. Buggs, JSC

