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

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Perez, J

INDEX NO. 108099/07

MOTION DATE

- v -

MOTION SEQ. NO. 02

Transit Authority

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

Dated: 5/10/10

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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JEPHTE PEREZ,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and HIRO REAL ESTATE COMPANY,

Defendants.

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DECISION/ORDER
Index No.: 108099/07
Seq. No.: 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def Hiro's n/m (§§ 3212, 3211) w/GPP affirm, exhs	1
Def Con Ed's opp w/EAB affirm, exhs	2
Def Hiro's reply w/GPP affirm, exhs	3
Def Con Ed's affirm (by JMF)	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for personal injuries that plaintiff, Jephte Perez, claims to have sustained as a result of defendants' negligence. In a decision dated 3/3/08, the complaint and all cross-claims against defendant, New York City Transit Authority ("NYCTA"), were dismissed by Hon. Donna M. Mills (Seq. No. 001). In a decision dated 3/4/10, plaintiff's motion for summary judgment on the issue of liability against defendant, Consolidated Edison Company of New York, Inc. ("Con Ed"), was granted by this court (Seq. No. 003). Defendant, Hiro Real Estate Company ("Hiro"), now

moves, pursuant to CPLR §§ 3212 and 3211, for summary judgment dismissing the complaint and all cross-claims against it. The motion is opposed by Con Ed. Plaintiff, however, has not opposed this motion, although proof of service has been filed.

Issue has been joined and discovery is complete. The Note of Issue was filed October 26, 2009. This motion was brought timely, therefore it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

Arguments

Plaintiff alleges he tripped and fell on a sidewalk grating abutting the building located at 150 East 42nd Street, New York, New York (the "premises"). According to plaintiff, who was deposed, he stepped with his right foot on the right-hand corner of the iron grating, then "the grating shifted two to one inch . . . the corner went up and the other part went down." Based upon these allegations, plaintiff has brought an action against Hiro for negligence.

Hiro denies that it had notice of a defective condition prior to the date of plaintiff's accident. Hiro contends that the gratings are a special use of the sidewalk by Con Ed and solely for the benefit of Con Ed. Hiro contends that it did not control, own, or operate the gratings, nor was it responsible by law or agreement to maintain them. Hiro contends that it only has a "ground lease" and is not the landowner.

Con Ed opposes Hiro's motion for summary judgment, arguing that there are issues of fact. Con Ed contends, inter alia, that there is inconsistent testimony about where the accident occurred and that Hiro has not established that it does not own the

building. Con Ed argues that Hiro's duty to maintain the sidewalk under the ground lease is an issue of fact for the jury. The ground lease has not been provided to the court. However, Con Ed has since conceded liability, and admitted that it was negligent.

The Law Applicable to a Motion for Summary Judgment

A movant seeking summary judgment in its favor 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 (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003).

Discussion

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (Perez v. Bronx Park South, 285 A.D.2d 402 [1st Dept. 2001]). This duty includes the sidewalk abutting its property (New York City Admin Code § 7-210; Vucetovic v.

Epsom Downs, Inc, 2006 WL 4804734, 2006 N.Y. Slip Op. 30210(U) [N.Y.Sup. Sep 18, 2006] *aff'd* Vucetovic v. Epsom Downs, Inc., 45 A.D.3d 28 *aff'd* Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517 [2008]).

A landowner is not otherwise liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's premises unless the landowner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon the landowner. Jeanty v. Benin, 1 A.D.3d 566 (2d Dept. 2003); Bloch v. Potter, 204 A.D.2d 672 (2d Dept. 1994).

The language of New York City Admin Code § 7-210 is to be given its plain meaning and construed according to the fair import of its terms. City of New York v. Castro, 160 A.D.2d 651 (1st Dept. 1990). A literal reading of § 7-210 reveals that the abutting landowner is responsible only for *sidewalk* repairs. There is no indication that this includes repairs to other objects or openings that may be located on, or as a part of, the sidewalk, unless placed there by the owner and therefore constitute a special use thereof. Lucciola v. City of New York, 2005 NY Slip Opn 25584 (Sup. Ct. Bronx Co. 2005). (Http://www.nycourts.gov/reporter/3dseries/2005/2005_25584.htm) (*nor*). Were the court to adopt plaintiff's argument, that the entire sidewalk, including the gratings, is the responsibility of the abutting property owner, it would be adding in language or a meaning not expressly codified. Therefore, Hiro is not legally responsible for the gratings, unless it otherwise caused the defect or made special use of the grating.

Whether Hiro is a ground lessee or a landowner is not dispositive of its motion for summary judgment. There is no claim that Hiro created the defective condition.

Hiro has made its *prima facie* case that it did not have a special use of or derive a benefit from the sidewalk grating. *See* Lobel v. Rodco Petroleum Corp., 233 A.D.2d 369 (2d Dept. 1996). The gratings were there for the special use and benefit of Con Ed. Yenal Ozger, an Assistant Field Operator for Con Ed, testified that the gratings generally need to be accessed and opened by a Con Ed worker with a special hook. Additionally, Walter Maher ("Maher"), the senior real estate manger for CB Richard Ellis, who is the property manager for Hiro, was deposed. Maher testified that the gratings do not provide any access to any portion of the building, he has no idea what lies in the vaults underneath the sidewalk gratings, and they are there for use by Con Ed. Maher testified, "none of my staff or anyone I am responsible for tried to gain access to those grates. The only times I have seen those grates open has been when Con Edison has been on site and they had it sealed-off because they were working down there, and that is since June of 1998 to current."

Based upon the facts of this case, the court holds, that as a matter of law, defendant is not legally responsible for maintaining the grating or repairing it. Hiro does not have a special use of or derive a benefit from the grating. The code does not impose a legal responsibility on defendant to make any repairs to the grating, there is no violation of the statute, and, therefore, no evidence of negligence. *See* Elliot v. City of New York, 95 N.Y.2d 730 (2001). Hiro did not create the condition. Hiro has established that no cognizable cause of action under a theory of negligence exists in connection with plaintiff's claims. Therefore, Hiro's motion is granted and the Clerk shall enter judgment in favor of Hiro, against plaintiff, dismissing the complaint and cross-claims against Hiro. Plaintiff's claims against Con Ed shall continue.

Conclusion

It is hereby:

ORDERED that defendant, Hiro Real Estate Company's, motion for summary judgment dismissing plaintiff's complaint and all cross-claims against it, is hereby granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendant, Hiro Real Estate Company, against plaintiff, Jephte Perez, dismissing the claims against Hiro; and it is further

ORDERED that the complaint and this case shall continue against defendant, Consolidated Edison Company of New York, Inc.; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
May 10, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.