

<b>Escolastico v City of New York</b>
2022 NY Slip Op 34356(U)
December 22, 2022
Supreme Court, New York County
Docket Number: Index No. 153020/2015
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

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INDEX NO. 153020/2015

WILLIAM ESCOLASTICO,

MOTION SEQ. NO. 004

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC, AND AUDUBON  
REALTY LLC,**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for

JUDGMENT - SUMMARY

In this premises liability action, commenced by plaintiff William Escolastico, defendant Audubon Realty LLC moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against it. Plaintiff opposes.

Factual and Procedural Background

This case arises from an incident on July 4, 2014, in which plaintiff was allegedly injured in front of a building located at 227 Audubon Avenue in Manhattan (“the premises”) when she tripped after stepping into a hole on the sidewalk (NYSCEF Doc No. 1 at 3-10). The premises were owned by defendant Audubon Realty LLC (“Audubon”), and managed by an entity named Successful Management (“Successful”) (Doc No. 98 at 4). Plaintiff then commenced the captioned action against defendants City of New York, Consolidated Edison Company of New York, Inc. (“Con Edison”), and Audubon, alleging that he was injured due to their negligent ownership, control, management, and/or maintenance of the sidewalk in front of the premises (Doc No. 1 at

3-10). Audubon joined issue by their answer dated August 18, 2015, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 52).

Audubon moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against it, arguing that it did not create the alleged defective condition of the sidewalk, and that it had no actual or constructive notice of it (Doc No. 98 at 5-9). In support of its motion, it submits, among other things, a photograph of the allegedly defective condition of the sidewalk, an affidavit from Chayim Jakob, a Successful employee, and deposition testimony from Yesenia Campoverde, a Con Edison employee (Doc Nos. 22, 41-42, 57).<sup>1</sup> Plaintiff opposes, arguing that Audubon has not satisfied its burden of making a prima facie showing that it is entitled to summary judgment (Doc No. 104 at 4-7). He argues further that, in any event, there are questions of fact as to whether Audubon had constructive or actual notice of the allegedly defective condition (Doc No. 104 at 7-10).

#### *Incident Scene Photograph*

The image submitted by Audubon is a black and white photograph of the sidewalk in front of the premises (Doc No. 22 at 1).<sup>2</sup> It depicts a rectangular opening in the sidewalk with several sawhorse barricades arranged nearby in a square around some metal grating in the parking lane (Doc No. 22 at 1). However, there are no indications of the length, width, and depth of the opening.

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<sup>1</sup> These NYSCEF documents were not submitted as exhibits to Audubon's summary judgment motion (Seq. 004) (Doc Nos. 90, 98), however, each was mentioned in Audubon's moving papers and submitted in connection with prior motions.

<sup>2</sup> Although Audubon submits additional images of the sidewalk in front of the premises (Doc No. 22 at 2-7; Doc No. 55), it has not explained when those photographs were taken and whether plaintiff stated that such photos accurately depicted the sidewalk at the time of the incident. At plaintiff's deposition, he was only shown the black and white photograph (Doc No. 22 at 1), and he indicated that it showed the condition of the sidewalk at the time of the incident (Doc No. 21 at 26-28).

*Affidavit of Chayim Jakob*

In his affidavit, Jakob averred that neither Audubon nor Successful created the allegedly defective condition of the sidewalk, since they never performed or hired anyone to work on the sidewalk, and had no involvement in directing or supervising any work done on it (Doc No. 41 at 2). He further averred that Audubon and Successful had no actual or constructive notice of the condition, had never received a complaint about the sidewalk, and had no prior reported incidents (Doc No. 41 at 3). However, he made no mention of when the sidewalk was last inspected.

*Deposition Testimony of Yesenia Campoverde of Con Edison*

At her deposition, Campoverde testified that Con Edison performed a search of its records looking for documents relating to work performed on or near the premises for two years prior to the accident (Doc No. 57 at 7-9). The search revealed, among other things, a DOT street opening permit (no. M012014176105), a Con Edison street/sidewalk opening report (no. PS655152), and a Con Edison paving order (no. 130773) (Doc No. 56 at 2, 4-5; Doc No. 57 at 9-26). She explained that the DOT street opening permit gave Con Edison permission to cut into either the street or the sidewalk, without specifying which was being cut (Doc No. 57 at 13). The Con Edison street/sidewalk opening report provided, among other things, details about the type and dimensions of the cuts made, where such cuts were made, and whether the opening had been backfilled (Doc No. 56 at 4; Doc No. 57 at 15-18). She explained further that after Con Edison performs its cuts and the required repair work, it “leave[s] the street or the sidewalk the way [it] found it” through the process of backfilling and paving (Doc No. 57 at 20-21, 25-26).

She stated that, here, the DOT street opening permit listed “conduit construction and franchise” as the purpose for such permit (Doc No. 57 at 13, 30-31). The Con Edison street/sidewalk opening ticket indicated that a rectangular cut was made in the sidewalk in front of

the premises and that it was backfilled on August 9, 2013 (Doc No. 57 at 15-24). A paving order was then issued, with paving of the area completed by August 31, 2013, when the area was inspected (Doc No. 56 at 5; Doc No. 57 at 25-26, 45). She could not specify the exact date that the area was paved, but it was inspected and deemed complete on August 31, 2013 (Doc No. 25-26). When asked if she could testify to whether photographs of the premises aligned with the work described in the records, she stated that she could not speak to those questions because she had no field experience (Doc No. 57 at 17, 21-22).

### Legal Conclusions

“The Administrative Code of the City of New York requires owners of real property abutting any sidewalk to maintain that sidewalk in a reasonably safe condition, which includes repaving, repairing[,] and replacing defective sidewalks” (*Tropper v Henry St. Settlement*, 190 AD3d 623, 624 [1st Dept 2021]; *see* Administrative Code of the City of NY § 7-210). “[L]iability for an accident on a sidewalk abutting real property will arise when it is established that the owner of said property created the condition alleged or had prior notice” (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]). Notice may be either actual or constructive, with the latter occurring when a condition is “visible and apparent and in existence for a sufficient length of time prior to the accident to permit [a] defendant . . . to discover and remedy it” (*George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003] [internal quotation marks, brackets, and citations omitted]; *see Early*, 73 AD3d at 561). As the moving party, Audubon bears the burden of making a prima facie showing that it is entitled to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Audubon fails to establish prima facie that it lacked actual or constructive notice, since it “fail[s] to offer evidence based on firsthand knowledge as to when the sidewalk was last inspected

prior to plaintiff's accident" (*Powell v BLDG 874 Flatbush LLC*, 201 AD3d 534, 535 [1st Dept 2022]; see *Mollette v 111 John Realty Corp.*, 194 AD3d 614, 615 [1st Dept 2021]). Although the Jakob affidavit provides that Audubon did not create the opening and that there were no complaints or incidents involving such opening (Doc No. 41), it does not include any discussion about when the sidewalk was last inspected. Thus, Audubon's summary judgment motion must be denied (see *Maria v Concourse Estate, LLC*, 200 AD3d 578, 579 [1st Dept 2021]), and "there is no need to consider the sufficiency of the opposition papers" (*Zabawa v Sky Mgt. Corp.*, 183 AD3d 430, 431 [1st Dept 2020]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Even assuming Audubon satisfied its burden of making a prima facie showing, plaintiff demonstrates that questions of fact exist regarding the creation, and Audubon's constructive notice, of the opening. Although Audubon asserts that it did not create the opening and that, instead, Con Edison was responsible for such creation (Doc No. 98 at 8), Campoverde's testimony indicates that any cuts into the sidewalk made by Con Edison were backfilled and paved by August 31, 2013 (Doc No. 57 at 15-26, 45). However, the image submitted by Audubon in support of its motion indicates that an opening was present on the sidewalk (Doc No. 22 at 1). Thus, it is unclear whether the opening was created by defective restoration on the part of Con Edison, or by someone else (see *Maldonado v 527 Lincoln Place, LLC*, 173 AD3d 730, 731 [2d Dept 2019], *lv denied* 35 NY3d 914 [2020]; *Sheehy v City of New York*, 43 AD3d 336, 336-337 [1st Dept 2007]).

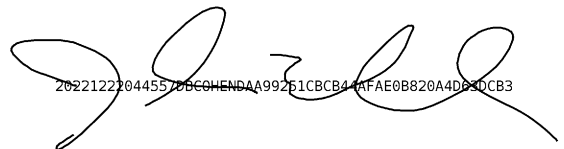
Similarly, assuming no defective restoration on the part of Con Edison, it is unclear when the defect was created and how long it was in existence prior to the date of plaintiff's incident, which implicates whether the defect was present long enough for Audubon to obtain constructive notice of it (see *Samuelson v Wollman Rink Operations LLC*, 201 AD3d 490, 491 [1st Dept 2022]; *George*, 306 AD2d at 161). Therefore, viewing the evidence in the light most favorable to plaintiff,

the non-moving party (*see e.g. Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]), Audubon is not entitled to judgment as a matter of law (*see Samuelsen*, 201 AD3d at 491).

Accordingly, it is hereby:

ORDERED that defendant Audubon’s motion seeking summary judgment dismissing the complaint as against it pursuant to CPLR 3212 is denied; and it is further

ORDERED that the parties are to appear for an in-person status conference at 71 Thomas Street, Room 305, on February 7, 2023 at 10:00 a.m., unless the parties provide a stipulation beforehand in accordance with the Part rules.



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12/22/2022  
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: