

**Mori v City of New York**

2023 NY Slip Op 30006(U)

January 3, 2023

Supreme Court, New York County

Docket Number: Index No. 155230/2020

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**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 05/06/2022  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 82, 83, 84, 92, 93, 94, 95

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing papers, the motion by defendant the Dormitory Authority of the State of New York (“DASNY”) is denied without prejudice to renew.

Plaintiff commenced this negligence action on July 10, 2020, alleging that on April 15, 2019, he tripped and fell on the sidewalk in front of John Jay College of Criminal Justice (“John Jay”)—a City University of New York college located at 899 Tenth Avenue, New York, New York—sustaining injuries (See NYSCEF Doc. Nos. 74 [Amended Complaint at ¶¶130-140]; NYSCEF Doc. No. 62 [Edwards Aff. at ¶6]). Plaintiff subsequently testified at a General Municipal Law (“GML”) 50-h hearing that he tripped and fell on the metal edge of a concrete pad surrounding a grating in the subject sidewalk (See NYSCEF Doc. No. 58 [Mori GML §50-h Tr. at p. 19]; see also NYSCEF Doc. Nos. 60 and 68]). As pertinent here, plaintiff alleges that DASNY

was negligent in creating or failing to repair this defective condition and violated 34 RCNY §2-07 (NYSCEF Doc. No. 59 [Bill of Particulars at ¶¶11-13]).

DASNY now moves, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all crossclaims against it. DASNY argues that, as a public benefit corporation created by the New York State legislature to finance and construct dormitories for educational purposes, its ownership of 899 Tenth Avenue is, as a matter of law, “more akin to that of mortgagor and mortgagee rather than that of traditional owner and tenant” (Garcia v Dormitory Auth. of State of N.Y., 195 AD2d 288 [1st Dept 1993]) and that this status exempts it from liability under Administrative Code §7-210 (See Morris v City of New York, 21 Misc 3d 758, 762-63 [Sup Ct, Kings County 2008]; Ellington v Dormitory Auth. of the State of New York, 2014 NY Slip Op. 33670[U] [Sup Ct, NY County 2014]; Gardner v City of New York, 2013 NY Slip Op 32438[U] [Sup Ct, NY County 2013]). In connection with this argument, DASNY submits the affidavit of its general counsel, Kay M. Edwards, Esq., attesting that DASNY only “issues bonds to obtain construction financing and holds title to the underlying properties as security for the bonds” and that the City University of New York (“CUNY”) bears the exclusive responsibility for maintaining and repairing 899 Tenth Avenue under Education Law §6203 and the governing lease agreement between CUNY and DASNY (the “Lease”) (NYSCEF Doc. No. 62 [Edwards Aff. at ¶¶5, 11, 12]). DASNY also submits this Lease (Id. at Ex. A [Lease]). Edwards also attests that “DASNY has financed construction projects at John Jay, but there was no DASNY-financed construction work (or construction-related work, like planning) ongoing in the sidewalks at John Jay on April 15, 2019” (Id. at ¶10). DASNY also argues it does not own the subject grating, as documentary evidence establishes that co-defendant Consolidated Edison Company of New York, Inc. (“ConEd”) is its owner.

Plaintiff and ConEd oppose DASNY's motion, arguing that the summary judgment is premature, as further discovery and depositions—including the deposition of Edwards—are needed. Plaintiff also argues that, under Torres v City University of New York, 29 AD3d 892, 893 (2nd Dept 2006), DASNY may be liable for any defective repairs it performed at the subject location and that further discovery is necessary to determine whether any such repairs were made. Finally, plaintiff and ConEd dispute that DASNY's submissions establish that ConEd owned the subject grating.

### 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]).

DASNY has failed to carry its burden here. As a threshold matter, the parties' dispute as to whether DASNY may be held liable for sidewalk defects under Administrative Code §7-210 is irrelevant to the disposition of this motion. Plaintiff's GML §50-h testimony makes it clear that he tripped and fell within twelve inches of a grating in the subject 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 “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, as liability under Administrative Code §7-201 and 34 RCNY §2-07 are mutually exclusive (See *Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]), the dispositive question on this motion is whether DASNY has established that it did not own the subject grating.

DASNY contends that it is exempt from liability because ConEd owns the grating in question. DASNY does not, however, submit an affidavit from Edwards or any other DASNY employee attesting that it does not own the subject grating. Instead, DASNY relies upon documents submitted by the City of New York in support of its motion for summary judgment— i.e., ConEd’s response to plaintiff’s Notice to Admit (NYSCEF Doc. No. 44) and the affidavit of New York City Department of Transportation employee Mildred McKnight-Gibson asserting that the grating in question was “the responsibility of Consolidated Edison” (NYSCEF Doc. No. 63 [McKnight-Gibson Aff. at ¶¶1-7])—which the Court previously determined were insufficient to establish ConEd’s ownership and control (See NYSCEF Doc. No. 96 [Decision and Order dated October 4, 2022]). Accordingly, DASNY’s motion is denied without prejudice to its renewal upon the completion of discovery.

Accordingly, it is

**ORDERED** that Dormitory Authority of the State of New York’s motion for summary judgment is denied without prejudice to its renewal upon the completion of discovery.

This constitutes the decision and order of the Court.

*Judy H. Kim*  
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1/3/2023  
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		SUBMIT ORDER	<input type="checkbox"/>
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>