

**Kennedy v Trizechahn 1065 Ave. of the Ams. Prop.
Owner LLC**

2023 NY Slip Op 32967(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 152503/2018

Judge: J. Machelles Sweeting

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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. J. MACHELLE SWEETING, J.S.C. PART 62

Justice

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INDEX NO. 152503/2018

ELEANOR KENNEDY,

02/28/2023,

Plaintiff,

MOTION DATE 02/15/2023

- v -

MOTION SEQ. NO. 003 004

TRIZEHAHN 1065 AVENUE OF THE AMERICAS
PROPERTY OWNER LLC, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., THE CITY OF NEW
YORK,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 146, 148, 149, 150, 151, 152

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 120, 122, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 147

were read on this motion to/for JUDGMENT - SUMMARY

In the underlying action, plaintiff alleges that she sustained injuries on September 11, 2017 when she was made to trip and fell on the sidewalk directly in front of 1065 Avenue of the Americas, New York, New York. The defendants include Trizechahn 1065 Avenue Of The Americas Property Owner LLC (the "Owner"); Consolidated Edison Company Of New York, Inc. ("Con Ed"); and The City Of New York (the "City").¹

¹ Plaintiff had also named defendant New York City Transit Authority, but this action was dismissed as against this defendant by order of the court (Hon. Lisa Ann Sokoloff) issued on or around August 8, 2019 (NYSCEF Doc. 36).

Now pending before the court are two motion sequences: Motion Sequence #003 where the Owner seeks an order (1) pursuant to Civil Practice Law and Rules 3212, granting summary judgment to the Owner and dismissing the Complaint in its entirety against the Owner; and (2) pursuant to CPLR 3212, granting summary judgment to the Owner, dismissing any and all cross-claims of co-defendants in their entirety against the Owner. In Motion Sequence #004 the City seeks an order, pursuant to CPLR 3212, granting summary judgment to the City and dismissing the verified complaint and all cross-claims against the City.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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 demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Motion Sequence #003 filed by the Owner

The Owner seeks summary judgment on the basis that Con Ed was responsible for the defect because it was located within 12 inches of a Con Ed grate. The court has reviewed all of the filings in this case, and denies summary judgment, as the facts as alleged raise more questions than they answer with respect to the Owner. There are a multitude of factual issues that remain that cannot be determined based on the evidence on the record, including the photographs and other documentary evidence that were submitted. These questions include, but are not limited to: Did Con Ed inform the Owner that it needed to access the grate, but was unable to because of the

scaffolding? If yes, how did the Owner respond? When did the scaffolding actually come down? Did the Owner tell Con Ed that the scaffolding had been removed? If yes, how was this message transmitted to Con Ed? Was the scaffolding down at the time the Owner's building manager, Angela Moroney, submitted a trouble ticket to Con Ed on or about July 26, 2017? These, and other questions, were not settled by the moving papers. Accordingly, this motion is denied.

Motion Sequence #004 filed by the City

The City seeks summary judgment on the basis that it is not liable for plaintiff's injuries because it does not own the abutting property; such property is not exempt from the liability shifting provision of Administrative Code 7-210; and the City did not cause or create the alleged defect.

It is undisputed that the City did not own the abutting property when plaintiff fell, and hence the City has established a *prima facie* case for summary judgment (*see Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] ["The City established *prima facie* that it did not own the real property abutting the sidewalk on which plaintiff fell and [...] therefore, pursuant to Administrative Code of City of N.Y. § 7-210(c), it was not liable for plaintiff's injuries"]).

The opposition papers also argue that the City caused or created the alleged defect by issuing a permit to the Owner to erect the scaffold. However, as the City correctly argued, the mere presence of scaffolding does not necessarily mean a permit was issued by the City to the erector of the subject scaffolding. Importantly, despite being provided over 1,000 pages of DOT records, Con Ed has not pointed to a single permit to support their claim that the City actually issued a permit. Further, even assuming *arguendo* that the City had issued the permit to the Owner to erect the scaffolding, the mere issuance of a permit to a permit applicant is not evidence that the

City caused and created the alleged condition. The burden is to show that the *City or a City contractor* performed work, and that the work immediately caused or created the subject condition (*see, e.g. Bolanos v City of New York*, 29 AD3d 455 [1st Dept 2006] [“[...] there was no evidence that the City or a city contractor ‘caused or created’ the hazard. Accordingly, the court properly dismissed the action against the City”]). Here, the opposition papers make no such arguments with respect to work being performed by the City or a City contractor, and thus fails to raise a question of fact sufficient to defeat a *prima facie* case for summary judgment.

Conclusion

Given the above, it is hereby:

ORDERED that Motion Sequence #003 filed by the Owner is **DENIED**; and it is further

ORDERED that Motion Sequence #004 filed by the City is **GRANTED**; and it is further

ORDERED that the Complaint and any cross-claims are dismissed against the City; and

it is further

ORDERED that the caption is amended to remove the City as a named defendant; and it

is further

ORDERED that this action is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the City shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptmanh).

8/28/2023

DATE

J. MACHELLE SWEETING, 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