

Rodriguez v City of New York

2023 NY Slip Op 31993(U)

June 12, 2023

Supreme Court, New York County

Docket Number: Index No. 150243/2020

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 52

Justice

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DARLENE RODRIGUEZ,

Plaintiff,

- v -

CITY OF NEW YORK, CON EDISON CORP, TRIUMPH
CONSTRUCTION INC

Defendant.

-----X

INDEX NO. 150243/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 74, 76, 78, 79, 80, 81, 82

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 77

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is

Motion Sequence #001 and #002 are consolidated for disposition. Motion Sequence #001 is the CPLR § 3212 motion, of defendants Con Edison Corp. and Triumph Construction Inc. for summary judgment dismissing the complaint and crossclaims against them. Motion sequence 002 is the City of New York’s summary judgment motion. In accordance with a stipulation dated May 30, 2023 (NYSCEF Doc. 83), the action has been discontinued against the City of New York. Accordingly, Motion Sequence #002 is denied as moot.

Statement of Facts

The facts, as alleged, are as follows. During the day of May 2, 2019, the plaintiff, Darlene Rodriguez, tripped over a bright plastic cable covering at a Con Edison/Triumph Construction (hereinafter “Defendants”) site. The pedestrian path she traversed lay adjacent to the crosswalk.

As she approached the covering, plaintiff observed the construction on both the street and the sidewalk, as well as orange cones on either side of the cable cover. Plaintiff testified that people were walking both in front of and behind her. She then allegedly tripped and fell over the cable covering, which plaintiff estimated to be between six and eight inches tall. Plaintiff suffered injuries to the left wrist and both knees and required extensive medical treatment.

Summary Judgment Standard

“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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion” (CPLR § 3212[b]). “In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

Discussion

“There is no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous” (*Graffino v City of New York*, 162 AD3d 990, 991 [2d Dept 2018] [citations omitted]). “A party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort

– to third persons where, as relevant here, it launches a force or instrument of harm, such as by negligently creating or exacerbating a dangerous condition” (*Brown v Garda CL Atl., Inc.*, 150 AD3d 542, 543 [1st Dept 2017] [citations omitted]). Although the question of whether something constitutes a dangerous condition is usually a question of fact for the jury (*see Ynoa v New York City Tr. Auth.*, 93 AD3d 406, 406 [1st Dept 2012]), where the evidence is clear and undisputed, it may be established, as a matter of law, that the defendant did not create an inherently dangerous condition (*see Capozzi v Huhne*, 14 AD3d 474, 474 [2d Dept 2005]).

Likewise, determining the open and obvious nature of a condition typically remains “a question for the trier of fact” (*Garrido v City of New York*, 9 AD3d 267, 268 [1st Dept 2004]). However, if provided with clear and undisputed evidence, a court may deem a risk or condition open and obvious as a matter of law (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]; *see, Liriano v Hobart Corp.*, 92 NY2d 232, 242, 677 NYS2d 764, 700 NE2d 303 [1998]; *Tushaj v City of New York*, 258 AD2d 283, 685 NYS2d 64, *lv. denied* 93 NY2d 818, 697 NYS2d 566, 719 NE2d 927 [1999]). “An open and obvious condition relieves the owner of a duty to warn about the danger” (*DiVetri v ABM Janitorial Serv., Inc.*, 119 AD3d 486, 488 [1st Dept 2014]).

The cable cover on which the plaintiff tripped was open and obvious and not inherently dangerous.

To determine whether a condition proves inherently dangerous, one must examine “the totality of [the] specific facts of each case” (*Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153, 1154, 138 NYS3d 546 [2d Dept 2020]). Here, the defendants have established that the condition in question was not inherently dangerous. Defendants submitted the affidavit of an expert, Stan A. Pitera, P.E., a professional engineer. Mr. Pitera explained that the cable cover was a common safety device with features such as sloped leading edges, a low-profile design, and high visibility

yellow and orange colors to distinguish it from surrounding surfaces providing a sharp visual cue of its location and characteristics. He further affirmed that the defendants complied with all statutory and customary construction safety procedures. As set forth in Mr. Pitera's affidavit, New York City rules require that the cables be bridged and protected by warning signs or lights. Here, the photos marked at the plaintiff's deposition (NYSCEF Doc. No. 49) and plaintiff's deposition testimony (NYSCEF Doc. No. 48, 8/2/2021 Plaintiff tr at p. 42, ln 2-3) establish that there was a cone on either side of the cable cover. Additionally, the photos show that the cable cover was bright orange and yellow and contrasted sharply with the pavement. Mr. Pitera concluded the "use of the subject cable protector complied with the requirements of the New York City Highway Rules 34RCNY Section 2-05(d)(17) and did not obstruct the pedestrian path" (see NYSCEF Doc. No. 40). As such, the defendants have established that the cable cover did not constitute an inherently dangerous condition. To determine a condition's open and obvious nature, one must examine "whether '[a]ny observer reasonably using his or her senses would see' the condition" (*Centeno v Regine's Originals, Inc.*, 5 AD3d 210, 211 [1st Dept 2004], quoting *Tagle v Jakob*, 97 NY2d 165, 170 [2001]).

Here, it is undisputed that the cable cover was bright orange and yellow and that there were cones placed to either side of it. The plaintiff confirmed that the weather was sunny, and no precipitation had fallen the night before, or the day of, the accident (NYSCEF Doc. No. 48, 8/2/2021 Plaintiff tr at p. 28, ln 22-25). Plaintiff was wearing her glasses and observed the barriers and cones around the plastic covering (*Id.* at p. 29, ln 17-19). Other pedestrians walked over the cable cover without issue (*Id.* at p. 27, ln 16-24). Accordingly, defendants made a prima facie showing that the complained-of condition was both open and obvious, i.e., readily observable by those employing the reasonable use of their senses, and not inherently dangerous

(see *Sun Ho Chung v Jeong Sook Joh*, 29 AD3d 677, 678 [2d Dept 2006] [The court found that the yellow construction tape's low placement and partial obstruction did not constitute an open and obvious or inherently dangerous condition]). Therefore, the burden shifts to the plaintiff to show that a question of material fact exists. The plaintiff has failed to meet this burden.

Plaintiff's contention that the cable cover was not open and obvious due to the presence of other pedestrians in front of her and the low-to-the-ground placement is unavailing. Plaintiff testified that the area was only "medium crowded," with no other pedestrian euphemistically "on top of [her]" (NYSCEF Doc. No. 48, 8/2/2021 Plaintiff tr at p. 48, ln 4-12). Furthermore, the cases relied upon by the plaintiff in opposition contain facts that are distinguishable from the case at hand. In *Westbrook*, the plaintiff's view of the alleged tripping hazard was completely invisible from view (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 70 [1st Dept 2004]). In *Cook*, the plaintiff's view was obstructed by other pedestrians on the crowded sidewalk, who were wearing long coats and carrying shopping bags, precluding her from seeing a gap that resulted from separated shunt boards (*Cook v Consol. Edison Co. of New York, Inc.*, 2007 N.Y. Slip Op. 33232[U] [N.Y. Sup Ct, New York County 2007], *affd sub nom. Cook v Consol. Edison Co. of N.Y., Inc.*, 2008 N.Y. Slip Op. 04200 [1st Dept 2008]).

Accordingly, the defendants have established, as a matter of law, that the cable cover was both open and obvious and not inherently dangerous. As "[t]here is no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous" (*Graffino v City of New York*, 162 AD3d 990, 991 [2d Dept 2018] [citations omitted]), the defendants' motion for summary judgment is granted.

Conclusion

For the reasons stated herein above, it is hereby

ORDERED that the motion of defendants Con Edison Corp. and Triumph Construction Inc. for summary judgment dismissing the complaint and crossclaims against them is GRANTED; and it is further

ORDERED that the motion of defendant City of New York for summary judgment dismissing the complaint against them is DENIED as moot.

This constitutes the decision and order of the court.

6/12/2023
DATE


NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
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<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: