Colton v Lenox Hill Hosp. & Consol. Edison Co. of N.Y.
2015 NY Slip Op 32087(U)
August 31, 2015
Supreme Court, New York County
Docket Number: 112578/09
Judge: Richard F. Braun
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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. RICHARD F. BRAUN J.S.C.
Justice

PART 23

CULTON, MARY

-v-

NEW YORK CITY TRANSIT, et al.

INDEX NO. 112578/09
MOTION DATE 7/2/15
MOTION SEQ. NO. 005

The following papers, numbered 1 to 3, were read on this motion to/for SJ DISMISSING Complaint

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits | No(s). 1

Answering Affidavits — Exhibits | No(s). 2

Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this motion is granted to the extent of awarding defendant Lenox Hill Hospital summary judgment dismissing the plaintiff's causes of action and all cross-claims against that defendant, and it is further

ORDERED that the Clerk shall enter judgment accordingly, and the remaining claims are severed and shall continue.

This constitutes the decision and order of ~~this Court~~. See separate Opinion.

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

Dated: New York, New York, August 28, 2015

ENTER: [signature], J.S.C.

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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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MARY COLTON   Index No. 112578?09

<u>OPINION</u>

v

LENOX HILL HOSPITAL & CONSOLIDATED EDISON COMPANY OF NEW YORK

-- X

FILED
SEP - 3 2015
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NEW YORK

RICHARD F. BRAUN, J.:

This is a personal injury action arising out of a trip and fall on an allegedly defective utility grate in a sidewalk adjacent to Lenox Hill Hospital (hereinafter LHH).[1] Plaintiff Mary Colton testified that the grate moved and wobbled when she stepped on it causing her to lose her balance and fall. Defendant LHH moves for summary judgment dismissing the complaint and all cross claims against it contending that co-defendant Consolidated Edison Company of New York (Con Ed) admits to owning the sidewalk vault and that Con Ed is solely responsible for any defect in the grate.

A party moving for summary judgment must demonstrate that there are no disputed issues of fact and that he, she, or it is entitled to judgment as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]; *see Gammons v City of New York*, 24 NY3d 562, 569 [2014]). To defeat summary

[1]New York City Transit Authority and The City of New York were granted summary judgment dismissing the claims against them by Orders, dated September 29, 2014 and February 24, 2015 respectively, and the claims against Keyspan Energy Corporation and National Grid Utility Services, LLC were discontinued.

judgment, the party opposing the motion has to show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]; *see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014]).

Movant has established its prima facie entitlement to summary judgment. Movant has shown that the alleged defective condition was a sidewalk grate owned and controlled by Con Ed. In its October 1, 2013 verified reply to plaintiff's notice to admit, Con Ed admitted that it owned and maintained the sidewalk grate that is alleged to have caused plaintiff's accident. In addition, a Con Ed witness viewing a photograph acknowledged that it looked like a Con Ed vault with a grate on top, while LHH's director of engineering testified that to his knowledge LHH does not own any subsurface vaults in the 77th Street sidewalk and that the subject metal grate is above a subsurface Con Ed vault with electrical equipment. Finally, Con Ed's witness testified that the subject vault was cleaned by Con Ed two weeks before plaintiff's accident, and that the grate would have been opened and inspected at that time.

Under 34 RCNY 2-07(b)(1) and (2), an owner of a vault is charged with maintaining its sidewalk grate and correcting any defect therein. Administrative Code 7-210 imposes no liability on the property owner under such circumstances (*see Lewis v City of New York*, 89 AD3d 410, 411 [1st Dept 2011] ["Con Edison had exclusive maintenance responsibility over the grate ..., which included the alleged sidewalk defect that caused plaintiff's fall. Accordingly, only Con Edison, and not defendants-appellants, may be liable for plaintiff's injuries"]). Indeed, the First Department held in *Hurley v Related Mgt. Co.* (74 AD3d 648, 649 [1st Dept 2010]):

> Rules of New York City Department of Transportation Highway (34 RCNY) § 2-07), which governs the maintenance and repair of sidewalk grates, places maintenance and repair responsibilities on the owners of covers or gratings....
> ... § 7-210 of the Administrative Code of the City of New York does not impose liability upon a property owner for failure to maintain a sidewalk grate in a reasonably safe condition. Defendants ... have 'established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not have exclusive access to, or the ability to exercise control over, the grate on which . . . plaintiff allegedly [slipped] and fell' *(Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560 [2009]).

Plaintiff has failed to raise an issue of fact to the contrary, and Con Ed does not oppose the motion. LHH's witness's inconclusive testimony that "I'm not sure. I'm thinking of one small grate up towards the corner that may be owned by us, but I'm not sure if it is" is not enough to raise an issue of fact in the face of the clear admission by Con Ed of ownership and control of the vault identified as the location where plaintiff fell and other evidence to that effect. Likewise, building permits seemingly listing LHH as the owner in connection with construction of a vault for Con Ed equipment in 2013 without linking that work to the vault where plaintiff fell in June 2008 are inadequate to raise an issue of fact. Indeed, LHH"s witness placed that new vault to the east of the location where plaintiff fell, and testified that it was his understanding that Con Ed owns the vaults and is responsible for maintaining them.

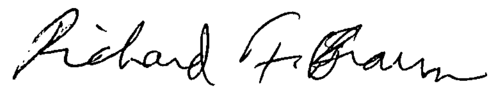
Plaintiff offers only speculation that "LENOX HILL may well have created said gap during the initial installation of the subsurface vault." Also, the fact that LHH"s witness testified that he would notify Con Ed of a defect observed in a sidewalk grate, or that he would put caution tape or stanchions around a dangerous condition does not raise an issue of fact as to LHH's duty to maintain or repair the vault or sidewalk grates. Finally, Con Ed, not LHH, put the sidewalk to a special use (*see Ausderan v City of New York*, 219 AD2d 562, 563 [1st Dept 1995]).

Accordingly, by separate decision and order of this date, defendant LHH was granted

summary judgment dismissing plaintiff's causes of action and all cross claims against movant.

This constitutes the opinion of this court.

Dated: New York, New York
August 31, 2015



RICHARD F. BRAUN, J.S.C.

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