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| <b>Lebron v Ocean Drive Holdings LLC</b>                                                                                                                                                                                       |
| 2023 NY Slip Op 31518(U)                                                                                                                                                                                                       |
| May 4, 2023                                                                                                                                                                                                                    |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 156809/2020                                                                                                                                                                                           |
| Judge: David B. Cohen                                                                                                                                                                                                          |
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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. DAVID B. COHEN **PART** **58**

*Justice*

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YOLANDA LEBRON,

Plaintiff,

- v -

OCEAN DRIVE HOLDINGS LLC, OCEAN DRIVE  
HOLDINGS, LLC, EL CARIBE HOUSING DEVELOPMENT  
FUND COMPANY, INC.,

Defendants.

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**INDEX NO.** 156809/2020

**MOTION DATE** 01/25/2023

**MOTION SEQ. NO.** 002 003

## DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 110, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111

were read on this motion to/for JUDGMENT - SUMMARY.

In this action alleging personal injury, defendant El Caribe Housing Development Fund Company, Inc. moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims (mot. seq. three), which is unopposed.

Third-party defendant Consolidated Edison Company of New York, Inc. moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and any cross claims (mot. seq. two), which is opposed by third-party plaintiff Ocean Drive Holdings, LLC.

### I. BACKGROUND

This personal injury matter arises out of claims that plaintiff was injured when she tripped and fell on the sidewalk adjacent to the premises located at 303 and/or 305 East Houston Street, New York, New York, on June 27, 2019 (NYSCEF Doc. No. 1 ¶ 44). Plaintiff commenced this action by filing a Summons and Complaint on August 26, 2020 (*Id.*).

Ocean Drive filed their answer with cross claims on October 29, 2020, and El Caribe filed their answer with cross claims on November 9, 2020 (NYSCEF Doc. Nos. 7, 10). On May 17, 2021, plaintiff filed a motion seeking a default judgment against defendant Ocean Drive Holdings LLC<sup>1</sup> (Holdings), for its failure to appear and answer, which was granted as to plaintiff's claims against Holdings only, on July 22, 2021 (NYSCEF Doc. Nos. 14-21, 26 [Motion #1]).

Ocean Drive then filed a third-party summons and complaint on May 18, 2021, naming Con Edison as a third-party defendant. (NYSCEF Doc. No. 22). Con Edison filed their third-party answer with cross claims and counterclaims on July 27, 2021 (NYSCEF Doc. No. 28). The parties engaged in discovery, and on November 9, 2022, and November 10, 2022, respectively, the instant motions were filed.

## II. STANDARD OF REVIEW

"Summary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant's showing only by introducing "evidentiary proof in admissible form sufficient to require a trial of material questions" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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<sup>1</sup> Plaintiff included two similarly named, but separate defendants in this action, Ocean Drive Holdings, LLC, and Ocean Drive Holdings LLC. This decision refers only to Ocean Drive Holdings, LLC (Ocean Drive).

Consideration of a summary judgment motion requires viewing the evidence “in the light most favorable to the non-moving party” (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted]). However, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). “The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

For a defendant to be held liable for negligence, the plaintiff must establish that the defendant owed the plaintiff a duty of care (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976] [“In the absence of duty, there is no breach and without a breach there is no liability”]). The Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of a building to maintain the sidewalk abutting the premises in a reasonably safe condition.

In an action involving an accident due to an unsafe sidewalk condition, the owner is liable for any personal injury proximately caused by the owner’s failure to maintain such sidewalk in a reasonably safe condition (*see NYC Admin. Code 7-210; Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008] [owner had statutory nondelegable duty to maintain sidewalk]). An owner’s failure to maintain the sidewalk in accordance with the Administrative Code constitutes negligence (*see Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167 [2019]).

A building owner also owes a duty of care when it makes special use of a sidewalk (*see Ascencio v New York City Hous. Auth.*, 77 AD3d 592 [1st Dept 2010]). A defendant who does not own the sidewalk can only be held liable for failing to maintain or repair it if that defendant

created the dangerous or defective condition or made special use of the sidewalk (*see Keech v 30 E. 85th St. Co., LLC*, 2016 NY Slip Op 31793[U] \*2 [Sup Ct, NY County 2016]).

### III. ANALYSIS

#### A. Defendant El Caribe's Motion

El Caribe moves for summary judgment dismissing the plaintiff's complaint and all crossclaims on the ground that the evidence is insufficient to establish a genuine issue of material fact as to its liability for plaintiff's accident. It contends that the evidence establishes that plaintiff fell on the sidewalk abutting 303 East Houston Street, and as they are the owner of 305 East Houston Street, and do not own the premises located at 303 East Houston Street, they may not be held liable here. Absent ownership of the premises abutting the sidewalk at issue or special use thereof, El Caribe maintains that it did not owe plaintiff a duty of care.

El Caribe relies on an affidavit submitted by plaintiff in support of her default judgment motion, wherein she states that she fell on the sidewalk adjacent to 303 East Houston Street (NYSCEF Doc. No. 26) and plaintiff's deposition testimony confirming the accuracy of her statement in the affidavit (NYSCEF DOC. No. 101). El Caribe also submits a photograph in which the plaintiff drew a circle around the area of the sidewalk in which she fell, which El Caribe asserts represents an area adjacent to 303 East Houston Street, along with plaintiff's testimony confirming the circled area as the location of her accident (NYSCEF Doc. Nos. 101, 102).

El Caribe also submits a copy of the deed to 303 East Houston Street, the testimony of one of its members, and the testimony of its property manager, whereby the deponents confirmed that Ocean Drive owned the building at 303 East Houston Street on the date of plaintiff's

accident, and that El Caribe owned the premises at 305 East Houston Street (NYSCEF Doc. No. 104).

El Caribe thus establishes, *prima facie*, that plaintiff's accident occurred on the sidewalk adjacent to the premises located at 303 East Houston Street, and that it does not own that premises, and that, therefore, it neither owed nor breached a duty of care to plaintiff and may not be held liable for her accident (*see Pollard-Leitch v R&D Utica Realty, Inc.*, 186 AD3d 513 [2d Dept 2020] [summary judgment should have been granted as defendant established that it did not own property adjacent to defective sidewalk, nor did it create condition or cause it occur by special use of sidewalk]). As the motion is unopposed, plaintiff raises no triable issues.

#### B. Defendant Con Edison's motion

##### 1. Contentions

Con Edison argues that it did not owe a duty to the plaintiff absent any relationship between it and plaintiff's accident. It denies having performed any excavation or repair work on the sidewalk adjacent to 303 and 305 East Houston Street, or that it or its contractors were involved in any construction activity or projects where the accident allegedly occurred. Con Edison contends that it did not own the sidewalk and roadways within New York City, nor did it occupy, control, maintain, or make special use of the sidewalk adjacent to the accident location.

Ocean Drive opposes the motion, asserting that triable issues of fact exist regarding Con Edison's liability due to their positioning of a shunt<sup>2</sup> on the sidewalk, causing the sidewalk to be narrowed and plaintiff's path to be obstructed, thereby directing her toward the alleged unsafe sidewalk condition.

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<sup>2</sup> Shunts provide temporary power to a location and may be covered by orange and yellow rubber mats, referred to as shunt mats or shunt covers.

In reply, Con Edison argues that plaintiff has not opposed its motion, nor has plaintiff made any claim that Con Edison's shunt mats or any other equipment or materials contributed to her accident. It denies that there are triable issues of fact because their shunt did not play a role in the plaintiff's accident.

## 2. Pertinent deposition testimony

During plaintiff's deposition, she testified that she tripped on the uneven, broken sidewalk abutting 303 East Houston Street, and that the unsafe sidewalk condition was the only thing that contributed to her fall (NYSCEF Doc. No. 65 p 72 lines 5-16, p 79 lines 4-15, p 169 lines 2-18, p 99 lines 6-8). Plaintiff circled exactly where she alleges the accident occurred in a photograph, depicting a broken and cracked sidewalk adjacent to 303 East Houston Street (NYSCEF Doc. No. 66 p 9). Plaintiff testified that she did not walk on the cellar door in front of 303 East Houston Street, but only walked on the sidewalk to the left of the cellar door. While she recalled seeing a rubber [shunt] mat on the sidewalk towards the left of the cellar door, she could not recall if there was more than one mat but in any event, she did not step over or onto mats (NYSCEF Doc. No. 65 p 34 lines 13-24, p 45 lines 3-11, p 47 lines 11-15). She also stated that there was enough space between the mat and the cellar door for her to walk on that part of the sidewalk before she fell, and that she was "[m]ore than an arm's length" from the building, and "towards the right-hand side" of the sidewalk when she fell (NYSCEF Doc. No. 65 p 41 line 9-22, p 73 lines 4 – p 74 line 4).

Con Edison's record searcher testified that he searched Con Edison's records for Department of Transportation permits, opening tickets, paving orders, corrective action requests, notices of violations, and emergency system control tickets for the two-year period prior to and including June 27, 2019, for the sidewalk abutting 303-305 East Houston Street, between Clinton

Street and Attorney Street in Manhattan (NYSCEF Doc. Nos. 67, 66 p 20 line 13 – p 22 line 24). He testified that the records reflected that Con Edison placed a shunt on the sidewalk adjacent to 303 East Houston Street, but it did not perform any work in the area of the sidewalk where the accident occurred (NYSCEF Doc. Nos. 66 p 9; 68 p 18 lines 12-24, p 22 line 7). If the sidewalk had been opened or excavated by Con Edison, there would be opening tickets and paving orders, but none existed for the pertinent location (NYSCEF Doc. Nos. 66 p 9; 68 p 18 lines 12-24, p 19 lines 14-25, p 21 line 22 – p 22 line 2). Nor were any complaints received about the shunt mat at issue (*Id.* p 24 lines 22-25).

Con Edison demonstrates that the sole work it performed at the accident location was the placement of a shunt with a shunt cover, and that plaintiff's testimony and other evidence demonstrates that the shunt had nothing to do with the accident. It thus satisfies its prima facie burden (*see Bagley v 1122 E. 180<sup>th</sup> St. Corp.*, 203 AD3d 502 [1st Dept 2022] [Con Edison properly granted summary dismissal as it showed that it did not cause or create sidewalk and curb defect]).

In opposition, Ocean Drive fails to submit any evidence to support its allegation that Con Edison performed work on the sidewalk that caused the uneven or broken sidewalk condition before plaintiff's accident. While there were permits issued to place a shunt, there were no opening tickets or paving orders issued to Con Edison for this sidewalk location, which would have been required for Con Edison to engage in excavation work and to potentially cause the unsafe condition. It thus fails to raise a triable issue.

As Con Edison had no duty to maintain the sidewalk and did not create the condition, there is no need to address the issue of whether it had constructive notice of the dangerous condition (*see Vivas v VNO Bruckner Plaza LLC*, 113 AD3d 401 [1st Dept 2014]).

IV. CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion by defendant El Caribe Housing Development Fund Company, Inc., for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims is granted in its entirety, and the complaint and all cross claims as against it are severed and dismissed; and it is further

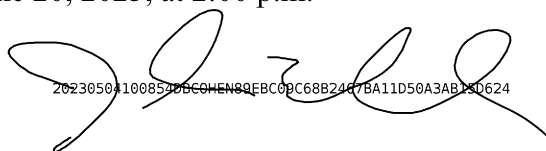
ORDERED that the motion by third-party defendant Consolidated Edison Company, for an order pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and all cross claims is granted in its entirety, and the third-party complaint is severed and dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the parties are to appear for a settlement/trial scheduling conference in Part 58, 71 Thomas Street, Room 305, to be held on June 20, 2023, at 2:00 p.m.

5/4/2023

DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE