[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PART

Index Number : 113983/2003

DI SANZA, FILIP

VS

CITY OF NEW YORK

Sequence Number : 001

DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion consolidated w/ seq 2 + denied pursuant to attached Rem

FILED
MAY 22 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/15/06

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

FILIP DI SANZA,

Index No.
113983/2003

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and 30 EAST 40th, L.L.C.

Defendants.

----------x

Shafer, M.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiff Filip Di Sanza on March 19, 2003, when he tripped and fell on a metal sidewalk grating while walking on the sidewalk adjacent to the building 30 East 40th Street in New York City.

In motion sequence 001, Con Edison moves, pursuant to CPLR Section 3212, for an order granting summary judgment in its favor. Con Edison claims that it is entitled to summary judgment based upon the fact that there is no evidence that Con Edison created a dangerous condition on the grating that plaintiff claims caused him to fall, as well as the fact that the plaintiff has not produced any evidence to establish that Con Edison had notice of a defective condition.

In motion sequence number 002, 30 East 40th, LLC moves, pursuant to CPLR 3212, for summary judgment in its favor, on the ground that it did not cause or create the defect in question, did not make any repairs to that portion of the sidewalk where plaintiff fell, did not have special use over that portion of the sidewalk, and that Con Edison did have special use of

that portion of the sidewalk.

BACKGROUND

On the morning of March 19, 2003, plaintiff Filip Di Sanza allegedly tripped and fell as a result of a raised metal sidewalk grating protruding about an inch above the sidewalk in front and/or adjacent to 30 East 40th Street, between Madison Avenue and Park Avenue, in New York City.

The metal grate that allegedly caused plaintiff's accident covered a vault owned, operated and maintained by defendant Con Edison. Louis Leardi, (Leardi) an operating supervisor for Con Edison testified that less than five months before plaintiff's alleged accident, on October 29, 2002, he conducted a routine inspection of the subject vault, number 8529, located at 30 East 40th Street. The vault houses electrical equipment such as transformers owned by Con Edison. Leardi stated that records indicate that this vault and others like it are required to be inspected by Con Edison once every year. In order to check the equipment in the vault, the worker must open up the hinged metal grating, exposing a cage and a descending ladder. When the vault covers are closed, they are supposed to be flush with the sidewalk. Leardi asserted that had he noted anything wrong with the grating at the October 29, 2002 inspection, he would certainly have noted it in his report and barricaded it off and/or had it repaired. When asked if he could identify what might have caused the defect in the grating, Leardi stated that a heavy vehicle moving out of traffic and onto the sidewalk might have caused the grating to become lifted.

Paul Kane, a Con Edison senior specialist in charge of installation and removal of network equipment in Manhattan and the inspection of that equipment, testified as to the transformer and network protector contained within the vault. He stated that the transformer was

for use for the general area in and around 30 East 40th Street. He also testified as to the procedures put in place by Con Edison in the event that there is a problem with the grating above the vault. He stated that with respect to the vault in question, he had never had any conversations with anybody from the emergency response team. He also noted that if a citizen had called in to complain about the vault, and in accordance with procedure, a document would have been generated.

Plaintiff offers an affidavit of Stanley H. Fein (Fein), a professional engineer and accident reconstruction expert in support of his claims against defendant Con Edison and defendant 30 East 40th LLC. It is Fein's opinion that the creation of the raised area, which he attributed to the negligence of Con Edison and the building 30 East 40th LLC, was an extreme tripping hazard caused by the constant opening and closing of the hinged door for access to the vault below. He also stated that the vault under the grating was also being used for the special use and benefit by the building located at 30 East 40th Street, as the transformers housed within the vault provided electrical services to this building. Noting various New York City Department of Transportation highway rules and regulations regarding street hardware defects, Fein further opined that, within a reasonable degree of engineering certainty, that a single annual inspection of the grating and hinged door located at the site of plaintiff's alleged accident was insufficient. In fact, he stated that the grating should have been inspected every three months, though he did not cite any specific regulation regarding the specific timetable required for inspections.

Defendant City of New York, in its opposition to Con Edison's motion for summary judgment, maintains that Con Edison failed to address five separate opening permits for the vault at issue granted to Con Edison by the City over the course of one and a half years prior to

plaintiff's accident, creating a triable issue of fact as to whether Con Edison created the defect by the continued opening and closing of the metal grate.

