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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 114959/2009
MARTON, EVA
VS
CONSOLIDATED EDISON
SEQUENCE NUMBER 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: SEP 0 [illegible]

_____, J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☒ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Eva Marton,

Plaintiff (s),

-against-

Consolidated Edison Company of New York, Inc. and Rockefeller University,

Defendant (s).

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DECISION/ORDER
Index No.: 114959/09
Seq. No.: 002, 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion Seq. No. 002	
Rockefeller n/m (3212) w/WCL affid, exhs	1
Marton opp w/ LC affirm	2
Rockefeller reply w/WCL affirm, AK affid	3
Motion Seq. No. 003	
Con Ed n/m (3212) w/MJN affirm, exhs	4
Marton opp w/ LC affirm, exhs	5
Con Ed reply w/MJM affirm (re: good cause)	6
Other:	
Various stips of adjournment	7

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a personal injury action involving a sidewalk grate. Issue was joined and the note of issue was filed by plaintiff (fee paid) on December 13, 2011. Motion sequence number 2, by Rockefeller University ("Rockefeller") for summary judgment

dismissing the complaint and all cross claims, is timely. Motion sequence number 3, by Consolidated Edison Company of New York, Inc. ("Con Ed") for summary judgment dismissing the complaint and all cross claims, was served April 17, 2012 which is more than 120 days after the filing of the note of issue. Marton argues that Con Ed's motion is late and should be denied on that basis alone, citing the requirements of CPLR § 3212 and the seminal case of Brill v. City of New York (2 NY3d 648 [2004]).

CPLR § 3212 [a] requires that a motion for summary judgment be made no later than 120 days of the note of issue being filed, "except with leave of court on good cause shown" (Micelle v. State Mutual Auto Ins Co., 3 NY3d 725 [2004]; Brill v. City of New York, 2 NY3d 725 [2004]).

Michael J. McNulty, Esq., an attorney employed by Con Ed as in house counsel, states that he is the reason the motion was brought late. He states that he underwent medical tests during the months of April and March, 2012. Following a biopsy, shortly before this motion was due, a serious medical condition was confirmed and surgery ensued. Attorney McNulty states that this crisis affected his state of mind, causing him to miscalculate the due date for the motion.

CPLR § 3212 [a] is not so unyielding as to require that an "excellent" excuse be offered for the delay. There simply has to be "satisfactory explanation for the untimeliness" and the court has considerable discretion in determining whether there is "good cause" shown for a delay in the making of the motion (Fofana v. 41 W34th St., 71 AD3d 445 [1st Dept 2010]; Filianno v. Triborough Bridge and Tunnel Authority, 34 AD3d 280 [1st Dept 2006]). Thus, in deciding whether there is "good cause" the court should not lose sight of why cases such as Brill and its progeny came to be. They were

intended to stem the tide of "11th hour" motions for summary judgment which often disrupted calendars and delayed trials.

An attorney's illness has been found to be "good cause" for why a motion for summary judgment was made beyond 120 days (Perini Corp. v. City of New York, 16 AD3d 37 [1st Dept. 2005]). Attorney McNulty has shared the details of his private condition, establishing this was more than law office failure. The court finds that Attorney McNulty has established "good cause" for why Con Ed's motion was made late. Therefore, both motions are properly before the court, they are consolidated for decision, and will be decided on the merits.

Arguments

Plaintiff Eva Marton ("Marton") contends she fractured her left wrist, hurt her nose and suffered dental injuries in an accident that occurred on July 8, 2009 at approximately 8:00 a.m. In her Bill of Particulars, Marton states that the accident occurred on the east side sidewalk of York where it intersects with East 64th Street. Marton was deposed and asked questions about the accident. She testified at her EBT that the accident occurred on 64th street where there is grating and a driveway. She was walking on the sidewalk when her left leg "got caught on something and then I fell." After she fell, she noticed "an iron piece or cover and one side was sticking out or was higher, higher up than the other side." Marton was shown color photographs of the area where she fell and asked to describe "exactly what it as about the metal, the iron...that was raised." Although she identified the photographs as being accurate depiction of the general area where the accident took place, she stated they did not show what she fell on because she did not see the piece of iron sticking out in it. When

asked to verbally describe the area where she fell, Marton responded that it was where the two iron pieces met, "one of them was higher than the other one." When asked to estimate the how high the one piece was relative to the other piece, she indicated a height with her fingers and stated, "I don't know exactly." Her attorney stated Marton's gesture approximated the difference as 1 ½ inches and Marton agreed.

Rockefeller's motion for summary judgment is based upon arguments that it did not own nor control the grate, it did not cause or create the dangerous condition alleged, it did not make a special use of the grate and, in any event, the defect is trivial and non-actionable as a matter of law. Rockefeller relies on the EBT testimony of Alexander Kogan, Rockefeller's Associate Vice President of Plant Operations and Housing. Kogan testified that the opening of that "grate that hinges, the one I described as hinged" effects Rockefeller's ability to accept deliveries. He also stated that "It is one thing if they need to go in for a few minutes. If it is going to be a couple of days of work, it has to be coordinated..." because the driveway is "critical" to Rockefeller's "whole campus operation." Kogan stated that after he was notified of the accident, he examined the area where plaintiff fell. This was either the same day or the next day. He also examined security video to pinpoint where Marton fell. When he examined the grate, he noticed "definitely some deflection" in one corner of the grate and it "definitely was not level with the sidewalk..." He estimated the deflection was "by memory and guess, maybe half an inch."

Con Ed admits ownership of the grate in its answer and in a written stipulation so-ordered on December 1, 2011: "[Con Ed] admits ownership, operation an a duty (pursuant to NYC Admin Code) to maintain the grate/cover shown In [Rockefeller's]

3/3/11 response," referring to photographs taken by Kogan on his cell phone. These are the same photographs, marked as Defendant's Exhibits A through D, that Marton was asked to examine during her deposition.

Despite admitting ownership of the grate and a duty to maintain it, Con Ed argues that Marton could not identify in those photographs exactly where she fell and, therefore, Marton cannot prove that the grating was defective. Con Ed also claims it did not have notice of a defective condition, citing the deposition testimony of Patrick Keoh. Keoh is employed by Con Ed as a Specialist. His duties including doing record searches and testifying about the results of his searches. He is charged with searching for all opening tickets, DOT permits, paving orders, corrective action requests, notices of violations and emergency control tickets. Keoh testified that there an opening at the easterly intersection of York and 64th Street, but found no notation that work was performed to any grate in that area, nor did he locate any complaint about a misleveled grating thereat.

Marton separately opposes each of these motions. Marton contends that although the grate is owned by defendant Con Ed, it is located in a portion of the sidewalk/ driveway abutting property owned by defendant Rockefeller. Despite claims by Rockefeller that it never controlled the grate, nor had exclusive use of it and is not liable to plaintiff, Marton contends Rockefeller made a special use of the sidewalk, unrelated to its public use. The claimed "special use" is twofold: the grate encloses transformers and other equipment that supply power to the campus and the grate is in Rockefeller's driveway where Rockefeller accepts deliveries.

Marton cites testimony by Kogan that she claims shows Rockefeller derives a

benefit by having the grate where it is located and, therefore, by making use of it, has assumed a duty to keep it in a reasonably safe condition. She points to Kogan's testimony that the grate is Con Ed's connection "between the stuff on York Avenue and what is on campus" and that he acknowledged the driveway entrance where the grate is located is "our main entrance, it is the entrance that is predominately used for deliveries." He also testified that Con Ed notifies Rockefeller when it has to do any kind of work along the street and that the "grate is kind of in no man's land." On various occasions, Kogan and Con Ed have been in contact by email to coordinate work in the driveway. Thus, according to Marton, this raises triable issues whether Rockefeller exercises substantial control over the grate sufficient to deny its motion for summary judgment.

With respect to Con Ed's motion, Marton states that Con Ed is responsible for the grate and has admitted such responsibility. According to Marton, the documents Con Ed has provided regarding its searches about complaints, work orders, etc., are inconclusive as to whether Con Ed conducted an inspection sufficient to satisfy its duty to maintain and inspect its grates.

Discussion

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (Perez v. Bronx Park South, 285 AD2d 402 [1st Dept 2001]). This duty includes the sidewalk abutting its property (New York City Admin Code § 7-210; Vucetovic v. Epsom Downs, Inc, 2006 WL 4804734, 2006 N.Y. Slip Op. 30210(U) [N.Y.Sup. Sep 18, 2006] *aff'd* Vucetovic v. Epsom Downs, Inc., 45 A.D.3d 28 *aff'd* Vucetovic v. Epsom

Downs, Inc., 10 NY3d 517 [2008]).

Pursuant to Admin Code § 7-210, frequently referred to as the "sidewalk law," a landowner has the nondelegable duty to maintain the sidewalk abutting its property. Violation of the sidewalk law is, for tort purposes, "evidence of negligence" against the abutting property owner (Elliot v. City of New York, 95 NY2d 730 [2001]). To prevail on its motion for summary judgment, Rockefeller must prove that as a matter of law, section 7-210 of the Administrative Code does not apply to the facts of this case (see, Vucetovic v. Epsom Downs, Inc., 10 NY3d 517 [2008]).

34 RCNY § 2-09 [f][1] provides, in relevant part, as follows:

> **Property owners' responsibility.**
> Property owners shall, at their own cost, install, repave, reconstruct and maintain in good repair, at all times, the sidewalk abutting their properties, including, but not limited to the intersection quadrant for corner property, in accordance with the specifications of the Department. Upon failure of a property owner to install, repave, reconstruct or repair the sidewalk pursuant to a Notice of Violation issued by the Department after an inspection, the Department may perform the work or cause it to be performed and shall bill the property owner pursuant to § 19-152 of the New York City Administrative Code...

34 RCNY § 2-07 governs sidewalk grates, placing the responsibility for their maintenance and repair on the owner of such cover or grating. Furthermore, section 2-07[b][1] also requires that the owner of such grates monitor the "condition of the covers or gratings and the area extending twelve [12] inches outward from the perimeter of the hardware."

34 RCNY § 2-07 addresses "Underground Street Access Covers, Transformer Vault Covers and Gratings." 34 RCNY § 2-07 [b][1] provides, in relevant part, as

follows:

> (b) Maintenance requirements. (1) The 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.

34 RCNY § 2-07[b] [2] also 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 [12] inches outward from the perimeter of the cover or grating."

Although Admin Code § 7-210 generally imposes liability for injuries resulting from negligent sidewalk repair on the abutting property owners, 34 RCNY § 2-07 places the responsibility for the upkeep and maintenance of a sidewalk grate on the owner of the grate (Storper v. Kobe Club, 76 AD3d 426, 427 [1st Dept 2010]; Hurley v. Related Management Co., 74 AD3d 648 [1st Dept 2010]). Thus, where as here, Con Edison owns the grate covering the vaults below which supply power, Con Edison is responsible for replacing or repairing any cover or grating found to be defective. The sidewalk law does not supplant the provisions of 34 RCNY § 2-07 or the statutory obligations of grate owner to maintain its property (i.e. a grating or grate cover) (Storper v. Kobe Club, *supra*).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 NY2d 1065

[1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Con Ed asserts that Marton could not pinpoint the defect she fell on in the photographs that were taken by Kogan on his cell phone. This argument is unavailing. Even Kogan acknowledged that the photographs marked as Plaintiff's Exhibit 1 through 16 were much clearer than his photographs because they were "better quality." Thus, the EBT testimony that Con Ed relies on is taken out of context and completely ignores Marton's other testimony describing the claimed defect in detail.

Con Ed argues that it has no record of complaints about the grate in the five (5) years preceding Marton's accident. Although 34 RCNY § 2-07[b][1] obligates Con Ed to maintain the grate, it is only responsible for any defect if it created the condition or had prior notice (actual or constructive) of the condition (Distanza v. City of New York, 47 AD3d 535 [1st Dept 2008]). Keogh testified on behalf of Con Ed that he is "not sure" whether Con Ed performed any inspection of the grate, other than in connection with a complaint or when work involving the grate was required. There is documentation, however, that Con Ed did work in the area where plaintiff claims to have fallen within two (2) years prior to the accident. Plaintiff claims that this included work on the grates. There is, therefore, an issue of fact on notice which precludes the grant of summary judgment (Hurley v. Related Management Co., 74 A.D.3d 648 [1st Dept. 2010]).

