Deoleo v City of New York

2023 NY Slip Op 32569(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
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY **PART** 28M

Justice

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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.

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INDEX NO. 151158/2019

MOTION DATE 05/16/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

4650 BROADWAY HOLDINGS, LLC

Defendant.

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Third-Party
Index No. 595914/2020

The following e-filed documents, listed by NYSCEF document number (Motion 006) 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 261, 263, 266, 268, 270, 273, 274, 275, 276, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 323, 324, 325

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

Upon the foregoing documents, it is hereby ORDERED that the movant-defendant, Park It Management Corp.'s (hereinafter "Park It") motion for an Order, pursuant to *CPLR §3212,* for summary judgment to dismiss the claims and cross-claims made against the moving defendant is DENIED. Co-defendants, 4650 Broadway Holdings LLC ("4650 Broadway), Consolidated Edison Company of New York, Inc. ("Con Edison") and Plaintiff Angie Deoleo ("Plaintiff") filed opposition. Defendant Park It 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 Holdings LLC (hereinafter "4650 Broadway") and leased to Park It for the operation of a parking garage. In the complaint, 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, Con Edison. As a result of the fall, the plaintiff claims she suffered personal injuries.

Park It's Motion for Summary Judgment

In support of the motion for summary judgment, defendant Park It asserts, *inter alia*, that based on the evidence provided in discovery, Park It did not cause, create, contribute, or own the sidewalk or premises where Plaintiff's accident occurred. *See, NYSCEF Doc. No.* 258. In addition, Park It argues that plaintiff failed to establish that Park It owed or breached a duty to plaintiff because Park It is a tenant of the parking garage which is adjacent to the alleged defective sidewalk. Defendant Park It argues they are not responsible for the defective sidewalk because their commercial lease does not require Park It to repair or maintain the sidewalk.

In addition, defendant Park It argues that they did not create or cause the defect, therefore, plaintiff's causes of action and co-defendants' crossclaims for common law indemnity and contribution must fail as a matter of law. Defendant Park It asserts that even in the absence of a lease, it is the owner, and not the tenant, that has a non-delegable duty to maintain the premises. Defendant Park It further argues that it was the co-defendant 4650 Broadway's negligence in failing to maintain the subject sidewalk that caused Plaintiff's accident. Lastly, Defendant Park It argues that defendants, 4650 Broadway and 4650 TIC LLC, have failed to put forth any evidence that defendant Park It failed to abide by its insurance procurement obligations pursuant to the lease. *See, NYSCEF Doc. No.* 258.

4650 Broadway's Opposition

In opposition, defendant 4650 Broadway submits, *inter alia*, an affirmation in opposition, the Decision granting the City of New York's Motion for Summary Judgment, and the Preliminary Conference Order. *See, NYSCEF Doc. Nos.* 273-276. Defendant, 4650 Broadway, argues that defendant Park It's motion is untimely because they failed to submit their motion within the date specified pursuant to the Preliminary Conference Order dated April 20, 2021. Furthermore, defendant 4650 Broadway contends that defendant Park It failed to proffer evidence that it did not use the subject sidewalk for a "special use." Defendant 4650 Broadway maintains that its crossclaims for contractual indemnification should not be dismissed because defendant 4650 Broadway was responsible to maintain or repair the section of the sidewalk in question, and has no merit under the terms of the lease. Defendant 4650 Broadway also asserts that co-defendant Con Edison, as the owner of the grate, is responsible for the grate and the twelve inches surrounding the grate, therefore, defendant 4650 Broadway would not be responsible for the area where the accident occurred. Defendant 4650 Broadway argues that there is an issue of fact regarding whether defendant Park It made special use of the sidewalk by parking cars on the sidewalk, and therefore Park It's motion must be denied. *See, NYSCEF Doc. No.* 273.

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

In opposition, defendant Con Edison submits an Affirmation in Opposition and a Response to Statement of Material Facts. *See, NYSCEF Doc. Nos.* 279-280. Defendant Con Edison argues that defendant Park It's motion for summary judgment is untimely because it failed to make the appropriate motion extending its time to file a dispositive motion, and Park It did not demonstrate good cause for their late filing. Furthermore, defendant Con Edison contends that defendant Park It failed to meet its *prima facie* burden to establish that it did not cause or create the alleged defect. *See, NYSCEF Doc. No.* 279.

Plaintiff's Opposition

In opposition, Plaintiff asserts, *inter alia*, that defendant Con Edison owned and had the exclusive duty to the 12 inches of sidewalk grating where the subject incident occurred. Plaintiff asserts that Con Edison failed to adequately monitor and maintain its grating, and the 12 inches surrounding the area of the sidewalk. Plaintiff maintains that 34 *RCNY § 2-07*, also referred to as "the 12-inch rule," places the responsibility on the owner for the upkeep and maintenance of gratings and the surrounding area. Plaintiff submits that Con Edison disclosed, during discovery, that they are not in possession of any reports of inspection, repair or maintenance of the subject sidewalk area for two years prior to the subject incident.

Plaintiff further argues that if the Court finds that Con Edison did not have exclusive duty to maintain the subject sidewalk, then the motion for summary judgment filed by 4650 Broadway should be denied because defendant 4650 Broadway also had a statutory duty to maintain the portion of the sidewalk pursuant to *New York City Administrative Code Section 7-210*, which shifts responsibility to maintain the sidewalk abutting a property from the City to the abutting landowner. In addition, Plaintiff acknowledges that there are issues of facts regarding the obligation to repair the subject area.

Park It's Reply

In reply, defendant Park It argues that it has demonstrated a good cause for the late filing of the instant summary judgment motion, which was due to the timing and late disclosure of defendant 4650 Broadway's deposition transcript of Paul Fruchthandler. Defendant Park It maintains that it has met its *prima facie* burden establishing that Park It did not make special use of the sidewalk, such that all claims made against it and crossclaims should be dismissed as a matter of law. Defendant Park It also asserts that defendant 4650 Broadway failed in its contractual and common law duties to maintain the sidewalk and to repair the structural components of its building. *See, NYSCEF Doc. No.* 323.

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). "On 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 there are material issues of fact as to whether Park It used the sidewalk as a parking space over the subject area grate. Specifically, plaintiff maintains that the lease for defendant Park It was a standard net lease, and that defendant 4650 Broadway was an out-of-possession landlord that would not be responsible for sidewalk repairs. *See, NYSCEF Doc. No.* 281. Park It argues it did not make "special use" of the sidewalk, particularly to park cars. *See, NYSCEF Doc. No.* 323. However, plaintiff argues that there is a material issue of fact of whether defendant Park It, through special use and benefit of using the sidewalk as an additional parking space, caused, created, or contributed to the alleged defect. Plaintiff's testimony states that the

parking attendant advised her that defendant Park It was aware of the defect and had submitted complaints about the defect, and Google Map photographs showed a vehicle parked directly over the grate at issue in this case. *See, NYSCEF Doc. No.* 279. As there are clear issues of fact, the motion for summary judgment must be denied.

Accordingly, it is hereby

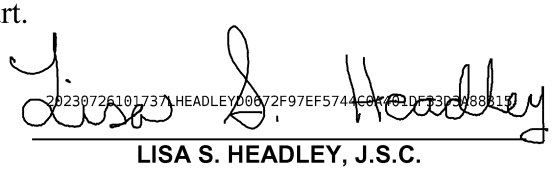
ORDERED that defendant PARK IT MANAGEMENT CORP.'s motion for an Order, pursuant to *CPLR §3212* for summary judgment as to all causes of action and crossclaims asserted against PARK IT MANAGEMENT CORP. by Plaintiff and Co-Defendants, is DENIED, and it is further

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-defendant shall serve a copy of this Decision/Order upon all parties 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		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE