

**Marguerite v 27 Park Ave. LLC.**

2015 NY Slip Op 31408(U)

June 25, 2015

Supreme Court, New York County

Docket Number: 158628/2012

Judge: Carol R. Edmead

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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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

ROBINSON, MARGUERITE

INDEX NO. 158628/2012

-v-

MOTION DATE 6/11/2015

27 PARK AVENUE LLC.

003

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

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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant/third-party plaintiff 277 Park Avenue LLC to

(1) dismiss the complaint of the plaintiff Marguerite Robinson and all cross-claims asserted against it, or in the alternative, (2) for summary judgment against third-party defendant Metro-North Commuter Railroad Company, is granted solely to the extent the plaintiff's complaint is severed and dismissed against 277 Park Avenue LLC; and it is further

ORDERED that said defendant/third-party plaintiff 277 Park Avenue LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/25/15

HON. CAROL EDMEAD, 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: PART 35

-----x  
MARGUERITE ROBINSON,

Plaintiff,

Index No. 158628/2012  
Motion Seq. 003

-against-

277 PARK AVENUE LLC,

Defendant.

-----x  
277 PARK AVENUE LLC,

Third- Party Plaintiff,

-against-

METRO-NORTH COMMUTER RAILROAD COMPANY,

Third-Party Defendant.

-----x  
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action arising from an alleged trip and fall accident, defendant/third-party plaintiff 277 Park Avenue LLC (“277”) moves to (1) dismiss the complaint of the plaintiff Marguerite Robinson (“plaintiff”) and all cross-claims asserted against it, or in the alternative, (2) for summary judgment against third-party defendant Metro-North Commuter Railroad Company (“Metro North”).

*Factual Background*

Plaintiff allegedly tripped and fell on July 5, 2012 on a sidewalk adjacent to a building owned by 277.

According to 277, the evidence demonstrates that plaintiff fell due the “broken sidewalk pieces” that she stepped on immediately before her fall. Plaintiff stated that there was metal strip

running the complete width of the sidewalk, and at her deposition, circled the area of the cracked cement on the sidewalk; the cemented area adjacent to the metal strip ran alongside the metal strip. 277's property manager testified that Metro North was responsible for the metal strip and the cement sections on both sides thereof, and that the yellow markings on the sidewalk beside the metal strip were made in 2014. Metro North's supervisor testified that the metal strip was a "cover plate for expansion joint," (EBT, p. 8) and that the yellow markings "signified that something is wrong over there" (EBT, p. 9); "the painting" shows "some cracks in the cement." (EBT, p. 10); and, Metro-North was responsible for repairing such area (EBT, p. 12). 34 RCNY 2-07(b) places responsibility of the sidewalk hardware and area extending 12 inches from the perimeter of the hardware on the owner of the sidewalk hardware. Since the expansion joint was placed in the sidewalk by Metro North for its sole use and benefit, and Metro North was responsible for the maintenance and repair of the expansion joint and the concrete area either side thereof, Metro North is solely liable for plaintiff's injuries, and 277 owed no duty to plaintiff or breached any duty to plaintiff. Consequently, 277 is also entitled to summary judgment against Metro North for contribution and common law indemnification, as there is no evidence that 277 was negligent.

Metro North opposes summary judgment against it, arguing that plaintiff's bill of particulars, supplemental bill of particulars, deposition testimony of the parties, and photographs marked at her deposition create an uncertainty as to the location of her fall. Further, it is undisputed that 277 undertook the responsibility to inspect the location of plaintiff's fall and to notify Metro North of any issues, and there is no evidence that it notified Metro North of the alleged defect for which it received a notice violation. There is no evidence that Metro North

had constructive notice of the condition to give it sufficient time to remedy the condition.

Therefore, and questions as to whether 277 conducted reasonable inspections of the sidewalk, and whether 277 took appropriate steps to secure the area and warn pedestrians of the defective condition, must be resolved at trial. Nor is there evidence that Metro North created the condition.

Plaintiff opposes dismissal, arguing that its expert report reflects that the cracks in the sidewalk constituted a tripping hazard that violated NYC Administrative Code §19-152. Further, 277 failed to warn pedestrians of the tripping hazard of which it had notice by virtue of a notice of violation issued to 277 on July 27, 2007. Thus, an issue of fact exists as to 277's negligence.

In reply, 277 argues that plaintiff's expert report contains several factual errors, thereby rendering it inadmissible. For example, there is no west side of East 48<sup>th</sup> Street as plaintiff's counsel and her expert asserts. And, the diagram plaintiff's expert drew mistakenly shows that East 48<sup>th</sup> Street runs North and South, when it in fact runs East and West. And, the violation the expert provided requires replacement of part of a sidewalk on Lexington Avenue, and does not cover the location where plaintiff fell, and was not addressed to 277. The photograph plaintiff's counsel provides to show post-accident repairs was not attached to the opposition papers received by 277, and was not identified by plaintiff at her deposition, and thus, has no probative value.

277 also states that plaintiff's testimony is clear as to the location of her fall. 277's property manager stated that 277 made informal inspections but not of the expansion joints, which are the responsibility of Metro North. Further, according to 277's supplemental response and 277 contacted Metro North twice on June 28, 2012, prior to plaintiff's accident, about repairs

needed to the expansion joints on 48<sup>th</sup> Street, and Metro North advised that it would inspect the joints. Thus, Metro North received actual notice of the problem with the expansion joints.

In a sur-reply, Metro North argues that 277's supplemental response indicates that, contrary to its assertion in reply, 277 did not have notice of the alleged defective condition. The alleged hand-written note of notice given to Metro North was not mentioned during discovery, and the evidence indicates that 277 hired a contractor to do repairs to the sidewalk at the accident site prior to the date of the accident.

#### *Discussion*

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1<sup>st</sup> Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012] citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212

[b]; *Farias v Simon*, 122 AD3d 466 [1<sup>st</sup> Dept 2014]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” for this purpose” (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980)).

The opponent “must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v. Genger*, --- N.Y.S.2d ----, 2014 WL 6803487 [1<sup>st</sup> Dept 2014] citing *Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 [1st Dept 1993]). In other words, the “issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1<sup>st</sup> Dept 1984]; see also, *Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1<sup>st</sup> Dept 2012]).

34 RCNY § 2–07(b) states, “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.” (*Perry v. Rey Sun Realty, LLC*, 42 Misc.3d 1209(A), 984 N.Y.S.2d 634 (Table) [Supreme Court, New York County 2014]).

Here, plaintiff’s deposition testimony establishes the location of her accident and authenticates the photographs depicting the accident location. Plaintiff does not dispute that 34 RCNY 2-07 applies because the condition that caused plaintiff’s fall was located within one foot of the metal cover. Plaintiff’s marked the location of her fall at her deposition, and the photographs depict the cracked concrete located alongside the metal strip which was installed by

Metro North. Metro North's conclusory assertion of purported disputed issues of fact as to the location of plaintiff's fall is insufficient to overcome 277's showing that plaintiff tripped on 48<sup>th</sup> Street, in front of 277's building located at 277 Park Avenue. Metro North does not point to any specific inconsistencies among the pleadings and depositions that raise an issue of fact as to the location of plaintiff's accident.

Plaintiff's expert report and opposition papers fail to raise an issue of fact as to 277's liability.

Further, Metro North fails to raise an issue of fact as to its obligation to maintain and repair of the metal strip/expansion joint cover running across the width of the sidewalk, and cemented area within 12 inches of the perimeter of the cover, which allegedly caused plaintiff's fall (*Lewis v City of New York*, 89 A.D.3d 410, 931 N.Y.S.2d 855 [2011] ("As 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 (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-appellants, may be liable for plaintiff's injuries"))).

Metro North failed to explain the manner in which the proposal to repair the sidewalk area dated May 16, 2012, two months prior to plaintiff's accident (and issued to 277) rendered 277 caused or created the condition which caused plaintiff's fall, or supplanted Metro North's duty to maintain the area which caused plaintiff's fall.

Further, that there is insufficient evidence demonstrating that 277 notified Metro North of the alleged defect or that Metro North had constructive notice of the condition, does not defeat 277's entitlement to dismissal of plaintiff's complaint as asserted against it.

Since 277's motion as against Metro North is asserted as alternative relief, and 277 prevailed on its motion to dismiss the complaint, the Court does not reach the issue of whether 277 is entitled to summary judgment against Metro North on its contribution and common law indemnification claims.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by defendant/third-party plaintiff 277 Park Avenue LLC to (1) dismiss the complaint of the plaintiff Marguerite Robinson and all cross-claims asserted against it, or in the alternative, (2) for summary judgment against third-party defendant Metro-North Commuter Railroad Company is granted solely to the extent the plaintiff's complaint is severed and dismissed against 277 Park Avenue LLC; and it is further

ORDERED that said defendant/third-party plaintiff 277 Park Avenue LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

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Dated: June 25, 2015



Hon. Carol Robinson Edmead, J.S.C.  
**HON. CAROL EUMEAD**