

Arkin v Consolidated Edison Co. of NY, Inc.
2012 NY Slip Op 32950(U)
December 12, 2012
Sup Ct, New York County
Docket Number: 110906/10
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 110906/2010
ARKIN, IRENE
vs.
CONSOLIDATED EDISON
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 110906/10
MOTION DATE 10/15/12
MOTION SEQ. NO. 004

The following papers, numbered 1 to 10 were read on this motion for summary judgment and cross motion for partial summary judgment

Notice of Motion; Affirmation — Exhibits A-H [Affirmation]-I [Affidavit]-J [Affidavit]-K-L _____ | No(s). 1; 2-5

Notice of Cross Motion— Affirmation — Exhibits A-N [Affirmation] _____ | No(s). 6-8

Affirmation in Opposition to Cross Motion — Exhibits A-B [Affidavit]-C _____ | No(s). 9-10

Replying Affirmation — Exhibits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

FILED
DEC 17 2012
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 17 2012
MOTION SUPPORT OFFICE
MICHAEL D. STALLMAN
J.S.C.

Dated: 12/12/12
New York, New York

[Signature], J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
IRENE ARKIN,

Plaintiff,

Index No. 110906/10

-v-

Decision and Order

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC., CONSOLIDATED EDISON, INC.,
THE CITY OF NEW YORK, METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK
CITY TRANSIT AUTHORITY, MOSCOT OPTICAL
CORP., JES DELANCEY ORCHARD, LLC, SOL
MOSCOT, INC., and PHYSICAL HOLDING, INC.

Defendants.
-----X

FILED

DEC 17 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action arising out of a trip and fall over a sidewalk grate, defendant City of New York (City) moves for summary judgment dismissing all claims and cross claims against it (motion sequence 004); plaintiff cross-moves for partial summary judgment as to liability against defendant JES Delancey Orchard LLC (JES) and also opposes City's motion. Defendant JES also moves for summary judgment dismissing all claims and cross claims as against it (motion sequence 005) and plaintiff opposes. Defendant New York City Transit Authority (NYCTA) also moves for summary judgment dismissing all claims and cross claims as against it (motion sequence 006), and plaintiff has submitted a

limited opposition. Plaintiff moves for partial summary judgment on the issue of liability as against Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. (collectively, ConEd) (motion sequence 007). This decision addresses all four motions.

BACKGROUND

On September 9, 2009, plaintiff allegedly tripped and fell over a defect in the sidewalk adjacent to a grating. The defect was on the sidewalk abutting 114-116 Orchard Street, between Delancey Street and Rivington Street, in New York, New York. As a result of the alleged accident plaintiff sustained injuries. At her deposition, plaintiff was asked to mark a photo of the subject area. (Goldberg Affirmation, Ex. O.) Plaintiff marked a spot that is within twelve inches of the grating. (DiMartini Reply Affirmation, Ex. B.) Plaintiff commenced this action against Consolidated Edison Company of New York, Inc., Consolidated Edison, Inc., The City of New York, Metropolitan Transportation Authority and the New York City Transit Authority. Plaintiff served an amended summons and complaint on Moscot Optical Corp. (Moscot) and JES Delancey Orchard LLC. Defendants City, JES and NYCTA now separately move for summary judgment dismissing the complaint and all cross claims as against them. Plaintiff cross-moves for summary judgment in her favor as to liability as against defendant JES and separately moves

[* 4]
for summary judgment in her favor as to liability as against defendant ConEd.

DISCUSSION

Motion Sequence 004

Defendant City has met its prima facie burden for establishing judgment as a matter of law. Pursuant to § 7-210 (b) of the Administrative Code of the City of New York, “the owner of real property abutting any sidewalk...shall be liable for any injury to property or personal injury...proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” Therefore, the City is not responsible for maintaining or repairing the subject sidewalk. Furthermore, plaintiff’s accident allegedly occurred adjacent to a grating in the sidewalk. Pursuant to 34 RCNY § 2-07 (b) (1) “the owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware.” Furthermore, 34 RCNY § 2-07 (b) (2) states that “[t]he owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating.” ConEd has admitted ownership of the grating at issue and the responsibility for maintenance and repair of the subject grate. (Baumrin Affirmation, Ex. K, L.) Therefore, the City has no

[* 5]
responsibility for maintenance or repair of the subject area.

Plaintiff has not met her prima facie burden for judgment in her favor as a matter of law against JES on the issue of liability. Plaintiff has not shown that JES owned or had the responsibility to maintain the subject area surrounding the sidewalk grate. Although § 7-210 of the Administrative Code of the City of New York places responsibility for maintenance and repair of the sidewalk on the abutting property owner, 34 RCNY § 2-07 (b) places responsibility for maintenance and repair of gratings and twelve inches surrounding the grating in the sidewalk on the owners of such gratings. Plaintiff has not shown that JES owned the subject grating. Furthermore, ConEd admitted to owing the subject grate and to having the responsibility to repair and maintain the grating and the twelve inches surrounding the grating. (DiMartini Affirmation in Opposition, Ex. B.) Therefore, JES is not responsible for maintaining the area of the alleged defect.

Motion Sequence 005

Defendant JES has met its prima facie burden for establishing judgment as a matter of law. JES has shown that it is not responsible for the subject sidewalk defect even though it owns the property abutting the sidewalk where the alleged accident occurred. Pursuant to § 7-210 of the Administrative Code of the City of

New York, the abutting property owner is responsible for maintenance and repair of any sidewalk defects. However, pursuant to 34 RCNY § 2-07 (b) the responsibility for maintenance and repair of the grating and twelve inches surrounding the perimeter of a sidewalk grating is on the owner of the grating. In this case, plaintiff allegedly tripped on a defect that was within the twelve inch perimeter surrounding a grating. (DiMartini Affirmation, Ex. K.) ConEd has admitted to ownership of the subject grating and to the responsibility of maintenance and repair of the grating. (*Id.*, Ex. I.) Therefore, defendant JES had no responsibility to maintain the area of the alleged defect.

Plaintiff argues that the abutting property owner's duty to maintain and repair the sidewalk is non-delegable to the owner of a sidewalk grating. However, "[a]s the undisputed owner of the subject grate, Con Edison had exclusive maintenance responsibility over the grate and the area extending 12 inches outward from the perimeter of the grate, which included the alleged sidewalk defect that caused plaintiff's fall." (*Lewis v City of New York*, 89 AD3d 410, 411 [1st Dept 2011].) Moreover, "§ 7-210 of the Administrative Code of the City of New York does not impose liability upon a property owner for failure to maintain a sidewalk grate in a reasonably safe condition." (*Hurley v Related Mgt. Co.*, 74 AD3D 648, 649 [1st Dept 2010].) Plaintiff also argues that the summary judgment

motion is premature, and more discovery is necessary. However, the motion is not premature. ConEd has already admitted ownership of the grate and responsibility for maintenance and repair of the grate and twelve inches surrounding it.

Motion Sequence 006

The NYCTA has met its prima facie burden for establishing judgment as a matter of law. It has shown that it does not own the subject grating, and therefore does not have the responsibility for maintenance and repair of it or the twelve inches surrounding it. The NYCTA has submitted an affidavit by Carmelite Cadet, a civil engineer employed by the NYCTA. Ms. Cadet avers that “[t]he New York City Transit Authority does not own, operate, maintain, repair, inspect, service or control the sidewalk vault/grating at [the subject] location.” (Shufer Affirmation, Ex. K at ¶ 6.) Moreover, ConEd has admitted to owning the subject grating and therefore, also having the duty to maintain and repair the grating and twelve inches surrounding the perimeter of the grating. (*Id.*, Ex. I, J.) Therefore, the NYCTA had no duty to maintain the subject area in a reasonably safe condition and cannot be held liable for plaintiff’s alleged injuries.

Pursuant to CPLR 3212 (b), the Metropolitan Transportation Authority (MTA) is granted reverse summary judgment for the same reasons that summary judgment was granted to the NYCTA.

Plaintiff does not oppose the NYCTA's motion except to request the Court limit relief to summary judgment, and not grant a stay. However, discovery is automatically stayed during the pendency of a substantive motion.

Motion Sequence 007

Pursuant to 34 RCNY § 2-07 (b), the owners of sidewalk gratings are responsible for maintenance and repair of the gratings and the twelve inches surrounding the grating. According to photographs plaintiff marked at her deposition, plaintiff alleges she tripped within twelve inches of the subject grating. (Goldberg Affirmation, Ex. P.) ConEd has admitted to owing the subject grating and to having the duty of maintenance and repair of the grating and twelve inches surrounding the grating. (*Id.*, Ex. P, Q.) ConEd does not oppose plaintiff's motion. Therefore, plaintiff is granted summary judgment in her favor as to liability as against ConEd.

CONCLUSION

Accordingly it is hereby

ORDERED that the motion for summary judgment by defendant City of New York is granted and the complaint and all cross claims are dismissed in their entirety as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the cross motion by plaintiff for partial summary judgment as against defendant JES Delancey Orchard LLC is denied; and it is further

ORDERED that the motion for summary judgment by defendant JES Delancey Orchard LLC is granted and the complaint and all cross claims are dismissed in their entirety as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the motion for summary judgment by defendant New York City Transit Authority is granted to the extent that the complaint and all cross claims are dismissed in their entirety as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Metropolitan Transportation Authority is granted reverse summary judgment and the complaint and all cross claims are dismissed in their entirety as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the action is severed and continued as against the remaining defendants; and it is further

ORDERED that plaintiff's motion for partial summary judgment as to liability against defendants Consolidated Edison Company of New York, Inc. and

Consolidated Edison, Inc. is granted and the only triable issues of fact remaining relate to the amount of damages to which plaintiff is entitled; and it is further

ORDERED that an immediate trial of the aforesaid issues of fact shall be had before the court; and it is further

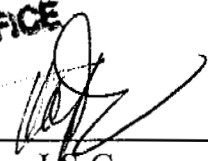
ORDERED that the plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that this action is respectfully referred the to Trial Support Office for transfer to a General Part, as the New York City Transit Authority is no longer a party to the action; and it is further

ORDERED that the Clerk is directed to enter judgment in defendants' favor accordingly.

Dated: December 12, 2012
New York, NY

FILED
DEC 17 2012
ENTER:
NEW YORK
COUNTY CLERKS OFFICE


J.S.C.

MICHAEL D. STALLMAN
J.S.C.