

**Minahan v New York City Tr. Auth.**

2023 NY Slip Op 33005(U)

August 29, 2023

Supreme Court, New York County

Docket Number: Index No. 162252/2019

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

ANN MINAHAN, INDEX NO. 162252/2019
MOTION SEQ. NO. 001

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19,
20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, Plaintiff's motion for partial summary judgment pursuant
to CPLR §3212 against the Defendants is denied and the Defendants' motion for summary
judgment pursuant to CPLR §3212, dismissing the complaint, is granted.

This personal injury action arises out of an August 15, 2019 incident wherein the Plaintiff,
ANN MINAHAN, alleges that she was caused to trip and fall due to a defective, uneven and
cracked sidewalk condition located near a sidewalk grate along the sidewalk abutting 620 6th
Avenue in Manhattan. (NYSCEF Doc. 14).

The Plaintiff timely moved, post-note of issue, for summary judgment against the
Defendants seeking to establish claims sounding in negligence against the Defendants for the
alleged defective condition in the sidewalk and to dismiss the culpable conduct affirmative
defense. The Defendants opposed the Plaintiff's motion and cross-move for summary judgment
seeking to dismiss the complaint, asserting that they did not owe the Plaintiff a legal duty of care.

Upon review, the Defendants have met their prima facie burden by establishing that they
did not owe the Plaintiff a legal duty of care as that they did not own or control the subject grate.
The Plaintiff has not met her prima facie burden in establishing negligence on the part of the
Defendants and raises no material issues of fact. Accordingly, the Plaintiff's motion for partial
summary judgment is denied and the Defendants cross-motion for summary judgment is granted.

**TRANSIT's Summary Judgment Cross-Motion**

CPLR §3212 provides any party in any action, including in a negligence action, to move for summary judgment. (CPLR §3212 [a], *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 [1974]). The party seeking summary judgment, even if unopposed, has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (see CPLR §3212 [b], *Voss v Netherlands Ins. Co.*, 22 N.Y.3d 728, 734, 8 N.E.3d 823 [2014], *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81, 790 N.E.2d 772 [2003], *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324–25, 501 N.E.2d 572, 574 [1986], see also *Zuckerman v City of New York*, 49 NY2d 557 [1980]). “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* 68 N.Y.2d at 324).

The Plaintiff's complaint asserts a single cause of action against the Defendants sounding in negligence based upon the Defendants' purported ownership, control and/or management of the subject grating located in the sidewalk abutting 620 6<sup>th</sup> Avenue.

Upon a review of the Plaintiff's photos and expert report of Scott Silberman (who performed an August 25, 2022 site visit), the sidewalk grating is located on the East side of 6<sup>th</sup> Avenue in front of a “Marshalls” storefront and appears to be closer to the intersection with 19<sup>th</sup> Street (NYSCEF Doc. 23, 25, 27).

The Defendants submit the affidavit of Heriberto Hernandez (“Hernandez”, NEW YORK CITY TRANSIT AUTHORITY's Associate Project Manager Level II which is supported by a Plan of Sidewalk Grating (NYSCEF Doc. 34, 33). As per Hernandez' affidavit, the Plan of Sidewalk Grating only reflects NEW YORK CITY TRANSIT AUTHORITY's gratings. Based upon Hernandez' review of the Plan of Sidewalk Grating, Hernandez avers that there are no subway grates in the area where the Plaintiff's accident occurred. The only subway grates on the East side of 6<sup>th</sup> Avenue are closer to 18<sup>th</sup> Street. Hernandez also testified at a deposition in this matter wherein he offered testimony regarding the Plan of Sidewalk Grating and his inspection consistent with that in his affidavit. (NYSCEF Doc. 24).

“[L]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property ... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the

property’.” (*Minott v. City of New York*, 230 A.D.2d 719, 720, 645 N.Y.S.2d 879 [1996] quoting *Turrisi v. Ponderosa Inc.*, 179 A.D.2d 956, 957, 578 N.Y.S.2d 724 [3d Dept 1992]).

The Defendants have presented sufficient and uncontroverted evidence that they did not owe the Plaintiff a legal duty of care as they did not own, control or manage the subject grate or sidewalk. In opposition, the Plaintiff offers no admissible evidence raising a material issue fact with respect to the Defendant’s purported ownership or control of the sidewalk or grate.

The Plaintiff’s argument that the Defendants should be precluded from denying ownership of the grates based upon their alleged failure to respond to the Plaintiff’s March 27, 2020 notice to admit is unavailing. Upon review, it is clear that the Defendants denied owning, operating, managing, controlling and supervising the subject grating in their February 28, 2020 answer (NYSCEF Doc. 5). Moreover, there is no evidence that the Defendants were properly served with the notice to admit. (NYSCEF Doc. 18). The Defendants deny being served with the notice to admit and question when and how the notice to admit was served, pointing out that there is no affidavit of service, it was not served via NYSCEF and apparently was sent during the height of the COVID-19 pandemic “lockdown”. Nor is the owed response accounted for in the subsequent July 1, 2021 preliminary conference order. (NYSCEF Doc. 8). Further, in light of the fact that the ownership of the grating was clearly denied in the Defendants’ answer, repeating such allegations in the notice to admit was not proper. “A notice to admit pursuant to CPLR 3123(a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial.” (*Meadowbrook-Richman, Inc. v. Cicchiello*, 273 A.D.2d 6, 6, 709 N.Y.S.2d 521, 522 (2000); see also *Washington v. Alco Auto Sales*, 199 A.D.2d 165, 165, 605 N.Y.S.2d 271 [1st Dept 1993]). Finally, this Court would be remised if it did not take note that, the Plaintiff has not detrimentally relied upon any misrepresentation by the Defendants. In fact, it appears that based upon the information relayed by Hernandez at his deposition, the Plaintiff commenced a separate action against the both the apparent property owner and ConEd pending in this Court, Index No. 151862/2022, on or about March 2, 2022.

Furthermore, even if the subject grate was a subway grate, pursuant to Section 7-210 of the New York City Administrative Code and Title 34 of the Rules & Regulations of the City of New York §2-07(b)(1) the City of New York as the actual owner of the subway grating (as per the 1953 Lease Agreement between the City of New York and the NEW YORK CITY TRANSIT

AUTHORITY who holds the non delegable duty to maintain the 12 inch area around the grates. (See *Fajardo v. City of New York*, 197 A.D.3d 456, 148 N.Y.S.3d 908 [2d Dept 2021]). Upon review, as the Appellate Division, First Department has not ruled otherwise on this issue, *Fajardo* is controlling. Thus, this Court is bound by Appellate Division authority holding as a matter of law that the City of New York, and not the Defendants, is the owner of sidewalk subway ventilation grates and would have the non-delegable duty to maintain the grate.

Accordingly, the Defendants have met their prima facie burden in establishing that as they did not own of the subject grate or sidewalk, and did not have a duty to maintain either in a reasonably safe condition.

For the reasons set forth herein, the Plaintiff's motion for partial summary judgment is denied as the Plaintiff cannot establish that the Defendants owed the Plaintiff a legal duty of care. That branch of the Plaintiff's motion which seeks a dismissal of the affirmative defense of culpable conduct is denied as moot.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ORDERED that the Defendants 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); 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).

8/29/2023  
DATE

HON. DENISE M. DOMINGUEZ  
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE