

Harding v Consolidated Edison Co. of N.Y., Inc.

2011 NY Slip Op 32086(U)

July 21, 2011

Supreme Court, New York County

Docket Number: 108540/09

Judge: Cynthia S. Kern

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SCANNED ON 7/29/2011

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

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

Index Number : 108540/2009
HARDING, SALLY
vs.
CONSOLIDATED EDISON
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 108540/09
MOTION DATE _____
MOTION SEQ. NO. 04
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

is decided in accordance with the annexed decision. This action is hereby transferred to
a Non-CITY Part, as the CITY is no longer a party to this action.

FILED

JUL 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/21/11

PK
CYNTHIA S. KERN 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 52

-----X
SALLY HARDING,

Plaintiff,

Index No. 108540/09

-against-

DECISION/ORDER

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., 20 WEST 47th OWNERS, LLC,
47 STREET BUSINESS IMPROVEMENT DISTRICT,
LLC, THE CITY OF NEW YORK, F.M. RING
ASSOCIATES,

Defendants.

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-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell in front of 20 West 47th Street in Manhattan on March 30, 2008. Defendant the City of New York (the "City") now moves for summary judgment dismissing the complaint on the ground that the City is not liable pursuant to Administrative Code §7-210. For the reasons set forth below, defendant City's motion is granted.

The relevant facts are as follows. On March 30, 2008, plaintiff fell in front of 20 West

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47th Street. It is unclear whether she fell on a sidewalk grate or simply near the grate. The grate is owned by defendant Con Edison. The City does not own the premises adjacent to the location where plaintiff tripped and those premises are not a one-, two- or three-family home.

The City of New York is not liable for injuries arising from defective sidewalk conditions pursuant to §7-210 of the Administrative Code, which shifted liability for sidewalk defects from the City to the adjacent landowner except where the adjacent property is an owner-occupied one-, two- or three-family dwelling. Section 7-210 provides in pertinent part:

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.

c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.

In the instant case, the City is entitled to summary judgment. If plaintiff fell on the sidewalk grate, the City is not liable as it is undisputed that defendant Consolidated Edison owned the grate. If plaintiff fell on the sidewalk adjacent to the grate, the City is not liable as it did not own the abutting property, the abutting property did not fall into one of the exceptions enumerated by §7-210, plaintiff fails to raise a question of fact as to whether the City “caused or created” the sidewalk defect or and there is no allegation that the City used the sidewalk for a “special use” which conferred a benefit upon the City. *See Scavuzzo v City of New York*, 47 A.D.3d 793 (2nd Dept 2008); *Fernandez v City of New York*, 19 Misc.3d 1135(A) (Sup Ct, Kings Cty 2008).

If plaintiff claims that the City caused or created the condition, it is the plaintiff's burden to submit evidence to that effect. *See Roman v City of New York*, 38 A.D.3d 442 (1st Dept 2007); *Koehler v Incorporated Village of Lindenhurst*, 42 A.D.3d 438 (2nd Dept 2007); *Shannon v Village of Rockville Centre*, 39 A.D.3d 528 (2nd Dept 2007). Moreover, the plaintiff must show that the City created the defect through an affirmative act of negligence "that immediately result[ed] in the existence of a dangerous condition." *Yarborough v City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Scavuzzo*, 47 A.D.3d 793, 794-95. In *Yarborough*, the Court of Appeals held that the City should be granted summary judgment because plaintiff failed to establish that the City had negligently performed a pothole repair which immediately resulted in a dangerous condition. *See* 10 N.Y.3d 726.

Plaintiff fails to raise an issue of triable fact as to whether the City caused or created the condition. She does not submit any evidence showing that the City or its contractors created the condition other than referring generally to the fact that permits for work in the area had been found. This is insufficient to raise a question of triable fact

Finally, co-defendants 20 West 47th Owner LLC and F.M. Ring Associates, Inc.'s argument that the City's motion is premature is without merit. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Davila v New York City Transit Auth.*, 66 A.D.3d 952, 953-54 (2nd Dept 2009); *see also Brown v Bauman*, 42 A.D.3d 390, 392-93 (1st Dept 2007). Co-defendants fails to offer any basis other than speculation for their claim that further discovery would uncover facts sufficient to deny summary judgment.

Accordingly, defendant City's motion for summary judgment is granted and plaintiff's

complaint is dismissed as against the City only. This constitutes the decision and order of the court.

Dated: 7/21/11

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J.S.C.

CYNTHIA S. KERN
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