

Jones v Vornado N.Y. RR One L.L.C.

2022 NY Slip Op 34103(U)

December 6, 2022

Supreme Court, New York County

Docket Number: Index No. 159102/2015

Judge: Sabrina Kraus

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

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

CHRISTIAN JONES, KATHY JONES,
Plaintiffs,

INDEX NO. 159102/2015

MOTION DATE 06/10/2022

MOTION SEQ. NO. 005 006

- v -

VORNADO NEW YORK RR ONE L.L.C., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., BOARD OF
MANAGERS OF THE TOWER 53 CONDOMINIUM, PRIDE
PROPERTY MANAGEMENT, CORP., T53 CONDOMINIUM,
LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

BOARD OF MANAGERS OF THE TOWER 53
CONDOMINIUM, PRIDE PROPERTY MANAGEMENT, CORP.

Third-Party
Index No. 595397/2017

Third-Party Plaintiffs,

-against-

52ND-8TH OPERATING INC. d/b/a LINDY'S.

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 176, 177, 178, 187, 189, 191, 193

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 173, 175, 179, 180, 181, 182, 183, 184, 185, 186, 188, 190, 192, 194, 195, 196, 197, 198, 199, 200

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiffs commenced this action seeking damages for personal injuries sustained by plaintiff Christian Jones (Christian), which they allege were incurred when he tripped and fell on

a manhole cover which was lying on a public sidewalk abutting 825 Seventh Avenue in Manhattan. Plaintiffs allege that defendants violated Administrative Code §§ 7-210, 7-211, 7-212, 16-118(2), 27-127, and 27-128, and assert causes of action sounding in negligence and loss of consortium on behalf of plaintiff Kathy Jones, Christian's spouse.

PENDING MOTIONS

On January 31, 2022, defendants/third-party plaintiffs Board of Managers of The Tower 53 Condominium (Board) and Pride Property Management Corp. (Pride) moved for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and all crossclaims against them. (Mot. Seq. 5).

On January 31, 2022, defendant Consolidated Edison Company of New York, Inc. (Con Ed) moved for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all crossclaims against it. (Mot. Seq. 6).

The motions are consolidated herein for determination as set forth below.

ALLEGED FACTS

Undisputed Facts

Pursuant to the parties' statements of material fact, and responses thereto, the following facts are undisputed:

1. On July 18, 2015, Christian was injured when he caught his foot under an elevated manhole cover, causing him to trip and fall on the sidewalk in front of 825 7th Avenue in Manhattan (premises), on the northeast corner of 53rd Street and 7th Avenue.
2. At the time of the accident, defendant Vornado New York RR One L.L.C. (Vornado) owned the ground floor commercial condominium unit of the premises, and defendant T53 Condominium, LLC (T53) owned condominium units on floors 2-8 of the premises.

3. Board owned the common areas of the building, which were managed by Pride pursuant to an agreement.
4. Board was responsible for the common elements of the premises, including the adjacent sidewalk.
5. While Con Ed's records indicate that it performed work to address a gas leak in December 2014 near the accident site, there is no documentation in Con Ed's gas leak history report indicating that Con Ed replaced, repaired or otherwise removed an electric manhole cover pursuant to the work for the gas leak jobs performed by Con Ed in December 2014.

Relevant Deposition Testimony

Christian testified that he did not see the manhole cover before his accident and that he did not know how long it had been on the sidewalk prior to the accident, that the manhole cover had a four-foot-tall garbage can on top of it and that after the accident he noticed trash underneath the manhole cover. He testified that while he was lying on the ground after the accident, he heard someone that came out of the premises state that they called Con Ed about the manhole cover, and that he spoke with Barbara Roche¹, who he had an appointment with later that day.

Board's handyman Rifat Merkashi testified that its staff would generally sweep and pick up trash from the adjacent sidewalk three to four times a day, and sometimes would wash it in the spring and summer. He stated that they kept no records of this cleaning. He testified that he had not seen the subject manhole cover prior to plaintiff's accident and did not know how long it had been there.

¹ The name appears to be misspelled as Roache in the deposition transcript

Stanley Lewis, Section Manager of Distribution Engineering at Con Ed testified that the subject manhole cover appears to be a Con Ed vented manhole cover used for its electrical facilities. He stated that such covers weigh over 200 pounds and could be opened with a “manhole hook” or “any similar tool crybar, crowbar.” He testified that Con Ed maintains a call center to take complaints, including about missing and damaged manhole covers, and that a “B ticket” would be generated. He also testified that when a Con Ed employee or authorized agent would open a vented cover, a record would typically be made by a “B ticket” or work request.

John Cagney, Field Operations Planner at Con Ed’s Gas Operations Department, testified that vented manhole covers would be used on Con Ed electrical manholes, whereas solid manhole covers, which had no holes would be used for access points to gas regulator stations. He testified that if his department had reason to remove or replace a vented manhole cover, there would be a record of it in the leak history report. He also testified that if his department had to dispose of a broken manhole cover while it was removing or replacing it, there would be no record of that, and the broken manhole would be disposed of in a dumpster. He testified that his department did work near the accident site in December, 2014.

