SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

ELAINE KLAU AND MARVIN L. KLAU,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 7/11/12

KEYSPAN GAS EAST CORPORATION d/b/a NATIONAL GRID d/b/a KEYSPAN ENERGY DELIVERY LONG ISLAND d/b/a KEYSPAN ENERGY DELIVERY NEW YORK f/k/a BROOKLYN UNION GAS COMPANY,

INDEX NO.: 16835/11

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Motion pursuant to CPLR 3212 by the plaintiffs Elaine Klau and Marvin L. Klau for partial summary judgment.

In August of 2009, the plaintiff Elaine Klau fell while walking on a public sidewalk abutting 325 Shore Road in Long Beach, New York, near the Lincoln Apartment complex, which is owned by non-party Belair Building, LLC ["Belair"]. As Klau proceeded along the sidewalk, she lost her balance and fell when her right foot struck an allegedly up-raised, lump or "blob" of concrete. The concrete blob was fused onto, and located directly on top of, a metal gas valve cap which had been installed into the concrete sidewalk slab. Notably, the defendants herein, Keyspan Gas East Corporation, d/b/a, National Grid, *et. al.*, [collectively "National Grid"], own and are responsible for maintaining the gas box valve on which Elaine Klau allegedly stumbled.

Thereafter, in September of 2009, Klau and her husband, Marvin L. Klau [the "plaintiffs"], commenced a personal injury action against Belair (Sommer Aff., Exh., "A"). By third-party complaint dated October, 2009, Belair then instituted a third-party action against National Grid asserting entitlement to contribution and/or indemnification

(*see, Klau v. Belair Bldg., LLC* [Nassau County Index No. 19456-09)(Sommer Aff., Exh., "E"). Among other things, the plaintiffs' prior complaint relied upon Long Beach City Charter § 256, which in substance, imposes liability upon adjoining landowners who fail to properly maintain and/or repair abutting sidewalks and other structures (Cmplt [in prior action],¶¶ 9-10)(*see generally*, *Hausser v. Giunta*, 88 NY2d 449, 451 [1996]).

Belair subsequently moved for summary judgment in the prior related action. In support of its motion, Belair primarily argued that City Charter § 256 section was inapplicable because the gas valve was not part of the sidewalk and therefore not governed by the City Charter provision. Additionally, Belair asserted that it did not own or maintain the gas valve, and that it had not affirmatively created the alleged defect. Notably, the available evidence before the Court when the motion was made, established, *inter alia*, that contractors retained by National Grid had performed repairs to the valve prior to the accident – which repairs entailed breaking apart and then reinstalling the sidewalk slab in which the gas valve was located.

Upon reviewing the foregoing evidence, this Court dismissed the plaintiffs' complaint, holding that: (1) the Belair was not duty-bound to maintain the utility-owned gas valve or clear it of defects within the meaning of Long Beach Charter § 256; and (2) alternatively, that upon the available evidence, Belair did not create the defect, but rather, that National Grid was responsible for creating it (*Klau v. Belair Bldg., LLC*, ___ Misc.3d.___, 2011 WL 5892814 [Supreme Court, Nassau County 2011]). National Grid, although a third-party defendant in the prior action, did not file papers in connection with Belair's motion for summary judgment.

Shortly after this Court dismissed the plaintiffs' prior action as against Belair, the plaintiffs commenced this personal injury action as against National Grid, alleging that National Grid was responsible for plaintiff Elaine Klau's injuries based upon its ownership and/or alleged negligent maintenance of the subject gas valve (Cmplt.,¶¶ 13-20 [Sommer Aff., Exh., "J"). National Grid has answered, denied the material allegations of the complaint and interposed several affirmative defenses (Sommer Aff., Exh., "K").

Upon the instance notice, the plaintiffs now move for summary judgment. In his supporting affirmation, counsel for the plaintiffs has advised that he is making what he himself has described as an "unusual" motion as against National Grid based solely on collateral estoppel grounds (Sommer Aff., ¶ 2). Specifically, the plaintiffs contend that this Court – in its prior order – necessarily and preclusively determined as a matter of law

that National Grid itself was solely responsible for creating the alleged gas valve defect. The plaintiffs' motion should be denied.

Pursuant to the "doctrine of collateral estoppel, a party is precluded "from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500 [1984] *see also, City of New York v. Welsbach Elec. Corp.*, 9 NY3d 124, 127-128 [2007]; *Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 432 [2000]; *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999]).

Nevertheless, "collateral estoppel is a flexible doctrine," which is "grounded in the facts and realities of a particular litigation (*Mavco Realty Corp. v. M. Slayton Real Estate, Inc.*, 77 AD3d 892, 893-894). Because, "at its core" collateral estoppel is an equitable doctrine "rooted in principles of fairness"' (*ABN AMRO Bank, N.V. v. MBIA Inc.*,17 NY3d 208, 226 [2011]), it is not to be rigidly or "mechanically applied simply because some of its formal prerequisites may be present" (*Mavco Realty Corp. v. M. Slayton Real Estate, Inc., supra,* 77 AD3d 892, 894 *see.*

Rather, and "[i]n the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results" (*Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, 153 [1998].

With these principles in mind, the Court agrees that the plaintiffs have failed to carry their burden on the motion with respect to the preclusive application of the collateral estoppel doctrine. In general, "[a]n abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty" (*Romano v Leger*, 72 AD3d 1059, 1059

A review of the prior record indicates that Belair's original dismissal motion in the related action was dependent on the theories that: (1) the subject City charter provision was inapplicable because the gas valve was not part of a defective sidewalk as contemplated by charter; and (2) that liability could not be independently and/or

alternatively predicated upon the affirmative creation exception to the abutting landowner rule (*e.g.*, Milch [June 14, 2011] Aff., ¶¶ 34-49).

With respect to the former dismissal basis, this Court held that the subject charter provision was inapplicable because, among other things, "there is no language in that provision which expressly states that a utility-owned, metal gas box valve constitutes part of a sidewalk for purposes of imposing liability on adjoining landowners" (*Klau v. Belair Bldg., LLC, supra*, 2011 WL 5892814). Significantly, the foregoing statutory construction argument did not require the Court to attribute negligence or fault to National Grid.

Moreover, while Belair's main submissions also advanced the alternative argument that it did not maintain or affirmatively create the alleged defect, the pertinent legal issue for the purposes of resolving this claim was not whether National Grid created the defect, but rather, whether Belair itself had any actionable involvement in its creation (*see, Williams v. Azeem*, 62 AD3d 988, 989 *see also, Long v. Town of Southold, supra,* 96 AD3d 808; *Holmes v Town of Oyster Bay,* 82 AD3d 1047, 1048). Specifically, to prevail on the foregoing theory, it was not necessary for Belair to establish, or for this Court to definitively decide, the identity of the party whose conduct was actually responsible for creating the concrete defect, so long as the evidence adduced demonstrated – as it did here – that Belair did not create it (*Long v. Town of Southold, supra,* 96 AD3d 808; *James v. County of Nassau, supra*, 85 AD3d 971; *Williams v. Azeem, supra*, 62 AD3d 988, 989).

Upon ultimately resolving the foregoing claim, this Court did refer to National Grid as the party responsible for creating the alleged defect. However, more aptly, the Court's determinative ruling was its holding that, in fact, Belair neither created nor maintained the alleged defect for the purposes of applying the abutting land owner exception (*e.g., Long v. Town of Southold, supra,* 96 AD3d 808; *James v. County of Nassau, supra*, 85 AD3d 971; *Williams v. Azeem, supra*).

Additionally, and apart from the above, the litigation "realities" support the inference that National Grid – as a third-party defendant – possessed a limited incentive to oppose Belair's pending motion, which, if granted, would have generated a favorable result from National Grid's perspective at the time, *i.e.*, a dismissal of both the main action and the indemnity/contribution-based third-party complaint.

In sum, based on, *inter alia*, an equity-based, "practical inquiry into the realities" of the litigation (*Jeffreys v Griffin, supra*, 1 NY3d 34, 42-43), the Court agrees that the plaintiffs' motion for summary judgment should be denied.

The Court has considered the plaintiffs' remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR 3212 by the plaintiffs Elaine Klau and Marvin L. Klau for partial summary judgment is **denied.**

This constitutes the Order of the Court.

Dated: October 31, 2012

J.S.C.