Conaty v City of New York
2023 NY Slip Op 35100(U)
August 9, 2023
Supreme Court, Queens County
Docket Number: Index No. 715352/18
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part 10
Justice

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Mary Conaty,

Plaintiff,

- against -

City of New York, New York City Department of Transportation, Noblestone Inc., Consolidated Edison Company of New York Inc., 41-06 Bell Blvd. Bakery LLC and Theramotion Physical Therapy PLLC,

Defendants.

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Index Number: 715352/18

Motion Date: 7/31/23

Motion Seq. No.: 6

The following papers numbered E240-E259, E288-E297 & E310-E312 read on this motion by defendant, Noblestone, Inc., for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits...............	E240-259
Affirmation in Opposition-Exhibits................	E288-297
Reply-Exhibit..................................	E310-312

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendant, Noblestone, Inc., for summary judgment is granted.

Plaintiff allegedly sustained injuries after tripping on a sunken gas cap on the sidewalk abutting 41-06 Bell Boulevard in Queens County on April 21, 2018. Said abutting property is a commercial premises owned by Noblestone. It is undisputed that the subject hardware is owned by Defendant, Consolidated Edison.

The Court deems the instant motion timely. It is undisputed there was a stay issued in this matter by the Honorable Maureen

Healy on February 20, 2020. The language therein provided that the stay would be lifted upon the completion of discovery, a conference would be held at that time, and deadlines for motions for summary judgment would be given. Thereafter, the stay was lifted on or about November 10, 2021. However, no summary judgment deadlines were provided or stipulated to. Notwithstanding Plaintiff's certification that all discovery was complete, it appears discovery was ongoing. Plaintiff filed a supplemental summons on June 11, 2021 to add a new Co-Defendant, Applied Health Chiropractic. The action was ultimately discontinued against Applied Health Chiropractic. Thereafter, the Court granted summary judgment to Defendant, Theramotion Physical Therapy PLLC by order issued October 24, 2022. Per Noblestone, the parties were waiting for Plaintiff to file a Certification Order, stipulating that discovery was complete and to file a new Note of Issue. Plaintiff failed to do so. Under the circumstances, the Court deems the instant motion timely and finds it appropriate to resolve the motion on the merits as opposed to deny it on procedural grounds. (see Brill v. City of New York, 2 N.Y.3d 648 [2004]).

In his deposition, Jae Yoon, the manager of Noblestone LLC, testified that the property located at 41-06 Bell Boulevard is owned by Noblestone LLC. The property is a two-story building with two commercial tenants, Co-Defendant 41-06 Bell Blvd. Bakery LLC and Theramotion Physical Therapy PLLC, who was granted summary judgment by order issued October 24, 2022. Yoon testified that prior to April 21, 2018, no repairs were made by Noblestone to the sidewalk adjacent to the subject building. Yoon would visit the building on a daily basis and inspect the sidewalks for any hazards. No complaints were received by Noblestone concerning any defective sidewalk conditions. Yoon was aware of the presence of a gas cap on the sidewalk abutting the premises. He knew Consolidated Edison owned the cap, but was not aware of any complaints regarding it or any work done to it at anytime after Noblestone purchased the building around 2007.

In her deposition, Irene Zannikos testified on behalf of 41-06 Bell Blvd. Bakery LLC that no one from the Bakery made any repairs to the sidewalk prior to April 21, 2018. Zannikos was unaware of any repairs made to the gas cap before April 21, 2018.

In his deposition, George Doulias testified on behalf of 41-06 Bell Blvd. Bakery LLC. that he did not observe any changes to the gas cap on the sidewalk nor was he aware of any repairs done to the sidewalk or complaints received prior to April 21, 2018.

An abutting property owner is not liable for injuries sustained by a pedestrian as a result of a defective condition of

a public sidewalk unless the property owner created the defective condition or caused it through some special use, or unless a statute charges the owner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2d Dept. 1999]).

Noblestone argues that it cannot be held liable under §7-210 of the Administrative Code because it did not own or install the subject gas cap and therefore, it is the owner of the cap that is statutorily responsible for its maintenance as well as the area of sidewalk within a 12-inch perimeter around it, pursuant to 34 RCNY §2-07(b). Movants further aver that it did not perform any repairs or work to the sidewalk surrounding the cap and thus did not create the condition, nor did it make special use of the area.

Section 7-210 was enacted to shift tort liability from the City to the property owner who breaches the duty to repair imposed by §19-152 of the Administrative Code. The scope of an adjacent property owner's liability regarding the repair and maintenance of sidewalks imposed by §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code section[s] 19-152" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore, §7-210 must be read in conjunction with §19-152.

With regard to the duty to repair, §19-152 provides that a property owner may only be required to repair "those sidewalk flags which contain a substantial defect." However, it also provides as follows:

> a. [A] substantial defect shall include any of the following:
> . . . .
> 6. hardware defects which shall mean (i) hardware or other appurtenances not flush within ½" of the sidewalk surface or (ii) cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition.

Therefore, the obligation to repair is not limited to defects in the actual masonry material of the flag, but may include defects in hardware installed in the masonry. Thus, an owner's duty to repair and, hence, his liability for failure to do so, pursuant to §7-210, would appear to extend to a valve box in the sidewalk.

However, it also seems clear that the legislative intent was not to impose upon the property owner an unqualified obligation

regarding such hardware. Section 19-152 (a) (6) refers to "hardware or <u>other appurtenances</u>."

Black's law Dictionary (2nd) defines "appurtenance" as "That which belongs to something else; an appendage; something annexed to another thing more worthy as principal, and which passes as an incident to it, as a right of way or other easement to land; an out-house, barn, garden or orchard, to a house or messuage ...Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Appurtenant is substantially the same in meaning as accessory, but is more technically used in relation to property, and is the more appropriate word for a conveyance." The Merriam-Webster dictionary defines an appurtenance as "an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it...a subordinate part or adjunct...accessory objects".

Thus, it is clear from this language that the New York City Council did not contemplate making owners responsible for all hardware installed in the sidewalk, but only such hardware that is appurtenant to, or belonging to, the owner's premises and, therefore, part of the owner's property. Since §§7-210 and 19-152 are in derogation of the common law, thereby requiring their language to be construed strictly (<u>see</u> <u>Vucetovic v. Epsom Downs, Inc.</u> 10 NY 3d 517 [2008]), this Court must interpret §7-210 and §19-152 as imposing a duty upon the adjacent property owner to repair only hardware installed in the sidewalk that is appurtenant to the property and therefore owned by the property and which, consequently, serves the property exclusively, and constitutes a special use of the sidewalk by the property.

This analysis harmonizes with the Highway Rules governing underground street access covers, transformer vault covers and gratings (34 RCNY §2-07[b][1]), which provides, "The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware." A sidewalk is included within the definition of "street" (<u>see</u> RCNY 2-01).

The Appellate Division, Second Department, is in accord with the First Department on the issue of responsibility for a defective area of sidewalk within a 12 inch proximity to a valve cover, holding, "We agree with the Appellate Division, First Department, that there is nothing in section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the

cover or grating to the abutting property owner" (Flynn v City of New York, 84 AD 3d 1018, 1019 [2d Dept. 2011][citing Storper v Kobe Club, 76 AD 3d 426, 427 [1st Dept. 2010]). Consequently, since the owner of the water valve is responsible for monitoring its condition, actual or constructive notice would not be required as a condition for the imposition of liability upon the owner of the hardware. If the owner is the City, then additionally the requirement of prior written notice would be inapplicable.

Therefore, if the defective sidewalk area upon which Plaintiff tripped was within 12 inches of the gas cap, the owner of the water valve would bear liability (see Cruz v. New York City Transit Authority, 19 AD 3d 130 [1st Dept. 2005]). Since Plaintiff alleges that she tripped on the gas cap, the owner of the cap bears liability for her alleged injuries, as a matter of law, pursuant to 34 RCNY 2-07(b). If that owner is the abutting property owner, said abutting owner would also be liable pursuant to §7-210.

In regards to special use, movants have proffered unrebutted evidence that it did not make special use of the subject gas gap. In opposition, Plaintiff argues that the gas cap was installed for the property owner's advantage. However, there is no evidence on this record that that is the case, nor has Plaintiff established such. There is nothing on this record to indicate that movant exercised control over the gas cap or that the gas cap is appurtenant to the property in a manner that it exclusively serves the property, as to constitute a special use (see Kaufman v. Silver, 90 N.Y.2d 204 [1997]; Flynn, 84 A.D.3d at 1018).

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed as against Noblestone, LLC.

Dated: August 9, 2023

KEVIN J. KERRIGAN,,J.S.C.