

Colon v 671 Bushwick Corp.

2022 NY Slip Op 33395(U)

October 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 517173/2020

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of October, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

SONIA COLON,

Plaintiff,

- against-

671 BUSHWICK CORP.,
THE BEST DELI AND GROCERY 1 CORP. AND
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendants.

-----X

DECISION/ORDER

Index No. 517173/2020

MOT. SEQ. 1, 2, 3

The following e-filed papers read herein:

NYSCEF #:

Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed _____

23-32; 37-57; 61-64

Opposing Affidavits (Affirmations) _____

65-74; 60, 65-74; 77-82

Reply Affidavits (Affirmations) _____

75; 76; 83

Upon the foregoing papers in this personal injury action, defendant The Best Deli and Grocery 1 Corp. (Deli) moves in motion sequence (mot. seq.) one for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims asserted against it. Defendant 671 Bushwick Corp. (Bushwick) moves in mot. seq. two for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims asserted against it. Defendant Consolidated Edison Company of New York, Inc. (Con Ed) moves in mot. seq. three for an order, pursuant to

CPLR 3212 (b), granting it summary judgment dismissing the complaint and all cross claims asserted against it.

Background

The Trip and Fall Accident

On May 28, 2020, at approximately 1:45 p.m., Sonia Colon (Colon), a pedestrian, was injured when she tripped and fell on the sidewalk adjacent to the property at 671 Bushwick Avenue in Brooklyn, New York.

At her deposition, Colon testified that on the date of her accident, she was walking back to her receptionist job after lunch, on one of her two alternative routes to her office, which took her past the Deli, which she was an occasional customer of. She said she took each of the two routes half the time [Page 88]. The deli is “maybe one, two, three blocks from my home” [Page 87]. She tripped and fell over a cable guard. She testified that she asked the workers in the Deli who had put the cable there, and they told her “Con Ed.” She said the doors to the basement under the Deli were open, and [Page 28] “there was an electrical wire going to down which was under the orange plastic, and the wire was going down into the basement.” On the other side, after crossing the entire sidewalk, the cable went into a manhole cover in the street [Page 84]. At another point, she was not sure if the cellar doors were open or closed [Page 73]. She said the plastic covering was laying straight over the wire on the sidewalk [Page 43] and identified photos shown to her. She testified [Page 60] that she had not looked down at the sidewalk, and “was focusing on getting to work.” When her foot came into contact with the cable guard, she fell forward onto her knees and her out-stretched hands [Page 66]. She provided an errata sheet for her

EBT [Doc 32] which corrects Page 89 thus “weeks prior to my accident I remember seeing the orange and yellow plastic on the sidewalk in front of the store/deli.”

The Instant Action

On September 15, 2020, Colon commenced this personal injury action against defendants by filing a summons and a verified complaint. The complaint alleges that all defendants owned, operated, maintained and/or leased the property and “its agents, servants and/or employees negligently and carelessly maintained said premises in such a haphazard, negligent manner as to cause the same to become and remain in an unsafe, improper and dangerous condition, which consisted of a trap and nuisance as well as a negligent and improper condition of which the defendant[s] had due notice, or by the use of reasonable care and inspection therein, might and should have had due notice.”

All three defendants answered the complaint, denied the material allegations therein and asserted affirmative defenses and cross claims. Con Ed avers “That the defendant, Consolidated Edison Company of New York, Inc., is a New York corporation engaged in the sale and distribution of electricity, gas and steam under franchises. All work performed or equipment installed at the times mentioned in the complaint was pursuant to the rights granted by law and the permission or license of the proper municipal authorities.” Bushwick and Deli aver, among other things, “The alleged condition was open and obvious.”

After issue was joined, discovery ensued. A note of issue and certificate of readiness is due on or before October 14, 2022, as provided in the Final Pre-Note Order dated May 19, 2022.

Defendants' Summary Judgment Motions

Deli, on March 28, 2022, moved for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that “Defendant did not setup the wiring or plastic which allegedly caused the Plaintiff’s injuries and Con Edison was solely responsible for setting up and removing same” [Aff, Doc 24 ¶11].

Bushwick, on June 22, 2022, moved for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that “it did not owe a duty to plaintiff, as possessors of land have no duty to protect or warn against conditions that are not inherently dangerous and are readily observable; there was no dangerous or defective condition and to the extent there was 671 Bushwick did not have actual or constructive notice of it” [Aff, Doc 39 ¶2]. Bushwick also avers in its affirmation that it is entitled to contractual indemnification against Deli, and common law indemnification against Con Ed, but such relief is not requested in its notice of motion. Deli submitted an affirmation in opposition [Doc 60].

