

<b>Mori v City of New York</b>
2022 NY Slip Op 34250(U)
December 15, 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*

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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 06/22/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 85, 86, 87, 88, 89, 90, 91

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing papers, the motion by defendants the Metropolitan Transportation Authority (“MTA”) and New York City Transit Authority (“NYCTA”) (collectively, the “Transit Defendants”) is granted for the reasons set forth below.

On July 10, 2020, plaintiff commenced this negligence action alleging that on April 15, 2019, he tripped and fell on the sidewalk in front of 899 Tenth Avenue, New York, New York (NYSCEF Doc. Nos. 74 [Amended Complaint at ¶¶130-140]). At his General Municipal Law (“GML”) §50-h hearing, plaintiff testified, in relevant part, as follows:

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]).

The Transit Defendants now move, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint and all cross-claims against it, contending that it is exempt from liability under Administrative Code §7-210 and the Rules of the City of New York Department of Transportation (34 RCNY) §2-07. In support of the motion, the Transit Defendants submit, inter alia, the affidavit of Heriberto Hernandez, an NYCTA employee, attesting that:

I am employed as an Associate Project Manager 2 with the Department of Subways Maintenance of Way - Engineering Division for the New York City Transit Authority. I have held this title for 6 years.

My job duties include conducting searches for property owned or maintained by the New York City Transit Authority (hereinafter referred to as "NYCTA") and Metropolitan Transportation Authority (hereinafter referred to as "MTA").

...

On June 9, 2022 I conducted a search for any property owned or maintained by the NYCTA and MTA located on the South side sidewalk of West 59th Street, between 10th and 11th Avenue, in front of the building 899 Tenth Avenue, New York, New York. I additionally conducted a search for any subway lines in the vicinity. My search included running a NYC Oasis map search for any NYCTA and MTA property in the area of the aforementioned address.

My search revealed that the NYCTA and MTA do not own or maintain any property located on the [s]outh side sidewalk of West 59th Street, between 10th and 11th Avenue, in front of the building 899 Tenth Avenue, New York, New York. More specifically, the NYCTA and MTA do not own or maintain the grating located on the [s]outh side sidewalk of West 59th Street, between 10th and 11th Avenue, in front of the building 899 Tenth Avenue, New York, New York.

Additionally, my search revealed that there are no subway lines running underneath West 59th Street, between 10th and 11th Avenue, New York, New York. [N]or are there any subway lines in the immediate vicinity thereof.

(NYSCEF Doc. No. 75 [Hernandez Aff. at ¶¶1-6]).

Plaintiff and defendant Consolidated Edison Company of New York, Inc. (“ConEd”) oppose the Transit Defendants’ motion, contending that issues of fact exist regarding the ownership of the sidewalk and grate<sup>1</sup>. Defendant Dormitory Authority of the State of New York (“DASNY”) opposes the Transit Defendants’ motion to the limited extent that the Transit Defendants assert that DASNY is liable to plaintiff pursuant to Administrative Code §7-210<sup>2</sup>.

### 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. 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, 324 [1986] [internal citations omitted]).

It is undisputed that plaintiff’s trip and fall was caused by an elevated metal grating within the sidewalk. Under 34 RCNY §2-07, “[t]he owners of covers or gratings on a street are responsible

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<sup>1</sup> The Court rejects plaintiff’s argument that the Transit Defendants’ motion must be denied as defective based on their failure to annex the pleadings to their motion. Every party’s pleadings has been electronically filed with the Court (See NYSCEF Doc. Nos. 1, 2, 6-11, 15-16) and has, therefore, been at all times available to all parties and the Court (See Studio A Showroom, LLC v Yoon, 99 AD3d 632, 632 [1st Dept 2012]).

<sup>2</sup> This issue is irrelevant to the disposition of the instant motion and will be determined in connection with DASNY’s motion for summary judgment (Mot. Seq. 002), currently sub judice.

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 “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]). Accordingly, the Transit Defendants have met their prima facie burden through the Hernandez affidavit, which establishes that the Transit Defendants did not own or maintain the subject grating.

In opposition, plaintiff and ConEd both argue that summary judgment is inappropriate because the Hernandez affidavit (i) fails to specify the documents searched; (ii) does not provide his professional qualifications for conducting the document review; and (iii) none of the parties have had the opportunity to depose Hernandez. These arguments are not persuasive. “Unlike many other factual issues that arise in negligence actions, the fundamental question of ownership is not one that is typically open to interpretation and thus better left for review upon a fully developed record in discovery” (Moy v The City of New York, 2010 NY Slip Op 30101[U] [Sup Ct, NY County 2010]). “Given the elemental nature of the factual question in dispute—either the Transit Authority own or do not own the grating—the affidavit submitted in support of the motion is sufficient to establish the Transit [Defendants’] *prima facie* entitlement to dismissal of the complaint and all cross claims” and plaintiff and ConEd “cannot defeat this motion simply by pointing out that discovery is not yet complete ... [where] [t]here is no suggestion in the opposition papers that further discovery might reveal that the Transit [Defendants] does in fact own the grating” (Id. [italics in original]).

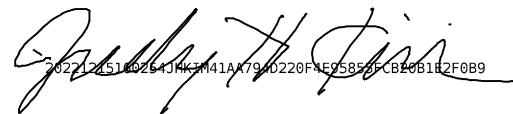
Accordingly, it is

**ORDERED** that the motion for summary judgment by defendants Metropolitan Transportation Authority and New York City Transit Authority, is granted and the complaint and all cross-claims are dismissed as to those defendants; and it is further

**ORDERED** that within twenty days from the date of this decision and order, counsel for defendants the Metropolitan Transportation Authority and the New York City Transit Authority shall serve a copy of this order with notice of entry on all parties, as well as the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office 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 “Efiling” page on this court’s website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)).

This constitutes the decision and order of the Court.



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12/15/2022  
DATE

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HON. JUDY H. KIM, J.S.C.

CHECK ONE:

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

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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