

Koff v Marti-Salgado
2020 NY Slip Op 32606(U)
August 11, 2020
Supreme Court, New York County
Docket Number: 160686/2014
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 160686/2014

IRA KOFF,

MOTION SEQ. NO. 008

Plaintiff,

- v -

GUADALUPE MARTI-SALGADO, LUIS MARTI, LUIS MARTI AS TRUSTEE OF THE LUIS G. MARTI LIVING, SERGIO CAMILO, 468-470 FOOD CORP., THE CITY OF NEW YORK, and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

DECISION + ORDER ON MOTION

Defendant.

-----X

GUADALUPE MARTI-SALGADO, LUIS MARTI, LUIS MARTI AS TRUSTEE OF THE LUIS G. MARTI LIVING

Third-Party Index No. 595230/2016

Third-Party Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK INC.,

Third-Party Defendant.

-----X

SERGIO CAMILO and 468-470 FOOD CORP.,

Second Third-Party Index No. 595625/2016

Second Third-Party Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 351, 352, 353, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

In this personal injury action, plaintiff Ira Koff ("Koff") moves, pursuant to CPLR 3212, for summary judgment on liability against defendant Consolidated Edison Company of New York ("Con Ed"), and an order directing that this matter proceed to an inquest for an assessment of damages (Docs. 313-336, 341, 370-375). Con Ed opposes the motion (Docs. 337-340, 356-369). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On August 6, 2014, Koff allegedly fell on the sidewalk abutting West 36th Street between 8th and 9th Avenues in Manhattan and fractured his wrist (Doc. 128 ¶ 10, 25). In August 2015, Koff filed an amended summons and complaint against Guadalupe Marti-Salgado, Luis A. Marti, and Luis G. Marti, as Trustees of the Luis G. Marti Living Trust ("the Marti defendants"), the alleged owners of a grocery store abutting the sidewalk; against Sergio Camilo ("Camilo") and 468-470 Food Corp. ("Food Corp."), the tenants who leased and operated the grocery store; and against the City of New York ("the City") (Doc. 33). On March 23, 2016, the Marti defendants commenced a third-party action against Con Ed, the owner of a vault/grate cover located on the sidewalk where Koff fell (Doc. 61). Camilo and Food Corp. filed a second-third party complaint against Con Ed (Doc. 95). Koff later amended the summons and complaint to add Con Ed as a direct defendant (Doc. 128).

In August 2016, the City moved, pursuant to CPLR 3212, for summary judgment seeking dismissal of the claims asserted against it on the ground that it was not liable under New York City Administrative Code § 7-210 (Doc. 85). This Court (Tisch, J.) granted the motion by decision and order filed June 16, 2017 ("the 6/16/17 order") and dismissed Koff's complaint against the City

(Doc. 117). Koff settled this action with the remaining defendants, except for Con Ed, and executed a partial stipulation of discontinuance to this effect (Doc. 304).

Koff now moves, pursuant to CPLR 3212, for an order granting it summary judgment against Con Ed (Doc. 313). Koff argues, *inter alia*, that Con Ed is liable for his injuries because it owned the vault cover immediately abutting the defective sidewalk and failed to monitor, inspect, maintain, and/or repair the sidewalk for at least three and a half years prior to the incident (Doc. 341 at 3).¹

Koff submits, *inter alia*, an affidavit, wherein he affirms, in relevant part, that he tripped due to a "sudden abrupt lip that protruded above the [subject] sidewalk" and that this defect was "within twelve inches of the edge of the vault cover" (Doc. 332 ¶ 4, 8-9). The affidavit references photographs of the defective sidewalk taken by Koff four days after the incident which, he asserts, accurately represent the condition of the sidewalk at the time of his injuries (Docs. 332 ¶ 7-8; 333). Koff affirms that one of the photographs show his feet standing in the location where he fell (Doc. 332 ¶ 8).

In response to a notice to admit, Con Ed conceded ownership of the vault cover located on the sidewalk where Koff fell (Docs. 320-321). Moreover, it denied conducting any repairs or maintenance of the subject area between 2010 and August 6, 2014 (Docs. 320-321). Further, Con Ed responded to a second notice to admit in November 2019, conceding that it performed no inspection, monitoring, repair, maintenance or any other type of work to the grate/vault or the surrounding sidewalk between January 1, 2011 and August 6, 2014 (Doc. 324).

¹ Koff inadvertently omitted his memorandum of law when filing his motion papers due to technical issues. However, by interim order filed May 19, 2020, and in an exercise of its discretion pursuant to CPLR 2001, this Court allowed Koff to submit a late memorandum of law and cured any potential prejudice to Con Ed by allowing it to respond to any arguments raised therein (Doc. 351).

Koff submits the expert affidavit of Irvin Loewenstein ("Loewenstein"), the former director of the prior notification unit of the NYC Department of Transportation ("DOT"), the unit responsible for receiving notifications of street and sidewalk defects in New York City (Doc. 335 ¶ 1). Loewenstein affirms, *inter alia*, that based on his review of Koff's affidavit, the photographs annexed to said affidavit, and other discovery materials, the subject sidewalk was dangerously defective and constituted a tripping hazard at the time of Koff's incident (Doc. 335 ¶ 10-11). Loewenstein asserts that "[b]y comparing the apparent size of the lip in the photographs to the dimensions of a standard size 11 shoe," worn by Koff in the photograph, "[he] estimate[s] that the lip protruded approximately one inch above the rest of the surrounding sidewalk" (Doc. 335 ¶ 14). Moreover, he opines that, given expected Manhattan foot traffic and weather, "an annual monitoring schedule is the minimum frequency [Con Ed] should have been using for the [s]ubject [v]ault [c]over and the surrounding sidewalk" (Doc. 335 ¶ 18). Loewenstein also concludes that it is clear from Koff's photographs that the sidewalk was in a dangerous state of disrepair for at least three years and, thus, that Con Ed violated RCNY § 2-07(b)(1) by failing to repair the sidewalk extending twelve inches from the vault cover at any time between January 1, 2011 and August 6, 2014 (Doc. 335 ¶ 16-19).

Koff also submits an unreported decision and order in the matter of *Fernandez v Consolidated Edison Company of New York, Inc.*, 705766/2017 (Sup Ct, Queens County 2019), along with the motion papers submitted on that summary judgment motion (Docs. 329-331). In *Fernandez*, the Court awarded the plaintiff partial summary judgment as against Con Ed on the issue of liability although Con Ed had inspected the defective sidewalk 17 months prior to her accident (Docs. 330-331). Koff maintains that "[p]resumably, the Court's view [in *Fernandez*] was that an inspection schedule of once every 17 months was insufficient" (Doc. 341 at 6).

Con Ed does not dispute its ownership of the vault cover (Doc. 363). Instead, Con Ed argues, *inter alia*, that Koff has failed to offer admissible proof to establish that the defect was within twelve inches of the vault cover (Doc. 363 ¶ 1). Koff's affidavit, claims Con Ed, contradicts his deposition testimony as to the location of his fall, having previously testified that he could not estimate the distance of the defect to the vault cover (Doc. 363 ¶ 1, 4). Moreover, Con Ed claims that Koff attempts to "support his changed testimony through misleading use of his photographs," insofar as he fails to submit the marked photographs from his deposition and 50-h hearing, which demonstrate the exact location of his fall (Docs. 363 ¶ 7-14; 365-367; 338 at 43-45; 368 at 19-21). Con Ed maintains that, based on the marked photographs, it is obvious that the exact location of Koff's fall was not within 12 inches of the vault cover (Doc. 363 ¶ 13-14).

Additionally, Con Ed urges this Court to disregard Loewenstein's affidavit as lacking in probative value, because his expert opinion regarding the distance of the defective sidewalk relies on Koff's affidavit and not on any prior deposition testimony; he never visited the scene of the accident or personally measured the defective sidewalk; and Con Ed claims that Loewenstein's conclusions with respect to the frequency of Con Ed's duty to inspect the sidewalk was speculative and unsupported (Doc. 363 ¶ 16-20). Con Ed also asserts that the present facts are distinguishable from *Fernandez* because that plaintiff tripped on the raised edge of the vault cover itself and, moreover, the issue of inspection was never addressed in that Court's decision and order (Doc. 363 ¶ 27).

In a reply memorandum of law, Koff argues, *inter alia*, that his affidavit is consistent with both his deposition testimony and his 50-h testimony that the defect in the sidewalk was 12 inches away from the vault cover but that, in any event, "whether [he] tripped within 12 inches of [Con Ed's] grate is irrelevant because it is undisputable that [he] tripped on a defective sidewalk flag,

and that the flag was defective from the spot where [he] tripped all the way to [the] edge of the grate" (Doc. 370 at 2). Thus, asserts Koff, Con Ed was required to replace the entire sidewalk flag pursuant to the New York City Administrative Code § 19-152(a)(9), which does not allow partial repairs, or "patchwork," of defective sidewalk flags, as well as § 4.4 of the NYC DOT's street works manual, which provides, in relevant part, that "[a]ll flags containing substantial defects as defined in the Highway Rules must be replaced" and that "patching of individual flags is not permitted" (Docs. 370 ¶ 5; 372).

LEGAL CONCLUSIONS:

"The proponent of a summary judgment motion 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 NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). Once met, the burden shifts to the opposing party who must establish the existence of a triable issue of fact to defeat the summary judgment motion (see (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])).

Pursuant to Rules of City of New York Department of Transportation, "[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]). The owner must also replace or repair any cover or grating found to be defective, as well as any defective street condition extending twelve (12) inches outward from the perimeter of the cover or grating (see 34 RCNY § 2-07 [b] [2]; *Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]; *Cruz v NY City Tr. Auth.*, 19 AD3d 130, 130-131 [1st Dept 2005]). The definition of a "street" as used in the regulation includes a sidewalk (see 34 RCNY § 2-07 [b] [2]; *Thadani v*

Between the Bread 40th Inc., 2019 NY Slip Op 32356[U], 2019 NY Misc LEXIS 4329, *11 [Sup Ct, NY County 2019]).

This Court finds that Koff has established its prima facie entitlement to summary judgment against Con Ed by submitting, *inter alia*, an affidavit in which he affirms that the defective sidewalk was within twelve inches from the vault cover. Further, Loewenstein's affidavit establishes that Con Ed had constructive notice of the defective sidewalk as imposed by its statutory obligation to inspect the vault cover (*see* 24 RCNY § 2-07 [b]; *Robles v Time Warner Cable Inc.* 167 AD3d 411, 411 [1st Dept 2018]) and that, based on the photographic proof, Con Ed failed to make the necessary repairs for at least three years.

Although Con Ed attempts to defeat Koff's motion for summary judgment by arguing that a material issue of fact exists with respect to, *inter alia*, the exact location of Koff's fall, this argument is unavailing. The case *Robles v Time Warner Cable Inc.*, 167 AD3d 411 [1st Dept 2018]) is particularly instructive. In *Robles*, the plaintiff tripped and fell near a defective sidewalk located near a metal box cover owned by defendant Time Warner (*id.* at 411). Time Warner moved for summary judgment dismissing the complaint, arguing, *inter alia*, that it was not liable under 34 RCNY § 2-07(b) for plaintiff's injuries because the location of plaintiff's fall measured more than 12 inches from its metal box (*id.*). The Appellate Division, First Department, reversed the trial court's decision granting Time Warner's motion, reasoning that, although the alleged defect was 12 inches from the box cover, "if the area had been inspected, Time Warner would have repaired the cracked sidewalk condition around the box cover and replaced the sidewalk flag, *which extends to the spot where plaintiff tripped*" (*id.* at 412 [emphasis added]).

Assuming, *arguendo*, that the exact location of where Koff tripped extends more than twelve inches from Con Ed's vault cover, the photographic proof shows that the defective sidewalk

extended from the vault cover to the location marked on the submitted photographs. Thus, as in *Robles*, the defective condition herein was "at least in part, inside the 12 inch area that is within defendant's zone of responsibility" and, thus, this Court finds that Con Ed has failed to submit any proof to refute liability (*Gardner v City of NY*, 2013 NY Slip Op 32438[U], 2013 NY Misc LEXIS 4609, *15 [Sup Ct, NY County 2013]; see *Lewis v City of New York*, 89 AD3d 410, 411 [1st Dept 2011]; *Cruz v NY City Tr. Auth.*, 19 AD3d 130, 130-131 [1st Dept 2005]).

Further, although Con Ed challenges Loewenstein's opinion as to how often Con Ed was required to inspect the sidewalk structure, it fails to submit any proof setting forth any alternative standard. Moreover, Con Ed submits the deposition testimony of its construction inspector, Leighton Pinnock ("Pinnock"), who affirms, in relevant part, that he inspected the vault on June 13 and November 15, 2010 (Doc. 369 at 29). However, this purported inspection occurred more than 44 months before the accident, which has no bearing on Loewenstein's opinion that, based on foot-traffic and weather, Con Ed should have inspected the grate annually (Doc. 335 ¶ 18). Based on the foregoing, Koff's motion is granted.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Ira Koff's motion for summary judgment on liability, pursuant to CPLR 3212, is granted as against defendant Consolidated Edison Company of New York, Inc.; and it is further

ORDERED that this matter is referred to a JHO/Special Referee for the purpose of conducting a hearing on the issue of damages, attorneys' fees, costs, and interest owed to plaintiff; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, on defendant within 10 days after this order is uploaded to the New York State Courts E-filing System ("NYSCEF"), and plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (available at <http://www.nycourts.gov/courts/ljd/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise the parties or their attorneys of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

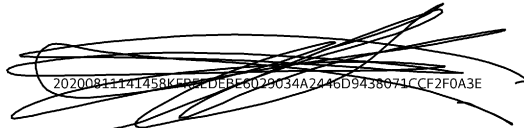
ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that the JHO/Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the JHO/Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts; it is further

ORDERED that this constitutes the decision and order of the court.

8/11/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE