

Watts v Sydith Realty Corp.

2023 NY Slip Op 34869(U)

March 27, 2023

Supreme Court, Bronx County

Docket Number: Index No. 22741/2019E

Judge: Paul L. Alpert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26



-----X

Rasheen Watts

Index No. 22741/2019E

-against-

Hon. Paul L. Alpert

Sydith Realty Corp., Consolidated Edison Inc.,
Consolidated Edison Company of New York, Inc.,
and Consolidated Edison Energy, Inc.,

Justice Supreme Court

-----X

Sydith Realty Corp.,

-against-

Consolidated Edison Inc., Consolidated Edison
Inc., Consolidated Edison Company of New
York, Inc., and Consolidated Edison Energy,
Inc.,

The following papers numbered 1 to _____ were read on this motion (Seq. No. 1)
for _____ noticed on
_____.

Table with 2 columns: Document Name, No(s). Rows include: Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed, Answering Affidavit and Exhibits, Replying Affidavit and Exhibits.

The defendant's motion is decided in accordance with the annexed decision and order of the court.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 3/27/23

Hon. [Signature]
HON. PAUL ALPERT J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

-----X
Rasheen Watts,

Index No.: 22741/2019E

Plaintiff,

-against-

DECISION/ORDER

Sydith Realty Corp, Consolidated Edison
Inc., Consolidated Edison Company of New
York, Inc., and Consolidated Edison Energy,
Inc.,

Defendants.

-----X
Sydith Realty Corp.,

Third-Party Plaintiff

-against-

Consolidated Edison, Inc., Consolidated
Edison Company of New York, Inc., and
Consolidated Edison Energy,
Inc.,

Third-Party Defendants.

-----X

Recitation, as required by CPLR 2219 of the papers considered in the review of this motion as indicated below:

Papers	Numbered
Notice of Motion, Affirmation in Support & Exhibits.....	1
Memorandum of Law in Support of Motion.....	2
Affirmation in Opposition & Exhibits.....	3
Memorandum of Law in Opposition.....	4
Reply Affirmation.....	5

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this personal injury action on March 17, 2019. On June 15,

2018 he tripped on the sidewalk in front of 320 East 167th Street Bronx, New York and fractured his leg. The defendant Sydith Realty Corp., moves for summary judgment dismissing the plaintiff's complaint and all cross-claims or in the alternative awarding it summary judgment on its cross-claim for common law indemnification against the third-party defendants Consolidated Edison, Inc., and Consolidated Edison Company of New York, Inc. (hereinafter "Con Ed"). The plaintiff opposes the motion.

The proponent of a motion for summary judgment must tender sufficient evidence to show absence of any material, triable issues of fact and the right to entitlement to judgment as a matter of law (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [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 (see *Assaf v. Ropog Cab Corp.*, 153 Ad2d 520 [1st Dept 1989]). It is well settled that issue finding, not issue determination, is the key to summary judgment (see *Rose v. Da Ecib USA*, 259 Ad 258 [1st Dept 1999]). Summary judgment will only be granted if there are no material, triable issues of fact (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Pursuant to the Rules of the City of New York Department of Transportation 34 RCNY § 207 (b) (1) Owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad, if such pad is installed. 34 RCNY § 207 (b)(2) states that the owners of covers or gratings shall replace or

repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating. RCNY § 207(b)(3) indicates that “Street hardware shall be flush with the surrounding street surface”. The definition of the term “street” includes the “sidewalk” (34 RCNY §2-01).

Sydith claims that it cannot be held liable for the plaintiff’s injuries because it did not have a duty to maintain and repair the subject vault cover/grate and the area extending twelve inches outward from its perimeter. It argues that to establish a prima facie case of negligence, a plaintiff is required to demonstrate (1) that the defendant owed plaintiff a duty of reasonable care, (2) that there was a breach of that duty, (3) and that the breach was a proximate cause of the injury (*Boltax v. Joy Day Camp*, 67 NY2d 617; *Solomon v. City of New York*, 66 NY2d 1026 [1985]).

The defendant relies on the Rules of the City of New York Department of Transportation 34 RCNY § 2-07(b)(1)(2) and (3) in support of its argument that Con Ed is responsible for maintaining the area where the plaintiff fell. Sydith argues that exhibit “W” which supposedly represents pre-incident inspections and exhibit “N” which purports to show post-incident reports prove that Con Ed owns the part of the sidewalk where the plaintiff’s accident occurred. The defendant also argues that based on the plaintiff’s photographs marked as exhibits” h-l” at his deposition, and the plaintiff’s testimony, there is no question that as a matter of law the incident occurred within 12 inches of the perimeter of the hardware. It contends that the plaintiff testified that his foot contacted the metal edge of the cover of Con Ed’s vault. It also states that Con Ed admitted to its ownership of that area of the sidewalk in response to Sydith’s Notice to Admit.

Adon Pimentel, Sydith’s superintendent since 1992, testified that he believes that the

metal vault under the sidewalk on East 167th belonged to Con Ed (Exhibit “S” pg. 19 line 2-7). He stated that he inspects the sidewalk everyday (pg 18 line 16-19). He observed a raised metal grate in the sidewalk (pg 20 lines 5-8). He received complaints from the tenants at the building regarding repairs (pg . 25 lines 8-18). However he did not receive any complaints regarding the sidewalk (Pg. 25 line 22-24). In February 2021 he observed workers working on the metal vault (pg 40 line 17-25; pg, 41 line 10-24). He stated at his deposition that “they already remove the metal thing on the sidewalk and they put like a metal thing on top. They remove the whole thing and put like a metal – how you call that – they put in the street all the time when they are doing a hole. They put a metal plate in the sidewalk” (Exhibit “S” pg. 51 line 25 through pg. 52 line 1-7).

An affidavit by Mr. Pimentel is also submitted for the purpose of demonstrating that no one at Sydith or on Sydith’s behalf performed any structural repairs, maintenance, alterations or replacements to the grate or the sidewalk flags immediately abutting the grate either before or after June 15, 2018. He states that he was not asked about these issues at the deposition and is therefore augmenting his testimony at the deposition with the affidavit.

The defendant also argues that the plaintiff’s photographs in exhibit “Q” which were marked Exhibit “H” and “I” at the deposition indicate where the plaintiff tripped. There is a red circle marked on the photograph which depicts where the plaintiff tripped. This picture shows a sidewalk flag that is raised with metal around the perimeter of the sidewalk flag. The border of the sidewalk flag is outlined in black in the picture. A red circle is on part of the metal that surrounds the perimeter of the sidewalk. The plaintiff testified at his deposition that the red circle marked on the photo is where his foot came into contact with the metal border which is to

the right of the metal grating. The plaintiff contends that the incident occurred within 12 inches of the perimeter of the hardware.

The plaintiff opposes the motion for summary judgment and argues that the defendant did not meet its prima facie burden in demonstrating that it did not create the condition that allegedly caused the accident nor had actual or constructive notice of its existence (see *Kruger v. Donzelli Corp.*, 111 AD3d 897, 975 NYS2d 689; *Bravo v. 564 Seneca Ave. Corp.*, 83 AD3d 633, 634; *Bloomfield v. Jericho Union Free School Dist.*, 80 AD3d 637, 638). Here, he claims that the sidewalk flags which surround the raised Con Ed sidewalk vault are depressed and unlevel. He argues that there is an issue of fact as to whether Sydith was negligent in its ownership and maintenance of the sidewalk flags which caused, created or contributed to the plaintiff's accident. He contends that the First Department has not set a "definitive" rule regarding concurrent liability, instead, the conditions are analyzed on a case-by-case basis.

In a trip and fall case, a defendant real property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence (see *Deutsch v. Green Hills (USA), LLC.*, 202 AD3d 909 [2022]; *Williams v. Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 937; *Pryzywany v. New York City Tr Auth.*, 69 AD3d 598). A dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (see *Viera v. Riverbay Corp.*, 44 AD3d 577[1st Dept 2007]; *Carriero v. St. Charles/ Resurrection Cemetery*, 156 AD3d 858 [2nd Dept 2017]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer evidence as to when the area in question was last cleaned or inspected

relative to the time when the plaintiff fell (see *Gordon v. American Museum of Natural History*, 67 NY2d 836 [Ct App 1986]; *Williams v. Island Trees Union Free School District*, 177 AD3d 936 [2nd Dept 2019]).

The defendant, Sydith, argues that it has no duty to the plaintiff because Con Ed admitted to owning the part of the sidewalk that the plaintiff tripped on. However, Con Edison did not admit to owning the part of the sidewalk that the plaintiff tripped on. In the Notice to Admit it “admits to ownership of the sidewalk grate located at 320 East 167th Street, Bronx, New York”. Moreover, the pre-incident and post-incident reports submitted by the defendant do not indicate that Con Ed did work on this area or owns this part of the sidewalk.

The pictures submitted to the court depict the sidewalk abutting Sydith’s property. The grating is within a raised area of the sidewalk flag, which for the most part, is in the shape of a square. The border of this square is made up of metal. It is the metal border part of this square that the plaintiff tripped on. It is unclear to the court if the metal border depicted in the pictures, is part of a concrete pad installed by Con Ed. It clearly is not the grating and it does not appear to be a cover. Neither party submitted an affidavit from an expert explaining to the court that the metal border is part of a concrete pad that was installed or if it is considered street hardware. There was no proof as to who installed this metal border. There was no measurements taken to prove that the place on the metal border where the accident occurred is twelve inches outward from the edge of the grating. This court will not guess as to how far away the plaintiff’s accident occurred from the grating solely by looking at a picture of the scene of the accident.

The property owner’s duty to maintain his or her premises in a reasonably safe condition extends to the sidewalks abutting the property (see Administrative Code of City of NY § 7-210).

Courts have held that the property owners duty to maintain the sidewalk abutting their property, including the duty to repair defective sidewalk flags, was not displaced by the duty of owners of covers or gratings under 34 RCNY § 2-07 (b)(2), to repair any defect in their vault cover or in the pavement within twelve inches of the perimeter of the cover (see *Shehata v. City of New York*, 128 AD3d 944 [2nd Dept 2015]). In *Shehata*, the plaintiff tripped and fell on the edge of a sidewalk flag which was not level with the adjoining sidewalk flag. The sidewalk was in front of an assisted living facility operated by the defendant Palm Beach Home for Adults. The defendants Cablevision, owned and maintained an underground vault, the cover which was located on the sidewalk flag on which the injured plaintiff tripped. Palm Beach Home for Adults moved for summary judgment to dismiss the complaint. The condition which allegedly caused the injured plaintiff to trip and fall was located more than twelve inches from the perimeter of the vault cover. The court determined that the Palm Beach defendant failed to demonstrate that the uneven condition of the sidewalk flags existed for a sufficient length of time to permit them to discover and remedy it. In affirming the lower court decision, the court held that the defendant failed to demonstrate they lacked constructive notice of the defective condition.

The defendant did not prove that Con Ed owns the area where the plaintiff tripped and is therefore liable for its maintenance and repair. The distance of the accident from the perimeter of the grating is an important factor because if it is found to be more than twelve inches away from the grating or if a concrete pad is installed then Con Ed is not liable. Moreover, the defendant failed to establish that it did not create this defective condition or have constructive notice regarding the raised portion of the sidewalk. It did not demonstrate that the sidewalk flags, that appear to be sinking or depressed, around the area where the accident occurred did not exist for a

sufficient length of time to allow them to discover and remedy it. In addition the defendant failed to demonstrate that it lacked constructive notice of this alleged dangerous condition and did not show when it last inspected the sidewalk flags. A jury may conclude that the sidewalk flags which appear to be depressed in the photos, contributed or caused the plaintiff's accident.

Accordingly, the defendant's motion for summary judgment is denied as there are issues of fact regarding where the accident took place and if the defendant created or had constructive notice regarding the alleged defective condition that caused the accident.

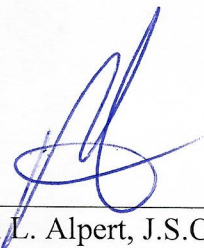
Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the defendant's motion for summary judgment is denied in its entirety, and it is further,

ORDERED AND ADJUDGED, that the plaintiff shall serve a copy of this decision and order upon the defendants within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: March 27, 2023



Hon. Paul L. Alpert, J.S.C.