Berg v Consolidated Edison of N.Y.
2015 NY Slip Op 32251(U)
November 24, 2015
Supreme Court, New York County
Docket Number: 156431/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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TOSHIKO BERG,

Plaintiff,

Index No. 156431/2013

-against-

DECISION/ORDER

CONSOLIDATED EDISON OF NEW YORK, 316 WEST 90 STREET OWNERS' CORP., and FRANK BRUSCO MAINTENANCE, LLC,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on the sidewalk in front of a building located at 316 West 90th Street, New York, New York (the "building"). Defendant 316 West 90th Street Owners' Corp. ("Owners' Corp.") now moves for summary judgment dismissing plaintiff's complaint and granting its cross-claim for common law indemnification against co-defendant Consolidated Edison of New York ("Con Ed"). For the reasons set forth below, defendant's motion is denied.

The relevant facts are as follows. On the night of May 10, 2011, plaintiff was walking on the sidewalk located in front of the building when she tripped and fell (the "accident"). Specifically, plaintiff alleges that she tripped on a shunt board on the sidewalk. Defendant Con

Ed had placed the board on the sidewalk to temporarily cover electrical cables, or "shunts," being used to restore electricity to the building. The building that abutted the sidewalk where the accident occurred was owned by defendant Owners' Corp. Photographs taken of the area reveal that the shunt board was placed near a hole in the street. The photographs show that the hole was barricaded and marked with orange traffic cones, but the shunt board on the sidewalk did not appear to be either barricaded or marked. A photograph taken of the area at night shows illumination of at least part of the sidewalk in front of the building, but it is not clear from the photograph whether the entire shunt board, including the transitions between the surface of the sidewalk and the shunt board, was illuminated. Plaintiff had walked on the area of the sidewalk where the shunt board was located on at least one other occasion without incident, although she claims that she did not recall seeing the shunt board before the accident.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

The court first considers defendant's motion for summary judgment dismissing plaintiff's complaint as against it on the ground that it owed no duty of care to plaintiff. It is well established that in order for a defendant to be held liable for negligence, the plaintiff must

establish that the defendant owes some duty of care to the plaintiff. *See Pulka v. Edelman*, 40 N.Y.2d 781 (1976); *see also Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 339, 342 (1928). "[A]bsent such duty, as we have said before, there can be no breach of duty, and without breach of duty there can be no liability." *Kimbar v. Estis*, 1 N.Y.2d 399, 405 (1956). There are two ways in which building owners may owe a duty to plaintiffs who are allegedly injured by sidewalk defects. Building owners owe a nondelegable duty to maintain abutting sidewalks in a "reasonably safe condition" pursuant to § 7-210 of the Administrative Code of the City of New York. Building owners also owe a duty of care when they make special use of a sidewalk. *Ascencio v. New York City Housing Authority*, 77 A.D.3d 592, 593 (1st Dept 2010) (citing *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517 (2008)).

In *Cook v. Consolidated Edison Co. of N.Y., Inc.*, 51 A.D.3d 447 (1st Dept 2008), where the plaintiff tripped in the gap between two Con Ed shunt boards, the First Department held that the owner of the abutting building was "under a statutory nondelegable duty to maintain the sidewalk" where the shunt boards were placed pursuant to NYCAC § 7-210 and that an issue of fact also existed as to whether the placement of the shunt boards constituted a special use of the sidewalk by the owner. *Id.* at 448. The First Department again held that an issue of fact existed as to whether the placement of the shunt board constituted a special use of the sidewalk by a building owner in *Eliassian v. Consolidated Edison Co. of N.Y., Inc.*, 300 A.D.2d 51 (1st Dept 2002). In the present case, as in *Cook* and *Eliassian*, defendant is not entitled to summary judgment dismissing plaintiff's complaint because an issue of fact exists as to whether defendant breached its duty of care with regard to the maintenance of the shunt board pursuant to NYCAC § 7-210 or the "special use" doctrine.

Defendant's argument that it had no duty with regard to maintaining the shunt board because it had no control over the shunt board is without merit. The First Department specifically addressed this argument in *Doyley v. Steiner*, 107 A.D.3d 517 (1st Dept 2013), holding that building owners have enough control over shunts to be held liable for their negligence in maintaining shunts and the sidewalks where shunts are placed. In *Doyley*, the First Department held that shunts, the electrical cables that shunt boards are designed to temporarily cover, were not "electrical equipment" or "electrical apparatus" and therefore were not governed by 34 RCNY 2-20(a)(2), which prohibits unauthorized persons from repairing or working within three feet of electrical equipment, or 34 RCNY 2-20(a)(7), which prohibits unauthorized persons from interfering with electrical apparatus. *Doyley*, 107 A.D.3d at 518-19. Moreover, the court held that 34 RCNY 2-20(b)(7) and 2-05(d)(17), which require shunts to be protected and ramped, do not give utilities "exclusive control over sidewalk shunts." *Id.* The court further held that even if these rules applied, "nothing in the rules appears to have prohibited the property owners from taking steps to warn pedestrians about the hazards posed by the shunts in a manner that did not involve working within three feet of them or 'interfering' with them in any respect." *Id.* at 519. Just as in *Doyley*, defendant's argument that it had no control over the shunt board and therefore no duty with regard to maintaining the shunt board is without merit.

The court next considers defendant's motion for summary judgment dismissing plaintiff's complaint in its entirety on the ground that the condition was open and obvious and not inherently dangerous. Building owners have no duty to protect or warn "where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous." *Boyd v. New York City Housing Authority*, 105 A.D.3d 542, 543 (1st Dept 2013). The issue of

whether a condition is open and obvious is generally a question for the jury to decide. *Schulman v. Old Navy/The Gap, Inc.*, 45 A.D.3d 475, 476 (1st Dept 2007). In the present case, defendant has failed to establish through its submitted evidence that the shunt board was open and obvious and not inherently dangerous as a matter of law.

The court next considers defendant's motion for summary judgment on its cross-claim for common law indemnification against co-defendant Con Ed. To establish a right to common law indemnification, "a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." *Naughton v. City of New York*, 94 A.D.3d 1, 4 (1st Dept 2012). Defendant's motion is denied as premature because defendant may be found liable, if at all, either vicariously pursuant to NYCAC § 7-210 or for its own negligence pursuant to the "special use" doctrine, and therefore the court cannot yet determine whether defendant is entitled to common law indemnification.

Accordingly, defendant 316 West 90 Street Owners' Corp.'s motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 11/24/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.