

<b>McLaughlin v 45 Wall St LLC</b>
2016 NY Slip Op 31485(U)
August 5, 2016
Supreme Court, New York County
Docket Number: 152216/14
Judge: Lynn R. Kotler
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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 5

WILLIAM MCLAUGHLIN

INDEX NO. 152216/14

MOT. DATE

- v -

MOT. SEQ. NO. 003, 004, 005, and 006

45 WALL ST LLC et al.

The following papers, numbered 1 to 8 were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. - Affidavits - Exhibits No(s) 1, 2, 7, 8
Notice of Cross-Motion/Answering Affidavits - Exhibits No(s) 3, 4, 5
Replying Affidavits No(s) 6

This personal injury action arises from a trip and fall. In motion sequence number 003, defendant The City of New York (the "City") moves for summary judgment dismissing all claims and cross-claims against it. In motion sequence number 004, defendants 45 Wall St LLC ("Owner") and TF Cornerstone Inc. ("Managing Agent") move for summary judgment dismissing all claims and cross-claims against them, or alternatively, for contractual indemnification from defendant Cucina Bene Pizzeria (the "Tenant"). Also in motion sequence number 004, defendant W Associates, LLC ("W Assoc") cross-moves for summary judgment dismissing all claims and cross-claims against it. In motion sequence number 005, defendant Salon 25 Black Label, LLC ("Salon") moves to dismissing all claims and cross-claims against it. Finally, in motion sequence number 006, Tenant moves for summary judgment dismissing all claims and cross-claims against it.

There is no opposition to motion sequence number 003, 005 or 006. As for sequence number 004, Salon and the Tenant partially oppose the motion. Neither plaintiff nor defendant Consolidated Edison ("ConEd") have submitted any opposition to the motions. Since the motions are interrelated, they are hereby consolidated for the courts consideration and disposition in this single decision/order. Further, the motions are timely and therefore properly before the court (CPLR § 3212[a]; Brill v. City of New York, 2 NY3d 348 [2004]). The court's decision follows.

The facts are largely undisputed. According to plaintiff's notice of claim, at approximately 2pm on March 24, 2013, plaintiff tripped and fell on the sidewalk located on the sidewalk in front of 41 Exchange Place, New York, New York due to "obstructed, cracked, uneven, raised, depressed, missing and/or deteriorated sidewalk and metal grating." The defective condition was located 103 feet west of William Street on the north side of Exchange Place, six and a half feet north of the curb line and eight inches from the grate.

Dated: August 5, 2016

HON. LYNN R. KOTLER, J.S.C. (with signature)

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

accident because his accident occurred on sidewalk abutting 43 Exchange Place and/or ConEd is liable for the area of sidewalk upon which the defective condition is located.

W Assoc is the owner of the building located at 43 Exchange Place. In support of its motion for summary judgment, it argues that since it is undisputed that ConEd owns the grating and the defective condition is within 12 inches of that grating, W Assoc cannot be held liable.

## Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Administrative Code § 7-210(b) provides that "the owner of real property abutting any sidewalk... shall be liable for any ... personal injury .... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." "Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk." *Id.*

The City has established that Admin Code § 7-210 applies here and therefore it cannot be held liable for plaintiff's accident. Accordingly, motion sequence number 003 is granted.

As for the remaining three motions and the cross-motion, they are all also granted since it is undisputed that the defective condition was within twelve inches of ConEd's metal grate and there are no issues of fact as to whether the respective parties caused and/or exacerbated the defective condition. 34 RCNY § 2-07 (b) (1) provides that "[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" (see *Cruz v New York City Tr. Auth.*, 19 AD3d 130 [2005]). 34 RCNY 2-07 (b) (2) requires that "[t]he 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." Nor can the movants and ConEd be concurrently liable (*Storper v. Kobe Club*, 76 AD3d 426 [1st Dept 2010]).

Accordingly, the motions by Owner and Managing Agent, W Assoc, the Tenant and Salon are granted to the extent that all claims and cross-claims against them are hereby severed and dismissed. The Owner and Managing Agent's motion is otherwise denied as moot.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** motion sequence number 003 is granted in its entirety; and it is further

At his 50-h hearing, plaintiff testified about the accident as follows. Prior to the accident, plaintiff was walking on the sidewalk abutting Exchange Place when his foot became caught on an "raised up broken section" of the sidewalk and he fell to the ground. At his deposition, plaintiff estimated the height differential to be about two inches and claimed that the defective condition was approximately eight to ten inches away from the metal grating to its right. Photographs of the defective condition have been provided to the court.

Wlodzimierz Grzybowski testified on behalf of the Owner and Managing Agent. Mr. Grzybowski is the resident building manager for the Owner. Mr. Grzybowski stated that the sidewalks abutting the entire perimeter of the subject building were inspected by an outside contractor in 2006 and any potential hazards were repaired at that time. Further, Mr. Grzybowski states that no defects were identified on the Exchange Place side of the building. The Tenant operates a pizzeria in the ground floor of the building. The Salon is the ground floor tenant next-door to the building.

Mr. Grzybowski walks around the perimeter of the building every day and inspects the sidewalks for defects. Mr. Grzybowski does not walk in front of the pizzeria because the Tenant is responsible for maintaining the sidewalks in front of its store. When shown photographs of the alleged defect, Mr. Grzybowski stated that he did not know who performed the patchwork repair depicted in the photographs. Further, Mr. Grzybowski testified that there were no trip and falls on the sidewalks abutting the building since he started working for the Owner in 2002.

The Owner and Managing Agent have provided to the court an affidavit by a licensed land surveyor named Frank Ferrantello. Mr. Ferrantello is President of Ferrantello Land Surveying. He reviewed photographs and documents exchanged during discovery and conducted a site visit of the accident location on July 24, 2015. Mr. Ferrantello then prepared a map survey containing a Property Study and six photographs which have been provided to the court as well. Based upon this land survey, Mr. Ferrantello claims that plaintiff fell outside the property line for the premises known as 41 Exchange Place, New York, New York. Rather, the area marked by plaintiff in photographs identified at his deposition as depicting the defective condition is known as 43 Exchange Place, New York, New York.

The Owner and Managing Agent have also provided the affidavit of Stanley Fein, a professional engineer. According to Mr. Fein, who reviewed photographs and testimony and inspected the subject sidewalk, the defective condition was seven to seven and a half inches away from the metal grating owned by ConEd.

The Owner and Managing Agent have provided an affidavit by Steven Phillips, property manager for the building located at 41 Exchange Place. Mr. Phillips verifies a lease between the Owner and Barry's of Little Italy, Inc. which was assigned to Mediterranean Items, Inc. d/b/a Cucina Bene Pizzeria (a/k/a Tenant). Mr. Phillips further maintains that neither the Owner nor the Managing Agent owned, operated, controlled, maintained or made a special use of the metal grating near the defective condition. Further, Mr. Phillips states that neither the Owner nor the Managing Agent performed the repair work depicting in photographs of the defective condition.

Salon disputes the Owner and Managing Agent's claim that the defective condition existed on the sidewalk abutting 43 Exchange Place. Salon otherwise joins with the Owner and Managing Agent's arguments that since the defect is less than twelve inches from ConEd's grate, ConEd is solely responsible for maintaining the area of sidewalk which caused plaintiff's accident.

The Tenant opposes The Owner and Managing Agent's motion as to the cross-claims for contractual indemnification based upon the Lease. Specifically, the Tenant argues it cannot be liable for plaintiff's

**ORDERED** that all claims and cross-claims against defendant The City of New York are hereby severed and dismissed; and it is further

**ORDERED** that the motion by defendants 45 Wall St., LLC and TF Cornerstone, Inc. (motion sequence number 004) is granted to the extent that all claims and cross-claims against defendants 45 Wall St., LLC and TF Cornerstone, Inc. are severed and dismissed; and it is further

**ORDERED** that the cross-motion by defendant W Associates, LLC (motion sequence number 004) is granted in its entirety and all claims and cross-claims against defendant W Associates, LLC are hereby severed and dismissed; and it is further

**ORDERED** that motion sequence number 005 is granted in its entirety; and it is further

**ORDERED** that all claims and cross-claims against defendant Cucina Bene Pizzeria are hereby severed and dismissed; and it is further

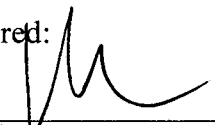
**ORDERED** that motion sequence number 006 is granted in its entirety; and it is further

**ORDERED** that all claims and cross-claims against defendant Salon 25 Black Label, LLC are hereby severed and dismissed; and it is further

**ORDERED** that since the City is no longer a party to this action, the Clerk is directed to randomly reassign this action to a non-City IAS part.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: August 5, 2016  
New York, New York

So Ordered:   

---

Hon. Lynn R. Kotler, J.S.C.