5

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

----------X

GINA FONTANA,

Plaintiff,

Index No. 116378/2010

- against -

DUELL LLC, 453 LLC, VERIZON NEW YORK INC., VERIZON COMMUNICATIONS INC., CONSOLIDATED EDISON COMPANY OF NEW YORK INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSPORTATION OPERATING AUTHORITY, and METROPOLITAN TRANSPORTATION AUTHORITY,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on June 7, 2010, she tripped and fell on the sidewalk immediately adjacent to a grate, abutting property located at 461 Sixth Avenue in Manhattan.

Several parties now move for summary judgment dismissing the complaint and any cross claims: the City of New York (Motion Seq. No. 002); the New York City Transit Authority, Manhattan and Bronx Surface Transportation Authority and Metropolitan Transportation Authority (collectively, the Authorities) (Motion Seq. No. 003); Duell LLC and 453 LLC, the alleged abutting property owners (Motion Seq. No. 004); and Verizon New York Inc., Verizon Communications Inc., and

Empire City Subway Company (Limited) (collectively, the Verizon Defendants) (Motion Seq. No. 005). This decision addresses all four motions for summary judgment.

BACKGROUND

The notice of claim addressed to the City and to the Authorities states, in pertinent part:

> "On June 7, 2010, at approximately 7:00/7:30 p.m. while claimant, GINA FONTANA was a lawful pedestrian walking upon, at or near the sidewalk abutting 461 6th Avenue, New York, New York, at or near the subway grating/utility or conduit grating thereat, she was caused to trip and fall due to dangerous and defective conditions thereat (including but not limited to a cracked, pitted, uneven, and unlevel sidewalk surrounding the subject subway/utility grating)."

(di Guida Affirm., Ex A.) Attached to the notice of claim were photographs that allegedly depicted the location of her accident. (*See id.*)

At her 50-h hearing, plaintiff testified that she was walking south on the west side of Sixth Avenue (Lee Affirm., Ex J [Tr.] at 20, 23), when "my foot got caught in a ditch, crack, I don't know" (*id.* at 31), causing plaintiff to fall forward. According to plaintiff, "I tried to stop the fall and my foot got caught in the second ditch, and I fell, bang, with all my weight on my hands and knees." (*Id.* at 33.) At her 50-h hearing, plaintiff was asked to "circle the first crack" depicted in a photograph marked as Exhibit F, and to put a number one and her initials next to it. (*Id.* at 36.)

Plaintiff was also similarly asked to "circle the second crack" depicted on Exhibit F, and to put a number two and her initials next to it. (*Id.* at 37.)

In a verified reply to plaintiff's notice to admit, defendant Consolidated Edison Company of New York, Inc. (Con Edison) admitted that "Con Edison owns a grating in the sidewalk in front of 461 6th Avenue in Manhattan." (Lee Aff., Ex B.)

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers ."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].) "The moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case." (Ferluckaj v Goldman Sachs & Co., 12 NY3d 316, 320 [2009].)

The City, the Authorities, Duell LLC and 453 LLC (the alleged abutting property owners), and the Verizon Defendants argue that Con Edison, the admitted

owner of the grate, was responsible for maintaining the grate and the area around the grate pursuant to 34 RCNY § 2-07 (b). Additionally, the City and the Verizon Defendants assert that they did not perform any work on the sidewalk at any time prior to plaintiff's alleged accident.

34 RCNY § 2-07 (b) states, in pertinent part:

> "(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. (2) The 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."

Moreover, Section 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].)

Here, Con Edison admitted ownership of the grate in response to plaintiff's notice to admit. (Lee Aff., Ex B.) A copy of the photograph marked as Exhibit F at plaintiff's 50-h hearing appears to indicate that the areas that plaintiff circled and initialed are next to the grate. (Baumrin Affirm., Ex G.) Plaintiff does not dispute that the areas that plaintiff circled are within twelve inches of the grate. As the admitted 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 (34 RCNY 2–07[b][1],[2]), which included the alleged sidewalk defect that caused plaintiff's fall. Accordingly, only Con Edison, and not [defendants], may be liable for plaintiff's injuries." (*Lewis v City of New York*, 89 AD3d 410, 411 [1st Dept 2011].)

The Court rejects plaintiff's argument that the motions for summary judgment should be denied as premature. Con Edison admitted ownership of the grate at issue, and plaintiff does not dispute that the alleged defects are within the twelve inches of Con Edison's grate. Any evidence that plaintiff hopes to uncover in discovery would not bear on either ownership of the grate or the location of the alleged defects. Plaintiff's hope that discovery will uncover evidence needed to defeat summary judgment is therefore insufficient. (*Smartix Intl. Corp. v MasterCard Intl. LLC*, 90 AD3d 469 [1st Dept 2011].)

Thus, the motions for summary judgment by the City, the Authorities, Duell LLC and 453 LLC, and the Verizon Defendants are granted, and the complaint is severed and dismissed as against them. Dismissal of the complaint as against them necessarily results in dismissal of the cross claims for common-law indemnification and contribution asserted by and against the City, the Authorities, Duell LLC and 453 LLC, and the Verizon Defendants.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motions for summary judgment by the City of New York (Motion Seq. No. 002), by the New York City Transit Authority, Manhattan and Bronx Surface Transportation Authority and Metropolitan Transportation Authority (Motion Seq. No. 003), by Duell LLC and 453 LLC (Motion Seq. No. 004), and by Verizon New York Inc., Verizon Communications Inc., and Empire City Subway Company (Limited) (Motion Seq. No. 005) are granted; and it is further

ORDERED that the complaint is severed and dismissed as against defendants City of New York, New York City Transit Authority, Manhattan and Bronx Surface Transportation Authority, Metropolitan Transportation Authority, Duell LLC and 453 LLC, Verizon New York Inc., Verizon Communications Inc., and Empire City Subway Company (Limited), with costs and disbursements to said defendants as taxed by the Clerk of the Court, and all cross claims by and against these defendants are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

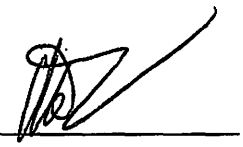
ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the action is referred to the Trial Support Office reassignment

to a general IAS Part.

Dated: July 5, 2013
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN