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

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice PART 5

Index Number : 110702/2004
RIVERA, HECTOR
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT
CAL. # 108

INDEX NO. 110702/04
MOTION DATE 11/10/11
MOTION SEQ. NO. 003
MOTION CAL. NO. 108

this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4,5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

FEB 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/6/12
FEB 06 2012

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

HECTOR RIVERA,

Plaintiff,

-against-

THE CITY OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

---x

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

DANELLA CONSTRUCTION COMPANY,

Third-Party Defendant.

---x

Index No. 110702/04

Argued: 10/18/11
Motion Seq. No.: 003
Motion Cal. No.: 108

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
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For City:
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By notice of motion dated May 23, 2011, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment against defendants on the issue of liability and, pursuant to CPLR 603 and CPLR 1010, for an order severing the third-party action. Defendants oppose.

I. BACKGROUND

On April 27, 2003, at approximately 11:30 p.m., plaintiff, while crossing First Avenue on the crosswalk at its intersection with East 122nd Street in Manhattan, tripped and fell on a sunken

utility vault embedded in the roadway. (Affirmation of Thomas B. Grunfeld, Esq., dated May 23, 2011 [Grunfeld Aff.], Exh. A).

On September 19, 2003, plaintiff was examined pursuant to General Municipal Law § 50-h, testifying that the weather was clear on the night of the accident, that he crossed on the cross-walk once traffic on First Avenue was stopped at a red light, that he did not look down at the roadway as he was crossing, instead "looking towards the incoming traffic," and that he had not "noticed anything about the condition of the road inside the crosswalk before the time [his] accident happened." (*Id.*, Exh. 2). He described the way in which his accident occurred as follows: "as you walk it's like the floor goes down, I guess, and as it goes down the rest of the street was up and that's when I – I tumbled." (*Id.*). When asked to describe the "hole" on which he tripped, he said that it was a "pretty big," "pretty wide" box but could not estimate its dimensions. (*Id.*).

On July 20, 2004, plaintiff commenced the instant action with the filing of summons and verified complaint, asserting negligence claims against defendants arising from their ownership, operation, maintenance, and inspection of the roadway and the vault. (*Id.*, Exh. 3). Sometime thereafter, defendants joined issue with service of their answers. (*Id.*, Exh. 4).

At a deposition held on June 19, 2009, plaintiff testified that "[t]here was plenty [of] light" when his accident occurred, and when asked to clarify this response given that his accident occurred at night, he stated that light emanated from a streetlight. (*Id.*, Exh. 9). According to him, just before he tripped, he was crossing from the east side of First Avenue to the west side, looking "straight ahead" and to his left at oncoming traffic, and he was looking straight ahead when he tripped and fell. (*Id.*). He described the hole as follows: "The hole was – it's at the

corner of where the plate meets the street and it's about three – three inches deep. . . . It was pretty wide. . . . I would say about maybe a foot wide." (*Id.*). When presented with photographs of the vault, which is located on the east side of First Avenue and extends into the middle of the crosswalk, he stated that they depicted the accident site as it existed on the date of his accident and identified the vault as the "hole" on which he tripped. (*Id.*). In the photographs, which appear to have been taken during the day at some distance from it, the vault is clearly visible and appears to be as wide as a minivan parked just north of it and as long as a sedan parked just south of it. (*Id.*).

At an examination before trial (EBT) held on January 5, 2010, George Canzaniello, records searcher for defendant Consolidated Edison Company of New York, Inc. (Con Ed), testified that on September 14, 2004, a search of DOT records for First Avenue and East 122nd Street from April 27, 2001 to April 27, 2003 was performed, yielding, *inter alia*, an emergency control ticket dated October 8, 2002 reflecting that Con Ed had responded to a complaint regarding a collapsed S7 vault on the east side of the intersection of First Avenue and East 122nd Street, that the vault had collapsed "three to four inches down," and that a Con Ed employee went to the site and determined that the vault needed "regrate and covers." (*Id.*, Exh 12).

At an EBT held on July 30, 2010, Miguel Lopez, highway repair supervisor for the New York City Department of Transportation (DOT), testified that DOT inspects the New York City Marathon route six weeks in advance, that a "special events inspections" report is created listing the roadway defects found during the inspection, and that "the pothole guy [then] goes out to fix the potholes . . . ." (*Id.*, Exh. 11).

On or about December 16, 2010, City provided plaintiff with a DOT special events

inspections report dated October 23, 2002, which reflects that there existed a "S7 collapsed vault" on First Avenue at East 122nd Street, for which Con Ed was the permittee. (*Id.*, Exh. 14). At an EBT held on March 17, 2011, John Flanagan, construction representative for Con Ed, when presented with a photograph of the accident site, testified that Con Ed owns the vault, which is known as an "S7." (*Id.*, Exh. 13).

On or about March 21, 2011, Con Ed commenced a third-party action against Danella Construction Company (Danella) with the filing of a third-party summons and complaint, asserting claims for indemnification arising out of an April 21, 2001 contract between Con Ed and Danella whereby Danella agreed to perform work on the crosswalk at the intersection of First Avenue and East 122nd Street and to indemnify Con Ed against liability arising from its work. (*Id.*, Exh. 16).

Court records reflect that on March 24, 2011, plaintiff filed his note of issue.

At an EBT held on April 14, 2011, Lawrence Moses, supervisor for DOT's special events unit, testified that, were DOT to discover a sunken vault while inspecting the marathon route on the day of the race, it would pave it over. (Affirmation of Michael J. McNulty, Esq., in Opposition, dated Aug. 17, 2011 [McNulty Opp. Aff.]).

On April 29, 2011, Danella joined issue on the third-party complaint with service of its answer. (*Id.*, Exh. 17).

By letter dated November 11, 2011, counsel for Danella describes the discovery outstanding in the third-party action, stating that on April 27, 2011, Danella served plaintiff and Con Ed with discovery demands and that he asked them, prior to writing the letter, to serve Danella with their responses to same within 30 days; and that there is an outstanding notice of

discovery and inspection from Con Ed to Danella, to which Danella will respond within 30 days. He also requests that City forward its responses to prior discovery demands within 30 days and that Danella be provided with copies of any independent medical examination (IME) reports and expert disclosure. And he represents that Danella will determine whether to request additional depositions of witnesses deposed prior to commencement of the third-party action within 30 days and that it seeks leave to request an additional IME of plaintiff if necessary.

II. CONTENTIONS

Plaintiff asserts that Con Ed may be held liable for his injuries, as it obtained actual notice of the collapsed vault through the October 8 complaint and corresponding written emergency control ticket and failed to repair it. (*Id.*). He claims that City may also be held liable, as it obtained prior written notice of the defect through the marathon inspection report. (*Id.*). And he contends that the third-party action must severed given the prejudice he will experience as a result of Con Ed's delay in commencing it. (*Id.*).

In opposition, Con Ed argues that triable issues of fact exist as to whether the defect was open and obvious, whether it was negligent given that a portion of the vault is located outside the bounds of the crosswalk, and whether City caused the defect in preparing for the marathon, given Moses's testimony as to its practices for same. (McNulty Opp. Aff.). It denies that the third-party action should be severed, explaining that its delayed commencement resulted from its counsel's mistaken belief that Danella performed work on the other side of First Avenue, and claiming that discovery may be expedited such that plaintiff will not be prejudiced. (*Id.*).

In opposition, City claims that a violation of the New York City Administrative Code constitutes merely some evidence of negligence, not negligence per se, and that triable issues of

fact exist as to prior written notice, causation, and plaintiff's comparative negligence. (Affirmation of Jessica Wisniewski, ACC, in Opposition, dated Aug. 16, 2011).

In reply, plaintiff contends that Con Ed and City may be held liable even if the defect was open and obvious, as they were responsible for maintaining the vault and roadway in a reasonably safe condition, and its open and obvious nature merely raises issues of fact as to his comparative negligence. (Affirmation of Thomas B. Grunfeld, Esq., in Reply to Con Ed's Opposition, dated Aug. 18, 2011 [Grunfeld Con Ed Reply Aff.]; Affirmation of Thomas B. Grunfeld, Esq., in Reply to City's Opposition, dated Aug. 30, 2011 [Grunfeld City Reply Aff.]). He observes that there is no evidence in the record reflecting that City paved over or otherwise altered the vault in preparation for the marathon, and he maintains that Con Ed's delay in commencing the third-party action severely prejudices him to the extent that he will be forced to participate in discovery a second time. (Grunfeld Con Ed Reply Aff.; Grunfeld City Reply Aff.).

III. ANALYSIS

A. Plaintiff's motion for summary judgment

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

To establish a *prima facie* case of negligence, a plaintiff must show duty, breach, and

proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control, or special use." (*Gibbs v Port Auth.*, 17 AD3d 252, 254 [1st Dept 2005]).

It is well-settled that City is under a duty to maintain its roadways in a reasonably safe condition. (*Kiernan v Thompson*, 73 NY2d 840, 841 [1988]). However, Con Ed, as owner of the vault, is obligated to maintain it, and the portion of roadway within 12 inches of its perimeter, in a reasonably safe condition, which includes ensuring that it remains flush with the roadway. (34 RCNY 2-07[b][1], [3]).

In *Thoma v Ronai*, 82 NY2d 736 (1993), the Court of Appeals held that a plaintiff who establishes a *prima facie* claim of negligence is not entitled to summary judgment where there exist triable issues of fact as to comparative negligence. In contrast, in *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198 (1st Dept 2010), the First Department held that, pursuant to CPLR 1411 and notwithstanding decisions of the Second Department (*see, eg, Gideon v Flatlands Beverage Distribs., Inc.*, 59 AD3d 596 [2d Dept 2009]; *Dragunova v Dondero*, 305 AD2d 449 [2d Dept 2003]), comparative negligence "merely acts to diminish [a] plaintiff's recovery in proportion to the culpable conduct of the defendant[]," and thus, a plaintiff need not demonstrate freedom from comparative negligence in order to be entitled to summary judgment on the issue of liability. Rather, she need only show that "the defendant's negligence was a substantial cause of the events which produced the injury." (*Tselebis*, 72 AD3d at 200; *see Gonzalez v ARC Interior Constr.*, 83 AD3d 418, 419 [1st Dept 2011]; *Strauss v Billig*, 78 AD3d 415 [1st Dept 2010]).

However, the First Department, notably a different panel, recently declined to follow

Tselebis. In *Calcano v Rodriguez*, __ AD3d __, 2012 Slip Op 110 (1st Dept, Jan. 12, 2012), the court, noting that "[t]he Second Department consistently recognizes that *Thoma* governs this issue [and that] . . . . it is not [its] prerogative to overrule or disregard a precedent of the Court of Appeals," held that a plaintiff must demonstrate that no triable issues of fact exist as to his comparative negligence in order to be entitled to summary judgment on the issue of defendant's liability. Consequently, it is now the law in this department that a plaintiff, in order to obtain summary judgment on the issue of whether a defect is open and obvious, must establish, *prima facie*, freedom from comparative negligence.

The open and obvious nature of a defect raises triable factual issues as to a plaintiff's comparative negligence. (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 [1st Dept 2004]). A defect is open and obvious "if it would be seen by any passerby reasonably using his [ ] senses." (*Sweeney v Riverbay Corp.*, 76 AD3d 847, 849 [1st Dept 2010]). However, "[e]ven visible hazards do not necessarily qualify as open and obvious because the nature or location of some hazards, while they are technically visible, make them likely to be overlooked." (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 [1st Dept 2011]). In light of the fact-specific nature of the inquiry, whether a defect is open and obvious is generally determined by the fact finder at trial, and the court may only decide it as a matter of law on the basis of "clear and undisputed evidence," "when the established facts compel that conclusion." (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]).

Here, as plaintiff's motion was submitted before *Calcano* was decided, he relied on *Tselebis* in declining to address the issue of his comparative negligence substantively and the open and obvious nature of the vault.

Nonetheless, the photographs of the vault show that it is as long and as wide as a passenger car and is clearly visible during the day from some distance away, and petitioner testified that he was looking ahead and did not see the vault before tripping, even though there was "plenty [of] light" at the accident scene, and there was no evidence reflecting that it was not clearly visible at night from plaintiff's vantage as he was crossing the street. Thus, it cannot be determined as a matter of law that the vault was not open and obvious. (*See Westbrook,* 5 AD3d 69 [where plaintiff tripped and fell over box in supermarket aisle, triable issues of fact existed as to open and obvious nature of box, as it "had not been visible to plaintiff as she approached the aisle, and she did not see the box before she fell"]; *cf. Paek v City of New York*, 28 AD3d 207 [1st Dept 2006] [jury finding that plaintiff not comparatively negligent "supported by the weight of the evidence, which shows that the metal spike over which plaintiff tripped and fell was thin, dark, protruded only a few inches from the sidewalk, and was not plainly visible at night"]). Consequently, plaintiff has not established entitlement to summary judgment.

In light of this determination, the parties' contentions as to City's receipt of prior written notice, Con Ed's receipt of actual notice, and the effect of the vault's location on Con Ed's duty to maintain it need not be considered.

B. Plaintiff's motion to sever the third-party action

Pursuant to CPLR 1010:

> The court may . . . order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Here, notwithstanding the potential existence of common factual issues among the

primary and third-party actions, as seven years have elapsed between plaintiff's commencement of the primary action and Con Ed's commencement of the third-party action, that the only explanation offered for this delay was Con Ed's counsel's mistaken belief regarding the location of Danella's work, that the primary action has been ready for trial since March 24, 2011, and that there remains discovery outstanding in the third-party action, severance is necessary to protect plaintiff from undue delay in trying his case and to provide Danella an adequate opportunity to complete discovery. (*See Garcia v Gesher Realty Corp.*, 280 AD2d 440 [1st Dept 2001] [although primary and third-party actions shared common issues, as defendant waited until after note of issue filed to commence third-party action and failed to provide excuse for delay, prejudice to plaintiff caused by further delay warranted severance]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of defendants' liability is denied; and it is further

ORDERED, that, pursuant to CPLR 1010, in furtherance of convenience to the parties and to avoid any prejudice, plaintiff's motion to sever the third-party action is granted, and there shall be separate trial of the third-party action.

FILED
FEB 08 2012
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: February 6, 2012
New York, New York

FEB 0 ⁶ 2012