

Jones v New York City Hous. Auth.

2024 NY Slip Op 30218(U)

January 9, 2024

Supreme Court, New York County

Docket Number: Index No. 159666/2015

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

JESSE JONES, INDEX NO. 159666/2015
MOTION SEQ. NO. 004

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, THE CITY OF
NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, THE
METROPOLITAN TRANSIT AUTHORITY, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 148, 149, 150, 151, 152, 153,
154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176,
177, 178, 179, 180, 181

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, Defendant NEW YORK CITY HOUSING
AUTHORITY's ("NYCHA") motion for summary judgment pursuant to CPLR §3212 is denied
and Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK's ("CON ED")
unopposed cross-motion for summary judgment, pursuant to CPLR §3212 is granted.

As per the notice of claim, this personal injury matter arises out of a January 5, 2015, 12:30
a.m. incident that occurred along the East 112th Street side of 2190 2nd Avenue in Manhattan
when the Plaintiff, JESSE JONES, alleges that they were injured due to a defective condition along
the sidewalk (NYSCEF Doc. 151).

NYCHA moves post note of issue for summary judgment pursuant to CPLR §3212 seeking
a dismissal of the complaint and all cross claims. CON ED cross moves for summary judgment
pursuant to CPLR §3212 also seeking a dismissal of the complaint and all cross claims. Plaintiff
and Defendants NEW YORK CITY TRANSIT AUTHORITY and THE METROPOLITAN
TRANSIT AUTHORITY ("TRANSIT") oppose NYCHA's motion only.

NYCHA previously moved, and CON ED previously cross-moved seeking similar relief
(Motion Seq. 3). By Order of this Court dated, January 31, 2023, the motion and cross motion

were denied with leave to refile as the movants' respective statement of material facts was not in compliance with 22-NYCRR-202.8-g (NYSCEF Doc. #147). The motion and cross-motion were then refiled. Thus, the motion and cross-motion will now be addressed on the merits.

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 v Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574 [1986]). “[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact.” (*Castore v. Tutto Bene Rest. Inc.*, 77 A.D.3d 599, 909 N.Y.S.2d 452, 453 [1st Dept 2010]).

NYCHA's Motion for Summary Judgment

NYCHA moves for summary judgment, alleging that it cannot be found negligent as NYCHA did not own or maintain the sidewalk grate involved in this matter and made no special use of sidewalk or grate. Plaintiff and TRANSIT oppose the motion arguing that NYCHA has not met its *prima facie* burden and that there are questions of fact as to whether NYCHA's maintenance activities did not cause or contribute to the raised/defective sidewalk grate.

Although not specifically identified in either the notice of claim or the Plaintiff's complaint, it appears that the Plaintiff was caused to trip due to a raised and/or defective sidewalk grate. (NYSCEF 151, 152, 154, 155). The Plaintiff appears to have identified the location where he tripped at the time of his June 21, 2017 deposition by marking a photograph that had been annexed to the notice of claim (NYSCEF Doc 156).

NYCHA submits the transcript of the deposition testimony of TRANSIT's witness, Hashim Muhammad-Graham ("Muhammad-Graham") in support of its motion. Muhammad-Graham testified that he conducted an inspection of the subject sidewalk grate involved in this incident. Muhammad-Graham also testified that he believed that the grate was owned by TRANSIT because TRANSIT's records showed that the vents in that location were closed and covered with cement sometime in the 1970s. He further testified that although the grate was designed to withstand a "very heavy" load, the grate was not designed to sustain a heavy traffic "over and over like a roadway". (NYSCEF Doc. 119, 158).¹

NYCHA also submits the transcript of the deposition testimony of its Supervisor of Grounds at the Jefferson Houses (which abut the subject sidewalk), Geraldo Rivera ("Rivera") in support of the motion. As per Rivera's testimony, NYCHA does not own the grate, and is not responsible for repairing or maintaining the grate. However, NYCHA employees are responsible for picking up garbage and for snow removal from the perimeter sidewalk up until 18 inches from the curb. NYCHA also had four tractors and a truck with a plow to remove snow, as well as a utility "off-road" vehicle that it used; the equipment would be driven over the exterior sidewalks, including the area of the subject grate. (NYSCEF Doc. 157).

"[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]).

Upon review, NYCHA has not met its *prima facie* burden. Even if NYCHA did not own the subject grate, it is clear that NYCHA operated a fair amount of control over the subject sidewalk area, which included the grate, that surrounded the Jefferson Houses. It is clear from Rivera's deposition testimony that NYCHA was responsible for snow removal and garbage removal. Moreover, NYCHA's own admissible evidence shows that its maintenance work included operating multiple tractors and a truck with a snowplow over the sidewalk for snow

¹ The transcript for Muhammad-Graham was not correctly uploaded in connection with the instant motion as Exhibit "H"; it appears that two Exhibit "I" were uploaded instead. The transcript was however uploaded in connection with NYCHA's prior motion as Exhibit "H" (NYSCEF Doc. 119). As it is clear that all parties had access to this transcript, and as no party raised any objection in its opposition to the within motion, this Court recognizes NYSCEF Doc. 119 as the Muhammad-Graham transcript, which should have been uploaded as NYSCEF Doc 158.

removal and that such vehicles would be parked on the sidewalks. On a motion for summary judgment, it is not enough for a defendant to identify potential problems or issues with a plaintiff's negligence case. Rather, it is the defendant's burden to show that its alleged negligence was not the proximate cause of the plaintiff's accident. (See *Hairston v. Liberty Behav. Mgmt. Corp.*, 157 A.D.3d 404, 405, 68 N.Y.S.3d 439, 440 [1st Dept 2018]; *Artalyan, Inc. v. Kitridge Realty Co.*, 79 A.D.3d 546, 547, 912 N.Y.S.2d 400 [1st Dept 2010]).

Here, NYCHA has not shown that its own maintenance operation, by driving and parking its vehicles along the sidewalks and grate and using a snowplow and tractors to remove snow along the sidewalk and grate did not cause or contribute the raised/defective condition. Accordingly, NYCHA's motion for summary judgment is denied.

CON ED's Cross Motion for Summary Judgment

CON ED cross moves for summary judgment pursuant to CPLR §3212 also seeking a dismissal of the complaint and all cross claims as it did not own the grate and did not perform any work near the accident location. CON ED's motion is unopposed.

CON ED submits the transcript of its deposition witness, Yesenia Campoverde ("Campoverde") in support of its motion. (NYSCEF Doc. 167). Campoverde testified concerning CON ED's records (from January 5, 2013 to January 5, 2015) regarding work performed in the general area of the accident, East 112th Street between 1st and 2nd Avenues. As per Campoverde's testimony, the roadway and sidewalk on the south side of East 112th Street (the opposite side of the street from the Jefferson Houses) were opened for work in March/April 2013. Work was also performed on the sidewalk at 314 East 112th Street (also on the south side of the street) to repair a gas line in May 2013. Work records indicate that work was also performed in the roadway for the installation of high voltage on East 112th Street, between 1st and 2nd Avenues and that such work was completed on May 12, 2014. Although CON ED performed work on the north sidewalk on 112th Street, the cuts were 340 feet (east) from the corner of 112th Street and 2nd Avenue.

Upon review, CON ED shows that in the two years prior to the date of the accident, it did not perform any work near the subject grate as the only work it performed concerning the sidewalk on the north side of 112th Street was over 200 feet from the location of the accident (as per the

notice of claim, the alleged defective grate was only 100 feet from the corner of 112th Street and 2nd Avenue).

CON ED has established its *prima facie* burden as CON ED has submitted evidence showing that it did not own, control or maintain the subject sidewalk or grate, and it did not perform any work concerning or even near the subject grate. Therefore, CON ED's motion for summary judgment is granted.

Accordingly, it is hereby

ORDERED that Defendant NEW YORK CITY HOUSING AUTHORITY's motion summary judgment is denied; and it is further

ORDERED that Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK's cross-motion for summary judgment is granted and the complaint and all cross-claims are dismissed against said Defendant; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK, 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 the action is severed and continued against the remaining Defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal against Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK, and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that within 20 days from the entry of this order, Defendant CONSOLIDATED EDISON COMPANY OF NEW YORK shall serve a copy of this order with notice of entry upon all parties and 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 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).

1/9/2024
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

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