

Cook v Consolidated Edision Co. of N.Y., Inc.
2007 NY Slip Op 33232(U)
October 4, 2007
Supreme Court, New York County
Docket Number: 0103874/2004
Judge: Barbara Kapnick
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: **BARBARA R. KAPNICK**

Justice

PART 12

Index Number : 103874/2004

COOK, MARY E.

vs

CONSOLIDATED EDISON

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

103874/04

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

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

FILED

OCT 10 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 10/4/07

BARBARA R. KAPNICK
J.S.C.
J.A.C.

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: PART 12

-----X

MARY E. COOK,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., E PLUS E LLC, MADISON 55th
RESTAURANT, INC., Individually and doing
and/or transacting business as "Burger
Heaven" and BURGER HEAVEN, Individually,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 103874/04
Motions Seq. Nos.
003 and 004

Motions sequence numbers 003 and 004 are consolidated for disposition.

In this action, plaintiff Mary E. Cook seeks to recover damages for personal injuries she sustained on November 9, 2003 when she tripped and fell allegedly as a result of separated yellow wooden shunt boards running across the sidewalk outside of the building located at 536 Madison Avenue in Manhattan ("the building").

Defendants Madison 55th Restaurant, Inc., individually and doing and/or transacting business as "Burger Heaven", and Burger Heaven, individually (collectively "Burger Heaven") operated a 'Burger Heaven' restaurant on the first two floors and basement of the building. Defendant E Plus E, LLC ("E Plus") was the owner of the building, which includes the commercial premises leased to

Burger Heaven and three upper floors occupied by residential tenants.

The boards were placed at the location by defendant Consolidated Edison Company of New York, Inc. ("Con Edison") in order to cover electrical wires which were temporarily providing power to the building, including the restaurant and residential units, while repair work to the building's permanent electrical system was ongoing.¹

Defendant E Plus now moves (under motion sequence number 003) for an order granting it summary judgment on its cross-claim against defendant Burger Heaven for defense and indemnification pursuant to the terms of their lease agreement.²

Defendant Burger Heaven moves (under motion sequence number 004) for summary judgment dismissing plaintiff's Second Amended Verified Complaint and all cross-claims against it.

¹ Con Edison was called to the building on June 23, 2003 after the manager of the restaurant smelled burning plastic and observed smoke emanating from the Con Edison electrical box in the basement.

² Although plaintiff has submitted an Affirmation in Opposition to that portion of defendant E Plus' motion seeking summary judgment dismissing plaintiff's Complaint against it, defendant E Plus' Notice of Motion does not specifically seek that relief.

Plaintiff claims that she was caused to fall by a gap between two of the shunt boards. The manager of the restaurant, Philip Varis, testified at his deposition that he recalled seeing the shunt boards separated on approximately five occasions from the time Con Edison placed the boards on the sidewalk in late June 2003 until plaintiff's November 9, 2003 accident.

He further testified that

I call Con Edison every time I saw these boards separate, I call Con Edison. And I was explaining to them what's going on, and they came a few times, they fix them, but not all the time.

Mr. Varis has also submitted an Affidavit in which he explains that "[t]he restaurant employees would not attempt to fix these boards when this occurred, because Con Edison advised us that we should contact them."

However, Mr. Varis claims that he does "not recall ever noticing the wood boards being separated during the time period" from late October 2003 "when Con Edison responded to [a] leak in the basement through the time period when Ms. Cook alleges she fell on November 9, 2003."

According to Mr. Varis, "[d]uring the entire period that the boards were run in front of the restaurant, no one ever complained

to Burger Heaven that the boards were separated and the only incident we are aware of anyone falling on these boards is Ms. Cook." He further recalls "observing that the boards were together when I left the restaurant on Saturday, November 8, 2003 in the evening."

The assistant manager of the restaurant, Edgar Barrios, has also submitted an Affidavit in which he alleges that

[o]n the date of Ms. Cook's incident I recall arriving at work that morning and observing that the two Con Edison boards located outside the restaurant were together. These boards had been located outside the restaurant for several months and in the past I had noticed about 3 - 5 times that the boards had become separated. Each time the boards had become separated, I would tell Philip Varis, the manager, and he would call Con Edison to fix the problem. Con Edison would eventually come to fix the boards.

Mr. Barrios further claims that "[a]pproximately an hour before this incident, I recall looking out the window and I did not observe that the wood boards were separated or that there was any debris on the floor."

Defendant E Plus argues that (i) it neither created nor had actual or constructive notice of the condition; (ii) E Plus was not responsible for the maintenance of the sidewalk; and (iii) Burger Heaven was dealing exclusively with Con Edison regarding the utility issues.

However, as plaintiff argues, E Plus was responsible for the condition of the sidewalk pursuant to New York City Administrative Code § 7-210(a) which provides that

It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

Defendant Burger Heaven moves for summary judgment dismissing plaintiff's Second Amended Verified Complaint and all cross-claims against it, on the ground that it never assumed the duty to maintain Con Edison's boards on the public sidewalk.

Plaintiff argues in opposition that "there is a triable factual issue as to whether the placement of shunt boards under these circumstances constituted a special use of the sidewalk by" Burger Heaven thereby giving rise to a duty on the part of Burger Heaven to maintain the provisional sidewalk structure and/or to warn plaintiff of the dangerous condition. Eliassian v. Consolidated Edison Co. of New York, 300 A.D.2d 51 (1st Dep't 2002). See also, Sheehy v. The City of New York, 43 A.D.3d 336 (1st Dep't 2007).

Plaintiff further argues that there is an issue of fact based on Mr. Varis' admission that the boards had separated on approximately five prior occasions, as to whether or not Burger

* 7]
Heaven, as well as E Plus,³ had constructive notice of a recurring condition.

It is well settled that

[t]o establish a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the condition that caused the accident or had actual or constructive notice of it (citation omitted). Constructive notice arises from a defect that is visible and apparent and has existed for a sufficient length of time before the accident to permit its discovery and remedy by the defendant's employees (citation omitted). Constructive notice may be demonstrated by evidence of a recurring dangerous condition in the area of the accident that was routinely left unaddressed by the defendant (citation omitted).

Mullin v. 100 Church LLC, 12 A.D.3d 263, 264 (1st Dep't 2004). **See also**, Modzelewska v. The City of New York, 31 A.D.3d 314 (1st Dep't 2006).

Based on the papers submitted and the oral argument held on the record on June 13, 2007, this Court finds that there are triable issues of fact as to whether or not there was a recurring dangerous condition in front of the building, thereby demonstrating constructive notice to defendants E Plus and Burger Heaven of the alleged condition, and as to whether defendants were each negligent in failing to remedy that condition.

³ Mr. Varis testified that Evans Cyprus, the owner of E Plus, was at the premises "very often, almost every other day".

Accordingly, that portion of defendant Burger Heaven's motion seeking summary judgment dismissing plaintiff's action against it is denied.

Finally, defendant E Plus moves for summary judgment on its cross-claim against defendant Burger Heaven for defense and indemnification pursuant to the terms of their lease agreement which provides, in relevant part, as follows:

57. INDEMNITY.

(a) Tenant covenants and agrees to indemnify, defend and save Owner harmless from and against any liability, loss, claims, cost, injury, damage and other expense whatsoever arising from acts occurring upon or about the Demised Premises during the term of this Lease for damages, losses or injuries to goods, including but not limited to wares, merchandise and property and/or for any personal injury or loss of life in, upon or about the Demised Premises or on the sidewalks adjoining the Demised Premises resulting directly or indirectly from the use, misuse, occupancy, possession or unoccupancy of the Demised Premises by Tenant, its agents, servants, employees, invitees, contractors or subcontractors, subtenants or other persons claiming through or under Tenant... (emphasis supplied).

Although Burger Heaven concedes that it assumed a duty under its lease to "take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto," Burger Heaven argues that it never assumed a duty to maintain Con Edison's equipment. It further argues that the indemnification provision of the lease is unenforceable pursuant to


GOL § 5-322.1 because E Plus seeks to be indemnified for its own negligence.

For the reasons discussed above, this Court finds that there are triable issues of fact as to whether each of the defendants was negligent with respect to the happening of the plaintiff's accident. Accordingly, E Plus' motion seeking summary judgment on its cross-claim against Burger Heaven is denied as premature.

A pre-trial/settlement conference shall be held in IA Part 12 on October 31, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: October 4, 2007



Barbara R. Kapnick
J.S.C.

FILED
OCT 10 2007
NEW YORK
COUNTY CLERK