Wanping Mei v Tzu Tai Tsao Corp
2025 NY Slip Op 31832(U)
May 20, 2025
Supreme Court, New York County
Docket Number: Index No. 452452/2024
Judge: Hasa A. Kingo

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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WANPING MEI,

Plaintiff,

- v -

TZU TAI TSAO CORP, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Defendant.

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INDEX NO. 452452/2024

MOTION DATE 02/28/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS.

Upon the foregoing documents, Defendant Tzu Tai Tsao Corp ("Tzu") moves to dismiss Plaintiff's complaint for failure to state a cause of action against it. Plaintiff Wanping Mei ("Plaintiff") and Co-Defendant Consolidated Edison of New York ("Con Ed") oppose the motion. For the reasons enunciated herein, Tzu's motion is denied.

BACKGROUND

On March 14, 2023, Plaintiff allegedly tripped and fell because of a defective condition on the sidewalk and/or curb abutting 240 Grand Street, New York, New York.[1] Plaintiff commenced this action on April 3, 2024 to recover for the injuries she sustained as a result of the fall. Con Ed joined issue by service of its answer on May 9, 2024, the City of New York joined issue by service of its answer on May 18, 2024, and Tzu joined issue by service of its answer on June 3, 2024. Tzu now moves to dismiss Plaintiff's complaint and all cross-claims against it pursuant to CPLR § 3211(a)(7).[2]

In support of the motion, Tzu argues that to the extent there is a defective condition, it is within twelve inches of a Con Ed grate, and Tzu cannot be held liable under New York City sidewalk law. Instead, the owner of the grate and not the owner of the abutting premises is

[1] Except where otherwise noted, the facts are recited here as alleged in the complaint and are accepted as true for the purpose of the motion, as required on a motion to dismiss pursuant to CPLR § 3211(a)(7).
[2] "A motion based upon [failure to state a cause of action] may be made at any subsequent time" (CPLR § 3211[e]).

responsible for maintaining and/or repairing the defective condition under Section 2-07 of the Rules of the City of New York Department of Transportation.[3]

Plaintiff opposes the motion on the grounds that she has stated a cause of action for negligence by alleging that Tzu, as the owner of the abutting premises, had a duty to maintain the sidewalk and its negligent maintenance, supervision, and/or repair created the defective condition that proximately caused her injuries. Plaintiff points to Tzu's answer, which admits that it maintained and repaired the subject sidewalk.

In its opposition, Con Ed argues that the location of the defective condition is in dispute and Tzu's reliance on Section 2-07 of the Rules of the City of New York Department of Transportation is thus premature. Additionally, Con Ed argues that even if the location of the defect is within twelve inches of the grate, Tzu has not met its burden of demonstrating that it did not cause or create the condition.

DISCUSSION

On a motion to dismiss brought under CPLR § 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group*, LLC, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *aff'd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

To state a cause of action for negligence, Plaintiff must plead that Tzu owed a duty to Plaintiff, that Tzu breached its duty, and the breach proximately caused Plaintiffs' injuries (*Pasternack v Lab'y Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). It is well established that owners of real property have a duty to maintain their property in a reasonably safe condition (*Mejia v New York City Transit Auth*., 291 AD2d 225, 225–26 [1st Dept 2002]). Section 7-210 of the Administrative Code of the City of New York imposes liability on the abutting property owners for injuries resulting from negligent sidewalk maintenance (Administrative Code of City of NY § 7-210). However, section 2-07 of the Rules of City of New York Department of Transportation provides an exception to this general rule (Rules of City of NY Dept of Transportation [34 RCNY] § 2-07). Specifically, 34 RCNY § 2-07 imposes the duty of maintenance and repair of covers or

[3] Tzu admits that it is the owner of 240 Grand Street (NYSCEF Doc No. 17, verified answer ¶ 2), and in response to Tzu's notice to admit, Con Ed admits that it owned a metal grate located on the sidewalk on Bowery at the corner of Grand Street and Bowery (NYSCEF Doc No. 53, response to co-defendant's notice to admit ¶ 2).

gratings, and the area extending twelve inches outward, on the owner(s) of the cover or grating, and not the abutting property owner (34 RCNY 2-07[b]; *Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]; "There is nothing in Administrative Code § 7-210 to show that the City Council intended to supplant the provisions of 34 RCNY 2-07 and to allow a plaintiff to shift the statutory obligation of the [owner of the grate] to the abutting property owner"]). Accordingly, where a defect occurs within twelve inches of a cover or grating, the owner of the cover or grate, and not the abutting property owner is liable (*Storper*, 76 AD3d at 427 [there is no concurrent liability between the owner of the grate and the abutting property owner]).

In this instance, Plaintiff has stated a cause of action against Tzu by alleging ownership and negligent maintenance, supervision, and/or repair of the subject premises (NYSCEF Doc No. 1, verified complaint ¶¶ 7-15, 35, 37-40). Plaintiff's allegations that Con Edison "owned a grating within twelve inches of the defective sidewalk and curb" is not enough to vitiate Plaintiff's claims against Tzu at this stage (*id*. ¶ 36). Not only is Plaintiff "authorize[d] to plead inconsistent claims" under CPLR § 3014, but there is an issue of fact regarding the location of the defect (CPLR § 3014; *Brown v Riverside Church in City of New York*, 231 AD3d 104, 111 [1st Dept 2024]). Plaintiff's allegations that she was "walking on the sidewalk" when she "stepped onto the sidewalk/curb which had a vertical grade differential," that "the curb area where Plaintiff's incident occurred is within a 12-inches of a grating over a vault," and that "the defective, dangerous sidewalk/curb is 9-inches from the perimeter of the grating" presents issues of fact that cannot be resolved on a motion to dismiss where the court does not have the benefit of a record before it (NYSCEF Doc No. 1, verified complaint ¶¶ 35, 38; NYSCEF Doc No. 45, notice of claim 1-3; *see Wright v City of New York*, 223 AD3d 547, 548 [1st Dept 2024] ["As further discovery was necessary to resolve existing factual questions, most notably the precise incident location and the party responsible for its repair and maintenance, [defendant's] motion to dismiss was premature"].[4]

While it may come to pass that Tzu is ultimately not liable to Plaintiff, "whether Plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]). This notion is further underscored by Tzu's reliance on cases that came before the court on summary judgment, and not dismissal under CPLR § 3211(a)(7) (*see Jones v 3417 Broadway LLC*, 172 AD3d 551 [1st Dept 2019] ["Defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence"]; *Storper*, 76 AD3d at 427 [summary judgment affirmed on appeal where "there is no doubt that the defective area of the sidewalk where plaintiff fell was inside the 12-inch zone"]; *Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010] ["NYCHA met its burden on summary judgment with a prima facie showing establishing as a matter of law that plaintiff did not slip on the sidewalk"]. Tzu has not made such showing, and the court is not inclined to treat this motion as one for summary judgment (CPLR § 3211[c]).

Finally, the court is unpersuaded by Tzu's arguments that it would not be liable even if it created a hazardous condition within twelve inches from the subject grate (*see Flynn v City of New*

[4] While the court declines to consider such evidence, Plaintiff has included a photograph of the alleged defect with her notice of claim, and Tzu has proffered Google images of the alleged accident site (NYSCEF Doc No. 45, notice of claim 9; NYSCEF Doc No. 62, exhibit A). The court notes that these photographs do not contain or depict any measurements to determine the distance between the defect and the grate, and it is entirely unclear where exactly Plaintiff tripped and fell.

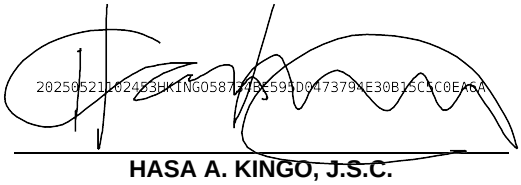
York, 84 AD3d 1018, 1019 [2d Dept 2011] [defendant established "that it did not violate a statute that expressly imposes liability on it for failure to maintain the abutting sidewalk" and "that it did not create the alleged dangerous condition [or] negligently maintain the area"). The cases that Tzu relies on are factually distinguishable as they involve routine wear and tear of bus stops and the doctrine of special use, neither of which Plaintiff has alleged at this time (*Weiters v City of New York*, 103 AD3d 509, 510 [1st Dept 2013] [plaintiff alleged that MTA created a defective condition by operating its buses on the subject roadway]; *Cabrera v City of New York*, 45 AD3d 455, 456 [1st Dept 2007] [use of bus lanes do not constitute a special use by the transit defendants]; *Shaller v City of New York*, 41 AD3d 697, 698 [2d Dept 2007] [the allegations against NYCTA "were based on the normal operation of NYCTA buses"]; *Tanzer v City of New York*, 41 AD3d 582, 583 [2d Dept 2007] [plaintiff's "allegations were based simply on the normal operation of NYCTA buses" and did not constitute a special use]; *Towbin v City of New York*, 309 AD2d 505, 505 [1st Dept 2003] ["no triable issue as to whether vehicles operated by the transit defendants . . . caused the complained-of defect"]). Accordingly, Tzu's motion to dismiss is denied.

Therefore, it is

ORDERED that Defendant Tzu Tai Tsao Corp's motion to dismiss is denied; and it is further

ORDERED that the clerk is directed to schedule this matter for a preliminary conference in the Differentiated Case Management Part on the next available date.

This constitutes the decision and order of the court.



5/20/2025
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[*4]