| **Mackins v City of New York** |
| --- |
| 2021 NY Slip Op 32440(U) |
| November 24, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 161517/2013 |
| Judge: J. Machelle Sweeting |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

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

**PRESENT:** **HON. J. MACHELLE SWEETING** **PART 62**

***Justice***

----------X

DURON MACKINS, as Administrator of the Estate of SYLVIA MACKINS a/k/a SYLVIA YEJE, Deceased, and DURON MACKINS

Plaintiff,

- v -

CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC.,

Defendants.

----------X

**INDEX NO.** 161517/2013

**MOTION DATE** 04/26/2021

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

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

Background and Relevant Facts

This is an action for personal injuries allegedly sustained by decedent SYLVIA MACKINS a/k/a SYLVIA YEJE ("plaintiff") on January 26, 2013, when she slipped and fell on a metal plate in the western crosswalk of the intersection of West 100th Street and Columbus Avenue, in the County, City, and State of New York.

Plaintiff's Notice of Claim (NYSCEF Document #67) alleges, generally, that the City was liable in:

> […] permitting and allowing a metal grate and/or plate located on the pedestrian crosswalk to be and remain a dangerous defective condition and/or covered with snow, ice, and/or other foreign substances; in failing to erect barricades, or otherwise restrict use of aforesaid area to prevent a hazard, trap and nuisance from endangering the general public and, more particularly, claimant herein, in failing to warn the general public and, more particularly, claimant herein, of the subject hazard, trap and nuisance […]

In the EBT transcript of plaintiff (NYSCF Document #60), plaintiff's general testimony, as relevant to this motion, is: Plaintiff was walking on the street "around 8:00 pm" (p. 16) "It had just stopped snowing" (p. 18). The streets had not been salted and she was walking on "thin ice" on said streets (p. 18). The metal plate was approximately 4 feet by 4 feet (p. 31). When plaintiff's "second foot" stepped onto the "metal plate," she "lost my [her] footing" and fell (p. 28). The first time plaintiff saw metal plate on the day of the accident was "when I [she] fell on it" (p. 41). After plaintiff fell, she noticed that "there was ice" on the metal plate (p. 35).

Plaintiff did not testify that she fell because the metal plate was at a different height than the surrounding street, or that the metal plate was structurally defective.

Plaintiff initially filed this action on December 16, 2013 under the instant Index Number (161517/2013) in New York County, against defendant The City Of New York (the "City") only.

On May 2, 2015, plaintiff passed away. The death certificate lists the "Immediate Cause" of death as "Acute Intoxication Due To The Combined Effects of Heroin." The autopsy report states:

> CAUSE OF DEATH: ACUTE INTOXICATION DUE TO THE COMBINED EFFECTS OF HEROIN. METHADONE, ALPRAZOLAM AND MIRTAZAPINE
>
> MANNER OF DEATH: ACCIDENT (SUBSTANCE ABUSE)

Subsequently, DURON MACKINS (hereinafter referred to as the "administrator") was appointed the administrator of plaintiff's estate.

On January 18, 2016, a lawsuit based on the same action was filed in Queens County, against Consolidated Edison Company of New York, Inc., and Consolidated Edison, Inc. (collectively, "Con Ed") under Index Number 700565/2016.

On or around May 17, 2017, the court (Hon. James E. d'Auguste) issued an order consolidating the two actions.

Pending now before the court is a motion filed by the City seeking an order, pursuant to CPLR 3212, granting summary judgment and dismissing the verified complaint. Also pending before the court is a cross-motion filed by Con Ed seeking an order, pursuant to CPLR 3212, granting Con Ed summary judgment and dismissing the verified complaint and all cross-claims as against Con Ed.

Upon the forgoing documents, the motion and cross-motion are each GRANTED.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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 demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Procedural Objections and Timeliness

As a preliminary matter, this court first addresses procedural arguments regarding timeliness of the motion and cross-motion.

First, plaintiff argues that the Case Scheduling Order (the "CSO") issued by this Court on June 14, 2014 (NYSCEF Document #73) states that "Summary Judgment Motions shall be filed no later than sixty (60) days after filing the Note of Issue unless otherwise directed by the Court." Plaintiff argues that here, the Note of Issue ("NOI) was filed on February 24, 2021, which means that the last date to file summary judgment motions would have been on April 25, 2021. Because

the City's motion was filed on April 26, 2021, and Con Ed's cross-motion was filed on July 7, 2021, plaintiff argues that the motions should be denied as untimely.

New York General Construction Law § 25-a (Public holiday, Saturday or Sunday in statutes; extension of time where performance of act is due on Saturday, Sunday or public holiday) provides:

> When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day […]

Here, the deadline provided for in the CSO was April 25, 2021, which was a Sunday. The City's motion was filed the following day, on April 26, 2021. Therefore, the City's motion is timely.

With regard to Con Ed, as has been correctly argued, Con Ed was not a party to this matter at the time the CSO was issued on June 14, 2014. In fact, Con Ed was not joined in this action until almost three (3) years later, by Order dated May 11, 2017. The Appellate Division, First Department has repeatedly held:

> [t]hat it is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible and for that purpose a liberal policy is adopted with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues . . ..

38 Holding Corp. v. New York, 179 A.D.2d 486 (App. Div. 1st Dept. 1992); *See also* Gluck v. McDonough, 139 A.D.3d 628 (2016) (referencing that "strong public policy favors resolving cases on the merits") and Acosta v. Riverdale Dev., LLC, 72 A.D.3d 525 (2010) ("Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits"). To the extent that plaintiff seeks to dismiss Con Ed's cross-motion on the grounds that it is untimely, such application is denied.

Second, plaintiff argues that defendants' motions are each defective because each failed to annex a separate Statement of Material Facts pursuant to 22 NYCRR 202.8-g(a). With respect to Con Ed, plaintiff's argument is unavailing, as Con Ed did file the required Statement (NYSCEF Document #106). Con Ed argues that plaintiff failed to respond to Con Ed's Statement of Material Facts, and accordingly, each statement made in Con Ed's Statement is deemed admitted pursuant to 22 NYCRR § 202.8-g(c).

On this point, the City concedes the error, but requests that the court waive and/or disregard these procedural "mistakes, omissions, defects, and/or irregularities," pursuant to CPLR § 2001 and Part 202.1 (b) of the Uniform Rules.

CPLR § 2001 (Mistakes, omissions, defects and irregularities) provides:

> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced […]

The N.Y. Ct. Rules, § 202.1 (Application of Part; Waiver; Additional Rules; Application of CPLR; Definitions) provides:

> (b) Waiver. For good cause shown, and in the interests of justice, the court in an action or proceeding may waive compliance with any of these rules other than sections 202.2 and 202.3 unless prohibited from doing so by statute or by a rule of the Chief Judge.

As noted above, CPLR § 2001 and Part 202.1 (b) of the Uniform Rules give the court discretion to overlook the defects in the City's papers. Further, 22 NYCRR 202.8-g(a) does not require that the motion be denied or marked off. *See also* Abreu v Barkin and Assoc. Realty, Inc., 69 AD3d 420 (Sup. Ct. App. Div. 1st Dept 2010) ("We reject defendants' argument that plaintiff's failure to provide a fully supported counterstatement of disputed facts in opposition to defendants' motion for summary judgment, in accordance with Rule 19–a of the Commercial Division of the

Supreme Court (22 NYCRR 202.70), required the court to deem defendants' statement of material facts admitted. While the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so. There was sufficient evidence in the record to raise triable issues of fact and the court was not compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19–a"). Here, in the exercise of discretion, this court has considered the City's papers and does not deem plaintiff's statement of facts as admitted. Instead, this court now decides all motions herein on the merits.

City's Motion

With respect to the substantive issues, the City argues that it is entitled to summary judgment because the City did not have a reasonable time to remedy the condition prior to plaintiff's alleged incident. The City further argues that it did not receive prior written notice of the alleged defect as required by Section 7-201(c)(2) of the Administrative Code. Finally, the City argues that it did not cause and create the alleged condition.

The City submitted several exhibits in support of its motion. First, the City submitted the Affidavit of Fulu Bhowmick (NYSCEF Document #76), in which the affiant stated that she had conducted a search in the pertinent electronic databases and identified and requested a search for corresponding paper records of permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections, contracts, maintenance and repair orders, complaints, gangsheets for roadway work, milling and resurfacing records, and Big Apple Maps for the roadway located at the intersection of West 100th Street and Columbus Avenue in the County, City, and State of New York, for a period of two years prior to and including January 26, 2013, the date that plaintiff

claims to have been injured. The City argues that the results of the search show that the City had no prior written notice of the alleged defect.

The City also attached the Affidavit of James Marinello (NYSCEF Document #75) from the New York City Department of Sanitation ("DSNY") which stated, in part:

> 4. At the request of the Office of the Corporation Counsel, I reviewed the DSNY snow and ice removal records for the time period of January 12, 2013 to January 26, 2013 for the location of W. 100th Street between Columbus Avenue and Amsterdam Avenue, including the intersection of W. 100th Street and Columbus Avenue.
>
> 5. The snow and ice removal records show that on January 25, 2013, DSNY engaged in salt spreading operations at W. 100th Street between Columbus Avenue and Amsterdam Avenue, including the intersection of W. 100th Street and Columbus Avenue. Salt spreading operations require the DSNY operator to actively and continuously spread salt on the roadways.
>
> 6. The snow and ice removal records show that on January 26, 2013, DSNY engaged in spot salting operations at W. 100th Street between Columbus Avenue and Amsterdam Avenue, including the intersection of W. 100th Street and Columbus Avenue. Spot salting operations require the DSNY operator to salt the roadway in locations that appear to have snow and/or ice.
>
> 7. The snow and ice removal records show that other than salting the roadway DSNY did not engage in any other snow or ice removal operations at W. 100th Street between Columbus Avenue and Amsterdam Avenue, including the intersection of W. 100th Street and Columbus Avenue for the time period between January 12, 2013 and January 26, 2013.

Finally, the City attached a certified copy of Local Climatological data for New York, NY for January 2013, as prepared by the National Oceanic and Atmospheric Administration (NYSCEF Document #78).

The Administrative Code of City of NY § 7-201 [c] [2] (also known as the “Pothole Law”) provides, in relevant part:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the

> receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Here, there is no indication that the City was given prior written notice of any defect at the accident site, and plaintiff does not argue otherwise.

As noted above, plaintiff did not allege that she fell because the metal plate was at a different height than the surrounding street, or that the metal plate was structurally defective. Indeed, plaintiff's general allegation is that there was ice on the metal plate, which caused the plate to become slippery, and the slippery condition was what caused plaintiff to fall. However, plaintiff also testified, with regard to the weather, that "It had *just* stopped snowing [emphasis added]."

"The rule is well established that a municipality is not liable for injuries sustained by a pedestrian who slips and falls on an icy sidewalk unless a reasonable time has elapsed between the end of the storm giving rise to the icy condition and the occurrence of the accident […] A reasonable time is that period within which the municipality should have taken notice of the icy condition and, in the exercise of reasonable care, remedied it by clearing the sidewalk or otherwise eliminating the danger." (Valentine v. City of New York, 86 A.D.2d 381 [Sup. Ct. App. Div, 1st Dept. 1982]). Here, the City presented an Affidavit in stating that they had engaged in spot salting operations in which the DSNY "actively and continuously spread salt […] "in locations that appear to have snow and/or ice." Further, given that plaintiff herself testified that the snow had "just" stopped, the court finds that a reasonable time has not elapsed between the end of the storm giving rise to the icy condition, and the occurrence of the accident.

Given this, the court finds that the City has made a *prima facie* case in support of summary judgment, and the burden now shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

In opposition, plaintiff argues that the affidavits submitted by the City are insufficient, as they refer only generally to discretionary "spot salting" with no time frames or specificity as to location, and they did not indicate whether any salt was applied to the subject area prior to plaintiff's fall at 8 P.M. However, as noted above, even if the City had failed to salt the subject area prior to plaintiff's fall at 8 P.M. the City was not required to do so, as no reasonable time had elapsed between the end of the storm giving rise to the icy condition, and the occurrence of the accident.

Plaintiff also argues that prior written notice is not required here, as the City's undertaking of snow removal and salting *may* have created the dangerous condition on the metal plates where plaintiff fell. Despite plaintiff's contentions, however, the Court of Appeals has held that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions," such as is alleged here, are insufficient to defeat a *prima facie* case made for summary judgment. Here, there is no expert opinion to support plaintiff's contention that snow removal and salting may have actually created the slippery condition that caused plaintiff's fall. Importantly, discovery in this case is complete, and plaintiff had ample time to explore this theory during the past eight years since the first action was filed in this case, but has failed to adduce on this record, evidence sufficient to establish the existence of material issues of fact to overcome defendant City's *prima facie* case for summary judgment.

Finally, plaintiff argues that both defendants created the dangerous condition by failing to erect barricades around the metal plate, in violation of the New York City Department of Transportation Highway Rules Chapter 2, Section 2-02(h) and Section 2-05(c) (NYSCEF Document #115). These Sections provide, generally, that "obstructions on the street shall be protected by barricades, fencing, railing with flags, lights, and/or signs, placed at proper intervals."

This court finds this argument to be unavailing. First, the statutory sections cited by plaintiff are related to work sites and construction activity, and it is not clear on the record that the metal plate in question was related to either. Second, and more importantly, the alleged "defect" here is not the metal plate itself, but the slippery condition on top of said plate. Therefore, even if the metal plate was present as part of a construction-related activity, there was no reason to barricade it, as it was not defective in and of itself, and does not constitute an "obstruction" on the street.

For all of the above reasons, this court GRANTS the City's motion for summary judgment.

Con Ed's Cross-Motion

In its cross-motion, Con Ed first argues that it is entitled to summary judgment because it was not Con Ed's duty to remedy the snow and ice conditions at the location of the alleged accident. Second, Con Ed contends that even if this court were to find that Con Ed had a duty to remedy the snow and ice condition, Con Ed cannot be held liable because a reasonable amount of time did not pass between the end of the weather event and plaintiff's alleged accident. Third, Con Ed argues that plaintiff did not die from injuries from her alleged fall, but from an overdose of illegal and non-prescribed drugs. Con Ed contends that the overdose on illegal drugs was the proximate cause of the decedent's death, and a superseding act that severed the causal connection between her death and her initial accident. Fourth, Con Ed argues that the loss of services claim asserted by plaintiff Duron Mackins, who is also the administrator of plaintiff's estate, must be dismissed, as it is derivative of the plaintiff's substantive claims against Con Ed. Finally, Con Ed argues that the City's cross-claims against Con Ed must be dismissed, as Con Ed has established its *prima facie* entitlement to summary judgment on all claims.

As noted above, it is clear from plaintiff's testimony that the defect she alleges was the slippery condition itself, and Con Ed had no duty to remedy the snow and ice conditions at the location of the alleged accident. Further, even assuming *arguendo* that this court were to find that Con Ed had a duty to remedy the snow and ice condition, Con Ed cannot be held liable here because, as discussed above, a reasonable amount of time did not pass between the end of the weather event and plaintiff's alleged accident.

Accordingly, it is hereby:

**ORDERED** that the City's motion for summary judgment is GRANTED; and it is further hereby

**ORDERED** that Con Ed's cross-motion for summary judgment is GRANTED; and it is further hereby

**ORDERED** that plaintiff's complaint, and any cross-claims are dismissed, with prejudice, with respect to all defendants; and it is further hereby

**ORDERED** that plaintiff Duron's loss of services claim is also dismissed, as it is derivative of the decedent plaintiff's substantive claims.

This is the Decision and Order of the court.

**11/24/2021**
**DATE**

**J. MACHELLE SWEETING, J.S.C.**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **CHECK ONE:** | [X] | **CASE DISPOSED** | | [ ] | **NON-FINAL DISPOSITION** | | |
| | [X] | **GRANTED** | [ ] **DENIED** | [ ] | **GRANTED IN PART** | [ ] | **OTHER** |
| **APPLICATION:** | [ ] | **SETTLE ORDER** | | [ ] | **SUBMIT ORDER** | | |
| **CHECK IF APPROPRIATE:** | [ ] | **INCLUDES TRANSFER/REASSIGN** | | [ ] | **FIDUCIARY APPOINTMENT** | [ ] | **REFERENCE** |