

Lugo v Acadia 2914 Third Ave. LLC
2024 NY Slip Op 35414(U)
May 29, 2024
Supreme Court, Bronx County
Docket Number: Index No. 29772/2020E
Judge: Bianka Perez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
COUNTY OF BRONX, PART 8**

-----X

DEREK LUGO,

Index No. 29772/2020E

Plaintiff

-against-

Hon. Bianka Perez

Justice Supreme Court

ACADIA 2914 THIRD AVENUE LLC, THIRD
AVENUE BRONX FITNESS GROUP, LLC,
THIRD AVENUE BRONX FITNESS GROUP, LLC
D/B/A PLANET FITNESS, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., NEW
YORK CITY TRANSIT AUTHORITY and
METROPOLITAN TRANSPORTATION
AUTHORITY

Defendants.

-----X

The following documents were read on this motion **Seq 6** submitted on **January 31, 2024**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	Nyscef No(s). 158-172
Answering Affidavit and Exhibits	Nyscef No(s). 177-179, 180-181
Reply Affidavit and Exhibits	Nyscef No(s). 183-184

Upon the foregoing papers, plaintiff moves for an Order pursuant to CPLR 3212, granting plaintiff summary judgment on the issue of liability against the defendants, and striking all affirmative defenses of comparative fault. Defendants Acadia 2914 Third Avenue LLC (Acadia) and Consolidated Edison Company Of New York, Inc. (Con Ed) oppose. Defendants Third Avenue Bronx Fitness Group, LLC, and Third Avenue Bronx Fitness Group do not oppose as the complaint was dismissed against them. Defendants New York City Transit Authority and Metropolitan Transit Authority do not oppose as the action was discontinued against them.

Plaintiff commenced the instant action to recover for injuries he allegedly sustained on January 13, 2020, when he was caused to trip and fall due to a raised and uneven sidewalk flag adjacent to the premises owned by defendant Acadia, and adjacent to a grating and concrete pad owned by defendant Con Ed. Plaintiff testified at his deposition that as he was walking, looking ahead, his right foot caught in a “crack,” causing him to fall forward, turn to his left and fall on his back (NYSCEF Doc. 168, Exhibit H pgs. 55-64, 77-78). At his deposition, plaintiff was shown photographs depicting the sidewalk and identified the area where he fell (*Id.* at 69-97). Plaintiff

testified that the crack on the sidewalk was about two to three inches deep, that the crack was located near “the length of the side of the flag” and that he did not know how long the crack was (*Id.* at 59-61, 78-84).

Defendant Con Ed opposes arguing that there are issues of fact as to plaintiff’s comparative fault, where and how the accident occurred and whether the subject area was in a reasonably safe condition. In opposition, Con Ed annexed the deposition transcript of a Specialist/Record searcher for Con Ed and a company record search dated October 8, 2020. Defendant Acadia opposes arguing that there remain issues of material fact, including where on the sidewalk the incident occurred, and how long the defect existed. In opposition, defendant Acadia annexed plaintiff’s 50H hearing transcript.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept. 2006]). When deciding a summary judgment motion, the court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]).

Summary judgment is the procedural equivalent of a trial (*Mendoza v. Highpoint Associates, IX, LLC*, 83 AD3d 1 [1st Dept. 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders Inc., supra*, 231]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case (*Winegrad v. New York University Medical*

Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad, supra* at 853).

It is well settled that an owner of a premises has a duty to keep its property in a “reasonably safe condition, considering all of the circumstances including the purposes of the person’s presence and the likelihood of injury” (*Macey v. Truman*, 70 N.Y.2d 918 [1987]); *Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]). To recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 [1994]; *Leo v. Mt St. Michael Academy*, 708 N.Y.S.2d 372 [1st Dept. 2000]). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]). Further, New York City Administrative Code §7-210 (hereinafter “Administrative Code”) creates a nondelegable duty for the landowner of the abutting premises, to maintain the sidewalk (see *Yuk Ping Cheng Chan v. Young T. Lee Son Realty Corp.*, 110 A.D.3. 447 [1st Dept. 2008]). Administrative Code §7-210 states in pertinent part:

- b. 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.
- c. Notwithstanding any other provision of the law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.

Administrative Code §7-210.

Lastly, 34 RCNY § 2-07(b)(1) provides that “[t]he 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 § 2-07(b)(1).

In support of his motion, plaintiff annexed, the pleadings, his deposition transcript, the deposition transcript of Acadia's regional property manager Todd McGaughey, the note of issue, a notice to admit and photographs where the incident occurred. Here, it is undeniable that pursuant to 34 RCNY § 2-07(b)(1), Con Ed had a nondelegable duty to inspect and maintain the area within 12 inches of Con Ed's grate (see *Storper v. Kobe Club*, 76 A.D.3d 426, 427 [1st dept 2010]). However, plaintiff is not entitled to summary judgment against Con Ed as plaintiff failed to establish constructive notice as a matter of law (see *Roa v. City of New York*, 188 A.D.3d 504 [1st Dept 2020]). In addition, plaintiff is not entitled to summary judgment against Acadia as plaintiff has failed to show that Acadia created or had actual or constructive notice of the crack in the sidewalk. In his deposition, Acadia's regional property manager Todd McGaughey testified that he did not know how long the defect existed, was not aware of any complaints made about the sidewalk, was not aware of any received City of New York violations, that the last time he did sidewalk replacement and repair was "approximately three years ago. . . prior to COVID" and that "over the ten-year period that [he] managed the property, [he] averaged somewhere around twenty visits a year that were not related to specific property conditions, construction or specific requests (NYSCEF document No. 169, Exhibit I, pgs. 24-38). However, his testimony did not demonstrate that Acadia had created or had actual or constructive notice as to the condition in the sidewalk. Thus, plaintiff has failed to meet their initial burden for summary judgment.

As the plaintiff failed to meet his prima facie burden, it is unnecessary to determine whether the papers submitted by the defendants in opposition were sufficient to raise a triable issue of fact (see *Johnson v Salaj*, 130 A.D.3d 502, 503 [1st Dept. 2015]; *Che Hong Kim v Kossoff*, 90 A.D.3d 969 [2d Dept 2012]).

As to the aspect of the motion asking this court for an order striking all affirmative defenses of comparative fault, that branch of the motion is denied as the issue of plaintiff's comparative fault remains an issue for the factfinder at trial (see *Rodriguez v. City of New York*, 31 N.Y.3d 312, [2018]).

The court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability is denied.

This constitutes the decision and order of the Court.

Dated: May 29, 2024

HON. _____
BIANKA PEREZ, J.S.C.

1. CHECK ONE.....
2. MOTION IS.....
3. CHECK IF APPROPRIATE.....
- ☐ CASE DISPOSED IN ITS ENTIRETY

☒ CASE STILL ACTIVE
- ☐ GRANTED

☒ DENIED

☐ GRANTED IN PART

☐ OTHER
- ☐ SETTLE ORDER

☐ SUBMIT ORDER

☐ TRANSFER
- ☐ FIDUCIARY APPOINTMENT

☐ REFEREE APPOINTMENT