Yessina Campoverde, record searcher for Con Ed, testified that her co-worker conducted a search for New York City Department of Transportation permits, opening tickets, paving orders, notices of violations, corrective action reports and “B-tickets” for two years prior to the accident, within 30 feet of the intersection of 7th Avenue and W. 53rd Street. She stated after reviewing the search documents, nothing indicated that any work was done by Con Ed at that location in 2015.

Affidavits

Board and Pride attach the affidavit of Rifat Merkashi, who states that in June of 2015, he observed Con Ed employees opening manholes to inspect for what he understood to be a gas leak, placing manhole covers on the sidewalk, and that garbage cans had been placed over those manhole covers.

Con Ed attaches the affidavit of Jennifer Grimm, Senior Specialist in its Legal Services Department, who states that she performed a search for all “B-tickets” for an area encompassing 7th Avenue between 51st Street and 54th Street, for the period of December 1, 2014 through September 30, 2015, and that none of the records produced report a missing, broken, repair, or replacement of a Con Ed manhole.

Plaintiffs submit the affidavit of Barbara Roche, who states that she would regularly pass the accident site while walking to and from work in 2015. She sets forth that she observed the subject manhole cover, with a garbage can on top of it at the accident location for a period beginning several weeks prior to the accident. She states that she observed Con Ed performing work at the corner and in the vicinity of the accident throughout the month prior to the accident, and that the appearance of the manhole at the accident location occurred during this period.

DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d

966, 967 (1988). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” *O’Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Board and Pride’s Motion for Summary Judgment is Granted

Administrative Code of the City of New York § 7-210 shifts liability for injuries resulting from defective sidewalks from the City of New York to the abutting landowner. *Vucetovic v Epsom Downs*, 10 NY3d 517 (2008); *Sangaray v West River Associates, LLC*, 26 NY3d 793 (2016); *Torres v N.Y. City Hous. Auth.*, 118 AD3d 540 (1st Dept 2014).

Administrative Code § 7-210 requires the owner of real property abutting a sidewalk to maintain it in a “reasonably safe condition” and renders that owner liable for “any injury to property or personal injury” which is proximately caused by the failure to reasonably maintain the sidewalk. New York City Admin. Code § 7-210(a) and (b). The duty proscribed by § 7-210 is nondelegable. *Xiang Fu He v Troon Mgmt.*, 34 NY3d 167 (2019). However, pursuant to 34 RCNY § 2–07(b), which provides that:

- (1) The 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, if such pad is installed.
- (2) The 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...

Pursuant to this section liability is shifted from the adjoining property owner to the owner of a covering or grating for the area within 12 inches of the hardware. *Storper v Kobe Club*, 76 AD3d 426 (1st Dept 2010); *Hurley v Related Mgt. Co.*, 74 AD3d 648 (1st Dept 2010).

Board and Pride contend that they had no duty with respect to the manhole cover, as Con Ed had an exclusive duty pursuant to 34 RCNY § 2–07(b) to maintain the cover that it owned,

and that it would have been illegal for them to move it pursuant to Administrative Code § 10-118.1. Plaintiffs and Con Ed argue that 34 RCNY § 2-07(b) only applies to manhole covers that are installed, which is not the case here, and that Administrative Code § 10-118.1 does not relieve Board and Pride of liability.

The question of whether 34 RCNY § 2-07(b) applies to uninstalled manhole covers appears to be one of first impression before this court. “[L]egislative enactments in derogation of common law, and especially those creating liability where none previously existed,” must be strictly construed. *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 (2008), quoting *Blue Cross & Blue Shield of N.J., Inc. v Phillip Morris USA Inc.*, 3 NY3d 200, 206 (2004). Generally, courts “look first to the statutory text, which is the clearest indicator of legislative intent.” *People ex rel. Negron v Superintendent, Woodbourne Correctional Facility*, 36 NY3d 32, 36 (2020), quoting *Matter of New York County Lawyers’ Assn. v Bloomberg*, 19 NY3d 712, 721 (2012). “[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning.” *Id.*, quoting *State of New York v Patricia II.*, 6 NY3d 160, 162 (2006).

From a plain reading of the statute, it is clear that the word “installed” is only intended to apply to concrete pads, not to covers or gratings. The only requirement imposed by the statute is that the covering or grating be on the street, which includes sidewalks. 34 RCNY § 2-01; *Cruz v New York City Transit Auth.*, 19 AD3d 130 (1st Dept 2005). This interpretation is supported when read in conjunction with Administrative Code § 10-118.1 which makes it a criminal misdemeanor and imposes fines for unauthorized persons to

remove, or transport through, along or across a public street, any manhole cover, including but not limited to the cover of an opening in the ground, street or sidewalk used by a public utility or authority to access underground vaults, structures, installations, or other enclosed space; or the cover of such an opening that is part of a sewer system, fuel storage system, or water supply system.

Administrative Code § 10-118.1. Where 34 RCNY § 2-07(b) applies, the abutting property owner is not concurrently liable under Administrative Code § 7-210 if the accident occurs within the 12-inch zone of a cover or grate. *Storper*, 76 AD3d at 427. Thus, absent any allegation that Board or Pride created the condition that caused Christian's accident, there is no basis to hold them liable to plaintiffs, and plaintiffs' negligence claims are dismissed against them.

Absent opposition by Con Ed to the portion of Board and Pride's motion seeking to dismiss its cross claims for common law indemnity and contribution those portions of their motion are granted. *Bonventre v Soho Mews Condominium*, 173 AD3d 411, 412 (1st Dept 2019).

Con Ed's Motion for Summary Judgment is Denied

"A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury." *Ross v Betty G Reader Revocable Trust*, 86 AD3d 419, 420-21 (1st Dept 2011); *see e.g. Roa v City of New York*, 188 AD3d 504 (1st Dept 2020) (*denying summary judgment to plaintiff against Con Ed despite nondelegable duty under 34 RCNY 2-07(b)(1) for failure to prove notice as a matter of law*).

In *DeSilva v City of New York*, the plaintiff was injured when he tripped and fell on a manhole cover that was left on a subway grate. 15 AD3d 252 (1st Dept 2005). The First Department reversed the trial court's decision granting summary judgment to Con Ed, finding that evidence that Con Ed had removed and replaced a nearby manhole cover, and that they did not know what they did with the cover that was replaced, while circumstantial, provided a sufficient link between Con Ed and the condition that caused the plaintiffs accident to defeat

summary judgment. *Id.* The court also found that dismissal was properly granted to the owner of the grate, absent evidence that it had constructive notice of the manhole cover. *Id.*

Con Ed contends in its reply that the court should not consider the Merkashi affidavit, as it addresses subject matter that he testified at deposition to not having knowledge of, or the Roche affidavit, as she was not properly disclosed as an eyewitness given that her name was misspelled, and her employer misidentified in Christian's deposition.

An affidavit prepared by a witness which directly contradicts his or her prior deposition testimony creates only a feigned issue of fact, which is insufficient to defeat a motion for summary judgment. *Danis v John C. Food Corp.*, 179 AD3d 606 (1st Dept 2020); *Telfeyan v City of New York*, 40 AD3d 372, 373 (1st Dept 2007); *cf. Botfeld v Wong*, 104 AD3d 433 (1st Dept 2013) (*statements in affidavit which did not directly contradict prior deposition testimony properly supported reversal of summary judgment*). Here, as Mr. Merkashi was questioned about the manhole cover at issue, but not about Con Ed's activity in the area in general, the affidavit does not contradict his prior sworn testimony and is thus admissible.

The affidavit of a previously undisclosed witness proffered after the note of issue has been filed to defeat summary judgment is improper. *Garcia v Good Home Realty, Inc.*, 67 AD3d 424 (1st Dept 2009); *Rodriguez v N.Y. City Hous. Auth.*, 304 A.D.2d 468 (1st Dept 2003). Here, as Ms. Roche was not properly identified as a witness prior to plaintiff's submission of her affidavit, the affidavit is not considered.

Even if the court were to disregard the Merkashi affidavit, it is unrefuted that Con Ed performed work around the accident location prior to the accident, and that the manhole was owned by Con Ed. Thus, similar to *DeSilva*, this constitutes sufficient circumstantial evidence that Con Ed created the condition to defeat summary judgment.

Additionally, “[t]o meet its burden on the issue of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff’s fall.” *Torre v Aspen Knolls Estates Home Owners Ass’n, Inc.*, 150 AD3d 789 (2d Dept 2017). As Con Ed fails to submit evidence of its inspection activities prior to the accident, it fails to establish that it lacked constructive notice of the condition. *Cf. Di Sanza v City of New York*, 47 AD3d 535 (1st Dept 2008), *aff’d* 11 NY3d 766 (2008) (*Con Ed satisfied burden by submitting uncontested testimony of employee that he inspected grate less than five months before the accident and found no defect*)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants Board of Managers of The Tower 53 Condominium and Pride Property Management Corp. is granted, and the complaint is dismissed against them; and it is further

ORDERED that all crossclaims against said defendants are severed and dismissed; and it is further

ORDERED that the motion for summary judgment of defendant Consolidated Edison Company of New York, Inc. is denied; and it is further


ORDERED that, within 20 days from entry of this order, defendants Board of Managers of The Tower 53 Condominium and Pride Property Management Corp. shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made 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 the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

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

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12/6/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	REFERENCE
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CHECK IF APPROPRIATE: