SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 156191/2016

STANLEY DENKER,

Plaintiff,

MOTION SEQ. NO. 002

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, THE CITY OF NEW YORK, 377 ACQUISITION COMPANY, RS COMMERCIAL POWELL, L.P., and SPI COMMERCIAL POWELL, L.P.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73

were read on this motion to/for JUDGMENT - SUMMARY.

In this trip and fall action commenced by plaintiff Stanley Denker, defendants 377 ACQUISITION COMPANY 1, LLC and 377 ACQUISITION COMPANY 2, LLC i/s/h/a 377 ACQUISTION COMPANY, RS COMMERCIAL POWELL, L.P., and SPI COMMERCIAL POWELL, L.P. move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on April 2, 2016 in which plaintiff allegedly tripped and fell on a manhole cover while walking on a sidewalk on East 33rd Street near the corner of First Avenue in Manhattan. The building adjacent to the location where plaintiff fell was owned

by 377 ACQUISITION COMPANY 1, LLC, 377 ACQUISITION COMPANY 2, LLC, RS COMMERCIAL POWELL, L.P, and SPI COMMERCIAL POWELL, L.P. (collectively "movants") as tenants in common. Defendant Consolidated Edison Company of New York, Inc. ("Con Ed") owned and maintained the manhole cover.

Plaintiff commenced the captioned action by filing a summons and complaint against Con Ed and the City of New York ("the City") on July 26, 2016. Doc. 1. Con Ed joined issue by its answer filed August 18, 2016. Doc. 4. On or about December 8, 2016, plaintiff filed an amended complaint naming movants as additional defendants. Docs. 9-10. Con Ed answered the amended complaint on or about December 22, 2016 asserting, inter alia, cross claims against the City and movants for contribution and common-law indemnification. Doc. 15. Movants joined issue by their answer to the amended complaint filed March 30, 2017. Doc. 27. In their answer, movants denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed against Con Ed and the City for contribution and contractual indemnification. Doc. 27.

In his bill of particulars against movants, plaintiff alleged that the incident occurred on the sidewalk adjacent to 377 East 33rd Street in Manhattan ("the premises") and was caused by the negligence of movants in their "ownership, possession, operation, maintenance, management, inspection, control and repair" of the sidewalk. Doc. 65. Plaintiff further alleged that movants had actual and constructive notice of the condition. Doc. 65.

Plaintiff discontinued his claims, and Con Ed discontinued its cross claims, against the City by stipulation of discontinuance filed March 13, 2020. Doc. 58.[1]

[1] The stipulation was not executed by movants, which, as noted above, asserted a cross claim against the City for contribution and contractual indemnification. Docs. 27, 58. Although the cross claim is purportedly the basis for the alternative relief sought by movants herein, i.e., summary judgment on their cross claim for common-law indemnification, such a claim was not asserted.

At his deposition, plaintiff testified, inter alia, that the accident occurred on April 2, 2016 at approximately 8 p.m. on the sidewalk abutting 33rd Street near the corner of First Avenue. Doc. 66 at 14. At that time, plaintiff was walking towards Second Avenue to catch a bus home. Id. at 14-15, 19. Pedestrian traffic was light at the time and the accident occurred less than 100 feet from the corner of First Avenue. Id. At 16, 18. Plaintiff walked past the subject area between 15-20 times during the weeks preceding the accident but never saw the subject manhole cover before the incident. Id. at 17, 20. The accident occurred when plaintiff tripped over a manhole cover which was raised approximately one inch above the sidewalk. Id. at 18-19. During his deposition, plaintiff authenticated photographs of the manhole cover on which he tripped. Id. at 28-33.

Scott Lomenzo, a Field Operations Planner for Con Ed, appeared for a deposition on behalf of said entity. Doc. 67 at 7, 10. In his role, Lomenzo, working with the steam distribution department, planned for steam outages. Additionally, he went into the field approximately twice per month to visit job sites. Id. at 7-8. The manhole covers were made of cast iron or cast steel. Each year, Con Ed reviewed a list of structures that needed replacing and/or repair and designated such repairs or replacements as special projects. Id. at 16. If a hazard existed relating to a Con Ed manhole cover, Con Ed would send a field team member to repair it. Such hazards included manhole covers which were set too high or were loose and/or wobbly. Id. at 38. Lomenzo reviewed the photographs of the manhole exchanged by plaintiff's counsel and said he assumed it belonged to Con Ed. Doc. Id. at 41. He also confirmed that Con Ed either repaired its manhole covers or contracted out such repairs. Id. at 40-42.

Andrew Levinson appeared for deposition on behalf of movants. He testified that he was a principal of Dermot Realty Management Co., L.P., the managing agent for the premises. Doc. 68 at 7-10. Movants purchased the premises as tenants in common in February 2016, at which

time his company became managing agent of the same. Id. at 8-9, 14.[2] In his tenure as property manager, Levinson was never told about any problems with the sidewalk at the premises and did not recall seeing any uneven manhole covers. Id. at 16-17. He was not aware of any repairs made to the sidewalk in question by movants or of any "new pours" or sidewalk replacement projects undertaken by them. Id. at 23, 25.

Levinson maintained that movants were not responsible for maintaining or repairing manholes in the sidewalk. During the course of his career as a property manager, owners of manhole covers were always responsible for the maintenance thereof. Id. at 23-25. Although Levinson did not know who owned the manhole on which plaintiff tripped, he was able to identify Con Edison's name on the manhole in a photograph marked at his deposition. Id. at 26.

Plaintiff filed a note of issue on January 14, 2020. Doc. 57.

Movants now move for the relief set forth above. In support of the motion, they assert that they are entitled to summary judgment since they had no responsibility for, or connection to, the manhole in question despite the fact that it was located on a sidewalk abutting the premises. Doc. 61. Alternatively they assert that, if they are not granted summary judgment dismissing the complaint, then they are entitled to summary judgment against Con Ed on their cross claim for common law indemnification. Id.

LEGAL CONCLUSIONS:

It is well settled that the movant on 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

[2] The deed for the premises, recorded in March 2016, confirms that movants purchased the same as tenants in common. Doc. 71.

NY2d 851, 853 (1985). Such a motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as by pleadings and other proof such as affidavits, depositions and written admissions. *See* CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). If the moving party meets its burden, it becomes incumbent upon the non-moving party to establish the existence of material issues of fact. *Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*." *Vega*, 18 NY3d at 503 (internal quotation marks and citation omitted, emphasis in original).

> Pursuant to Administrative Code § 7-210, a property owner is liable for the sidewalk abutting its property, which liability is limited to "the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags." As this provision is in derogation of the common law, under which the abutting property owner was not liable for the public sidewalk, it must be strictly construed. *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 (2008).
>
> Pursuant to New York City Highway Rules, however, the responsibility to monitor manhole covers and gratings on the street remains with the owner of the cover or grating, including a surrounding twelve-inch radius. 34 RCNY § 2-07(b)(1). The Highway Rules expressly provide that the "street" includes the "sidewalk." 34 RCNY § 2-01; *Cruz v New York City Trans. Auth.*, 19 AD3d 130, 131 (1st Dept 2005). It has thus been held that an abutting property owner is not responsible for a cover or grating located on a sidewalk. *Celestin v MTA New York City Trans.*, 2009 WL 3706413 (Sup Ct, New York County 2009); *Storper v Kobe Club*, 2009 N.Y. Misc. LEXIS 5940, 2009 NY Slip Op 31397(U) (Sup Ct, New York County 2009); *Lightsy v City of New York*, 2007 NY Slip Op 33823(U) (Sup Ct NY Cty 2007).

Johns v City of NY, 2010 NY Slip Op 31062(U), *4-5 (Sup Ct, NY County 2010).

Here, Lomenzo admitted that Con Ed owned and was responsible for maintaining the manhole cover identified by plaintiff as the cause of his accident.[3] Additionally, Levinson testified that movants were not responsible for maintaining or repairing manholes in the sidewalk but that owners of manholes were responsible for maintaining them. Id. Plaintiff also testified that he fell because the manhole was raised approximately one inch. Therefore, plaintiff has established his prima facie entitlement to summary judgment. *See Hurley v Related Mgt. Co.,* 74 AD3d 648, 649 (1st Dept 2010) *citing Cruz*, 19 AD3d at 130-31.

Given that there is no opposition to the motion, no issue of fact has been raised and the motion is granted.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants 377 ACQUISITION COMPANY 1, LLC, 377 ACQUISITION COMPANY 2, LLC, RS COMMERCIAL POWELL, L.P, and SPI COMMERCIAL POWELL, L.P. is granted and the complaint and all cross claims are dismissed against them; and it is further

[3] This Court notes that, although no formally tabbed deposition exhibits were annexed to the motion, movants' counsel represents in his affirmation in support of the application that a photograph imbedded in said affirmation after paragraph 16 depicts one of the photographs marked at plaintiff's examination before trial and which plaintiff identified as the manhole over which he tripped. Doc. 61 at par. 16. Since counsel does not represent that plaintiff testified about two other photographs imbedded in his affirmation, this Court declines to consider the same in deciding this motion.

ORDERED that the said claims and cross-claims against defendants 377 ACQUISITION COMPANY 1, LLC, 377 ACQUISITION COMPANY 2, LLC, RS COMMERCIAL POWELL, L.P, and SPI COMMERCIAL POWELL, L.P. are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants 377 ACQUISITION COMPANY 1, LLC, 377 ACQUISITION COMPANY 2, LLC, RS COMMERCIAL POWELL, L.P, and SPI COMMERCIAL POWELL, L.P. dismissing the claims and cross-claims asserted against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to amend the caption to reflect the dismissal of defendants 377 ACQUISITION COMPANY 1, LLC, 377 ACQUISITION COMPANY 2, LLC, RS COMMERCIAL POWELL, L.P, and SPI COMMERCIAL POWELL, L.P.; and it is further

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

10/7/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE