

James v Hylan Elec. Contr. Inc.

2025 NY Slip Op 32761(U)

July 30, 2025

Supreme Court, New York County

Docket Number: Index No. 155982/2024

Judge: Hasa A. Kingo

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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. HASA A. KINGO PART 05M

Justice

-----X

JACQUELINE JAMES,

Plaintiff,

- v -

HYLAN ELECTRICAL CONTRACTING INC.,THE CITY OF
NEW YORK, Hylan DATACOM & ELECTRICAL
LLC,CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.

Defendant.

-----X

INDEX NO. 155982/2024
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 60, 61

were read on this motion for SUMMARY JUDGMENT.

Plaintiff Jacqueline James (“Plaintiff:”) moves for summary judgment pursuant to CPLR § 3212 against Defendants The City of New York (“the City”) and Consolidated Edison Company of New York, Inc. (“Con Edison”), asserting that there are no triable issues of fact with respect to liability and notice. Plaintiff also moves to strike various affirmative defenses raised by Defendants under CPLR § 3211(b). The City and Con Edison oppose the motion, arguing that it is premature and that material issues of fact remain for trial.

BACKGROUND AND ARGUMENTS

In this personal injury action, Plaintiff seeks to recover damages purportedly sustained when she tripped and fell on the roadway located at the intersection of West 46th Street and 7th Avenue in New York, New York, on January 27, 2024 at approximately 9:05 p.m. (NYSCEF Doc No. 27, second amended complaint ¶¶ 13, 37). Plaintiff served a notice of claim on the City on or about February 20, 2024 (*id.* ¶ 2). Plaintiff asserts that the City failed to conduct a hearing pursuant to General Municipal Law § 50-h within 90 days of receipt of the notice of claim (*id.* ¶ 3).

On June 28, 2024, Plaintiff commenced this action by filing a summons and complaint that interposed causes of action against the City and defendant Hylan Electrical Contracting Inc. (“Hylan”) (NYSCEF Doc No. 1, complaint). Plaintiff filed an amended complaint on August 20, 2024, adding defendant Hyland Datacom & Electrical LLC (together with Hylan, the “Hylan defendants”) (NYSCEF Doc No. 9, amended complaint), and filed a second amended complaint on November 19, 2024, which added defendant the Consolidated Edison Company of New York, Inc. (“Con Edison”) (NYSCEF Doc Nos. 27, second amended complaint). All defendants answered the second amended complaint (NYSCEF Doc Nos. 30, 32, 50). Plaintiff discontinued

the action against Hylan with prejudice pursuant to a stipulation dated May 19, 2025 (NYSCEF Doc No. 58).

Plaintiff now moves pursuant to CPLR § 3212 for summary judgment on liability against the City; on the issue of notice and prior written notice under the New York City Administrative Code § 701-2; pursuant to CPLR § 3211 (b) to striking the City's first, second, third, and sixth affirmative defenses alleging culpable conduct, assumption of risk, governmental function, and failure to state a cause of action; for summary judgment on liability against Con Edison; for summary judgment on the issue of notice against Con Edison; and pursuant to CPLR § 3211 (b) to strike Con Edison's first, fifth, and sixth affirmative defenses alleging culpable conduct, failure to state a cause of action, assumption of risk, and open and obvious (NYSCEF Doc No. 39, notice of motion).

In support of the motion, Plaintiff submits, *inter alia*, an affirmation of Plaintiff, a copy of the notice of claim and annexed photographs, and Department of Transportation ("DOT") Dash Inspection Records with annexed photographs (NYSCEF Doc No. 40, aff in support § 7). Plaintiff also submits a Notice to Admit that Plaintiff served on the City on August 13, 2024, in which Plaintiff requested that the City admit or deny receipt of an e-mail and photographs from Tom Harris ("Harris") of Times Square Alliance sent on October 3, 2023, discussing and depicting the crosswalk located at West 46th Street and 7th Avenue between the Northeast and Southeast corners in New York, NY Plaintiff tripped (*id.* § 8). The subject of the email is "46th Street Crosswalk at 7th" and Harris states in the body of the email, "This is deteriorating and is becoming a tripping hazard. Hylan electric has done work here and has never restored. Have you considered charging them with removing the pavers and putting asphalt here? It may be cheaper for them" (NYSCEF Doc No. 42, aff in support, exhibit B). A photograph of damaged sidewalk pavers is also attached to the email (*id.*). Plaintiff argues that the email and the City's failure to respond to the notice to admit demonstrate that the City had notice of the defect in question (*id.* ¶¶ 10-11). Plaintiff also submits documents from the DOT, obtained pursuant to a Freedom of Information Law ("FOIL") request, which discuss and depict the hazardous crosswalk at issue. Plaintiff contends that these documents establish, as a matter of law, that the City and Con Edison had notice of the condition. (*id.* ¶ 13).

The City does not contest the issue of prior written notice, but opposes the motion to the extent that the City disputes "all elements of Plaintiff's negligence claim" (NYSCEF Doc No. 51, aff in opposition ¶ 1). The City contends that Plaintiff has not established the City failed to perform a duty owed to Plaintiff or that "the Plaintiff established that her injury was [proximately caused by] the City's failure to perform a particular duty on the date of the alleged incident," and, therefore, "Plaintiff's motion is limited only to a determination of whether the City had notice of a condition in the subject roadway" (*id.* ¶ 1). The City also argues there are outstanding questions of fact regarding whether the condition was reasonably safe, as to damages and causality, and Plaintiff's own culpable conduct and assumption of risk (*id.* ¶ 2).

Con Edison separately opposes and argues that summary judgment is premature because Plaintiff did not identify which paver caused her to trip, Plaintiff did not demonstrate that Con Edison owned any manhole covers or structures within 12 inches of the allegedly defective paver, notice to Con Edison is irrelevant because Con Edison did not owe a duty to Plaintiff, and that

Plaintiff is not entitled to summary judgment because she has not established that she is free from comparative negligence, assumption of risk, or that the condition was not open and obvious as a matter of law.

In reply to the City's motion, Plaintiff argues that the City unequivocally had a duty to maintain the sidewalk in reasonably safe condition and that questions of fact regarding Plaintiff's comparative negligence do not preclude summary judgment. In reply to Con Edison's motion, Plaintiff argues that Con Edison had notice of a defective condition that it failed to repair, and is therefore liable for Plaintiff's injuries.

DISCUSSION

A motion for summary judgment "shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party" (CPLR § 3212[b]). "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013][internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotation marks and citation omitted]). A motion made prior to the completion of discovery may be denied as premature where discovery may lead to relevant evidence (*see* CPLR § 3212[f]; *Gomez v. City of New York*, 304 AD2d 374 [1st Dept 2003]).

To maintain a cause of action in 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" (*Pasternack v Lab's Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). "The question of whether a defendant owes a legally recognized duty of care to a plaintiff is the threshold question in any negligence action" (*On v BKO Exp. LLC*, 148 AD3d 50, 53 [1st Dept 2017]). "In the absence of a duty, as a matter of law, there can be no liability" (*Pasternack*, 27 NY3d at 825).

"Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). "The existence of one or more of these elements is sufficient to give rise to a duty of care" (*id.*). "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]).

"Administrative Code of the City of New York § 7-201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous

conditions which its officials have been actually notified exist at a specified location” (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). Administrative Code § 7-201(c)(2) provides the following:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe

Prior written notice laws such as Administrative Code § 7-201(c)(2) “are always strictly construed because they are enacted in derogation of common law” (*Belmer v HHM Assocs., Inc.*, 101 AD3d 526, 528-259 [1st Dept 2012]). “The only recognized exceptions to the prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence or where a special use confers a benefit upon the municipality” (*Smith v City of New York*, — NYS3d —, 2024 NY Slip Op 03150 [1st Dept 2024]). “The affirmative negligence exception is limited to work which immediately results in the existence of a dangerous condition” (*id.*).

“Rules of City of New York Department of Transportation (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 and gratings and the area extending twelve inches outward from the perimeter of the hardware” (*Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]). Section 2-07 (b) (2) requires that “[t]he 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.”

Here, the City concedes the issue of prior written notice and the documentary record supports that concession. Several DOT Dash Reports, NOVs, and communications from the Times Square Alliance—some dated months before the incident—highlight the defective condition and meet the threshold under NYC Admin. Code § 7-201 (*see Yarborough v. City of New York*, 10 NY3d 726 (2008)). Similarly, Con Edison was issued a violation (CAR #20235810058) on June 24, 2023, that specifically identified the presence of a 2-inch depression near its steam pad, which the DOT described as a “trip hazard.” Whether this notice is sufficient for liability purposes, however, hinges not merely on knowledge but on a breach of duty and proximate cause.

The City accurately argues that while prior written notice opens the courthouse door, Plaintiff must still prove all elements of a negligence claim to recover tort damages (*Weinreb v. City of New York*, 193 AD2d 596 [2d Dept 1993]). Those elements include a duty, breach, causation, and damages (*Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 585 [1994]). The record, as it now stands, is insufficient to establish breach and proximate cause as a matter of law. The City and Con Edison rightly assert that Plaintiff has not established that either defendant breached a duty of care or that such breach proximately caused Plaintiff's injuries. As stated in *Palka*, 83 NY2d 579, *supra*, negligence requires the showing of duty, breach, causation, and damages. The record before the court presently does not resolve whether the condition was visible and apparent, or whether Plaintiff's actions contributed to the incident.¹

As emphasized during oral argument on July 29, 2025, Plaintiff's affidavit does not establish a *prima facie* entitlement to summary judgment. While the affidavit reiterates the presence of uneven brick pavers and states that the depression was approximately two inches deep, it lacks specificity as to which portion of the crosswalk caused the fall, what precise defect existed at that location, and how it proximately caused Plaintiff's injuries. Notably, no photographs are marked to identify the exact site of the fall, and Plaintiff has not appeared for a General Municipal Law § 50-h hearing or deposition. Where "the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive," summary judgment is inappropriate (*Hutchinson v. Sheridan Hill House Co.*, 26 NY3d 66, 84 [2015]; *Gallis v. 23-21 33 Rd. LLC*, 198 AD3d 730 [2d Dept 2021]).

Likewise, the issue of whether the condition was unreasonably dangerous cannot be resolved on this record. Defendants raise questions about lighting, foot traffic, and whether Plaintiff was distracted or familiar with the area. These are all classic jury questions (*see Trincere v. County of Suffolk*, 90 NY2d 976 [1997]).

As it relates to Con Edison specifically, the court agrees with Con Edison's position that summary judgment is premature under the circumstances presented. To be sure, Plaintiff has not identified the specific paver that allegedly caused her fall, nor has she demonstrated that Con Edison owned or maintained any manhole covers or subsurface structures within 12 inches of the allegedly defective area. Moreover, the court finds persuasive Con Edison's argument that, absent ownership or control of the defect, any alleged notice is irrelevant, as Con Edison would owe no duty to Plaintiff.

In addition, questions of comparative fault remain unresolved. Plaintiff has not demonstrated the absence of culpable conduct. The record contains no testimony regarding whether Plaintiff was looking where she was walking, using a mobile device, or otherwise inattentive. Striking affirmative defenses without such evidence would be premature (*see Silverio v. Ford Motor Co.*, 183 AD3d 470 [1st Dept 2020]; *Bruni v. City of New York*, 2 NY3d 319 [2004]).

¹ The court acknowledges that, under *Rodriguez v. City of New York*, 31 NY3d 312 (2018), a plaintiff is not required to demonstrate the absence of comparative fault in order to prevail on summary judgment as to liability. Nevertheless, in the present matter, the absence of a developed factual record concerning the manner in which Plaintiff's accident occurred precludes the granting of summary judgment at this stage.

Finally, the motion is plainly premature. No depositions have been conducted. Plaintiff has not testified at a GML § 50-h hearing. As this case is still in its early stages and discovery remains incomplete, the court finds that summary judgment is not appropriate at this juncture. Plaintiff may renew her motion after completing discovery, including depositions and presentation of marked photographic or expert evidence sufficient to meet her burden under CPLR § 3212.

Accordingly, it is:

ORDERED that Plaintiff’s motion for summary judgment pursuant to CPLR § 3212 is denied, without prejudice, on the ground that the motion is premature, fails to make a prima facie showing of entitlement to judgment as a matter of law; and fails to eliminate the material issues of fact raised by Defendants; and it is further

ORDERED that Plaintiff’s motion to strike the affirmative defenses raised by Defendants under CPLR § 3211(b) is denied, without prejudice; and it is further

ORDERED that the parties shall proceed with all outstanding discovery expeditiously and shall appear in the Differentiated Case Management Part on Tuesday August 5, 2025 at 2:00 PM to enter into a Case Scheduling Order; and it is further

ORDERED that Plaintiff may renew the motion following completion of discovery.

This constitutes the decision and order of the court.



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HASA A. KINGO, J.S.C.

7/30/2025
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE