

**Neishlos v Rolex Watch U.S.A., Inc.**

2014 NY Slip Op 31913(U)

July 7, 2014

Supreme Court, New York County

Docket Number: 106694/2011

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

FILED ON 7/24/2014

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

**PRESENT:** Hon Jacob A. Mikh  
*Justice*

**PART** 11

Index Number : 106694/2011  
NEISHLOS, ARYE  
vs.  
ROLEX WATCH  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the*  
*attached Memorandum Decision + Order.*

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

**FILED**

JUL 24 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: July 7, 2014

\_\_\_\_\_, J.S.C.

- 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  
COUNTY OF NEW YORK: IAS PART 11

-----X

ARYE NEISHLOS,

Index No. 111631/05

Plaintiff,

- against -

ROLEX WATCH U.S.A., INC.

Defendant.

-----X

ROLEX WATCH U.S.A., INC.

Index No. 590100/12

Defendant,

- against -

CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.

Third-party Defendant.

-----X

ARYE NEISHLOS,

Index No. 590905/11

Plaintiff,

- against -

CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.

Third-party Defendant.

-----X

JOAN A. MADDEN, J.:

In this personal injury action, defendant Rolex Watch U.S.A., Inc. ("Rolex") moves for summary judgment dismissing the complaint of plaintiff Arye Neishlos, and the counterclaim of third-party defendant Consolidated Edison Company of New York, Inc. ("Con Ed"). Plaintiff and Con Ed each oppose the motion, which is granted.

**FILED**

JUL 24 2014

**COUNTY CLERK'S OFFICE  
NEW YORK**

[\* 3]

## Background

Plaintiff sues for damages arising out of personal injuries he allegedly sustained on December 22, 2010, when he tripped and fell on uneven or misaligned pavement in front of Rolex's place of business at 665 Fifth Avenue, New York, NY ("Building"), and adjacent to a Con Ed transformer grate. Rolex Realty Company, LLC ("Rolex LLC") owns the Building which is known as the "Rolex Building." Rolex is a tenant leasing commercial space in the Building's three upper floors.

Plaintiff testified that on the date of the accident, he exited the E Train subway station on the corner of Fifth Avenue and 53rd Street in front of the Building, and started to walk east towards his lawyer's office (Plaintiff Dep., at 9-11). He took "a couple of steps" after he reached the sidewalk level, and tripped on an uneven surface when his right foot came down on one concrete slab that was elevated above another. Id. at 11-12.

The sidewalk area where the fall occurred consists of three large concrete slabs. Plaintiff testified that a photograph marked during his deposition provides an accurate representation of the sidewalk location where he fell, but testified that the picture shows a much flatter, smoother concrete surface than the one present on the day he was injured (Id. at 15). Specifically, plaintiff testified that, on the day of the accident, the concrete slab designated as "2" in the same photograph was elevated above the concrete slabs designated as "1" and "3," and is what caused the unevenness where he fell. Id. at 16. Plaintiff also testified that there was a metal grate in slab 1, but that he did not observe the condition of the sidewalk around the grate on the day of the accident. Id. at 17-18.

Michael Delcioppo, ("Delcioppo"), is the Property Manager of Rolex and is part of a

team in charge of safety for the three floors of the Building in which Rolex leases commercial space (Delcioppo Dep., at 9 – 10), and Rolex LLC owns the Building. Id. 24. He denied that he or anyone else on his team was responsible for inspecting the condition of the sidewalk, although he acknowledged that he inspected the sidewalk periodically, and that he inspected the sidewalk about a week before plaintiff fell, but that he did not accept responsibility for the sidewalk when he inspected it. Id. at 10. According to Delcioppo, sometime prior to the accident, Con Ed performed construction work on the sidewalk area where plaintiff fell, which included chopping all the concrete surrounding the metal grate. Id. at 11-12. He testified that the concrete around the grate was in perfect condition prior to Con Ed starting construction and, specifically, that “there were no faults in the sidewalk whatsoever.” Id. at 12. After work commenced, Delcioppo asked a “super or the foreman” of Con Ed’s construction team how long the “mess” was going to be in front of his building. Id. at 13. He also requested that “they kept it clean and neat so people can get in and out of the building without a tripping hazard.” Id. To the best of his recollection, the whole construction process went on for about four or five months, between October 2010 and February 2011. Id. at 17-18.

Delcioppo testified that in approximately 2007 or 2008, Rolex LLC restored the sidewalk from the curb line to the building line where the entrance to the Building is located and that the restoration resulted in a sidewalk shade that was darker than the unrestored portion around it. Id. at 31-32. According to Delcioppo the concrete is a lighter shade in the area where Con Ed worked during the construction project which started in 2010, and that the darker part is that area that Rolex LLC restored in 2007 or 2008. Id. at 32.

Orlando Nazario (“Nazario”), testified that he has been an Operating Supervisor

employed by Con Ed since 2004 (Nazario Dep., at 8). He stated that Con Ed began construction to remove a transformer from a transformer vault, essentially an underground “room that holds the transformer, in early October 2010” Id. at 13-14. The vault was only accessible through a grate on the sidewalk outside the E Train 5th Ave. and 53rd Street entrance where Plaintiff fell. Id. A Con Ed daily crew activity report from October 1, 2010, records a crew of Con Ed workers “break[ing] out [the] beam and grating” of the transformer vault. Nazario explained this process saying, “[y]ou’re breaking out the sidewalk around the grating, and depending on the configuration, a little bit of the sidewalk.” Id. at 15. The next daily crew activity report is dated October 4, and shows a “backfill slab” procedure was performed once the transformer was put back into the vault, whereby the workers went back and filled it with “dirt, the roof, and blacktop.” Id. at 17. The last activity report provided is dated October 5 and denotes “vault repairs” were performed and that the workers “made repairs to grating.” Id.

Nazario testified that after a vault is backfilled an open ticket is made out by the Construction Management department of Con Ed to hire an outside contractor to pave over the sidewalk area with cement (Id. ), and the record includes an “opening ticket” dated October 26, 2010. Con Ed has not provided any records from November 2010 or December 2010 and Nazario testified that he does not have recollection of any work being done at that location beyond the records provided. Id. at 28.

Rolex moves for summary judgment dismissing the complaint and Con Ed’s counterclaim asserted against it in the third party action, arguing that it had no obligation or duty with respect to the sidewalk where plaintiff fell since it does not own the Building, but rather is a lessee of its three upper floors, and there is no evidence it caused or created the condition or

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benefited from a special use of the sidewalk. In support of its motion, Rolex points to Delcioppo's deposition testimony, and also submits Delcioppo's affidavit. In his affidavit, Delcioppo states that the Building is owned by Rolex LLC, a separate and distinct Delaware limited liability company from Rolex. (Delcioppo Affidavit dated July 2013, ¶ 2). As such, he states that Rolex has no obligations, responsibilities, or duties with respect to the sidewalk in front of 665 Fifth Avenue, or any sidewalk adjacent to that address since Rolex is a tenant in the Building and has no ownership interest in it. *Id.* at ¶ 1-3. He also states that "the area being worked by Con Edison involving the grate was within Con Edison's exclusive control." *Id.* at ¶ 8.

Plaintiff opposes the motion, arguing that, as the occupier and lessee of the property, Rolex has a duty to plaintiff since its employee testified that he knew about the defective sidewalk.

Con Ed opposes the motion, asserting that installation of a custom sidewalk in front of the Building gives rise to an obligation on the part of the owner and Rolex, as tenant, to maintain the sidewalk in a reasonably safe condition.

#### Discussion

On a motion for summary judgment, the proponent "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..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

It is well established that an owner or occupier of property which abuts a defective public sidewalk does not owe a duty to the public to keep the sidewalk in reasonably good repair, unless the owner or occupier creates the defective condition, uses the sidewalk for a special use or purpose, or a statute or ordinance places an obligation to maintain the sidewalk on the owner or occupier. Acosta v. City of New York, 24 AD3d 291, 292 (1st Dep't 2005); Montalvo v. Western Estates, Ltd., 240 AD2d 45, 47 (1st Dep't 1998). Thus, evidence that an occupier had notice of a sidewalk defect does not give rise to a duty to repair the defect.<sup>1</sup> Lowenthal v. Theodore H. Heidrich Realty Corp., 304 AD2d 725, 726 (2d Dept 2003).

Section 7-210, entitled “[l]iability of real property owner for failure to maintain sidewalk in a reasonably safe condition,” imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk. Collado v. Cruz, 81 AD3d 542 (1st Dep't 2011). Administrative Code § 19-101(d) defines a sidewalk as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians,” and the First Department has held that “in the absence of a definition in section 7-210, the definition of sidewalk in section 19-101(d) should govern.” James v. Westchester Ave., LLC, 105 AD3d 1, 2 (1st Dep't 2013). While there is no dispute that, here, that plaintiff fell on a sidewalk for the purposes of Section 7-210, Rolex has made a prima facie showing that it did not own the Building and the opposing party submits no evidence contrary to this showing. Accordingly, Rolex is not subject to liability as an owner under section 7-210.

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<sup>1</sup>The cases relied on by plaintiff holding that a landowner or occupier can be held liable where it had notice of a defect are not to the contrary as they involve circumstances in which the defect was part of the demised premises rather than a sidewalk. See e.g., Smith v. Costco Wholesale Corp., 50 AD3d 499 (1<sup>st</sup> Dept 2008)(trip and fall in bathroom in defendant's store).

Thus, the remaining issues are whether there is sufficient evidence to raise a triable issue of fact as to whether Rolex caused or created the condition on which plaintiff fell, or enjoyed a special use of the sidewalk. Here, Rolex has submitted evidence that it did not cause or create the condition, and the opposing parties have not controverted this showing. In connection, evidence submitted by Con Ed to support its position that it hired an independent contractor to pave that area after construction ended, does not raise a triable issue of fact with respect to Rolex's liability.

Next, it cannot be said that Rolex is liable based on its special use of the sidewalk. "The principle of special use...imposes an obligation on the abutting landowner [or occupier], where he puts part of a public way to a special use for his own benefit, and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others." See Balsam v. Delma Engineering Corp., 139 AD2d 292, 298, appeal dismissed in part, denied in part, 73 NY2d 783 (1988) (citation omitted); see, also, Kaufman v. Silver, 90 NY2d 204, 207 (1997) ("Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit.")

Here, while there is evidence that Rolex LLC installed a custom sidewalk in front of the Building, such installation does not provide a basis for imposing liability on Rolex since, as indicated above, Rolex and Rolex LLC are separate and distinct entities. In any event, the record shows that plaintiff fell on the sidewalk area that was paved over after Con Ed performed its work as opposed to the area that was installed by Rolex LLC.

In view of the above, it is

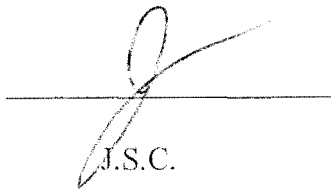
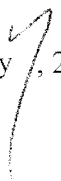
ORDERED the motion for summary judgment by defendant Rolex Watch USA is granted, and the complaint as well as the counterclaim asserted against Rolex Watch USA by Con Edison Company of New York in the third party action are dismissed; and it is further

ORDERED that as there are no remaining claims against Rolex Watch USA, its third party action against Con Edison Company of New York is dismissed as moot; and it is further

ORDERED that plaintiff's claims against Consolidated Edison Company of New York, Inc, shall continue; and it is further

ORDERED that the remaining parties shall proceed to mediation.

Dated July 7, 2014



J.S.C.

**FILED**

JUL 24 2014

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