Con Ed, on July 22, 2022, cross-moved (this is incorrect, as a cross motion is against the moving party) for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that “there is no proof there was a defect or inherently dangerous condition that caused plaintiff’s accident. In the instant case as set forth by counsel for D Best Deli and 671 Bushwick, the record demonstrates that all defendants are entitled to summary judgment as there is neither proof of a defective condition or any material issues of fact with respect to existence of such condition. The

condition itself was a warning and not a defect” [Aff, Doc 62 ¶4], and “the alleged defect is clearly open and obvious as a matter of law” [Id. ¶6].

Con Ed’s witness testified at her EBT [Doc 51] that a “trouble ticket” or “emergency ticket” had been opened, which indicates that there had been a manhole fire, which was reported to Con Ed by the Fire Department at about midnight on March 30, 2020, and that there was no electricity as a result for 669 Bushwick, the building next to defendant Bushwick’s building, and another ticket which resulted from a call from the Deli at defendant Bushwick’s building, which also has apartments above the Deli. Someone arrived a few hours later and Con Ed obtained a permit to provide temporary electricity from the street pole box, pursuant to a “shunt permit” according to the witnesses’ testimony. The work apparently had not been completed by the day of plaintiff’s accident. It must be noted here that March 30, 2020 was two weeks into the COVID-19 Pandemic, when everything in New York City had essentially shut down and only emergency work was being performed by businesses not deemed to provide essential services.

Counsel for all three defendants point out that plaintiff testified that she walked on this block many times per week, as it was on her 50/50 alternative route to work, and that she lived a few blocks away and went home each day for lunch.

Colon’s Opposition

Colon, in opposition, provides one affirmation opposing the motions of Deli and Bushwick, and another opposing the motion by Con Ed. The one filed with regard to the Deli and Bushwick defendants states “Building owners owe a nondelegable duty to maintain abutting sidewalks in a "reasonably safe condition" pursuant to § 7-210 of the

Administrative Code of the City of New York. Building owners also owe a duty of care when they make special use of a sidewalk” [Doc 70 ¶11]. Plaintiff continues “defendant is not entitled to summary judgment dismissing plaintiffs' complaint because an issue of fact exists as to whether defendant breached its duty of care with regard to the maintenance of the shunt board pursuant to NYC AC § 7-210 or the "special use" doctrine.” He avers that pursuant to the decision *Eliassian v Consolidated Edison Co. of N. Y, Inc.*, 300 AD2d 51 [1st Dept 2002] an issue of fact exists “as to whether the placement of the shunt board constituted a special use of the sidewalk by a building owner.” However, this analysis is incorrect. The court in that case said that it could not be determined whether the utilities were specifically installed to service the adjacent property owners under the direction of those property owners. For example, where the adjoining property requires temporary electrical service via wires and shunt boards installed upon a sidewalk, such installation may constitute a special use, because they are installed at the owner's direction and request, for the sole benefit of the owner (*See Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008] "With respect to both tenant and owner, issues of fact exist as to whether the placement of the shunt boards constituted a special use of the sidewalk such as to give rise to a duty to maintain this 'provisional sidewalk structure'"). Here, the cable and cable cover (referred to by some as a shunt board) were not installed at the request of the property owner, who testified he knew nothing about the electrical outage or the Con Ed work until the lawsuit was served. The Deli's representative testified that they called Con Ed, who came and set up the temporary electricity until they could

permanently fix it. Counsel for plaintiff concludes that “the issue of whether a condition is open and obvious is generally a question for the jury to decide.”

Plaintiff’s opposition to Con Ed’s motion [Doc 77] basically argues that “the defective condition was not open and obvious and was inherently dangerous. The issue of whether the subject condition is open and obvious is a material question of fact that should be left for the jury to decide.” Plaintiff also argues that Con Ed’s “cross motion for indemnification should be denied as premature.” However, Con Ed has not cross moved for indemnification. Bushwick moved (defectively) in its affirmation in support for common law indemnification against Con Ed.

The Reply Papers

Bushwick and Deli repeat their arguments in their reply papers. Con Ed states in its reply that the court should disregard the plaintiff’s affidavit [Doc 81] as raising facts which contradict her EBT testimony. Counsel adds “as noted in the moving papers, the alleged condition was a bright orange and yellow plastic shunt which was designed to warn pedestrians of a slight height differential (slant) caused by wires that were placed on the sidewalk. The shunt was clearly visible had plaintiff used her senses. It is well established that there is no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses. In sum, there was no defect or inherently dangerous condition and as such there was no negligence as the condition is the warning itself. Plaintiff’s accident was not caused by any defect or inherently dangerous condition. Lastly, plaintiff assumed the risk by walking over a very noticeable and bright condition. Simply, the condition a slight slope was open and obvious

and itself served as a warning. Lastly, 671 Bushwick is not entitled to common law indemnification as such a finding would be premature and moot for the reasons set forth and that all defendants should be granted Summary Judgment” [internal citations omitted].

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

“An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition . . . and must warn of any dangerous or defective condition of which it has actual or constructive notice” (*Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 707 [2015]). However, the Second Department has held that an owner or tenant has no duty to protect or warn against a condition that is *both* open and obvious *and not*

inherently dangerous (see *Rider v Manhattan Monster, Inc.*, ___AD3d___, 2022 NY Slip Op 05048, *1 [2d Dept 2022]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; see also *Karpel v National Grid Generation, LLC*, 174 AD3d 695, 696-697 [2d Dept 2019] [holding that “to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous”]; *Crosby v Southport, LLC*, 169 AD3d 637, 640 [2d Dept 2019]).

Regarding public sidewalks, the Second Department has held that “[a]n abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk [unrelated to any condition of the sidewalk material in New York City] only when the owner or lessee . . . created the condition . . . because of a special use . . .” (*Maya v Town of Hempstead*, 127 AD3d 1146, 1147 [2015]; see also *Lahens v Town of Hempstead*, 132 AD3d 954, 955-956 [2015]). Running wires across a sidewalk to provide electricity for two adjoining buildings as a result of a “manhole fire” in a Con Ed manhole is not a special use on the part of the property owner or the commercial tenant, this court concludes.

“Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Gorokhovskiy v NYU Hosps. Ctr.*, 150 AD3d 966, 967 [2017]; see also *Karpel*, 174 AD3d at 695).

Here, there is no dispute that neither the owner or the lessee of the property made special use of the sidewalk abutting the property by laying cables and a cable cover (shunt) across the public sidewalk which would result in liability for any inherently dangerous

unsafe condition caused by that use. While Colon's deposition testimony establishes that the cable cover on the sidewalk in front of the Deli was open and obvious – since she admittedly observed the cable cover on several prior occasions before she tripped on it – there is a triable issue of fact as to whether the cable cover on the sidewalk was *also* an inherently dangerous condition.

Colon contends that her foot got caught because the cable cover was a “trap-like” condition which was inherently dangerous. She avers that the plastic “puzzle piece” was not connected correctly and part of the connector was sticking up. The photos support her claim, in particular the one on Page 3 of Doc 77. Further, after the accident, the cable cover was changed, cones and barricades were put up, and the condition was made more “obvious.” See the photo at Doc 53. This is not the same cable cover as in the photo at Doc 29. While the repair should have taken less than eight weeks, due to the Pandemic, this cable shunt was in place for a longer period of time than it was perhaps designed for, and the pieces clearly separated, if they had been installed properly in the first place, by the time of plaintiff's accident.

The court concludes that defendant Con Ed has not established its *prima facie* entitlement to summary judgment. While the cable shunt over which Colon tripped and fell was open and obvious, they fail to present any evidence that the cable cover, in the condition it was in at the time of her accident, was not inherently dangerous.

Contrary to the Con Ed defendant's argument that “[t]he alleged condition was open and obvious thereby barring the plaintiff's action as a matter of law,” the legal standard to succeed on a summary judgment motion in the Second Department, since 2003 when that

court issued its decision in *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003] is, that in order to prove that it had no duty to protect or warn, the defendant must prove that the condition was both open and obvious and not inherently dangerous.

With regard to Con Ed's argument that plaintiff's action is barred by the doctrine of assumption of the risk, as walking on a sidewalk somehow brings her activity under the rubric of the doctrine, defendant is in error. As the Court of Appeals recently explained, "extension of the doctrine to cases involving persons injured while traversing streets and sidewalks would create an unwarranted diminution of the general duty of landowners--both public and private--to maintain their premises in a reasonably safe condition. As we explained in an earlier case, assumption of the risk 'does not exculpate a landowner from liability for ordinary negligence in maintaining a premises' The exception would swallow the general rule of comparative fault if sidewalk defects or dangerous premises conditions were deemed inherent risks assumed by non-pedestrians who sustain injuries, whether they be joggers, runners, bicyclists or rollerbladers" [internal citations omitted]. Plaintiff here was a pedestrian, not engaging in a sport, and as such, there is no valid argument that she assumed any risks.

In conclusion, whether or not the cable cover (shunt) which was run across the public sidewalk by Con Ed created an inherently dangerous condition is a question of fact for the jury.

Accordingly, it is

ORDERED that Deli's motion in mot. seq. one for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that Bushwick's motion in mot. seq. two for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that Bushwick's (defective) attempt to move for summary judgment against Deli for contractual indemnification and against Con Ed for common law indemnification is denied as moot in light of the court's dismissal of all claims against Bushwick; and it is further

ORDERED that Con Ed's motion in mot. seq. three for summary judgment dismissing the complaint and all cross claims asserted against it is denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J. S. C.