Rivas v Consolidated Edison Inc.
2023 NY Slip Op 32917(U)
February 20, 2023
Supreme Court, Queens County
Docket Number: Index No. 714356/2017
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
---X
VERONICA RIVAS,

Plaintiff,

-against-

CONSOLIDATED EDISON INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, LONG ISLAND RAIL ROAD, and THE CITY OF NEW YORK,

Defendants.
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Index No. 714356/2017

Part 6
Motion Date: January 23, 2023

Calendar No. 38
Sequence No. 5

The following papers numbered 1 to 18 on this motion by defendants CONSOLIDATED EDISON INC. and CONSOLIDATD EDISON COMPANY OF NEW YORK, INC. for summary judgment and dismissal of plaintiff's Complaint and any cross-claims pursuant to CPLR §3211 and §3212, and this cross-motion by defendants NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and LONG ISLAND RAIL ROAD for summary judgment and dismissal of plaintiff's Complaint and any cross-claims pursuant to CPLR §3211 and §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	1-4
NYCTA's Affirmation in Opposition, Exhibits	5-7
City's Affirmation in Opposition	8-9
Plaintiff's Affirmation in Opposition	10-11
Con Ed's Affirmation in Opposition	12-13
Con Ed's Reply Affirmation	14-15
City's Affirmation in Opposition to Cross-Motion, Exhibits	16-18

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendants Consolidated Edison Inc. and Consolidated Edison Company of New York, Inc. (hereinafter referred to as "Con Ed")'s motion for summary judgment dismissing plaintiff's Complaint and any cross-claims pursuant to CPLR §3211 and §3212 is denied. Defendants New York City Transit Authority, Metropolitan Transportation Authority and Long Island Rail Road (hereinafter referred to as "NYCTA")'s cross-motion for summary judgment and dismissal of plaintiff's Complaint and any cross-claims pursuant to CPLR §3211 and §3212 is denied, as untimely and without good cause.

Plaintiff commenced this action for personal injuries sustained on October 31, 2016, as a result of tripping and falling on a defective sidewalk abutting a metal grating between 91st Street and Archer Avenue, Queens County. Plaintiff filed the Summons and Complaint on October 16, 2017, and issue was joined on November 7, 2017.

Pursuant to CPLR 3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

The duty to maintain property free of dangerous or defective conditions is imposed upon those who own, occupy, or control the property, or who put the property to a special use or derive a special use from it. (*Guzov v. Manor Lodge Holding Corp.*, 13 A.D.3d 482, 483 [2d Dept. 2004].) However, a contractor may be liable for an act of negligence which results in the creation of a dangerous condition on a public street. (*Malayeva v. City of New York*, 180 A.D.3d 888, 890 [2d Dept. 2020].)

New York City Department of Transportation Highway Rule 34 RCNY §2-07 places the maintenance and repair responsibilities on the owners of covers and gratings, and requires owners

to repair any defective sidewalk condition found within an area extending twelve inches outside of the perimeter of the cover or grating. (*Hurley v. Related Mgt. Co.*, 74 A.D.3d 648, 649 [2d Dept. 2010].)

Defendants Con Ed established a prima facie entitlement to summary judgment, by demonstrating they were not liable for maintenance and repairs on the sidewalk, nor did it cause or create the defective condition where plaintiff fell. Defendants presented the pleadings, the parties' deposition testimonies, Notice to Admit and response, affidavit of Gillian N. Kovalski, affidavit of Vicki Chung and photographs in support of their motion. Plaintiff testified that she fell on a raised, defective sidewalk condition, and identified it in photographs. Defendants demonstrated that they were not liable for maintaining the sidewalk, pursuant to 34 RCNY §2-07 makes the owner liable for defective conditions. They presented evidence that the distance between the grating and the raised sidewalk was less than twelve inches, and they denied ownership of the grating. They further demonstrated that co-defendant NYCTA admitting leasing the grating in a contract with co-defendant City of New York, though City has denied ownership. Vicki Chung further attested that she reviewed Con Ed's records and found no work performed by Con Ed or on their behalf at the location where plaintiff fell. They further demonstrated that any cross-claims should be dismissed, as they would be based upon Con Ed's purported duty to maintain the sidewalk and grating. Based upon the evidence presented, defendants Con Ed are not liable for plaintiff's injuries.

However, co-defendant NYCTA raised a triable issue of fact, as it presented evidence that Con Ed may be the owner of the property abutting the sidewalk where plaintiff fell, and therefore liable under Administrative Code §7-210. It utilized co-defendant City's affidavit of merit from title examiner Thomas Russell, who attested that Con Ed owned the property located at 137-30 91st Avenue, which abuts the sidewalk where plaintiff fell. Defendant NYCTA also utilized the affidavit of its employee Heriberto Hernandez, a project manager who reviewed the Notice of Claim, photographs and observed the location where plaintiff fell and opined that the height differential in the sidewalk was due to the abutting sidewalk flag sinking. NYCTA demonstrated that a property owner's liability for maintenance of the abutting sidewalk is not eliminated by 34 RCNY §2-07, and raised an issue of fact for the jury to determine which entity is liable for the defective condition. (*See Doyley v. Steiner*, 107 A.D.3d 517 [1st Dept. 2013].) Co-defendant City of New York and plaintiff opposed the motion and relied upon NYCTA's arguments and evidence. As defendant Con Ed failed to present evidence to rebut the issues of fact, including but not limited to an expert affidavit with regard to what caused the defective condition, there are issues of fact in dispute.

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Defendant NYCTA's cross-motion for summary judgment is denied, as untimely and without good cause. Defendant admits its motion was untimely, and its claims that it needed more time to obtain the affidavit and observe the property due to logistical backlogs and staffing issues before making its cross-motion are insufficient to establish good cause for the delay in moving. (*See Nationstar Mtge., LLC v. Weisblum*, 143 A.D.3d 866 [2d Dept. 2016].) They failed to demonstrate that the affidavit and property inspection were essential to their cross-motion, as the primary argument in the cross-motion was that co-defendant Con Ed is the property owner responsible for the maintenance and repair of the sidewalk. (*See Navarro v. Damac Realty, LLC*, 202 A.D.3d 1100 [2d Dept. 2022].)

Accordingly, defendants Consolidated Edison Inc. and Consolidated Edison Company of New York, Inc.'s motion for summary judgment dismissing plaintiff's Complaint and any cross-claims pursuant to CPLR §3211 and §3212 is denied. Defendants New York City Transit Authority, Metropolitan Transportation Authority and Long Island Rail Road's cross-motion for summary judgment and dismissal of plaintiff's Complaint and any cross-claims pursuant to CPLR §3211 and §3212 is denied as untimely and without good cause.

This constitutes the decision and Order of the Court.

Dated: February 20, 2023

Hon. Tracy Catapano-Fox, J.S.C.