

**Verderosa v City of New York**

2023 NY Slip Op 34360(U)

December 4, 2023

Supreme Court, New York County

Docket Number: Index No. 157408/2016

Judge: Nicholas W. Moyne

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NICHOLAS W. MOYNE PART 52

Justice

-----X

KATHLEEN M VERDEROSA,
Plaintiff,

- v -

CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., DANELLA
CONSTRUCTION OF NY, INC., NICO ASPHALT PAVING,
INC.,

Defendant.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Plaintiff,

-against-

Defendant.

-----X

DANELLA CONSTRUCTION OF NY, INC.
Plaintiff,

-against-

EMPIRE CITY SUBWAY COMPANY (LIMITED)

Defendant.

-----X

INDEX NO. 157408/2016
12/01/2022,
12/02/2022,
MOTION DATE 12/07/2022
MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

Third-Party
Index No. 595521/2017

Second Third-Party
Index No. 595610/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 154, 155, 158, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 200, 201, 212, 213

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 156, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 202, 208, 209, 210, 211

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 148, 149, 150, 157, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 203, 204, 205, 206, 207, 214

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, it is

Motion sequences 004, 005, and 006 are consolidated for disposition. Motion sequence 004 is the motion of The City of New York and The New York City Department of Transportation (collectively the “City”) for summary judgment dismissing the complaint and all cross-claims against them. Motion sequence 005 is the motion of defendant/third-party plaintiff Consolidated Edison Company of New York, Inc. i/s/h/a Consolidated Edison Co. of New York, Inc. (“ConEd”) for summary judgment. Motion sequence 006 is the motion of defendant/second third-party defendant Nico Asphalt Paving, Inc. (“Nico”) to dismiss the complaint and cross-claims against it.

The plaintiff in this case alleges that on November 2, 2015, while crossing the street at a crosswalk, she was caused to trip and fall on a dangerous condition. The crosswalk area was allegedly uneven, with divots and chunks missing from it. Plaintiff indicates that there was a metal plate in the roadway at the crosswalk, and that the road was chipped out around the plate. She contends that there was a height difference of about an inch and a half between the plate and the street, that in the area where she was crossing, there was asphalt haphazardly and loosely placed around the plate – some of which was more like gravel. Plaintiff further contends that she tripped on the asphalt followed by the plate, and that the uneven pavement contributed to her losing her balance.

### Summary Judgment

“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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion” (CPLR § 3212[b]). “In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

#### Mot. Seq. 004

##### Prior Written Notice

The City’s contends that it is entitled to summary judgment because the City did not have fifteen-days prior written notice of the alleged defect as required by New York City Administrative Code (“NYC Admin. Code”) § 7-201(c)(2), and did not cause or create the defect. The plaintiff opposes the motion, contending that the City had prior written notice of the defect by way of complaints from citizens, a Big Apple Map, and an inspection by a City crew. The City must have prior written notice of the particular defect which caused the plaintiff to fall, the “awareness of one defect in the area is insufficient to constitute notice of a different

particular defect which caused the accident” (*Civic v City of New York*, 215 AD3d 445, 446 [1st Dept 2023]).

The complaints from members of the public do not serve to provide the City with prior written notice. The complaints came in via calls to the City’s 311 system. Telephonic communication received through the City’s 311 system is insufficient to raise an issue of fact as to prior written notice (*see Harvey v Henry 85 LLC*, 171 AD3d 531, 532 [1st Dept 2019]).

“Constructive or other actual notice is insufficient where the municipality did not receive prior written notice” (*Stride v City of Schenectady*, 85 AD3d 1409, 1410 [3d Dept 2011]).

Furthermore, many of the complaints involve a different alleged defect than that which plaintiff contends caused her fall.

The Big Apple Map did not provide the City with prior written notice. The Big Apple Map which plaintiff contends gives the City prior written notice is from 2003. The plaintiff’s fall was in November of 2015, over twelve years later. Accordingly, the Big Apple Map was too remote in time to provide the City with prior written notice (*see Figueroa v City of New York*, 210 AD3d 584, 584 [1st Dept 2022] [It cannot be determined if the pothole depicted in the Big Apple Map was the same that caused plaintiff’s accident eight years later]; *see also Silverio v City of New York*, 100 AD3d 543 [1st Dept 2012] [map from 15 years prior to the accident was too remote in time]). Furthermore, the City has provided a Google Maps photo of the intersection taken in 2011 (NYSCEF Doc. No. 118), which shows that any defects indicated on the Big Apple Map from 2003 had been remedied (*see Ryabaya v City of New York*, 2023 NY Slip Op 05284 [2d Dept Oct. 18, 2023] [“Supreme Court properly took judicial notice of the Google Maps image ... which showed that any defects indicated on the Big Apple map ... had

been remedied”). Accordingly, the Big Apple Map did not serve to provide the City with prior written notice.

The inspection reports did not provide the City with prior written notice because they either involved defects other than that which plaintiff alleged caused her to fall or the inspections resulted in a “pass” prior to plaintiff’s accident. Furthermore, work permits and repair orders do not satisfy the prior written notice requirement. (*see Haulsey v City of New York*, 123 AD3d 606, 607 [1st Dept 2014]; *Kapilevich v City of New York*, 103 AD3d 548, 548 [1st Dept 2013]; *Levbar v City of New York*, 282 AD2d 239, 242 [1st Dept 2001]; *Khemraj v City of New York*, 37 AD3d 419, 420 [2d Dept 2007]).

Therefore, the City submitted evidence showing that it did not have prior written notice of the condition that caused plaintiff to fall. In opposition, plaintiff failed to raise a triable issue of fact.

Cause or create

“Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule – that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see also Brown v City of New York*, 150 AD3d 615, 616 [1st Dept 2017]). Plaintiff does not contend that the special use exception applies to the instant matter. The affirmative negligence exception to the notice requirement is limited to work by the City that immediately results in the existence of a dangerous condition (*Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]; *see also Yarborough, supra*).

The City's records search did not uncover evidence that the City caused or created the defect. Plaintiff has failed to present evidence to the contrary. A plaintiff's conclusory allegations do not create a triable issue with respect to any of the exceptions to the written notice requirement (*Villaret v City of New York*, 236 AD2d 216, 216-17 [1st Dept 1997]; *see also Gray v City of New York*, 195 AD3d 538 [1st Dept 2021]). Accordingly, plaintiff failed to raise an issue of fact as to whether the City may have caused the condition through affirmative negligence that immediately resulted in a dangerous condition (*see Brown v City of New York*, 150 AD3d 615, 616 [1st Dept 2017]).

Therefore, as the City has established *prima facie* that it did not have prior written notice of the defect, and the plaintiff has failed to provide evidence to rebut this showing and has not meet her burden to show that the City caused or created the defect, the City's motion for summary judgment dismissing the complaint and all cross-claims against it is granted.

**Mot. Seq. 005 and 006**

**The jury would not need to engage in impermissible speculation**

ConEd, Danella Construction of NY, Inc. ("Danella"), and Nico argue that they are entitled to summary judgment because the plaintiff cannot specifically identify the cause of her fall, and therefore any finding by a jury would be based on impermissible speculation. A defendant may sustain their burden "of demonstrating entitlement to summary judgment as a matter of law because a jury would have to engage in impermissible speculation to determine the cause of the accident" (*Smith v City of New York*, 91 AD3d 456, 457 [1st Dept 2012]; *see also Thompson-Shepard v Lido Hall Condominiums*, 168 AD3d 614 [1st Dept 2019] ["plaintiff's testimony, which was limited to after-the-fact observations, reflected that she did not know the cause of the accident"]).

Defendants contend that, at the time of plaintiff's fall, the steel plates were entirely covered in asphalt, and therefore, plaintiff could not have tripped over the steel plate as she testified. In support of this position, the defendants point to depositions of Charles Agro and John Denegall which indicated that the steel plates were entirely covered in asphalt at the time of plaintiff's accident in November of 2015, and the fact that, at her depositions, plaintiff marked two photographs, Exhibits C and D to plaintiff's deposition (NYSCEF Doc. Nos. 161 and 163), to show the defective condition which caused her to fall. The first photograph, Exhibit D at the plaintiff's deposition (NYSCEF Doc. No. 161), taken in December of 2015, has an X marking the defect, at the edge of a steel plate. Defendants contend that the second photograph, Exhibit C at plaintiff's deposition (NYSCEF Doc. No. 163), taken November 2, 2015, has the X marking the defect not at the edge of a steel plate but at the edge of a square of asphalt.<sup>1</sup> Defendant's contend that this shows plaintiff cannot identify the cause of her fall, and the jury would need to engage in impermissible speculation to reach a verdict.

Contrary to defendants' contention, the plaintiff in this case has been consistent in her testimony. Plaintiff testified that she was able to see a metal plate in the roadway before she stepped off the curb, and that it was a combination of loose gravel, the absence of gravel and the metal plate that caused her to trip (*see* 9/1/2017 Tr at p. 35-36; *see also* 6/19/2018 Tr at p. 45). When asked if she was certain that there were metal plates on the crosswalk on the day of the accident, the plaintiff answered "Absolutely" (6/19/2018 Tr at p. 41). This testimony clearly differentiates the instant matter from the cases relied upon by the defendants where the plaintiff had "no idea" what caused their fall (*see e.g. Smith, supra*).

---

<sup>1</sup> Contrary to defendants' contention, this photograph, which is quite dark, does not "clearly" show a different condition. In fact, the X on each photo marks what appears to be a lip or edge at the same location relative to the manhole cover depicted in both photos. A reasonable trier of fact could conclude that both photos show the same defect.

In order to survive a motion for summary judgment, a plaintiff is not required to state for certain that she knew exactly what she tripped over the very instant that she tripped over it, to the extent that plaintiff's deposition testimony in this regard is vague or inconsistent, a credibility issue is raised to be decided by the jury, not the court on a motion for summary judgment (*see DiGiantomasso v City of New York*, 55 AD3d 502, 503 [1st Dept 2008]). Furthermore, even if the plaintiff's testimony were vague, her ability to mark photographs showing the cause of her fall is sufficient to defeat summary judgment (*see Taveras v 1149 Webster Realty Corp.* (134 AD3d 495, 496 [1st Dept 2015], *affd*, 28 NY3d 958 [2016]). To the extent that the defendants' deposition testimony indicates that the alleged condition couldn't have existed at the time of the accident, this raises an issue of fact for the jury. Accordingly, considering the evidence in the light most favorable to the plaintiff, the defendants have not established entitlement to summary judgment on the basis of plaintiff's inability to sufficiently identify the cause of her fall.

*The alleged defects cannot be said, as a matter of law, to be trivial*

The defendants contend that they are entitled to summary judgment because the defect was open and obvious and not inherently dangerous and constituted, at best, a trivial defect. "If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger" (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 71 [1st Dept 2004]). However, "even if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*Id.* at 70). "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear

and undisputed evidence” (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]). In the instant case, the plaintiff’s testimony that she recognized the defective condition as a tripping hazard (*see* 9/21/2017 Tr at p. 45) establishes that the defect was open and obvious (*see e.g. Baynes v City of New York*, 81 AD3d 423, 424 [1st Dept 2011]). Thus, the defendants did not have a duty to warn the plaintiff of the danger.

The defendants have not met their burden to show that the conditions were not inherently dangerous or that the defect was so trivial as to absolve them of liability. “A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). “[A] small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a pedestrian” (*Id.* at 78). Small defects are “actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards *or difficult to traverse safely on foot*” (*Id.* at 79 [emphasis added]). There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*Id.*).

Viewing the evidence in the light most favorable to plaintiff, a triable issue of fact exists whether the defects alleged in the instant matter were inherently dangerous. The defect at issue

here is not a single defect but a combination of several defects, each of which plaintiff says contributed to her fall, and none of which are so insignificant as to be non-actionable as a matter of law. The plaintiff alleges that she tripped on the metal plate, and the height differential between the metal plate and the surrounding roadway was approximately one-and-a-half inches. Summary judgment has been denied where the height differential was smaller than this (*see e.g. McCabe v Avalon Bay Communities, Inc.*, 177 AD3d 487, 488 [1st Dept 2019] [height differential in the sidewalk caused by the raised flag ranged between 7/16 of an inch and 13/16 of an inch]). Furthermore, in this case, other defects exist which plaintiff contends contributed to her fall including the uneven pavement in the crosswalk area, where chunks of pavement were missing, and asphalt which was placed haphazardly around the plate. Furthermore, the conditions at the time the accident took place may have increased the risk posed by the defects. Plaintiff contends that she had to maneuver around a manhole cover and contend with other pedestrians – who limited her ability to avoid the defect. Taking all of this into consideration, and viewing the evidence in the light most favorable to the plaintiff, it cannot be said that the defect was, as a matter of law, not inherently dangerous. Accordingly, the non-City defendants' motions for summary judgment are denied.

#### Conclusion

For the reasons set forth herein above, it is hereby

ORDERED that the motion for summary judgment of defendants The City of New York and The New York City Department of Transportation is granted, and the complaint and any cross-claims are dismissed against them; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the motion for summary judgment of defendant Consolidated Edison Company of New York, Inc. is denied; and it is further

ORDERED that the motion for summary judgment of defendant Nico Asphalt Paving, Inc. is denied; and it is further

ORDERED that the said claims and cross-claims against defendants Consolidated Edison Company of New York, Inc., Danella Construction of NY, Inc. and Nico Asphalt Paving, Inc. are severed, and the balance of the action shall continue; and it is further

ORDERED that as no remaining party to the action is represented by Corporation Counsel (i.e., the New York City Law Department); this matter is remitted to the General Clerk's Office for reassignment to a general IAS Part; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants The City of New York and The New York City Department of Transportation dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; 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)].

This constitutes the decision and order of the court.

Motion Sequence 004

*Nicholas W. Moynes*  
NICHOLAS W. MOYNE, J.S.C.

12/4/2023  
DATE

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

Motion Sequence 005

*Nicholas W. Moynes*  
NICHOLAS W. MOYNE, J.S.C.

12/4/2023  
DATE

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

Motion Sequence 006

*Nicholas W. Moynes*  
NICHOLAS W. MOYNE, J.S.C.

12/4/2023  
DATE

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