

Kaplan v 720 Lex Acquisition, LLC
2015 NY Slip Op 32058(U)
March 27, 2015
Supreme Court, New York County
Docket Number: 102083/2011
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA
3/31/15
E

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 102083/2011
KAPLAN, DENA
vs.
720 LEX ACQUISITION
SEQUENCE NUMBER : 002
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
ACCOMPANYING DECISION / ORDER**

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

RECEIVED
MAR 31 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

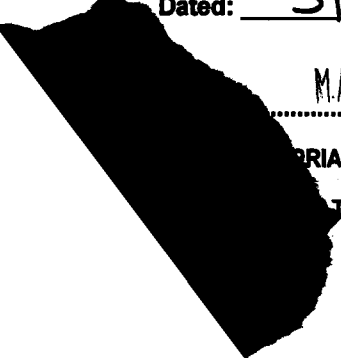
FILED

MAR 31 2015

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/27/15

HON. EILEEN A. RAKOWER, J.S.C.



MAR 27 2015

- APPROPRIATE: MOTION IS:
- CASE DISPOSED
 - NON-FINAL DISPOSITION
 - GRANTED
 - DENIED
 - GRANTED IN PART
 - OTHER
 - SETTLE ORDER
 - SUBMIT ORDER
 - DO NOT POST
 - FIDUCIARY APPOINTMENT
 - REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 16

Index Number : 102083/2011
KAPLAN, DENA
vs
720 LEX ACQUISITION
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
ACCOMPANYING DECISION / ORDER**

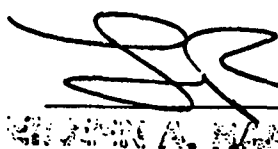
FILED

MAR 31 2015

**NEW YORK
COUNTY CLERKS OFFICE**

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

Dated: 3/27/15
MAR 27 2015


_____, J.S.C.
HON. EILEEN A. RAKOWER

- 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 15

-----X
DENA KAPLAN,

Plaintiff,

- v -

720 LEX ACQUISITION, LLC, ACHS MANAGEMENT
CORP., STEVEN MADDEN, LTD., STEVE MADDEN
RETAIL, INC., CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC., and EMPIRE CITY SUBWAY
COMPANY (LIMITED) and DANIELLA
CONSTRUCTION OF NY, INC.,

Defendants.

HON. EILEEN A. RAKOWER, J.S.C.

This personal injury action arises from a trip and fall accident that occurred on September 13, 2010. Plaintiff, Dena Kaplan ("Plaintiff" or "Kaplan"), claims that she tripped on September 13, 2010 as a result of a raised sidewalk located at 720 Lexington Avenue in New York, New York, which was located at the southwest corner of Lexington Avenue and 58th Street. As a result of the accident, Plaintiff claims that she sustained injuries to her left elbow, left wrist, and left shoulder.

Mot. Seq. 1

Defendant, Empire City Subway Company (Limited) ("Empire"), moves pursuant to CPLR § 3212, for summary judgment dismissing all claims and cross-claims against Empire. No opposition is submitted.

Empire submits the pleadings, Plaintiff's Verified Bill of Particulars, the transcript of the deposition of Kaplan held on November 25, 2013, Plaintiff's

FILED
MAR 31 2015
NEW YORK
COUNTY CLERKS OFFICE

Index No.
102083/2011

**DECISION
and ORDER**

Mot. Seq. 001 + (602)

FILED
MAR 31 2015
NEW YORK
COUNTY CLERKS OFFICE

photograph marked Exhibit B at her deposition and the transcript of the deposition of Denis Donovan of Empire dated October 29, 2013.

In her Verified Bill of Particulars dated January 10, 2012, Plaintiff states that the accident took place on September 13, 2010 on the sidewalk adjacent and appurtenant to 720 Lexington Avenue at the corner of 58th Street and Lexington Avenue, New York, New York.

Plaintiff testified that on September 13, 2010, she was at the vicinity of the Steve Madden store located at 58th Street and Lexington Avenue in New York. Plaintiff testified that she had walked south on Lexington Avenue after crossing 58th Street, was walking along the right side of the south sidewalk of 58th Street by building's windows when she tripped, and that the Steven Madden store is at the corner of the building. Plaintiff was shown photographs of the accident location at her deposition, and she testified that the photograph marked as Exhibit B at her deposition shows the spot where her foot caught and went flying.

Denis Donovan testified on Empire's behalf. Donovan is employed by Empire as an Area Operations Manager for construction. Donovan testified that Empire searched for any work performed by Empire on Lexington Avenue for the three years prior to and including the date of the loss and found a custom work order for a job to install two 4 inch PVC conduits from a manhole into the building at 720 Lexington Avenue. Donovan testified that the work involved excavating the roadway and part of the sidewalk and restoring the area. The sidewalk work involved was located 63 feet from the Empire manhole and took place "mid bloc" according to the drawing in Empire's "As Built Report." Donovan testified that the job commenced on July 24, 2010 and was completed on August 1, 2010. Donovan avers that according to Empire's records, Empire did not perform any work at the sidewalk at the corner of 58th Street and Lexington Avenue.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable,

are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

A defendant who moves for summary judgment in a slip-and fall action has the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden then shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice. *Rodriguez v. 705-7 East 179th Street Housing Development Fund Corp.*, 79 A.D.3d 518, 520 [1st Dept. 2010].

Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]). Further, “the factual allegations of the moving papers, uncontradicted by plaintiff, are sufficient to entitle defendants to judgment dismissing the complaint as a matter of law.” (*Tortorello v. Carlin*, 260 A.D.2d 201[1st Dept. 1999]).

Empire has established a prima facie showing of entitlement to summary judgment. The record contains no evidence that Empire did any work at the specific location where the accident occurred, created the alleged defect, or owned or controlled the area and had notice of the condition.

Mot. Seq. 2

Defendant, Danella Construction of NY, Inc., incorrectly sued as Danella Construction Company of NY, Inc. (“Danella”), moves pursuant to CPLR § 3212, for summary judgment dismissing all claims and cross-claims against Danella. Danella submits the pleadings, the transcript of the deposition of Kaplan, held on February 25, 2013, the transcript of the deposition testimony of Marcelo Klajnbart on behalf of ACHS Management and 720 Lex Acquisition on October 10, 2013, the transcript of the deposition testimony of Donald Herzog on behalf of Steven Madden Ltd. and Steve Madden Retail on October 16, 2013, deposition testimony of George Canzaniello on behalf of Con Edison on October 22, 2013, deposition testimony of Charles Agro on behalf of Danella on November 7, 2013. No opposition is submitted.

Danella contends that the summary judgment is warranted in its favor because there is no dispute that the Plaintiff’s accident occurred as a result of a defect

unrelated to any of Danella's work, which was done closer to the curb line located at 58th Street and Lexington Avenue, and at least 6 feet away from the subject defect, which is located near the building line.

Charles Agro testified on Danella's behalf. Agro testified that Danella performed a steam leak report for Con Edison at the subject intersection pursuant to a steam support contract, pursuant to Purchase Order 829210. Danella excavated the sidewalk located at the intersection of 58th Street and Lexington Avenue to expose a cooling chamber. The existing cooling chamber was removed and a new one installed.

Agro identified Street Opening Permit No. M012009303120, which was issued to Con Edison by the City of New York for work performed by Danella at the subject intersection to repair a steam leak. The permit was to open concrete only, so it would only include the area of the sidewalk. The permit was valid from November 2, 2009 through November 19, 2009.

Agro identified Street/Sidewalk Opening Ticket No. PS 466067, which indicated that Danella broke out the sidewalk on October 22, 2009. Danella hand excavated an area that measured 10 feet long and 6 feet wide. Agro testified that this was done by saw cutting the edges and using a jack hammer to break the concrete and make a square hole. On November 3, 2009, Danella removed the cooling chamber. Danella removed the pipe and installed another one, and the excavation was closed on November 4, 2009. On November 4, 2009, concrete was poured around the pipe which housed the new cooling chamber, which allowed water to cool off before it drained into the sewer. After concrete was poured, the excavation was backfilled with soil up to a proper elevation. The sidewalk was then replaced with concrete. Agro testified that the trench made by Danella was 10 feet long and 6 feet wide. Danella excavated to 6 feet from the face of the south curb on 58th Street, heading south. Agro identified a Google Earth photograph and testified that Danella's trench would have been approximately 6 feet from the defect which allegedly caused the Plaintiff to trip.

Danella has established a prima facie showing of entitlement to summary judgment. The record contains no evidence that Danella created the alleged defect, or owned or controlled the area and had notice of the condition.

By way of cross motion, defendants, Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. (collectively, "Con Edison"), moves for

summary judgment pursuant to CPLR 3212, dismissing the within action and all cross claims as against Con Edison. No opposition is submitted.

Con Edison, in support of its cross motion, submits the following documents: the affirmation of David Santoro; the pleadings; Con Edison's contract with Danella; copies of relevant emergency ticket and opening tickets. Con Edison also relies upon the deposition transcripts submitted by Danella. No opposition is submitted.

George Canzaniello, Con Edison's record searcher, testified that a search of Con Edison's records was conducted for all opening tickets, paving orders, emergency tickets and complaints for the sidewalk adjacent to 720 Lexington Avenue and the southwest corner of the intersection of East 58th Street for the 2 year period prior to and including the date of the accident. Mr. Canzaniello testified that the only work performed on behalf of Con Edison at the subject location on or after the date of the incident was performed by Danella.

Con Edison has established a prima facie showing of entitlement to summary judgment. The record contains no evidence that Con Edison (or Danella who performed work on Con Edison's behalf) created the alleged defect, or that Con Edison owned or controlled the area and had notice of the condition.

Wherefore, it is hereby

ORDERED that Defendant Empire City Subway Company (Limited)'s motion for summary judgment is granted without opposition (Mot. Seq. 1) and the complaint and cross-claims asserted against said defendant are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant Danella Construction of NY, Inc., incorrectly sued as Danella Construction Company of NY, Inc.'s motion for summary judgment is granted without opposition (Mot. Seq. 2) and the complaint and cross-claims asserted against said defendant are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc.'s cross motion for summary judgment is granted without opposition (Mot. Seq. 2) and the complaint and cross-claims asserted against said defendants are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 27 2015

MAR 27 2015



EILEEN A. RAKOWER, J.S.C.

FILED

MAR 31 2015

NEW YORK
COUNTY CLERK'S OFFICE