Rockefeller has, however, proved it is entitled to summary judgment in its favor for the following reasons. The area where Marton fell is not part of the sidewalk, as that term is defined under Admin Code § 7-210. Rockefeller has proved that Con Ed is

responsible for monitoring and maintaining the sidewalk grate, based upon the requirements of 34 RCNY § 2-07 et seq. That regulation also provides that such responsibilities encompass the area "extending twelve [12] inches outward from the perimeter of the hardware." Thus, Rockefeller had no duty to maintain the grates upon which plaintiff fell.

In opposition, Marton raises the issue of whether Rockefeller made a special use of the sidewalk, deriving a special benefit from the sidewalk grate, thereby assuming a duty on its part to keep it in a reasonably safe condition. The "special use" doctrine "applies when, among other things, a structure erected on public land has the effect of causing an adjoining private property to derive a special benefit from that land (Petty v. Dupont, 77 A.D.3d 466, 468 [1st Dept 2010] internal citations omitted). In that situation, the party benefitting from the special use is required to maintain the property so used in a reasonably safe condition to avoid injury to others (Petty v. Dupont, supra). This is true, regardless of whether the private landowner installed the structure or simply took advantage of it (*Id.*) An important consideration is whether the landowner has "express or implied access to, and control of" the instrumentality giving rise to the duty (*Id.*)

Although Rockefeller's delivery trucks rolled over the area where Con Ed's grate is located, Marton has failed to show how Rockefeller derived a special benefit from having the grate in the path of its driveway. Kogan testified to the difficulties posed by having the Con Ed grates in Rockefeller's driveway and that they are bothersome. The opening and closing of such grates by Con Ed requires that Rockefeller coordinate with Con Ed, not because Rockefeller controls them, but because once the gates are opened, they are not easy to close and interfere with deliveries to the campus.

Deliveries have to be suspended while the grates are opened because trucks cannot get by.

Marton's separate argument, that the substation powers the campus, suggests that the transformers only serve the campus. There is absolutely no evidence of this. The transformers provide power to an entire community. Therefore, Rockefeller has also proved it did not make a special use of Con Ed's grate either because it is in its driveway or the grate was installed to protect transformers that exclusively serve the campus.

Marton argues that Rockefeller's motion must be denied because Rockefeller has not shown the condition she fell on is "trivial" and, therefore, inactionable as a matter of law. Admin Code § 7–210, however, does not impose liability upon a property owner for failure to maintain a sidewalk grate in a reasonably safe condition. Not only is Con Ed responsible for maintaining, repairing, etc the grate, Con Ed is also responsible for the 12 inch area extending from the perimeter of its grate (Hurley v. Related Management Co., 74 AD3d at 649). Marton's claim is that the grate was misleveled with the sidewalk. No claim is made that there was some defect in the flagstone beyond the area that Con Ed is responsible for. Rockefeller has not only proved it is not responsible for the grate (Hurley v. Related Management Co., supra; See also Breland v. Bayridge Air Rights, Inc., 65 AD3d 559 [2nd Dept 2009]), no issue is raised that the defect alleged was on the sidewalk Rockefeller is obligated to maintain under Admin Code § 7-210. Under these circumstances, the issue of whether the deflection or misleveling is a "trivial" defect does not have to be decided by the court on Rockefeller's motion because it is academic. Rockefeller has met its burden of showing

it is entitled to summary judgment, therefore its motion is granted and the complaint and all cross claims against it are dismissed.

Conclusion

Although untimely, Con Ed has shown good cause for why its motion was brought late and has been considered on the merits. For the reasons stated above, however, the motion is denied. There are issues of fact regarding notice that must be tried.

Rockefeller, however, has met its burden and its motion for summary judgment, dismissing the complaint and all cross claims against it is granted. Since Rockefeller's cross claims against Con Ed relate to Marton's complaint against it which have been dismissed as a result of this decision and order, those cross claims are severed and dismissed as well. The remaining claims to be tried are solely those asserted by Marton against Con Ed.

This case is ready for trial since the Note of Issue was filed. Marton shall serve the Office of Trial Support with a copy of this decision and order so the case can be scheduled for trial.

In accordance with the foregoing,

It is hereby

ORDERED that the clerk shall enter judgment in favor of defendant Rockefeller University dismissing the complaint and all cross claims against it; Rockefeller's cross claims against co-defendant Consolidated Edison Company of New York, Inc. are dismissed as well; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
September 4, 2012

So Ordered:

Hon. Judith J. Gische, JSC