

Deoleo v City of New York

2023 NY Slip Op 32568(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 151158/2019

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 28M

-----X

ANGIE DEOLEO,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., 4650 TIC LLC, PARK IT MANAGEMENT
CORP., 4650 BROADWAY HOLDINGS, LLC,

Defendant.

INDEX NO. 151158/2019

MOTION DATE 05/16/2023

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

4650 BROADWAY HOLDINGS, LLC

Defendant.

Third-Party
Index No. 595914/2020

-----X

HON. LISA S. HEADLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 262, 264, 267, 269, 271, 277, 278, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322

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

Upon the foregoing documents, it is hereby ORDERED that 4650 Broadway Holdings LLC's (hereinafter "4650 Broadway") motion for an Order, pursuant to *CPLR §3212*, for summary judgment to dismiss the complaint and cross-claims against the moving defendant is DENIED. Plaintiff and Defendants filed opposition papers and the movant-defendant 4650 Broadway filed a reply.

Background

This action arises from an accident that occurred on June 16, 2018, when Plaintiff, Angie Deoleo, tripped and fell on the sidewalk adjacent to the premises located at 4650 Broadway, New York, New York 10040, which was owned by 4650 Broadway and was leased to Park It Management Corp. (hereinafter "Park It") for the operation of a parking garage. In the complaint, the plaintiff alleges she tripped over a hole on the sidewalk that was located at the far end of a

metal subway grate, which was owned by Defendant, Consolidated Edison Company of New York, Inc (hereinafter “Con Edison”). As a result of the fall, the plaintiff claims she suffered personal injuries.

4650 Broadway’s Motion For Summary Judgment

In support of motion, defendant submits, *inter alia*, a Statement of Material Facts, an Affirmation in support, several exhibits, some of which include the Affidavit of Paul Fruchthandler, and Affidavit of Stanley H. Fein. *See, NYSCEF Doc. Nos.* 197-233.

Defendant 4650 Broadway argues that it had no duty to monitor or make any repairs to the grate, which allegedly caused the subject incident, nor did it create the alleged condition as it did not maintain, repair, control, or exercise special use of the grate. *See, NYSCEF Doc. No.* 198. Defendant acknowledges that *Section 7-210 of the Administrative Code of the City of New York* places the obligation on property owners to maintain the public sidewalk abutting their buildings, but asserts that the obligation does not supersede pre-existing regulations, such as *34 RCNY 2-07(b)*, which explicitly bestowed the duty of maintaining and repairing the grate and surrounding area upon Con Edison as the owner. *See, NYSCEF Doc. Nos.* 198; *Roman v. Bob’s Discount Furniture of NY, LLC*, 116 A.D.3d 940, 983 N.Y.S.2d 845 (2d Dep’t 2014). Defendant argues that there is nothing in *section 7-210 of the Administrative Code of the City of New York* to indicate that the legislative intent was to supplant the provisions of *34 RCNY 2-07(b)*, and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner. *See, NYSCEF Doc. Nos.* 198; *Flynn v. City of New York*, 84 A.D.3d 1018, 923 N.Y.S.2d 635 (2d Dep’t 2011). Further, defendant argues that plaintiff’s deposition testimony stated that the subject grate and hole was located within twelve inches of the perimeter of the grate owned by Con Edison. *Id.*

Paul Fruchthandler, employee of FBE Limited LLC, which is a member of defendant 4650 Broadway, attests that from the date of purchase of the subject property on April 17, 2018, until the date of the accident on June 16, 2018, neither he nor anyone on behalf of defendant 4650 Broadway maintained, altered, or repaired the grate or the sidewalk that surrounds the grate where the accident occurred. Further, Mr. Fruchthandler states that an engineer was not retained to view this property prior to its purchase, and there was no reference made in any file pertaining to this property regarding the sidewalk or grate prior to the commencement of this lawsuit. Mr. Fruchthandler also attests that at no time from the date the property was purchased by defendant 4650 Broadway on April 17, 2018, until the date of the accident on June 16, 2018, did he or anyone on behalf of defendant 4650 Broadway use the grate or surrounding sidewalk for a special use. *See, NYSCEF Doc. No.* 232.

Stanley H. Fein, a professional engineer, attests that he is familiar with the various grates on New York City sidewalks, and has inspected several grates over the years. Mr. Fein states that on January 9, 2019, he inspected the grate located on the sidewalk that abuts the premises located at 4650 Broadway, New York, New York, where the subject incident occurred and he opined with a reasonable degree of certainty that the gap shown in plaintiff’s photographs is within 12 inches of the metal grate, and therefore the area where the accident occurred is owned by Con Edison. *See, NYSCEF Doc. No.* 233.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.’s Opposition

In opposition, defendant submits an Affirmation in Opposition and a Response to Statement of Material Facts. *See, NYSCEF Doc. Nos.* 277-278. Con Edison argues that Fruchthandler’s affidavit is self-serving and should not be considered by the Court because based on the unspecified and undisclosed documents, as well as the conversations with unidentified

individuals, Mr. Fruchthandler's affidavit contains hearsay information. Defendant also asserts that 4650 Broadway's expert affidavit does not support its motion for summary judgment, because nothing within Mr. Fein's expert affidavit absolves 4650 Broadway's responsibility to maintain the abutting sidewalk in a reasonable and safe condition, and does not consider its tenant/defendant Park It's special use of the subject sidewalk and grate. Further, Con Edison maintains that 4650 Broadway as a property owner, through the terms of the assumed lease agreement, did not surrender entire control of the premises at issue, and therefore, 4650 Broadway owes a duty to the public, including the plaintiff. Lastly, Con Edison argues that 4650 Broadway had the duty to inspect, maintain, and repair the subject sidewalk that caused plaintiff's incident because the tenant/defendant Park It alleges in its own motion for summary judgment that defendant 4650 Broadway was the sole responsible party for the inspection, maintenance and repair of the subject sidewalk. *See, NYSCEF Doc. No. 277.*

Plaintiff's Opposition

In opposition, plaintiff submits, *inter alia*, an Affirmation in opposition, Statement of Material Facts, Affidavit of Service, and several exhibits. *See, NYSCEF Doc. Nos. 301-320.*

Plaintiff asserts that Con Edison had the exclusive duty to adequately monitor and maintain its grating, and the 12 inches surrounding the subject area, which it failed to do. Further, plaintiff maintains that Con Edison had constructive notice of the defective condition and failed to inspect, maintain, or repair the subject area. Plaintiff argues that 4650 Broadway's motion for summary judgment should be denied because it failed to establish that it did not have a duty to maintain and repair the sidewalk where Plaintiff's incident occurred. Plaintiff also contends that *Section 7-210 of the Administrative Code of the City of New York*, shifts responsibility to maintain the sidewalk abutting a property from the City to the abutting landowner, which would shift the obligation onto 4650 Broadway to maintain the sidewalk. Plaintiff argues that there are issues of fact regarding whether the obligation to repair was contracted away to Park It in the subject lease agreement with 4650 Broadway. Plaintiff maintains that Con Edison's exclusive duty to repair the sidewalk supersedes 4650 Broadway's or Park It's duty, because *RCNY § 2-07*, also referred to as the "12-inch rule" supersedes *New York City Administrative Code Section 7-21*. Plaintiff also argues that any argument concerning plaintiff's alleged comparative fault does not preclude summary judgment in her favor. *See, NYSCEF Doc. No. 301.*

4650 Broadway's Reply

In reply, 4650 Broadway argues, *inter alia*, that they did not cause or create the alleged defect, nor did it make special use out of the subject sidewalk. 4650 Broadway asserts, similar to plaintiff, that Con Edison was negligent as a matter of law because a previous decision of this Court determined that *RCNY § 2-07*, also referred to as the "12-inch rule" applies in this case. *See, NYSCEF Doc. No. 322.* In addition, 4650 Broadway asserts that Con Edison conceded that they it owned the grate. *See, NYSCEF Doc. No. 210.*

Discussion

"[T]he 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 denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Under *CPLR §3212*, "[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. *CPLR §3212*. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's

meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.” *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) [internal citations and quotation marks omitted].

Here, the Court finds that summary judgment is denied because defendant, 4650 Broadway, has failed to demonstrate there are no material issues of fact. Defendant 4650 Broadway argues that tenant/defendant Park It was responsible for maintaining the sidewalk pursuant to the lease. *See, NYSCEF Doc. No. 321*. However, Con Edison argues that there are questions of fact as to whether 4650 Broadway had the duty to inspect, maintain, and repair the subject sidewalk that caused plaintiff’s incident because tenant/defendant, Park It, alleges in its own motion for summary judgment, that defendant 4650 Broadway was the sole responsible party for the inspection, maintenance, and repair of the subject sidewalk. *See, NYSCEF Doc. No. 277*.

Further, plaintiff reiterates that there are issues of fact regarding whether the obligation to repair was contracted away to Park It in the subject lease agreement with 4650 Broadway. *See, NYSCEF Doc. No. 301*. As there are clear issues of fact, the motion for summary judgment must be denied.

Accordingly, it is hereby

ORDERED that defendant, 4650 Broadway Holdings, LLC’s motion for an Order, pursuant to *CPLR §3212* for an order granting it summary judgment as to all causes of action and cross-claims asserted against it by Plaintiff and Defendants, is **DENIED**, and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

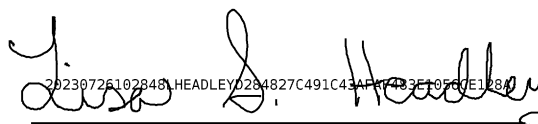
ORDERED that the parties shall proceed with discovery expeditiously and in good faith; and it is further

ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this Decision/Order upon the plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

7/26/2023

DATE



LISA S. HEADLEY, 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