

**Bandler v Consolidated Edison Co. of N.Y., Inc.**

2023 NY Slip Op 31118(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 153368/2020

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 05

Justice

-----X

KIMBALL CHRISTIAN BANDLER,
Plaintiff,

INDEX NO. 153368/2020

MOTION DATE 01/03/2023

MOTION SEQ. NO. 002

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., CONSOLIDATED EDISON, INC., THE CITY OF NEW
YORK, DANELLA CONSTRUCTION OF NY INC.,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38,
39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67,
68, 69, 70, 71, 72, 73, 74

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents, the City of New York's motion for summary judgment is
denied for the reasons set forth below.

On May 27, 2020, plaintiff commenced this negligence action by summons and complaint
alleging that on November 9, 2019, he was skateboarding on East 20th Street between Fifth
Avenue and Broadway when he collided with pedestrians in the vicinity of 11 East 20th Street
(NYSCEF Doc. No. 44 [Am. Compl. at ¶¶32-33]). Plaintiff alleges that this collision occurred
because the pedestrians in question were obscured by steam emanating from a nearby manhole
cover, and that this steam was created by the negligence of defendants in maintaining the "gas
mains, service pipes, electrical lines and other conduits and instrumentalities" beneath the manhole
cover (Id. at ¶33).

Defendant the City of New York (the “City”) now moves, pursuant to CPLR §3212, for summary judgment dismissing this action as against it. In support of its motion, the City submits an affirmation from New York City Department of Transportation (“DOT”) employee Danny Garcia attesting to his search of DOT records for the two years up to and including the date of the alleged incident for the roadway located at East 20th Street between Fifth Avenue and Broadway (NYSCEF Doc. Nos. 49 [Garcia Affirm.]) and attaches the records produced by this search (NYSCEF Doc. Nos. 50, 51). Among these records are permits the City issued to Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. (collectively “ConEd”) to perform work on East 20th Street between Fifth Avenue and Broadway between October 10, 2019 through January 18, 2020 (NYSCEF Doc. Nos. 50 [Permits]), including a permit to “repair steam” somewhere on East 20th Street between Fifth Avenue and Broadway on October 23, 2019, approximately two weeks before the subject accident (NYSCEF Doc. No. 51 [Steam Repair Permit]). In addition, these records include notices of violation issued by DOT’s Highway Inspection and Quality Assurance Unit to ConEd citing a failure to “close off the full width of the roadway to traffic with barricades, trucks and excavators to repair steam housing” at 20th Street between Fifth Avenue and Broadway (NYSCEF Doc. No. 52).

The City also submits an affidavit from Mildred McKnight-Gibson, an employee of the DOT’s Highway Inspection and Quality Assurance Unit, attesting to her personal inspection of the three manhole covers in the vicinity of 11 East 20th Street and her conclusion that these manhole covers were the property and responsibility of defendant Consolidated Edison of New York, Inc. (NYSCEF Doc. No. 53 [McKnight-Gibson Aff. at ¶¶5-7]). ConEd concedes that these manholes are its property (NYSCEF Doc. No. 60 [Coyne Affirm. in Opp. at ¶12]).

The City argues that its submissions establish that it did not own the subject manhole, did not cause or create the subject defect and, in any event, did not have the prior written notice of the defect required by Administrative Code §7-201.

Plaintiff and ConEd oppose the motion, arguing that: (1) the motion is premature, as discovery is incomplete; (2) the motion must be dismissed due to the City's failure to comply with 22 NYCRR §§202.8-b and 202.8-g; (3) the prior written notice requirement of Administrative Code §7-201 does not apply but, in any event, prior written notice has been demonstrated by the City's production of permits it issued to ConEd to repair a steam issue at or near the site of plaintiff's accident; and (4) the City has failed to establish that it was not responsible for the underground instrumentalities which created the steam.

In reply, the City argues that ConEd's ownership of the subject manhole cover and the permits issued to ConEd to perform steam repairs in and around the site of plaintiff's accident, taken together, establish that ConEd exclusively owns and controls the underground instrumentalities at issue. In further support of this argument, the City points to ConEd's now-discontinued third-party indemnification action against Danella Construction of New York, Inc. ("Danella") asserting that ConEd contracted with Danella to perform work in and about 11 East 20th Street, that Danella was performing work pursuant to that contract on or before November 9, 2019 and that any injuries sustained by plaintiff herein were due to Danella's negligence in its work performed under its contract with ConEd (NYSCEF Doc. No. 42 [Third Party Compl. at ¶¶4, 7, 14]).

### DISCUSSION

As an initial matter, the Court excuses the City's failure to comply with 22 NYCRR 202.8-b or 202.8-g. A statement of material fact is no longer mandatory under Uniform Rule §202.8-g,

and there is nothing in the record to suggest its absence has prejudiced plaintiff or ConEd. Neither does any party claim the City has violated the word limit set out in Uniform Rule §202.8-b(a) or demonstrate that the absence of an affidavit from the City attesting to its compliance fails to prejudice any party herein. Accordingly, the Court turns to the substance of the City's motion.

“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” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

The City has failed to meet its burden here. The City argues that dismissal is warranted because it did not receive written notice concerning any defect in the manhole cover required by Administrative Code §7-201. However, no such prior written notice is required because plaintiff does not allege that he was injured by any defect in the manhole cover but alleges that he was injured as a result of steam emanating from below the manhole cover. Neither steam nor underground instrumentalities fall within the ambit of Administrative Code §7-201.

That statute provides, in pertinent part, that:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger, or obstruction complained of, or the place otherwise made reasonably safe.

(Administrative Code §7-201).

As employed in this statute, the terms “impediment” and “encumbrance,” encompass only physical objects (See Tucker v City of New York, 84 AD3d 640, 643 [1st Dept 2011] [tree well is an “encumbrance” or “attachment” to sidewalk and therefore falls within ambit of Administrative Code §7-201]; see also Meltzer v City of New York, 156 AD2d 124, 124 [1st Dept] [projecting gas valve that caused plaintiff to trip constituted “encumbrance” under Administrative Code §7-201]). As steam is not a physical object, it is not a condition requiring prior written notice under the statute (See Pendergast v Cosco, 4 AD3d 880, 882 [4th Dept 2004] [faded pavement markings not physical defect subject to prior written notice statute]).

Neither does Administrative Code §7-201 apply to the subterranean facilities from which this steam allegedly emanated. Section 7-201, like all prior written notice laws, is “in derogation of the common law and must be strictly construed” (Selca v City of Peekskill, 78 AD3d 1160, 1161 [2d Dept 2010] quoting Windsor Ct. Assoc., LP v Vil. of New Paltz, 27 AD3d 814, 815 [3d Dept 2006]). Therefore, by its plain terms, Administrative Code §7-20 is limited to dangerous or defective conditions on New York City’s streets and sidewalks and does not include subsurface structures such as the ones at issue here (See Windsor Ct. Assoc., LP v Vil. of New Paltz, 27 AD3d 814, 815 [3d Dept 2006]; see also McKinnis v City of Schenectady, 234 AD2d 760, 762 [3rd Dept 1996]).

The City has also failed to establish, at this juncture, that it neither owns nor controls the underground instrumentalities from which the steam issued. The documents produced by Garcia’s DOT search do not support such a showing, as they relate to conditions at street level and have no bearing on whether the City owns or controls the underground instrumentalities. As ConEd notes,

the City has not produced records from a search of Department of Environmental Protection (“DEP”) records or any other agency related to the underground facilities at issue here.

The City’s effort to establish its non-ownership through proof that ConEd has exclusive ownership and control over the underground instrumentalities in question also fails. ConEd’s conceded ownership of the manhole is insufficient to conclusively establish its ownership of the facilities below that manhole or that the City has no obligation to maintain or repair same. Neither do the permits or violations issued to ConEd by the City do so; these documents establish that ConEd performed work on the subject block around the time of plaintiff’s accident, but it is still unclear whether this work was performed “at the subject manhole or steam condition” (NYSCEF Doc. No. 60 [Coyne Affirm. in Opp. at ¶13]). Finally, the City’s reliance on the allegations set forth in ConEd’s third-party complaint is misplaced, given the discontinuance of that action.

In light of the foregoing, it is

**ORDERED** that the City of New York’s motion for summary judgment is denied; and it is further

**ORDERED** that counsel for plaintiff shall serve a copy of this decision and order with notice of entry upon all defendants within ten days of the date of this decision and order; and it is further

**ORDERED** that within ten days from the date of this decision and order, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119); and it is further

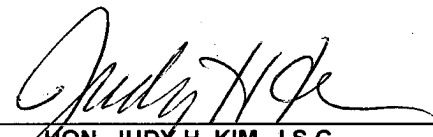
**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E filing" page on this court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

4/10/2023

DATE

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE