

<b>Mori v City of New York</b>
2022 NY Slip Op 33345(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 155230/2020
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

-----X

PAUL MORI,

Plaintiff,

- v -

THE CITY OF NEW YORK, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC

Defendants.

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INDEX NO. 155230/2020
MOTION DATE 05/03/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion for JUDGMENT - SUMMARY

On July 10, 2020, plaintiff commenced this personal injury action alleging that on April 15, 2019, he tripped and fell on the sidewalk of West 59th Street, between Tenth Avenue and Eleventh Avenue, in front of the 899 Tenth Avenue, New York, New York (the "Building"), sustaining injuries. At his General Municipal Law §50-h hearing, plaintiff testified, in relevant part, as follows:

Q: How did you fall?

A: I just felt – like the direction I fell?

Q: How. Did you trip, slip on something, step into something?

A: Yes. I stepped on the edge of this raise – I don't know what I should call it. Like a grated top, you know, like they use for the – outside on the street for some vents. So it's, like a big concrete block that has some metal grate in there. And it was elevated. I did not see it. I stepped on the edge, I twisted my ankle and I fell on the person in front of me [indicating].

(NYSCEF Doc. No. 39 [Mori GML §50-h Tr. at pp. 18-19])

On or about August 4, 2021, plaintiff served all defendants with a Notice to Admit seeking, inter alia, an admission “[t]hat on April 15, 2019, the grates and grated area located on the ... sidewalk adjacent to the building known as 899 Tenth Avenue, New York, New York ... approximately nine (9) feet and three (3) inches south from the southern curb of West 59th Street, and as depicted in the attached photos, is owned, operated and ... maintained by Con Edison” (NYSCEF Doc. No. 43 [Notice to Admit]). Consolidated Edison of New York, Inc.’s (“ConEd”) response stated:

Deny except to admit that, on April 15, 2019, Consolidated Edison Company of New York, Inc. owned and maintained a grating in the sidewalk, on the south side of West 59th Street, between 10th and 11th Avenue, in Manhattan. Con Edison objects to this demand on the grounds that it is an improper demand and not within the scope of a Notice to Admit as stated in CPLR 3123. In addition, this demand is vague as to the location of the “grate and grated area”. Consolidated Edison Company of New York, Inc. is not required to respond to questions of law that are properly reserved for trial...

(NYSCEF Doc. No. 44).

Defendant the City of New York (the “City”) now moves for summary judgment dismissing the complaint and all cross-claims against it, contending that it has established that it is exempt from liability under Administrative Code §7-210 and 34 RCNY §2-07 and did not cause or create the condition alleged to have caused plaintiff’s injuries. In support of its motion, the City submits the affirmation of David Atik, an employee of the New York City Department of Finance (“DOF”), in which he attests that a review of the DOF’s Property Tax System database reveals that the Building was not owned by the City on the date of plaintiff’s accident and, moreover, that the Building is classified as Building Class W9 (NYSCEF Doc. No. 45 [Atik Affirm.])

The City also submits the affidavit of Mildred McKnight-Gibson, attesting as follows:

I am employed by the New York City Department of Transportation (DOT) in the Highway Inspection and Quality Assurance Unit (HIQA). I have been employed by DOT and assigned to the HIQA Unit since 2010. My office is located at 55 Water Street, 7th Floor, New York, NY. My current title is Highway and Sewer Inspector. I have worked as a Highway and Sewer Inspector since 2010.

I commenced my employment at DOT by undergoing approximately 6 months of training where I attended presentations in a classroom setting and went out into the field to observe actual street conditions. For field training, I accompanied designated DOT senior inspectors to many locations in the City of New York ("City"). Among other things, I was taught how to determine which entities are responsible for street hardware based on a visual inspection.

My duties include visiting active work sites on sidewalks and roadways in the City to enforce DOT's rules and regulations regarding work being performed on the sidewalks and roadways, including but not limited to inspecting active work sites for (a) safety of pedestrians and vehicular traffic; (b) appropriate DOT permits authorizing the scope of work being performed; and (c) adherence to DOT permit stipulations. My duties also include issuing summonses, Corrective Action Requests (CARs), and Notices of Immediate Corrective Action (NICAs) to those that have violated DOT rules and regulations. I also conduct inspections of different street hardware on the City's sidewalks and roadways.

My duties require me to be able to identify the entities responsible for street hardware by a visual inspection in order to issue summonses, CARs, or NICAs to the appropriate entities so they can remediate unsafe conditions.

At the request of the New York City Law Department, I personally conducted an onsite inspection on October 20, 2021 to identify the grating located on the sidewalk on West 59th Street between Tenth Avenue and Eleventh Avenue (at 899 Tenth Avenue) in the County, City, and State of New York and as depicted in the photograph annexed hereto as Exhibit A.

In order to identify the entity responsible for the maintenance of this hardware, I observed the design and physical appearance of the hardware. I also examined the face of the hardware to determine if it contained any unique markings that tend to indicate the entity responsible for its maintenance and repair. In this instance, I observed that the style and appearance of the grating was similar to ones pointed out to me during training as typical Consolidated Edison gratings. Additionally, I observed that this grating is similar to ones for which I have issued NOV's, CARs and

NICAs to Consolidated Edison in the past, which have been accepted by them.

Based on the forgoing and in conformity with my training and experience, this grating is identified as being the responsibility of Consolidated Edison.

(NYSCEF Doc. No. 42 [McKnight-Gibson Aff.] [emphasis added]).

Finally, the City submits the affidavit of Anumon George, a Department of Transportation of the City of New York (“DOT”) paralegal, attesting to his search of DOT records of the sidewalk located at West 59th Street between Tenth Avenue and Eleventh Avenue on the side of 59th Street and adjacent to 899 Tenth Avenue for a period of two years prior to and including the date of plaintiff’s fall (NYSCEF Doc. No. 41 [George Aff.]). The City also attaches the records produced by George’s search as a separate exhibit (NYSCEF Doc. No. 40).

In opposition, plaintiff argues that City’s motion is premature and must be denied pending the completion of discovery, including the depositions of Atik, George and McKnight-Gibson. Plaintiff further argues that ConEd’s response to plaintiff’s Notice to Admit did not admit ownership of the grating at issue here.

### DISCUSSION

“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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

Here, the City has demonstrated through the Atik affirmation that it is exempt from liability under Administrative Code §7-210, which shifts tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two- or

three-family residential properties that are owner occupied and used exclusively for residential purposes (Santos v City of New York, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018] citing Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 520 [2008]).

Given the facts alleged here, however, this is not the end of the analysis. Specifically, plaintiff alleges that he fell on or near a grate in the sidewalk and, under 34 RCNY §2-07, “[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad” and must also “replace or repair any cover or grating found to be defective [as well as] ... any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating” (34 RCNY §2-07[b]). As a grate owner’s liability to make such repairs under 34 RCNY §2-07(b) is not shifted to the owner of an abutting property under Administrative Code §7-210 (See Storper v Kobe Club, et. al., 76 AD3d 426 [1st Dept 2010]), in order to establish its entitlement to summary judgment the City must also prove that it was not the owner of the subject grate. It has not done so.

The City argues that ConEd’s response to plaintiff’s Notice to Admit conceded ownership of the subject grating. The City’s reliance on ConEd’s response is misplaced, where, as here plaintiff’s notice to admit served on ConEd improperly sought to compel the “admission of fundamental and material issues or ultimate facts...” (MTGLQ Inv'rs, LP v Collado, 183 AD3d 414, 415 [1st Dept 2020] [internal citations omitted]) and ConEd objected to the request for admission on this ground. Even ignoring the foregoing, to the extent that ConEd’s response acknowledged ownership of one of the multiple gratings depicted in the photos plaintiff attached

to his Notice to Admit, such acknowledgement does not establish ConEd's ownership of the specific grating at issue here.

The City also contends that it has established that ConEd is the sole owner of the grating through the affidavit of McKnight-Gibson. The Court disagrees. McKnight-Gibson's affidavit is conclusory, as it fails to set forth the factual basis for McKnight-Gibson's conclusion that the grating in question is the property of ConEd, let alone establish that the grating was ConEd's property at the time of plaintiff's accident (See Vega v The City of New York, 2016 NY Slip Op 32580[U], 3 [Sup Ct, New York County 2016]; see also Concepcion v City of New York, 2019 NY Slip Op 30964[U], 4 [Sup Ct, New York County 2019]; Hawkins v The City of New York, 2019 NY Slip Op 30957[U], 3 [Sup Ct, New York County 2019]; but see Bailey v The City of New York, 2019 WL 1318499 [Sup Ct, NY County 2019]).

Accordingly, a question of fact remains as to whether the City may be liable to plaintiff under 34 RCNY §2-07(b), mandating the denial of the City's summary judgment motion (See Saez v Sapir Realty Mgt. Corp., 185 AD3d 456, 456-57 [1st Dept 2020] [11 Madison defendants' motion for summary judgment properly denied where they did not conclusively establish that ConEd was the owner of the sidewalk vault grate on which plaintiff allegedly tripped]).

In light of the foregoing, it is

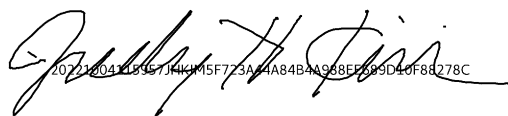
**ORDERED** that the City's motion for summary judgment dismissing the complaint and all cross-claims as against it is denied; and it is further

**ORDERED** that within twenty days of entry, plaintiff shall serve a copy of this order with notice of its entry upon all defendants and upon the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerks Office (60 Centre St., Rm. 119) in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

*Electronically Filed Cases* (accessible at the “E-Filing” page on this court’s website at the address www.nycourts.gov/supctmanh); and it is further

**ORDERED** that the Clerk of the Court is directed to set this matter down for a preliminary conference in the DCM Part on the next available date.

This constitutes the decision and order of the Court.



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10/4/2022  
DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE