

O'Gormley v City of New York

2014 NY Slip Op 31662(U)

June 27, 2014

Sup Ct, New York County

Docket Number: 101930-2009

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. MARGARET A. CHAN

PRESENT: _____
Justice

PART 52

Index Number : 101930/2009
O'GORMLEY, DAVID
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion to/for summary judgment.
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 10
Answering Affidavits — Exhibits cross motion _____ | No(s). 2, 3, 4
Replying Affidavits _____ | No(s). 5, 6, 7

Upon the foregoing papers, it is ordered that this motion ~~is~~

**motion and cross-motion are decided in accordance
with accompanying memorandum decision.**

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

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/27/14

 _____, J.S.C.

HON. MARGARET A. CHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS 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 — NEW YORK COUNTY

PRESENT: Hon. Margaret A. Chan
Justice

PART 52

INDEX 101930-2009

DAVID O’GORMLEY,
Plaintiff,

- vs. -

CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., VERIZON
COMMUNICATIONS, INC., VERIZON NEW
YORK, INC., AND EMPIRE CITY SUBWAY
COMPANY, LTD.,
Defendants.

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

There are two motion sequences before the court. Motion sequence #004 is Verizon Communication, Inc., Verizon New York, Inc., and Empire City Subway, Ltd.’s (collectively, the Verizon defendants) joint motion for summary judgment and the City of New York’s (the City) cross-motion seeking same. Motion sequence #005 is Consolidated Edison Company of New York, Inc.’s (Con Ed) motion for summary judgment.

At the outset, it should be noted that plaintiff argued that the instant motions were made beyond the time frame ordered by this court in the case scheduling order. The case scheduling order sets forth that summary judgment motions shall “be filed no later than 60 days after the filing of the note of issue” (Pltf Opp, Exh A). The case scheduling order was generated by this court on August 21, 2009. At that time the City and Con Ed were the only defendants in this action. In 2010, this court consolidated this matter with another action plaintiff brought against the Verizon defendants. There was no case scheduling order generated in the separate action brought against the Verizon defendants. The Verizon defendants brought their motion within 120 days of the filing of the note of issue pursuant to Local Rule 17 (*see* http://www.nycourts.gov/courts/ljd/suptctmanh/Uniform_Rules.pdf) and CPLR 3212(a). As the Verizon defendants motion was timely made it is considered below. The City’s cross-motion was made well beyond the 60 day time frame provided in the case scheduling order as was Con Ed’s motion.

The decision on both motion sequences is as follows:

Motion sequence #004

Plaintiff gave testimony that he slipped, tripped and fell on a manhole cover on February 12, 2008, that was located in the intersection of 8th Avenue and 21st Street in the City and State of New York. At the time of plaintiff’s fall there was snow and ice on the ground. At his GML § 50-h hearing plaintiff stated “I slid, my right foot got caught underneath the lip that was submerged, and then my left foot went up, and I rested my left arm back to brace myself” (City’s Cross-Mot, Exh E, p 9). Plaintiff stated that the manhole cover was totally submerged either in snow (*see id*) or sleet

* 3]

(Pltf Aff in Opp, Ex A, p 19). Photographs of the manhole cover indicate it was totally smooth, without identifying markings or treads (Verizon defts' Mot, Exh E¹). Plaintiff alleged that the manhole cover was depressed and slippery causing him to fall.

Defendant Empire City Subway, Ltd. (ECS) conceded that it owned the manhole cover identified by plaintiff as the cause of the accident (Verizon defts' reply, p 11, para 30²) and deposition testimony of one of its employees indicated as much (Verizon defts' Mot, Exh H, p 42). However, it argued that the manhole cover was not defective and even if it were defective, it had no notice of a defective condition. Further, ECS claimed that the City should indemnify it because evidence showed that the City performed work on the subject manhole cover approximately two years prior to the accident in March 2006.

The City cross-moved for summary judgment and argued that its work in March 2006 was limited to milling, paving, and pothole repair on 8th Avenue between 14th and 26th Streets. The City stated affirmatively that the project did not involve any repair to manholes in the roadway (City's Cross-Mot, p 16, para 38). The City additionally pointed to 34 RCNY § 2-07 to argue that ECS, as the owner of the manhole cover, is responsible for any incident involving its street hardware and the 12 inch area surrounding its hardware.

A movant seeking summary judgment 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." (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opponents to demonstrate the existence of a triable issue of fact. (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The proof raised by opponents must be sufficient to permit a finding of negligence and causation based not upon speculation, but upon a logical inference to be drawn from the evidence. (see *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], citing *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743, 744 [1986]).

It should be noted that days after the accident plaintiff made a complaint to the New York Police Department (NYPD). Thereafter, an officer made an investigation of the intersection with out plaintiff present. The officer's unauthenticated reports submitted with this motion stated that the manhole where plaintiff fell was in the middle of a crosswalk and that the manhole cover is marked "DWS". (Verizon defts' Mot, Ex M). These reports are not admissible or sufficient to create a triable issue of fact. Plaintiff's deposition testimony indicated that he did not escort the NYPD to the accident scene when an officer made an investigation (Verizon defts' Mot, Ex D, pp 66-67) nor did he fall in the middle of a crosswalk, but rather outside of the crosswalk in the intersection. Plaintiff maintained that he fell on an unmarked manhole cover which he identified in photographs

¹ Plaintiff identified what was shown on the second page of the exhibit (marked as defendant's Exhibit D) as the subject manhole cover.

² This concession appears on the 11th page of the Verizon defendants' reply papers. It is frustrating to the court that the issue of ownership is debated throughout the motion and cross-motion, and then only in the reply papers was this concession made. Indeed, the Verizon defendants' opposition papers to the City's cross-motion argued that some evidence exists that plaintiff may have fallen on a City sewer manhole cover (see Verizon defts' Opp, para 14). There is no issue that plaintiff has identified unequivocally that he fell on an unmarked manhole cover. That manhole cover was owned by ECS.

provided to him during his depositions. Based on the total submissions of the parties and ECS' concession that it owned the subject manhole cover that was in the intersection, this court is constrained to determine that ECS owned the subject manhole cover and plaintiff did not fall on the manhole independently identified by the NYPD.

As to the motion for summary judgment made by defendants Verizon Communication, Inc. and Verizon New York, Inc. they each submitted proof in admissible form that neither owned nor operated the subject manhole or manhole cover. The City argued that the affidavits were conclusory and made without personal knowledge about the subject manhole. In light of defendant ECS' concession of ownership there are no remaining triable issues regarding defendants Verizon Communication, Inc. and Verizon New York, Inc. involvement in this action. Therefore, those defendants are awarded summary judgment.

As to the motion for summary judgment made by ECS, it is denied. ECS failed to tender any evidence that the manhole cover itself was not defective. In viewing the evidence in the light most favorable to plaintiff, issues of fact exist where a jury could infer the condition of the manhole cover exacerbated the existing hazardous icy conditions (*see Jenkins v Related Companies, L.P.*, 114 AD3d 435 [1st Dept 2014]; *Figueroa v Lazarus Burman Associates*, 269 AD2d 215 [1st Dept 2000]).

Regarding notice, plaintiff argued that 34 RCNY § 2-07 imposed a duty on ECS to monitor the condition of its manhole cover. In pertinent part, 34 RCNY § 2-07 states “[t]he 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.” (34 RCNY 2-07[b][1]). ECS countered that any defective condition of the manhole and manhole cover was created by the work of the City. Triable issues remain on this point and thus, summary judgment in favor of ECS is denied.

As to the City's cross-motion, it argued that its late cross-motion should be considered in any event because the relief sought by the City was nearly identical to that sought by the Verizon defendants. As the motion was untimely and no good cause was proffered by the City, only issues raised that are shared with the original motion will be decided on the merits (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]; *Filannino v Triborough Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]). Thus, the City's first point concerning lack of prior written notice pursuant to the Administrative Code § 7-201(c)(2) of the alleged height differential between the sunken manhole cover and the outer ring of the subject manhole cannot be considered on the merits as it was not raised in the Verizon defendants' original motion.

The City also argued that it is entitled to summary judgment because it did not cause or create the height differential of the manhole cover and its outer ring – an issue that was raised in the initial motion. Regarding the work performed by the City, the parties submitted the deposition testimony of Michael Resdagno, a supervisor employed by the City's Department of Transportation (Verizon depts' Mot, Exh F). Mr. Resdagno testified that when the City performs milling work, as it did in March 2006 at the subject location, adapter rings may be placed on the existing hardware in the roadway. Mr. Resdagno explained that when the City mills the roadways, rings are placed around manhole castings, temporary asphalt is placed around the rings, and paving is done by the City to be flush with the top of the rings (*id* at pp 21-22). He stated manhole covers over time may wear out and then sit below the ring (*id* at 26). In regards to the milling work at the subject location, Mr. Resdagno testified that several rings were placed in the roadway on 8th Avenue between 19th and 22nd

Street, but he could not be more specific as to which manholes received the new rings (*id* at 25-27). When asked if he has ever raised manhole covers when they are depressed, Mr. Resdagno responded that he only has access to City sewer manhole covers, because sometimes the City will issue him replacement covers to use during milling (*id* at 25-27). Later during his deposition, Mr. Resdagno confirmed that sometimes after the City performs milling work he would notice sunken manhole covers that had to be raised (*id* at 45). His testimony did not completely resolve the triable issues presented here, and therefore, summary judgment in favor of the City is denied.

Motion sequence #005

Defendant Con Ed also moved for summary judgment and claimed that it did not own the subject manhole cover. Plaintiff argued that the motion was late, which it was. However, this court has searched the record and finds there are no cognizable claims remaining against Con Ed since ECS owns the subject manhole cover. Therefore, all claims and any cross-claims against Con Ed are dismissed (*see* CPLR 3212(b)).

Accordingly, it is hereby

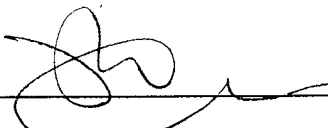
ORDERED, the Verizon defendants' motion is granted to the extent that summary judgment is awarded in favor of Verizon Communication, Inc. and Verizon New York, Inc. Summary judgment is denied as against defendant Empire City Subway, Ltd., it is further,

ORDERED, the City of New York's cross-motion for summary judgment is denied, it is further

ORDERED, the complaint and any cross-claims as against defendants Verizon Communication, Inc., Verizon New York, Inc., and Consolidated Edison Company of New York are dismissed. The clerk of court is directed to enter judgment as such.

This constitutes the decision and order of the court.

Dated: June 27, 2014


Margaret A. Chan, J.S.C.

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK