

**Tebbetts v 545 Eighth Ave.**

2023 NY Slip Op 30519(U)

February 17, 2023

Supreme Court, New York County

Docket Number: Index No. 158987/2019

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

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INDEX NO. 158987/2019

TEBBETTS, ANITA

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

545 EIGHTH AVENUE

DECISION AND ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for JUDGMENT - SUMMARY

Upon reading the above documents and having heard oral arguments, the motion for summary judgment by Defendants 545 Eighth Avenue Associates, LP (545 Associates) (Motion Seq. 1) is denied and the motion for summary judgment by Defendant, New York City Transit Authority (Transit) (Motion Seq. 2) is granted.

BACKGROUND

In this personal injury action, Defendant 545 Associates, is the owner of a commercial office building at 545 8th Avenue in the County, City and State of New York (the Building) (verified complaint, ¶¶ 1, 4-6, NYSCEF doc1). Defendant Eighth Avenue Lighting Incorporated (Eighth Avenue Lighting) is the commercial tenant of the building's ground floor storefront retail space (Id., ¶¶ 7-10). Defendant Transit is a legislatively created public authority that operates subway services on behalf of the non-party City of New York (the City) (id., ¶¶ 11-13).

Plaintiff Anita Tebbetts alleges that on October 4, 2018, she sustained injuries to her right wrist as a result of a slip and fall accident on the sidewalk in front of the Building. On September 18, 2019, Plaintiff commenced this action for negligence against these three Defendants (NYSCEF doc 1, 2, 3).

Regarding the location of Plaintiff's fall, she testified at the Transit's statutory hearing held on December 11, 2018, at the City's 50-h hearing held on February 14, 2019, and at her examination before trial held on February 25, 2021 (NYSCEF docs. 47, 48, 49, 50). At the statutory hearing, Plaintiff stated that she tripped "on a crack in the sidewalk" that was "less than a foot" from the subject grating (NYSCEF doc. 47 at 35, 37-38). However, she also stated that she "didn't measure" the distance between the crack and the grating (NYSCEF doc. 47 at 41). At the 50-h hearing, Plaintiff reiterated that she had tripped on "some cracks in the sidewalk." (NYSCEF doc. 48 at 18-20). At her deposition, Plaintiff again stated that she tripped on "the crack in the sidewalk." (NYSCEF doc. 49 at 38-39). She was later shown several photographs of the accident location but was unable to identify the particular crack as the one she had tripped on, and stated instead that it was one of several "in the general area" where she tripped yet she "couldn't be sure" which was the exact crack that she tripped on (NYSCEF doc. 49 at 81-92 and doc. 50).

Regarding the sidewalk subway ventilation grating in front of the Building, Transit argues that it is owned by the City (O'Brien affirmation, ¶¶ 26-31 NYSCEF doc. 40). Transit further argues that based on a master lease between the City and Transit (Master Lease), the City is also responsible for sidewalk ventilation grates over subways (NYSCEF doc 54).<sup>1</sup>

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<sup>1</sup> Transit also presents the affidavit of Michael B. Daniels (Daniels), Assistant Deputy Director of the Real Estate Department of the Metropolitan Transportation Authority (MTA), who avers that the master lease "states in relevant part that [the City] is the owner of the subway ventilation grating . . . in the sidewalk in the area near where Plaintiff allegedly fell." See notice of motion (motion seq. # 2), exhibit N, ¶¶ 5-6 (NYSCEF document 55). 545 Associates

## DISCUSSION

A party moving for summary judgment bears the high burden of establishing entitlement to judgment as a matter of law with admissible evidence (*see* CPLR 3212; *see e.g.*, *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64 [1st Dept 2002]). Once that showing has been made, the burden shifts to the opposing side to produce admissible evidence establishing the existence of material issues of fact which require a trial (*see e.g.*, *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Further, in deciding a summary judgment motion, the Court's function is one of primarily issue identification instead of issue determination (*see e.g.* *Speller v Sears, Roebuck & Co.*, 100 NY2d 38 [2003]); *Gee Tai Chong Realty Corp. v GA Ins. Co. of N.Y.*, 283 AD2d 295 [1st Dept 2001]. It is also well settled that issues of witness credibility are not appropriately resolved on motions for summary judgment (*see e.g.* *Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.*, 147 AD3d 507 [1st Dept 2017], citing *Santos v Temco Serv. Indus.*, 295 AD2d 218 [1st Dept 2002]).

Pursuant to Administrative Code of the City of New York (NYC Admin Code) § 7-210 (b), real property owners have a nondelegable duty on to maintain city sidewalks abutting their land in a reasonably safe condition (*see e.g.* *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167 [2019]). That duty of care is modified by New York City Rules & Regulations (34 RCNY) § 2-07 (b) (1) ("maintenance requirements"), which provides that "[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

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and Plaintiff responded to this submission by presenting deposition testimony by Vincent Stabile (Stabile), a maintenance supervisor in Transit's Maintenance of Way Department, and Susan Wedgle (Wedgle), an architect in Transit's Maintenance of Way Department, regarding Transit's maintenance obligations. *See* notice of motion (motion seq. #1), exhibit G; Lombardi affirmation in opposition (motion seq. #2), exhibit 1 (NYSCEF docs. 29, 30, 69). However, as will be discussed *infra*, the court does not consider the factual assertions made in these documents.

edge of the cover, grating, or concrete pad, if such pad is installed.” (34 RCNY; *see e.g., Nyack v City of New York*, 153 AD3d 1266 [1<sup>st</sup> Dept 2017]).

**545 Associates’ Summary Judgment (Motion Seq. 1)**

Plaintiff’s claim against 545 Associates alleges negligence based on the theory of premises liability (NYSCEF docs 1, 25). In this motion, 545 Associates argue entitlement to judgment by alleging that it did not owe Plaintiff a duty of care as a property owner because “it is beyond dispute that the condition responsible for Plaintiff’s accident was located within 12 inches of Transit’s vent cover grate.” (Pasternak affirmation, ¶ 19 (NYSCEF document 23). However, 545 Associates’ documents submitted in support do not establish this.

Here, Plaintiff’s deposition testimony was ambiguous on the issues of which crack she tripped on and its distance from the subject sidewalk grate (NYSCEF docs 47, 48, 49, 50). While 545 Associates relies on Plaintiff’s testimony to assert that she positively identified a particular sidewalk crack located ten and a half inches from the subject grate, she also testified that the crack was in the “general area” of the sidewalk defect. Thus, in light of the totality of her testimony, there is an unresolved issue of fact as to the exact location of the defect the allegedly caused her accident. In addition, the issue of Plaintiff’s credibility is one for a jury rather than for this Court (*Santos v Temco Serv. Indus.*, 295 AD2d at 218). Accordingly, 545 Associates has not established entitlement to judgment and the motion is denied.

**Transit’s Summary Judgment Motion (Motion Seq. 2)**

Plaintiff’s claim against Transit also alleges negligence based on the theory of premises liability (NYSCEF doc 1). Transit moves for summary judgment primarily arguing that it did not owe Plaintiff a duty of care since it does not own either the building or the sidewalk grate above the subway and therefore was not under any legal obligation to maintain the area. Transit

relies on the recent decision by the Appellate Division, Second Department, *Fajardo v City of New York* (197 AD3d 456 [2d Dept 2021]) which reviewed the same 1953 master lease submitted in this action and held that:

“The terms of the lease executed by the City and the Transit Authority demonstrate, prima facie, that the City is the owner of the subway ventilation grating, which is located in the sidewalk in the area near where the plaintiff allegedly fell. Therefore, the Transit Authority demonstrated, prima facie, that the City, and not the Transit Authority, owed a nondelegable duty under 34 RCNY 2-07 (b) to monitor the condition of the ventilation grating and the area of the sidewalk extending 12 inches outward from the perimeter of the grating.”

197 AD3d at 459.

Upon review this Court first finds that since the Appellate Division, First Department has not ruled otherwise on this issue, *Fajardo* is controlling here. Thus, this Court is bound by Appellate Division authority holding as a matter of law that the City, and not Transit, is the owner of sidewalk subway ventilation grates. In addition, based on *Fajardo*'s interpretation of the terms and provisions of the master lease, this Court is not inclined to address the factual dispute over the ownership of the subject sidewalk grating raised. Nor is this Court persuaded by Plaintiff' alternate argument that Transit made “special use” of the subject grate. Instead, this Court concludes that Transit has established, as a matter of law, that in this case it did not owe Plaintiff a duty of care pursuant to NYC Admin Code § 7-210 (b) or 34 RCNY § 2-07 (b) (1). Accordingly, Transit has established entitlement to judgment and the motion is granted.

Thus, it is hereby

ORDERED that the motion by Defendant 545 Eighth Avenue Associates, LP (Motion Seq 1) seeking summary judgment is denied; it is further

ORDERED that the motion by Defendant New York City Transit Authority (Motion Seq 2 ) seeking summary judgment is granted and the complaint and any cross claims against the New York City Transit Authority are dismissed; it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that this action is transferred to another IAS part since the New York City Transit Authority is no longer a party.

2/17/2023  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

HON. DENISE M. DOMINGUEZ

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

J.S.C.