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

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ELLEN COHEN,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY TRANSIT AUTHORITY (MABSTOA), METROPOLITAN TRANSPORTATION AUTHORITY, SAXON TOWERS OWNERS, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY COMPANY (LTD), VERIZON NEW YORK, INC., WALLACK MANAGEMENT CO., INC., and HOFFMAN MANAGEMENT CORPORATION,

Defendants.

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DECISION/ORDER

Index No. 154822/15
Seq. No. 006

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED	1-2 (Exs. A-K)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants, Empire City Subway Company (Limited) i/s/h/a Empire City Subway Company (LTD) (hereinafter "Empire City") and Verizon New York Inc. (hereinafter "Verizon"), move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing all claims and cross claims against them. The motion is unopposed. After reviewing the motion papers, and after considering the relevant statutes and case law, the motion is **granted**.

Factual and Procedural Background:

Plaintiff Ellen Cohen seeks to recover monetary damages for injuries she allegedly sustained on May 28, 2014, while a pedestrian on a public sidewalk in front of the premises known as 1471 Third Avenue, New York, New York. At her 50-h hearing in this matter in March of 2015, plaintiff testified that her accident occurred on the sidewalk of Third Avenue between East 83rd and East 84th Streets. Ex. D, at pp. 12-13.[1] At the time of the alleged incident, plaintiff was walking northbound on the east side of Third Avenue when she tripped on an approximately one-inch gap between two adjoining sidewalk grates. Ex. D, at pp. 15-16, 20-23.

Plaintiff commenced the instant action against defendants the City of New York, the City of New York Department of Transportation, the New York City Transit Authority (MABSTOA), the Metropolitan Transportation Authority, Saxon Towers Owners, Inc., Consolidated Edison Company of New York, Inc., Wallack Management Co., Hoffman Management Corporation, ECS, and Verizon on May 13, 2015. Ex. A. In her complaint, plaintiff alleged, inter alia, that her injuries were caused as a result of the negligence of ECS and Verizon. Ex. A.

ECS and Verizon joined issue by service of their verified answer on or about July 2, 2015. Ex. B. The remaining defendants joined issue by service of their respective answers, in which they asserted cross claims against ECS and Verizon. Ex. B; NYSCEF Doc. No. 59.

On or about September 15, 2015, plaintiff served a notice to admit on all defendants. Ex. H. In the notice to admit, plaintiff demanded admissions as to whether ECS and/or Verizon "owned", "leased", "installed", and/or "supervised" the grate on which she tripped on or before May 28, 2014 (Ex. H, at pars. 31-40) and ECS and Verizon denied these allegations. Ex. I.

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[1]Unless otherwise noted, all references are to the exhibits submitted in support of the motion.

On or about October 21, 2015, defendant New York City Transit Authority (MABSTOA) and Metropolitan Transportation Authority served a notice to admit on defendant Consolidated Edison Company of New York, Inc., in response to which the latter admitted that it "owns and maintains a vault grating on the sidewalk in front of 1471 Third Avenue in Manhattan." Exs. J and K.

On June 22, 2016, ECS and Verizon filed the instant motion for summary judgment seeking dismissal of all claims and cross claims against them. NYSCEF Doc. No. 111. In support of the motion, ECS and Verizon submit the verified complaint; the parties' answers (except for the answer of defendants New York City Transit Authority [MABSTOA] and Metropolitan Transportation Authority, which this Court has reviewed as part of the court record [NYSCEF Doc. No. 59]); plaintiff's notices of claim; plaintiff's 50-h hearing testimony; permits; notices to admit and responses thereto; and affidavits of Daniel Tergeson of ECS and Nai J. Zhang of Verizon.

In his affidavit, Tergesen, a construction manager for ECS, states that, although ECS had a job in the vicinity of where plaintiff was allegedly injured, the job, ECS job number 133908SF, was to assist Verizon with a subsidiary cable failure and Verizon neither performed physical work at the location nor supervised the work. Ex. E.

According to Tergesen, two permits were taken out by ECS for job number 133908SF. Ex. E. No work was performed under the first permit (Ex. F), which was for work on Third Avenue between East 83rd and East 84th Streets. Ex. E. The second permit (Ex. F) was solely for work performed within the intersection of Third Avenue and East 83rd Street and did not involve the sidewalk on Third Avenue between East 83rd and East 84th Streets. Ex. E. Tergesen further represented that ECS did not "own, operate or control" the grating which plaintiff identified in photographs (Ex. C) as the area of the alleged incident. Ex. E.

Zhang, a network engineer for Verizon, states in his affidavit that, on or about April 10, 2012, Verizon submitted to ECS a request for work due to a cable failure on Third Avenue between 83rd and 84th Streets. Ex. G. ECS in turn requested permits (Ex. F) from the City of New York. Ex. G. Verizon did not perform any work pursuant to the permits. Ex. G. Additionally, Zhang reviewed the photographs of the grating which, plaintiff alleged, caused her accident (Ex. C) and he stated that Verizon did not own the same. Ex. G.

Position of ECS and Verizon:

ECS and Verizon argue that, since there is no evidence that they created the condition that allegedly caused plaintiff's accident, and no evidence that they owned or had a duty to maintain the grating, they are entitled to summary judgment in their favor dismissing all claims and cross claims against them.

Conclusions of Law:

"The proponent of a summary judgment motion 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 A.D.3d 303, 306 (1st Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1989); *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 (1st Dept. 2008).

ECS and Verizon have submitted documentary proof which establishes their prima facie entitlement to summary judgment as a matter of law. Specifically, ECS and Verizon represented in

thier response to plaintiff's notice to admit (Ex. H) that they did not own or control the grating in question on or prior to the date of the alleged incident. Ex. I. Indeed, Consolidated Edison Company of New York, Inc. represented in its response to a notice to admit served by defendants New York City Transit Authority (MABSTOA) and Metropolitan Transportation Authority (Ex. J) that it owned and maintained the grate (Ex. K).

Further, Tergersen stated in his affidavit that Verizon did no physical work in the area of the grate and that ECS did not "own, operate or control" the grating which plaintiff identified in photographs (Ex. C) as the area of the alleged incident. Ex. E. He further averred that the only work performed by ECS in the area was within the intersection of Third Avenue and East 83rd Street and did not involve the sidewalk on Third Avenue between East 83rd and East 84th Streets where the alleged incident occurred. Ex. E.

Finally, Zhang stated that Verizon neither owned, nor did any work in the vicinity of, the grating. Ex. G.

Since neither plaintiff nor any co-defendant of ECS and Verizon has opposed this motion, they have clearly failed to raise a triable issue of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1989).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants Empire City Subway Company (Limited) i/s/h/a Empire City Subway Company (LTD) and Verizon New York, Inc. is granted; and the complaint and any cross-claims are hereby severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further,

ORDERED that defendants Empire City Subway Company (Limited) i/s/h/a Empire City Subway Company (LTD) and Verizon New York, Inc. shall serve a copy of this order, with notice of entry, on plaintiff and co-defendants and on the Trial Support Office at 60 Centre Street, Room 158 within 30 days of the date of this order; and it is further,

ORDERED that the caption shall now read as follows:

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ELLEN COHEN,

Plaintiff,

-against- Index No. 154822/15

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY TRANSIT AUTHORITY (MABSTOA), METROPOLITAN TRANSPORTATION AUTHORITY, SAXON TOWERS OWNERS, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., WALLACK MANAGEMENT CO., INC., and HOFFMAN MANAGEMENT CORPORATION,

Defendants.
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and it is further,

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

DATED: October 26, 2016

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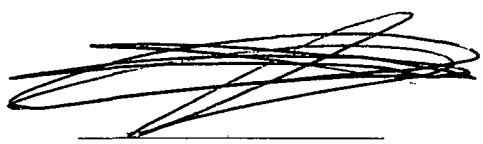

Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT