

Butler v City of New York

2025 NY Slip Op 33568(U)

September 23, 2025

Supreme Court, New York County

Docket Number: Index No. 155322/2024

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

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MAUREEN BUTLER, ERNEST DEFILIPPIS,

Plaintiff,

- v -

CITY OF NEW YORK, CONSOLIDATED EDISON,
INC.,CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,MUD LLC,RCN TELECOM SERVICES
(LEHIGH) LLC,TWO BROTHERS PLUMBING SERVICES,
INC.,TULLY CONSTRUCTION CO, INC

Defendant.

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INDEX NO. 155322/2024

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 25, 26

were read on this motion for DISMISSAL.

Defendant RCN Telecom Services (Lehigh) LLC (“RCN”) moves, pursuant to CPLR §§ 3211(a)(1), 3211(a)(7), and CPLR § 3212, for an order dismissing the complaint, together with all cross-claims asserted against it, on the ground that it neither owned, occupied, managed, controlled, nor performed work at the alleged accident location where Plaintiff Maureen Butler (“Plaintiff”) claims to have tripped and fallen.

BACKGROUND AND PROCEDURAL HISTORY

This personal injury action arises from an incident on March 25, 2023, when Plaintiff allegedly tripped on a “vertical declivity, vertical gap, and/or depression” in the roadway on East 9th Street, between First and Second Avenues, adjacent to 307 East 9th Street. Plaintiffs commenced this action against the City of New York in June 2024. Through subsequent amendments, additional defendants were named, including Consolidated Edison, Inc., Consolidated Edison Company of New York, Inc. (“Con Edison”), Mud LLC, RCN, Two Brothers Plumbing Services, Inc., and Tully Construction Co., Inc.

On July 16, 2025, Con Edison answered and asserted cross-claims against co-defendants. That same day, RCN filed the instant motion seeking dismissal at the pleading stage and, alternatively, on summary judgment grounds. The City and other defendants did not oppose; only Con Edison interposed opposition, urging denial of the motion as premature due to incomplete discovery.

ARGUMENTS

RCN argues that it has no nexus to the accident location. In support, RCN submits the affirmation of Brian Crombie, its Senior Construction Manager since 1999, along with maps, work permits, and records establishing that its work was confined to the block of East 9th Street east of First Avenue and did not extend to the location near Second Avenue where Plaintiff fell. RCN contends that, under controlling authority, a contractor with no ownership, occupancy, or control over the situs of injury cannot be held liable (*see Martin v. Rizzatti*, 142 AD3d 591 [2d Dept 2016]; *Dalder v. Inc. Vil. of Rockville Ctr.*, 116 AD3d 908 [2d Dept 2014]; *O'Toole v. City of Yonkers*, 107 AD3d 866 [2d Dept 2013]; *Soto v. City of New York*, 244 AD2d 544 [2d Dept 1997]). RCN further maintains that the specificity of the complaint removes doubt about the situs, and that mere hope that discovery will uncover liability is insufficient.

Con Edison asserts that the motion is premature because no discovery has occurred: Plaintiff has not provided a bill of particulars, no depositions have been conducted, and the precise cause and location of the fall remain in dispute. Con Edison relies on cases holding that summary judgment is inappropriate prior to meaningful discovery where facts essential to justify opposition may exist (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Pullman v. Silverman*, 28 NY3d 1060 [2016]; *Vega v. Restani Constr. Corp.*, 18 NY3d 499 [2012]).

RCN responds that only Con Edison opposed, and thus all cross-claims by default must be dismissed. It emphasizes that its records definitively show no work at or near the accident location and that, under CPLR § 3211(a)(7), evidentiary submissions may be considered to test whether a cognizable cause of action exist (*see Sokol v. Leader*, 74 AD3d 1180 [2d Dept 2010]; *Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]).

DISCUSSION

On a motion under CPLR § 3211(a)(7), the court must determine whether the plaintiff has a cause of action, not merely whether the complaint states one, where evidentiary submissions are considered (*Guggenheimer*, 43 NY2d 268, *supra*; *Sokol*, 74 AD3d 1180, *supra*). Dismissal under CPLR § 3211(a)(1) is warranted where documentary evidence conclusively refutes the allegations and establishes a defense as a matter of law.

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 moving party bears the initial burden of proving a *prima facie* entitlement to summary judgment on the cause of action or defense, by tendering evidence in admissible form eliminating any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “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]).

I. Lack of Duty

At the heart of this motion lies the foundational principle of premises liability: before liability may be imposed, a duty must exist. In tort law, “the existence and scope of a duty is a question of law” (*Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). Without duty, there can be no breach; without breach, there can be no liability.

Here, the uncontroverted evidence submitted by RCN demonstrates that it neither owned nor controlled the roadway where Plaintiff fell and that its prior work on East 9th Street was confined to an entirely different block. Under well-settled precedent, liability for defective sidewalks or roadways does not attach to entities lacking ownership, occupancy, or contractual control (*see Martin*, 142 AD3d at 592, *supra* [dismissing claims where defendant neither owned, occupied, controlled, nor created the hazardous condition]; *Dalder*, 116 AD3d at 909, *supra* [no liability for abutting property owner absent evidence of special use or affirmative negligence]; *O’Toole v. City of Yonkers*, 107 AD3d at 867, *supra*).

Plaintiffs’ allegations that RCN “possessed, managed, and/or exercised authority” over the location are refuted by the Crombie affirmation and supporting records. Indeed, the Crombie affirmation, accompanied by detailed maps, permits, and work logs, demonstrates that RCN’s excavation and conduit work was confined to the block of East 9th Street east of First Avenue, whereas Plaintiff’s fall occurred in the roadway between First and Second Avenues, adjacent to 307 East 9th Street. The documentary evidence thus draws a clear and unambiguous geographic line between the work performed by RCN and the situs of Plaintiff’s accident.

Unsubstantiated allegations cannot defeat dismissal where documentary evidence demonstrates the contrary (*Zuckerman*, 49 NY2d at 562, *supra*). Indeed, once a movant tenders evidentiary material demonstrating entitlement to dismissal or summary judgment, the burden shifts, and conclusory allegations or “mere expressions of hope” are insufficient to raise a triable issue (*id.*). Here, Plaintiffs’ allegations are directly refuted by the documentary evidence and thus cannot sustain a cause of action against RCN. Indeed, even if one were to assume *arguendo* that RCN had, at some point, conducted work on East 9th Street, the documentary record establishes that such work was located far from the accident site and was completed months before the incident. A defendant may not be cast in damages based on speculation that it “might” have contributed to a hazard in an area where the proof demonstrates it was never present. To hold otherwise would expose contractors and utilities to perpetual liability untethered to their actual conduct, a result the courts have consistently rejected (*see Espinal*, 98 NY2d at 140, *supra* [rejecting expansion of duty absent proof of contractually assumed obligation or affirmative negligence]).

In sum, because RCN had no legal duty with respect to the roadway where Plaintiff fell, and because liability in negligence cannot exist in the absence of such duty, the claims asserted against it must be dismissed as a matter of law.

II. Prematurity

Con Edison, the lone party to oppose the motion, contends that RCN's application is premature because discovery has not yet taken place. It is true that summary judgment should not be granted where facts essential to oppose the motion are exclusively within the movant's knowledge or control (*see Winegrad*, 64 NY2d at 853, *supra*).

Yet the mere invocation of prematurity is not talismanic. A party opposing summary judgment must demonstrate that discovery may lead to relevant evidence that is not already within its reach and that such evidence would create a triable issue of fact (*Lopez v. WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]).

Here, Plaintiffs' complaint describes with precision the situs of the accident—adjacent to 307 East 9th Street, near Second Avenue. The Crombie affirmation and RCN's records conclusively establish that its work was confined to an entirely different block, east of First Avenue. The dispositive issue, therefore, is not one of factual nuance that further discovery might illuminate; it is the absence of duty as a matter of law. That absence is already established by the record.

To defer dismissal under these circumstances would contravene the policy underlying CPLR § 3211 and § 3212, which is to spare litigants the burden and expense of needless discovery where the pleadings, read in conjunction with incontrovertible evidence, demonstrate no viable claim (*see Kornfeld v. NRX Tech.*, 62 NY2d 686, 688 (1984)). Con Edison's appeal to prematurity cannot overcome the dispositive effect of the documentary record.

III. Cross-Claims

Finally, the court addresses the cross-claims. It is undisputed that no defendant other than Con Edison has opposed RCN's motion. Under well-settled law, a party's failure to oppose a motion is deemed a concession that the motion is meritorious as against it (*Kuehne & Nagel v. Baiden*, 36 N.Y.2d 539, 544 [1975][defaulting party is deemed to have admitted all factual allegations and reasonable inferences]).

Accordingly, not only are the cross-claims infirm on the merits for the reasons already stated—namely, RCN's lack of duty—but they are also abandoned by default. As such, all cross-claims asserted against RCN are dismissed in their entirety.

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant RCN Telecom Services (Lehigh) LLC is granted; and it is further

ORDERED that the complaint and all cross-claims asserted against RCN Telecom Services (Lehigh) LLC are dismissed with prejudice; and it is further

ORDERED that counsel for RCN Telecom Services (Lehigh) LLC shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to enter judgment dismissing the case as against RCN Telecom Services (Lehigh) LLC; and it is further

ORDERED that service of this order 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 Section J of the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court's website); and it is further

ORDERED that the action shall continue as against the remaining defendants.

HASA A. KINGO, J.S.C.

9/23/2025

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