

**Gaddy v City of New York**

2010 NY Slip Op 33153(U)

November 3, 2010

Supreme Court, New York County

Docket Number: 103442/05

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE  
J.S.C. Justice

PART 5

GADDY, Sharon

INDEX NO. 103442/05

- v -  
City of N.Y., ET AL

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 010

MOTION CAL. NO. 37

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED  
NOV 09 2010  
NEW YORK COUNTY CLERK OFFICE

Dated: 11-3-10  
NOV 03 2010

BARBARA JAFFE  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 5

-----X  
SHARON GADDY and FRANK GADDY,

Plaintiffs,

-against-

Index No. 103442/05  
Motion Date: 10/5/10  
Motion Seq. No.: 010  
Calendar No.: 34

**DECISION & ORDER**

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION,  
METROPOLITAN TRANSIT AUTHORITY, NEW  
YORK CITY TRANSIT AUTHORITY, NEW YORK  
CITY PARKS DEPARTMENT, NEW YORK CITY  
PUBLIC LIBRARY, CONSOLIDATED EDISON  
COMPANY OF NEW YORK, YORK HUNTER, INC.,  
YORK HUNTER CONSTRUCTION, INC., and  
A. OTTAVINO CORP.,

Defendants.

**FILED**  
NOV 09 2010  
NEW YORK  
COUNTY CLERKS OFFICE

-----X  
BARBARA JAFFE, JSC:

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By notice of motion dated May 25, 2010, defendant A. Ottavino Corp. (Ottavino) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and cross-claims against it. Plaintiff and co-defendant Consolidated Edison Company of New York (Con Edison) oppose. For the reasons that follow, the motion is granted.

I. FACTS

At a 50-h hearing held on September 29, 2005, plaintiff testified that her foot had caught somewhere in a sidewalk grating (Affirmation of Andrea Sacco Camacho, Esq., dated May 25,

2010 [Camacho Aff.], Exh. E at 20-22), whereas at a deposition held on March 2, 2007, she testified both that the grating caused her fall (*id.*, Exh. F at 28-29), and that her foot caught on the beveled edge of the concrete around the grate (*id.* at 34-35), and in her verified bill of particulars dated October 31, 2008, she alleged that she tripped and fell on a “mis-leveled grating and uneven cement in the sidewalk” (*id.*, Exh. C). It is undisputed that the location of her accident was at the northwest corner of Fifth Avenue and West 40<sup>th</sup> Street, adjacent to the New York Public Library.

Mohammed Elkordy, Ottavino’s president, testified at a deposition held on March 25, 2010, that in June 1996, Ottavino had been hired by general contractors York Hunter, Inc. and York Hunter Construction, Inc. (collectively, York Hunter) to remove and reset the sidewalk and place bluestone around the grating. (*Id.* at 17-19). The work was completed in June 1998. (*Id.* at 31).

Roger LeGoff, a Con Edison consultant, testified at a deposition held on March 29, 2010 as to the results of a record search, which yielded records of inspections of the grate conducted on October 14, 2002 and June 14, 2004. (Camacho Aff., Exh. L). According to LeGoff, the records reflect that the grating was level with the framework and posed no tripping hazard. (*Id.* at 36-43).

## II. PERTINENT PROCEDURAL BACKGROUND

On September 17, 2007, plaintiff served Ottavino and York Hunter with the summons and complaint. (Camacho Aff., Exh. A). By orders dated September 30, 2008 and October 7, 2008, related actions were consolidated with the instant action. (*Id.*, Exh. B). York Hunter has defaulted (Affirmation of Arthur Lewis, Esq., dated June 2, 2010 [Lewis Aff.]), and dismissals

were granted to the New York Public Library and City defendants.

### III. CONTENTIONS

Ottavino denies liability for plaintiff's injuries on the ground that Con Edison was solely responsible for the grate which caused her fall, Ottavino has no ownership or control over the grate and thus no duty to repair, and inspections by Con Edison soon before the accident revealed no defective condition or misleveling. (Ottavino's Memorandum of Law in Support of Motion For Summary Judgment, dated May 20, 2010). It relies on plaintiff's pleadings, 50-h hearing testimony and deposition, LeGoff's deposition, and an affidavit from Elkordy in which he states that Ottavino completed the job and received no complaints about it. (Camacho Aff., Exhs. A, C, E, F, G, H, L).

In opposition, plaintiff maintains that Ottavino failed to meet its burden absent admissible evidence of those with firsthand knowledge of the accident or expert affidavits, or the deposition transcript of its own witness. (Kitchner Aff.). Even if Ottavino had done so, plaintiff claims that there exists an issue of fact, raised by its expert professional engineer Daniel Haines, P.E., who conducted an onsite investigation of the grate on April 14, 2010 and found that it did not conform to standards generally accepted in the industry because it is not flush with the sidewalk, that it was not built and maintained to code or to reasonable engineering standards, and that its negligent design proximately caused plaintiff's fall. (Kitchner Aff., Exh. B).

In opposition, Con Edison argues that given the issue as to where plaintiff fell, a summary dismissal of the claim against Ottavino is inappropriate. (Affirmation of Arthur Lewis, Esq., dated June 2, 2010).

In reply to plaintiff's arguments, Ottavino asserts that plaintiff's expert's affidavit is

without evidentiary value because he examined the site six years after the accident and the location could not possibly be in the same condition, and that, in any event, it does not demonstrate that Ottavino was negligent. (Reply Affirmation of Andrea Sacco Camacho, Esq., dated Aug.2, 2010). In reply to Con Edison's arguments, Ottavino contends that absent evidence of the precise location of plaintiff's fall, it is entitled to a summary dismissal. (*Id.*). It explains that it did not submit Elkordy's deposition testimony because plaintiff had not provided a copy of it. (*Id.*).

#### IV. ANALYSIS

It is well-settled that "[t]he 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." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). If shown, the burden shifts to plaintiff to establish that there exists a triable issue of fact.

Here, plaintiff has variously asserted that she caught her foot in the grate, on uneven cement, and on the bevel surrounding the grate, and it is uncontested that Ottavino removed and reset the pavement surrounding the grate and installed the bluestone bevel. This evidence does not eliminate the possibility that Ottavino is liable for her fall, should a finder of fact determine that the bevel caused her to fall. (*Compare DiGiantomaso v City of New York*, 55 AD3d 502, 503 [1<sup>st</sup> Dept 2008] ["To the extent that plaintiff's deposition testimony [i]dentifying the cause of

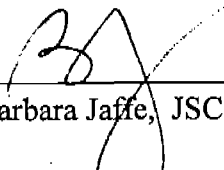
plaintiff's fall] was vague or inconsistent with her section 50-h testimony, a credibility issue is raised to be decided by the jury, not the court on a motion for summary judgment.”], *with Garvin v Rosenberg*, 204 AD2d 388 [2d Dept 1994] [well-settled that “[m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action”). Rather, “[i]t is, of course, the ordinary rule that where a plaintiff has offered two versions of an accident, only one of which would cast the defendant in liability, the inconsistency presents a question for the trier of fact.” (*Silva v 81<sup>st</sup> Street & Avenue A Corp.*, 169 AD2d 402, 404 [1<sup>st</sup> Dept 1991]; *Poreda v Krofssick*, 59 AD3d 1005, 1006 [4<sup>th</sup> Dept 2009]). That LeGoff believed that the bevel did not pose a tripping hazard is not dispositive.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that Ottavino's motion for summary judgment is denied.

This constitutes the decision and order of the court.

  
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 Barbara Jaffe, JSC

DATED: November 3, 2010  
 New York, New York

**BARBARA JAFFE**  
**FILED** J.S.C.  
 NOV 09 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE