

Goldberg v Consolidated Edison, Inc.

2024 NY Slip Op 30226(U)

January 17, 2024

Supreme Court, New York County

Docket Number: Index No. 150611/2020

Judge: Leslie A. Stroth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

-----X

CAROL GOLDBERG, DONALD SLONIM,

Plaintiff,

- v -

CONSOLIDATED EDISON, INC., CONSOLIDATED EDISON
COMPANY OF NEW YORK, 140-154 W. 72 REALTY, LLC

Defendant.

-----X

INDEX NO. 150611/2020

MOTION DATE 09/26/2023,
09/26/2023.

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 62, 64, 66, 68

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 65, 67, 69, 70

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff Carol Goldberg, PhD (plaintiff) brought this negligence action to recover damages for injuries she allegedly sustained from a trip and fall accident, on January 3, 2019. Plaintiff's accident occurred after her heel became stuck in an unseen hole in the ground near a metal grate owned by defendants Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc. (collectively, Con Ed) on the sidewalk, in front of numbers 140-146, on the south side of West 72nd Street between Broadway and Columbus Avenue (subject sidewalk).

Defendant 140-154 W. 72 Realty, LLC (Realty) is the owner of the property which abuts the subject sidewalk, and co-plaintiff Donald Slonim is the husband of plaintiff, and is also seeking damages from his alleged loss of society, services, consortium, and companionship. Con Ed asserts

a cause of action against Realty for common-law indemnification.

Plaintiff now moves for summary judgment (motion sequence no. 002) against Con Ed on the grounds that Con Ed had a statutory duty to maintain the subject sidewalk, and that it had actual notice of the defective condition for a sufficient length of time and failed to remedy it. As such, plaintiff asserts that no triable issue of fact exists as to potentially disprove Con Ed's liability. Con Ed opposes the motion, while Realty takes no position.

Realty also moves for summary judgment (motion sequence no. 003) dismissing all claims and cross-claims against it. Realty alleges that it did not cause or create the defective condition and that Con Ed was solely responsible for it, and therefore, no triable issues of material fact exist to support a claim of negligence against Realty in the instant matter. Con Ed opposes the motion, while plaintiff takes no position.

I. Alleged Facts

On the date of incident, at approximately 2:50 p.m., plaintiff, an eighty year-old psychologist, was walking home from her hair salon when she was caused to trip and fall after her heel became stuck in an unseen hole near a metal grate owned by Con Ed. Plaintiff alleges that Con Ed was negligent in maintaining the sidewalk surrounding its metal grating, which it had installed over its electrical equipment. As a result of the accident, plaintiff sustained serious personal injuries to multiple parts of her body, including fractured teeth which required surgery.

II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion

for summary judgment must tender sufficient evidence to show the absence of any material issue 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). The party opposing a motion for summary judgment is entitled to all favorable inferences drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

To establish a prima facie case of negligence, a plaintiff must demonstrate 1) a duty owed by the defendant to the plaintiff, 2) a breach thereof, and 3) injury proximately resulting therefrom. *See Solomon by Solomon*, 66NY2d 1026 (1985). On a negligence claim in a slip and fall case, plaintiff must show that defendants either created a dangerous condition or had actual or constructive knowledge of the condition. *See Lemonda v Sutton*, 702NY2d 275 (2000).

It has long been held that in premises liability cases, a defendant can only be held liable for injury of a "guest" if it, "knew of the [defect or] dangerous condition; realized that it involved an unreasonable risk; believed that the guests would not discover the [defect or dangerous] condition or realize the risk; and failed to warn them of the [defect or dangerous] condition and the risk involved." *Higgins v Mason*, 255 NY 104, 110 (1930). The premises owner must either have caused or created the dangerous/defective condition or have actual or constructive notice of such defect, and fail to remediate it within a reasonable amount of time to be liable. *See Parra v City of New York*, 137 AD3d 532, 532-533 (1st Dept 2016). Constructive notice can be demonstrated where the dangerous/defective condition is visible, apparent, and has existed for a sufficient length of time prior to the accident to permit defendant(s) to discover and remedy it. *See Espinal v New York City Housing Authority*, 215 AD2d 281, 626 (1st Dept 1995); citing *Gordon v American*

Museum of Natural History, 67 NY2d 836, 837 (1986).

A. Plaintiff's Motion for Summary Judgment

Plaintiff filed her motion for summary judgment against defendant Con Ed on February 17, 2023, alleging that Con Ed had a duty to maintain the subject premises under 34 RCNY §2-07, which states:

Underground Street Access Covers, Transformer Vault Covers and Gratings. (b) Maintenance requirements. (1) The 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. (2) 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. Such owner must obtain a permit to maintain a steel plate that is covering such cover or grating or such street condition.

Here, it is undisputed that Con Ed owned the grate on the subject sidewalk. The deposition of Con Ed Construction representative, Stephen Eduardo, evidenced that Con Ed received a "corrective action request" from the City of New York's Dept. of Transportation (the City) on 07/24/2017 and 04/04/2018 that stated the "electrical vault [or metal grate]" on the sidewalk, in front of building numbers 142-146, was not flush with the surrounding area and was one to two inches above the adjacent sidewalk, causing a tripping hazard. *See* NYSCEF doc. no. 46 at 38. Mr. Eduardo also identified the subject grate as owned by Con Ed and testified that Con Ed received a notice of violation from the City on 11/27/2017 about that grate. *Id* at 34. Plaintiff submits that Con Ed paid fines for violations, involving the aforementioned grate, to the City on 01/31/2018, 09/19/2018, and 02/27/2019, asserting that this shows that Con Ed admits to negligence in the instant matter. *See* NYSCEF doc. no. 48. Therefore, plaintiff contends that Con Ed had actual notice of the defective condition for a sufficient length of time, and failed to remedy it.

In opposition, Con Ed claims summary judgment should not be granted because plaintiff cannot establish that the defect was caused by Con Ed since there was some construction activity

on the date of plaintiff's accident, involving the abutting building owned by Realty. However, Con Ed presents no evidence in admissible form that construction workers caused the defect or contributed in any way to plaintiff's accident. Con Ed's argument here is speculative and irrelevant, as Con Ed had a statutory duty to maintain the grate area under 34 RCNY §2-07 and admitted responsibility for failing to repair the defect by paying multiple fines to the City, which gave defendant numerous notices of the instant defect. *See* NYSCEF doc. nos. 46, 47, and 48, Exhibits E, F and G.

While Con Ed also contends that questions of fact exist as to the comparative negligence of plaintiff, plaintiff correctly asserts that to obtain partial summary judgment on Con Ed's liability alone, she does not have to demonstrate the absence of her own comparative negligence. *See Rodriguez v City of New York* 31 NY3d 312 (2018) (holding that to obtain partial summary judgment in a comparative negligence case, a plaintiff is not required to establish the absence of her own comparative negligence).

Additionally, Con Ed argues that there is a question of fact as to whether the defective condition was open and obvious, which could also implicate plaintiff as comparatively negligent. Plaintiff asserts in reply to Con Ed's opposition that a sidewalk defect of this nature cannot be considered open and obvious. Furthermore, plaintiff argues that there has been no evidence of comparative negligence on plaintiff's part, and that even if there were, that comparative negligence is not a reason to deny summary judgment on the issue of defendant's liability. Here, plaintiff correctly asserts that even if there was evidence that the defective condition was open and notorious, thereby potentially implicating plaintiff as comparatively negligent, plaintiff need not demonstrate the absence of her own comparative negligence to succeed on her motion for summary judgment. *Id.*

In further opposition to plaintiff's motion, Con Ed argues that there are conflicting and unresolved facts concerning the accident that still exist, specifically whether the subject sidewalk in the accident was reasonably safe, and whether the defect in the City's notices is the same as the defect in the instant action. Plaintiff contends that admissible evidence shows that no issues of fact exist that raise a question as to whether the defect in the City's notices is the same as the defect condition in the instant action, nor does any question of fact exist to disprove that the defective condition was not reasonably safe. Moreover, plaintiff submits that the photograph shown to her during her deposition matches the photos of the defect that were sent to Con Ed by the City when the City requested that Con Ed correct the defect. *See* NYSCEF doc. no 46, 47, and 48, Exhibits E, F, and G. Furthermore, there is no issue of fact as to whether the subject sidewalk was reasonably safe, since the City not only identified it as a tripping hazard and notified Con Ed of such defect numerous times, but a violation was issued requiring Con Ed pay fines.

Notably, Con Ed incorrectly argues that plaintiff has failed to comply with the requirement to provide a statement of material facts and therefore her motion should be denied for failure to comply to 22 NYCRR 202.8-g(a). However, plaintiff is not required to submit material facts unless directed by the Court, per the amended version of Section 202.8-g(a) which states:

Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

In sum, no triable issues of material fact exist to defeat plaintiff's motion for summary judgment against Con Ed because evidence in admissible form has shown that Con Ed had a statutory duty to maintain the subject sidewalk, and had actual notice of the defective condition for a sufficient length of time, and failed to remedy it per the City's corrective action requests and

violation notices. Additionally, there has been no evidence to suggest that there was some other defective condition that was the proximate cause of plaintiff's trip and fall.

B. Defendant Realty's Motion for Summary Judgment

Realty moves for summary judgment seeking to dismiss the plaintiffs' complaint against it on the grounds that there are no triable issues of material fact as against Realty.

Realty argues that it did not cause or create the purported condition and because the subject defective condition—a hole in the cement sidewalk located within twelve inches of a sidewalk grate, admittedly owned, operated, and maintained by Con Ed—was the sole responsibility of Con Ed to maintain, pursuant to RCNY §2-07(b). Realty also claims that the testimony of the plaintiff, including the marked photographs, establishes without question that the accident where the plaintiff claims to have tripped and fallen occurred within twelve inches of the metal grating owned, operated, and maintained by Con Ed.

Realty purports that although Section § 7-210 of the Administrative Code of the City of New York imposes non-delegable liability for injuries resulting from negligent sidewalk maintenance on the abutting property owners, 34 RCNY §2-07(b) provides that owners of covers or gratings on a street are responsible for monitoring the condition of those covers and gratings, and the area extending twelve inches outward from the perimeter of the hardware, and for ensuring that the hardware is flush with the surrounding street surface. *See Flynn v City of New York*, 84 AD3d 1018 (2d Dept 2011); *see also Alexander v City of New York*, 118 AD3d 646 (2d Dept 2014). Accordingly, Con Ed, not Realty, is responsible for maintaining the area where the plaintiff fell. *See Storper v Kobe Club*, 76 AD3d 426 (1st Dept 2010).

Con Ed argues in opposition that it is not obligated to maintain the sidewalk pursuant to Administrative Code § 7-210. Section 7-210 states in relevant part that:

(a) It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition... (b) [and] that the owner of real property abutting any sidewalk ... shall be liable for any personal injury proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.

However, Con Ed's argument is unavailing because the instant grate is not a part of the "sidewalk" for purposes of Administrative Code § 7-210. *See Hurley v Related Mgt. Co.*, 74 AD3d 648 (1st Dept 2010) (holding that a sidewalk metal grating is not a part of the "sidewalk" for purposes of Administrative Code § 7-210).

Moreover, Con Ed asserts that there is a question of whether Realty caused and created the alleged defective condition leading to plaintiff's fall and/or obstructed the sidewalk thereby directing pedestrian traffic into the location of accident. Plaintiff testified at her municipal hearing, on August 13, 2019, that as she was walking the stores were to her left and "there was construction to the left of the defect. ... Stores were being constructed."... "They had construction material on the sidewalk." *See* NYSCEF doc. no, 53 at 14-15. As shown in plaintiff's photograph, there is someone standing on a ladder, a construction cone and yellow caution tape sectioning off a portion of the sidewalk restricting pedestrians from walking over the entire width of sidewalk. *See* NYSCEF doc. no. 54. Additionally, plaintiff testified at her deposition, on April 14, 2022, that there were "obstacles" such as "a lot of construction equipment, ladders, buckets" at the location of accident. *See* NYSCEF Doc. 55 at 22.

Realty replies to Con Ed's opposition by asserting that the "construction material on the sidewalk" was not the proximate cause of the accident as plaintiff did not step or trip on construction material. Furthermore, Realty argues that while the "construction material on the

sidewalk” may have furnished a setting encouraging plaintiff to step on the metal grate, the construction material was not the proximate cause of plaintiff's injury. *See Wood v City of New York*, 98 AD3d 845 (1st Dept 2012) (while the narrowed path may have furnished a setting encouraging plaintiff to step aside to avoid oncoming pedestrians, there were too many intervening factors to find that the construction shed proximately caused plaintiff's injury); *see also Cimino v City of White Plains*, 65 AD3d 1069 (2d Dept 2009) (where plaintiff/pedestrian sued the property owner for personal injuries allegedly sustained when a portion of the roadway collapsed beneath him after he had stepped off of the sidewalk and on to the roadway because a portion of the sidewalk in front of the property was blocked due to construction, and the Court held that the property owner did not have a duty to the pedestrian to maintain the area of the roadway in which the plaintiff/pedestrian fell). In the instant matter, if anything, the “construction material on the sidewalk” merely furnished the condition or occasion for the occurrence of the event, which is plaintiff's stepping onto the metal grate, for which it cannot be found liable. Moreover, contrary to Con Ed's argument, the Realty's building superintendent testified during his deposition that the building did not perform any repair work to the subject area. *See* NYSCEF doc. no. 57 at 13.

Notably, Con Ed also incorrectly argues that Realty has failed to comply with the requirement to provide a statement of material facts and therefore its motion should be denied for failure to comply to 22 NYCRR 202.8-g(a). However, Realty is not required to submit material facts unless directed by the Court, per the amended version of Section 202.8-g(a) which states:

Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

For the foregoing reasons, no triable issues of material fact exist to defeat Realty's motion for summary judgment as it has successfully shown through admissible evidence that it did not have a duty to control or maintain the area where the defective condition was located, nor did it create or cause the defect that caused plaintiff's trip and fall.

C. Defendant Realty's Motion to Dismiss Cross-Claims

Realty moves for summary judgment seeking to dismiss Con Ed's cross-claim against it for common-law indemnification, alleging that there are no material issues of fact that require a trial of this claim against Realty.

To establish a claim for common-law indemnification, the one seeking indemnity must prove "...not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence." See *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 (1st Dept 2010) (citation omitted). Similarly, contribution is only available where tortfeasors combine to cause an injury. *Godoy v Alabaster of Miami*, 302 AD2d 57 (2d Dept 2003), lv dismissed 100 NY2d 614 (2003) (citations omitted).

As Con Ed has not submitted evidence in admissible form to prove that Realty's negligence contributed to the causation of the accident, that Con Ed is free from negligence, and that tortfeasors have combined to cause the instant injuries, Con Ed's cross-claim for common-law indemnification must be denied.

III. Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as against defendant Con Ed; and it is further

ORDERED that defendant Realty's motion for summary judgment dismissing all of plaintiff's claims against it is granted; and it is further

ORDERED that defendant Realty's motion for summary judgment dismissing Con Ed's cross-claim against it is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly, together with costs and disbursements to defendant Con Ed to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that a hearing on the assessment of damages against defendant Con Ed is directed.

The foregoing constitutes the Order and Decision of the Court.

01/17/2024

DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE