

Taliento v Consolidated Edison Co. of N.Y., Inc.
2010 NY Slip Op 30427(U)
March 3, 2010
Supreme Court, Richmond County
Docket Number: 103221/06
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

RALPH TALIENTO,

**Index No: 103221/06
Calendar Nos: 2680-001
3847-003
3948-004
112-005**

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., DAGGART CONSTRUCTION CORP., COLGATE
SCAFFOLDING & EQUIPMENT CORP., FRIENDS OF
SEAMEN’S SOCIETY,

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

Defendants.

-----X
CONSOLIDATED EDISON COMPANY OF NEW YORK,

Third-Party Plaintiff,

-against-

VRD CONSTRUCTION CO.,

Third-Party Defendant.

-----X
The following papers numbered 1 to 17 were marked fully submitted on the 8th day of January 2009:

Papers	Numbered
Notice of Motion for Summary Judgment by Defendant Friends of Seamen’s Society, with Supporting Papers and Exhibits (dated August 8, 2009).....	1
Reply Affirmation to Con Edison’s Opposition to Daggart’s Motion for Summary Judgment by Defendant Daggart Construction Corp., with Exhibit (dated December 20, 2009).....	2
Affirmation in Opposition by Defendant Consolidated Edison (dated September 21, 2009).....	3
Notice of Motion by Third-Party Defendant VRD Construction Co., with Supporting Papers, Exhibits and Memorandum of Law (dated November 20, 2009).....	4

Notice of Motion for Summary Judgment by Defendant Daggart Construction Corp., with Supporting Papers and Exhibits (dated November 26, 2009).....	5
Affirmation in Opposition by Plaintiff Ralph Taliento, with Supporting Papers and Exhibits (dated December 2, 2009).....	6
Affirmation in Opposition by Defendant/Third-Party Plaintiff Consolidated Edison, with Supporting Papers (dated December 15, 2009).....	7
Reply Affirmation in Support of Daggart’s Motion for Summary Judgment by Defendant Daggart Construction (dated December 15, 2009).....	8
Affirmation in Opposition by Defendant/Third-Party Defendant Consolidated Edison (dated December 15, 2009).....	9
Affirmation in Reply by Defendants Friends of Seamen’s Society, with Exhibit (dated December 16, 2009).....	10
Affirmation in Reply by Defendant/Third-Party Defendant VRD Construction Co. (dated December 16, 2009).....	11
Affirmation in Reply by Defendant Daggart Construction Corp., with Exhibit (dated December 20, 2009).....	12
Amended Motion and Notice of Cross-Motion by Defendants Friends of Seamen’s Society, with Supporting Papers and Exhibits (dated December 21, 2009).....	13
Affirmation in Opposition by Defendant Daggart Construction Corp. (dated January 1, 2009).....	14
Plaintiff Ralph Taliento’s Memorandum of Law (dated January 5, 2010).....	15
Reply Affirmation in Support of VRD’s Motion for Summary Judgment by Defendant/Third-Party Defendant VRD Construction Co., (dated January 6, 2010).....	16
Affirmation in Reply by Defendants Friends of Seamen’s Society (dated January 6, 2010).....	17

Upon the foregoing papers, the respective motion and cross motions are denied.

This is an action to recover compensatory damages for injuries allegedly sustained when plaintiff tripped and fell over a grate that had been removed and left on the sidewalk in front of 50 Bay Street on Staten Island.

Defendant Friends of the Seamen's Society (hereinafter Society) is the owner of the building at 50 Bay Street abutting the sidewalk where plaintiff allegedly tripped. Defendant Daggart of Richmond (s/h/a Daggart Construction Corp.[hereinafter Daggart]) is the contractor hired by Society to renovate the building. Defendant Consolidated Edison Company of New York (hereinafter Con Edison) is the owner of the below-ground electrical vault on the grating of which plaintiff allegedly tripped. Defendant/third-party defendant VRD Construction Co. (hereinafter VRD) is an exclusive subcontractor of defendant Con Edison that allegedly had worked on the vault grating prior to the accident.

In Motion Sequence No. 001, defendant Society moves for summary judgment in its favor on the complaint and cross claims asserted against it. (In the alternative, it requests common-law indemnification from its co-defendants).

In Motion Sequence No. 003, defendant/third-party defendant VRD cross moves (1) to strike Con Edison's third-party complaint for its failure to maintain records and comply with court-ordered discovery; (2) for summary judgment in its favor on the third-party complaint and cross claims asserted against it; and (3) for summary judgment in its favor dismissing the complaint.

In Motion Sequence No. 004, defendant Daggart moves for summary judgment in its favor on the complaint and cross claims asserted against it.

In Motion Sequence No. 005, defendant Society cross moves for summary judgment with respect to its cross claims for contractual defense and indemnification by Daggart.

On June 7, 2006, plaintiff was walking north on the sidewalk along the west side of Bay Street. At the time, the building at 50 Bay Street, owned but not occupied by Society, was undergoing renovation pursuant to a contract between Society and Daggart. A scaffold, known as a construction shed, ran the length of the building above the abutting sidewalk. Two grates and the transformer vault

below them were located in that sidewalk and were owned and maintained by Con Edison. The grates are part of concrete slabs that serve as covers for the underground vault. Each contains an access panel grate, also known as a hatch and measuring two feet by three feet, that is designed to be unlocked and swing on its hinge.

According to the complaint, plaintiff “tripped over a grate that had been removed and left on the public sidewalk resulting in a ruptured Achilles tendon in his right leg that required surgical repair.”

Two months prior to the accident, on April 5, 2006, both Con Edison and its contractor, VRD, had worked on the transformer vault and the grating. According to deposition testimony, on that date a Con Edison employee had responded to a service call at the location, but could not gain access through the panel grate. Later that day, a Con Edison crew arrived and managed to gain access. They then were able to enter the transformer vault and make the necessary electrical repairs. On that same day Con Edison records indicate that its Field Operating Department (FOD) reported that the grating was broken and below grade; that it was “flagged off made safe;” and that FOD would request that a contractor make the necessary repairs to the grating. The records also indicate that Con Edison’s contractor, VRD, was called to the scene and “installed plate on 4-5-06 to make area safe.”

VRD’s witness, Dominic Angilletta, stated at his deposition that on April 5, 2006, he “received a phone call to mobilize a crew to go install a steel plate at 50 Bay Street to eliminate a tripping hazard.” Because of their size and weight, steel plates are installed by a boom truck. However, since the sidewalk was not accessible via a boom because of the scaffolding, the crew installed an orange fiberglass plate instead.

Mr. Angilletta stated that no gratings were removed by VRD that day.

Con Edison since has conducted a search and found no record of having performed any work in front of 50 Bay Street between April 5, 2006 and June 7, 2006. According to Robert Remauro, Manager of the Control Center on Staten Island and Emergency Operations for Con Edison, if work was done, there would have been a record.

Shortly after April 5, 2006 Con Edison also requested that VRD install a new vault roof, which could not be done until the scaffolding was removed. The orange plate was left in place until the scaffolding came down and a new roof was installed in October, 2006. VRD did not return to the scene between April 5, 2006 and June 7, 2006.

On the date of his accident, plaintiff was serving as the acting Superintendent of Transportation for Staten Island Railway and the incident was immediately reported to his employer. The Metropolitan Transportation Authority Police Department responded to the scene and took photographs of the area immediately after the accident. At his deposition plaintiff reviewed the photographs and identified the access panel grate on which he had tripped. According to Robert Remauro, the Con Edison employee who also responded to the scene, the photographs are fair and accurate representations of what the area looked like when he arrived. At the scene, he saw an orange plate in the center of the sidewalk and a door grating laying next to it on top of the other gratings. At the time, he assumed that the door grating came from under the plate since “there was no where else it could have come from.” He did not know who put the grating there or how long it had been there. At the time, Mr Remauro contacted the Control Center and told them to have the grating removed immediately. He also placed orange warning cones and barricade tape around the scene and took photographs. He since has lost or misplaced the photographs.

Summary judgment should be granted only when there is no doubt as to the absence of triable issues (*see Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). 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 from the case. Here, for the reasons stated below, the moving defendants have failed to meet their burden to eliminate such material issues (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]), and, accordingly, to the extent that the respective motions and cross motions seek summary judgment, they are denied.

At all relevant times, defendant Society was the owner of the property abutting the sidewalk and was required to maintain the area in a reasonably safe condition (Administrative Code of the City of New York § 7-210). That duty included the obligation to keep the sidewalk free from debris and other material that may constitute a dangerous or hazardous condition (Administrative Code § 16-118). This liability is imposed even if, as here, the owner is out of possession (*James v. Blackmon*, 58 AD3d 808 [2nd Dept 2009]).

On its motion for summary judgment (Mot. Seq. 001), Society failed to provide any evidentiary showing that it properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injury. Thus, it has failed to demonstrate its prima facie entitlement to judgment as a matter of law (*Winegrad v New York Univ Med Ctr*, 64 NY2d 851, 853 [1985]; *James v Blackmon*, 58 AD3d at 808).

In this regard, the issue of actual or constructive notice of the allegedly defective condition remains one of fact for trial. The portion of the grating upon which plaintiff allegedly tripped apparently was the access door that either Con Edison or VRD removed and left at the scene either while gaining access to the transformer vault on April 5, 2006 or in repairing the below-grade condition that day. Its placement, condition and defendant's awareness of same as a tripping hazard cannot be determined as a matter of law and therefore preclude summary judgment (*see and compare Gordon v Amer Museum of Natural History*, 67 NY2d 836, 837 [1986] holding that to provide 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 discovery and remedy). Moreover, "[to] meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Przywaly v. New York City Trans Auth*, 892 AD3d 181 [2nd Dept 2010], quoting *Birnbaum v. New York Racing Assn., Inc.*, 57 AD3d 598, 599 [2nd Dept 2008]). Here, Society has failed to submit any evidence demonstrating when the sidewalk was last inspected—although it does allege that the sidewalk was swept on at least a weekly basis .

Nor, under the circumstances presented, does any alleged "special use" of the sidewalk by Con Edison and/or VRD relieve Society of its duty. The principle of "special use," to the extent applicable here, imposes an obligation upon an entity to maintain a part of the public way in a reasonably safe condition when that part is under its control and is used for its own benefit (*Noia v Maselli*, 45 AD3d 746 [2nd Dept 2007]). In *Noia*, the abutting landowner established her prima facie entitlement to judgment as a matter of law by demonstrating that she did not have exclusive access to or the ability to exercise control over the gas valve cover on which the plaintiff allegedly tripped and fell. Similarly, in *Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559 (2nd Dept 2009), the plaintiff allegedly slipped and fell on a metal grate in front of a building owned by defendant. The grate and the transformer vault below it were owned and maintained by Con Edison and were located in the middle of the public sidewalk abutting the property owned by Baybridge. Defendant therein established its prima facie

entitlement to judgment as a matter of law by demonstrating that it did not have exclusive access to, or the ability to exercise control over the grate on which plaintiff allegedly slipped. (65 AD3d at 560). Here, plaintiff allegedly tripped on an unattached door grate that apparently had been discarded on the sidewalk by one of the co-defendants. To that extent, it constituted debris left on a part of the sidewalk--unlike the grating in *Breland*. (Compare also *Smirnova v City of New York*, 64 AD3d 641 [2nd Dept 2009]) where plaintiff allegedly tripped and fell when she caught her foot on the edge of a plywood board covering a city transit authority subway grate in the sidewalk adjacent to property owned by defendant Industrial Home for the Blind. The appellate court found that “the plywood boards [which had been] affixed to the sidewalk by NYCTA were not part of the ‘sidewalk’ for purposes of liability under Administrative Code § 7-210” (64 AD3d at 642). Here, unlike the plywood in *Smirnova*, the panel grate was not affixed to the vault cover and, in fact, apparently had been removed and left unattached on the sidewalk.

Similarly, Daggart, as the contractor renovating the building, had also assumed a contractual obligation to maintain a safe work site, including the sidewalk in front of the building. It, too, failed to provide any evidentiary showing that it properly maintained the sidewalk or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff’s injury. Thus, it has failed to demonstrate its prima facie entitlement to judgment as a matter of law on the complaint and cross claims against it (Mot. Seq. 004). Moreover, as counsel for Daggart concedes, “[there] are numerous factual issues which have not been resolved, including the culpable conduct of both [Society] and Daggart, what duties each had to the plaintiff and concerning the sidewalk.” (*Affirmation in Opposition to Friends of Seamen’s Society’s Amended Cross Motion* (dated January 1, 2010, ¶ 22).

The balance of Daggart’s motion (No. 004) to dismiss Society’s cross claim for contractual indemnification, and to Society’s amended cross motion (Mot. Seq. 005) for summary judgment on that cross claim, are denied. While Daggart correctly argues that an indemnification provision in a construction contract that seeks to indemnify a party for its own negligence is void as against public policy (General Obligations Law § 5-322.1), insurance procurement provisions such as that at issue here are “valid and enforceable and are not proscribed” by that section (*Leibel v Flynn Hill El Co*, 25 AD3d 768 [2nd Dept 2006]). Moreover, as noted, there are factual issues present here as to the liability, if any, of each of these defendants. Therefore, both applications are at best premature (*Marmo v Mall Properties, Inc*, 251 AD2d 214 [1st Dept 1998]).

Finally, VRD's motion (Mot. Seq. 003) also is denied. It is undisputed that employees of VRD, the exclusive subcontractor for Con Edison on this project, were called to the location on April 5, 2006 to make the area safe and that they placed the fiberglass covering over the transformer vault roof. The deposition testimony of both VRD and Con Edison establishes that the workers on the scene from one or the other of these defendants may have removed a portion of the grate from the vault roof and left it on the sidewalk where plaintiff later tripped over it. While VRD denies doing so, neither the deposition testimony of its employee nor that of Con Edison's workers resolves this issue of fact. As conceded by defendant Con Edison, either Con Edison or VRD was responsible for removing the grate portion. A tortfeasor may be held liable to an injured plaintiff when, inter alia, it negligently created the hazardous condition that was a substantial factor in causing the injury. Therefore, to establish its prima facie entitlement to summary judgment as a matter of law VRD was required to demonstrate that it did not create the allegedly hazardous condition (*Serano v New York City Hous. Auth.*, 66 AD3d 867 [2nd Dept 2009]). Its failure to do so is fatal to its motion.

Moreover, and contrary to VRD's argument, evidence that Con Edison employees remained at the site after VRD left on April 5, 2006, does not insulate VRD from liability. At best, it raises a question of fact concerning these defendants' respective liability.

In this regard, that portion of VRD's motion seeking to strike Con Edison's pleadings as against it based on allegations of spoliation of evidence also falls. In response to discovery demands and the order of this Court, counsel for Con Edison avers that he caused a search of the company's records for documents concerning what work, if any, was performed by its employees on and subsequent to April 5, 2006. While that search failed to produce the underlying handwritten notes of the Con Edison employees, it appears that in the normal course of business the information from the daily notes was entered in the company computer records, which have been produced. Once the information was entered, there was no apparent reason for Con Edison to retain the underlying handwritten notes. Thus, contrary to VRD's argument, this is not a situation where "a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense" (*quoting Baglio v St John's Queens Hosp.*, 303 AD2d 341, 342 [2nd Dept 2003]).

Moreover, to the extent counsel for VRD argues that the deposition testimony and documentary evidence supports a finding that Con Edison “would have necessarily returned after [April 5, 2006] and gained access to the transformer via the subject sidewalk grate,” any inference that fairly may be drawn from the evidence is a matter for trial. It does not require the drastic remedy of striking Con Edison’s pleading.

Accordingly, it is hereby:

ORDERED that the motion and cross motions are denied in all respects.

ENTER

Dated: March 3, 2010

Joseph J. Maltese
Justice of the Supreme Court