Moving co-defendant 30 East 40th LLC owned the building adjacent to the accident location. Joe Aguasviva, the superintendent of the building for the last 12 years, stated in his affidavit that the grate in the sidewalk in front of 30 East 40th Street is not owned or maintained by the building and that no one from the building ever made repairs to the grate or ever assessed the vault beneath the grate. He further stated that the building derives no benefit from the grate.

DISCUSSION

Con Edison and 30 East 40th LLC's motions for summary judgment are both granted. Plaintiff has failed to put forth sufficient evidence of the existence of a material fact requiring a trial as to whether either or both defendants created the defect or received notice of the defect.

"'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 eliminate any material issues of fact.'" (Wolff v New York City Transit Authority, 21 AD3d 956, 956 [2d Dept, 2005], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, ____ AD3d ____, 2006 WL 538764, *1 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruder v Ceppos, 46 NY2d 223 [1978]; Grossman v Amalgamated Housing Corp., 298 AD2d 224, 226 [1st Dept 2002]).

In the absence of evidence that a defendant created a defect or received actual notice of a

defect relevant to its facilities, the defendant is entitled to summary judgment (Schiano v TGI Fridays, 205 AD2d 407 [1st Dept 1994]; Trujillo v Riverbay Corp., 153 AD2d 793 [1st Dept 1989]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover it and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]).

In the instant case, the only evidentiary proof offered by plaintiff that Con Edison or 30 East 40th LLC created the defect or had notice of the same is the affidavit of plaintiff's expert, Fein, and Fein offered no evidentiary facts in support of his conclusions. In Zuckerman v City of New York, (427 NY2d 595, 598 [1980]), the court 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."

As such, unsupported conclusory allegations contained in an expert affidavit in opposition to a motion for summary judgment are insufficient to raise a triable issue of fact and thus, cannot defeat a summary judgment motion (see Buchholz v Trump, 767 Fifth Ave., LLC, 5 NY3d 1 [2005][plaintiff's expert cited no treatise, standard, building code, etc., to support his assertion that good and acceptable engineering building safety practices required the installation of tempered glass]; Amatulli v Delhi Construction Company, 77 NY2d 525, 532 [1991][summary judgment granted where plaintiff's expert submitted no evidence to support his conclusions]).

Here, plaintiff's expert Fein fails to demonstrate how he reached the conclusion that the metal grate was bent as a result of the constant opening and closing of the hinged grate, rather than perhaps a vehicle rolling over it, as witnesses for defendant Con Edison opined. In fact, Fein failed to put forth any analysis, tests, testimony or even evidence of personal knowledge as to how the grate's defect was created (see Machado v Clinton Housing Development Company, 20 AD3d 307, 307-308, [1st Dept 2005][expert's summary judgment affidavit insufficient to raise triable issue of fact where it offers no facts in support]; Jackson v Dresser Industries, Inc., 257 AD2d 538 [1st Dept 1999]).

Further, although the City of New York argues that several opening permits granting permission to Con Edison to work in the subject area raises a triable issue of fact as to whether Con Edison created the defect by the repeated opening and closing of the hinged grate, issuance of the permits alone without evidence of Con Edison's creation of the defect, which would have required more than merely using the grate in the way that it was designed to be used, or notice of the defect, is insufficient to defeat Con Edison's summary judgment motion (see Gee v City of New York, 304 AD2d 615, 617 [2d Dept 2003][issuance of permit did not constitute evidence of notice]; Levbarg v City of NY, 282 AD2d 239, 242 [1st Dept 2001]; Meltzer v City of NY, 156 AD2d 124 [1st Dept 1989]).

Plaintiff's expert Fein has also failed to present evidence sufficient to raise a triable issue of fact as to whether Con Edison properly maintained the grating at issue, as he failed to demonstrate how Con Edison's yearly safety inspections did not satisfy safety regulations. Although Fein states that, in his opinion, the grate should have been inspected every three months, and therefore Con Edison has not properly maintained the grate, he put forth no evidence

of a specific rule or regulation that Con Edison violated or that Con Edison's yearly inspection requirement is insufficient so as to have possibly contributed to the alleged accident (see Diaz v New York Downtown Hospital, 99 NY2d 542, 544 [1st Dept 2002][Court of Appeals affirmed summary dismissal of plaintiff's case where her expert failed to produce evidence of industry standard]; Hare v City of New York, 183 AD2d 682 [1st Dept 1992][Court properly charged that defendant's failure to comply with regulation requiring all manhole covers and other street hardware be flush against the sidewalk could be considered negligence]). Indeed, the undisputed evidence is that Con Edison inspected the area at issue on October 29, 2002, a mere five month's before plaintiff's alleged accident, and in accordance with Con Edison's yearly inspection requirements.

Plaintiff has also failed to raise an issue of material fact as to whether defendant 30 East 40th LLC caused or created the defect in question, or that 30 East 40th LLC enjoyed a special use over that portion of the sidewalk. At the time of the plaintiff's accident, the duty to maintain the public sidewalk where plaintiff fell did not rest upon defendant 30 East 40th LLC. As a general rule, landowners do not have a duty to keep public sidewalks abutting their property in a safe condition, and cannot be held liable for injuries sustained by pedestrians solely because of their ownership of the abutting property (Cannizzaro v. Simco Management Co., 26 AD3d 401 [2d Dept 2006]; Richter v Reade, 303 AD2d 232 [1st Dept 2003]; Muniz v Baccus, 282 AD2d 387, 388 [1st Dept 2001]; Amado v Friedland, 251 AD2d 57 [1st Dept 1998]). Even if the abutting landowner had noticed the alleged defect in the public sidewalk, the land owner had neither a duty to notify the municipality, nor an obligation to repair the condition (Zawacki v Town of North Hempstead, 184 AD2d 697 [2d Dept 1992][even though the abutting landowners knew for

many years of the defect in the sidewalk which caused the plaintiff to trip and fall, they had neither the duty to notify the town of the sidewalk's condition, nor an obligation to repair it themselves]).

Liability on an abutting landowner will attach where the land owner caused the defective condition or caused the defect to occur because of some special use (Fine v City of New York, 303 AD2d 306 [1st Dept 2003]; Tortora v Pro Foods Inc., 200 AD2d 471 [1st Dept 1994]). However, a landowner's use of a sidewalk does not defeat summary judgment where it cannot be shown that the landowner created the defect or caused the defect to occur (Reich v Meltzer, 21 AD3d 543 [2d Dept 2005][plaintiff must demonstrate that the special use was the proximate cause of the accident]; Karr v City of New York, 161 AD2d 449 [1st Dept 1990][Court held that issues existed as to whether the defect in the sidewalk was caused by the defendant's special use and if so, whether the defect was the proximate cause of the alleged accident]).

Here, as previously explained, Joe Aguasviva, superintendent of the building at 30 East 40th Street, stated that the grate in the sidewalk in front of 30 East 40th Street is not owned or maintained by the building; that no one from the building ever made repairs to the grate or assessed the grate; and that the building derives no benefit from the grate.

In addition, Con Edison employee Paul Kane testified that the equipment in the vault was used to supply electricity to the general area in and around 30 East 40th Street and not just to defendant 30 East 40th LLC's building. Likewise, in Roselli v City of New York (201 AD2d 417, 418-419 [1st Dept 1994]), based upon Con Edison's testimony that the transformer in the vault provided electrical service to many properties in the surrounding blocks, the court held as a matter of law that the grate did not constitute a special use of the abutting property owner. In

fact, in granting summary judgment to the abutting property owner, the First Department, Appellate Division, stated that the fact that the Con Edison vault was located in front of the abutting property was incidental to its purpose, and that there was no evidence that the building had received a benefit from the vault that was any different than that of the general public.

At any rate, without factual evidence to support his conclusions, plaintiff's expert Fein's assertions that defendant 30 East 40th LLC derived a special benefit from the transformers beneath the metal grating at issue cannot raise a triable issue of fact necessary to defeat defendant 30 East 40th Street LLC's motion for summary judgment (see Diaz v New York Downtown Hospital, supra; Amatulli v Delhi Construction Company, supra).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Consolidated Edison Company of New York's motion for summary judgment dismissing the complaint is granted, and the complaint is severed and dismissed as to this defendant with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that defendant 30 East 40th Street LLC's motion for summary judgment dismissing the complaint is granted, and the complaint is severed and dismissed as to this defendant, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May _____, 2006

5/15/06

ENTER

J.S.C.

HON. MARILYN SHAFER, JSC

FILED
MAY 22 2006
COUNTY CLERK'S OFFICE
NEW YORK