

Mizrahi v Consolidated Edison Co. of N.Y., Inc.

2021 NY Slip Op 30298(U)

January 26, 2021

Supreme Court, New York County

Docket Number: 450676/2016

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. DAKOTA D. RAMSEUR, J.S.C. **PART 5**

Justice

-----X	INDEX NO.	<u>450676/2016</u>
RENEE MIZRAHI,		05/13/2020,
		07/14/2020,
Plaintiff,	MOTION DATE	<u>07/16/2020</u>
- v -	MOTION SEQ. NO.	<u>002 003 004</u>

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., THE CITY OF NEW YORK, TRIUMPH
CONSTRUCTION CORP., VALI INDUSTRIES, INC.,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 134

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 143

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

Plaintiff commenced this action for personal injury, alleging that on April 22, 2015, she fell from her bicycle when the front tire got caught on a "raised metal plate on the roadway and the broken, cracked and depressed roadway" surrounding the plate, in front of 105 West 125th street, New York, New York (NYSCEF # 96, bill of particulars at ¶¶ 5, 6).¹ In motion sequence 002, defendant Consolidated Edison (Con Ed) moves pursuant to CPLR 3212 for summary dismissal of plaintiff's complaint and all crossclaims. In motion sequence 003, defendant/third-party defendant Triumph Construction Corp. (Triumph) moves pursuant to CPLR 3212 for summary dismissal of the complaint and all crossclaims. In motion sequence 004, defendant/second third party defendant Vali Industries, Inc. (Vali) moves pursuant to CPLR 3212 for summary dismissal of the complaint and all crossclaims. Plaintiff opposes Con Ed and Triumph's motions. Con Ed partially opposes Triumph and Vali's motions. Motion sequences 002, 003, and 004 are consolidated for joint disposition. For the following reasons, and after oral

¹ Plaintiff identifies the object that allegedly caused her fall as a "metal plate." In their respective papers, each party uses a different term to identify the object. At oral argument, the parties agreed to identify the object as "service box."

argument on January 26, 2021, defendants' respective motions for summary dismissal of the complaint are granted, and the complaint and all crossclaims are dismissed.

In support of their respective motions for summary dismissal of the complaint, defendants argue that plaintiff failed to identify a defective condition on the service box she claims caused her fall. Con Ed also argues that it did not have notice of the alleged condition. Vali additionally argues that it did not perform work on the subject service box that caused plaintiff's fall. In opposition to Triumph and Vali's motions, Con Ed contends that in the event the complaint is not dismissed, its claims for indemnification against its co-defendants should not be dismissed.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its prima facie showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2D 851, 853 [1985]).

The question of "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (*Trincere v Cnty. of Suffolk*, 90 NY2d 976, 977 [1997], quoting *Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]). "Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*Trincere*, 90 NY2d 977). It is well settled that "[t]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Tineo v Parkchester South Condominium*, 304 AD2d 383 [1st Dept 2003]). In determining whether a defect is trivial in nature, the court must examine the facts of each case "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere*, 90 NY2d 978).

Here, defendants meet their prima facie burden that there was no defect in the service box by submitting plaintiff's testimony concerning the cause of her fall and photographs of the alleged defect. Plaintiff testified that the front wheel of her bicycle tire got caught on a "metal plate" in the roadway, and specifically ruled out that her tire got stuck in the pavement around the service box (NYSCEF # 111 at 32:15-17; 45:14-18). Plaintiff testified as follows:

Q. When you saw it can you describe it? What it looked like -- that you got your tire caught in?

A. I don't know. It was just a big metal plate.

Q. It wasn't any kind of cracked pavement around the plate. It was the plate itself?

A. I don't remember.

Q. It could've been pavement around the plate?

A. No, my tire got stuck in that plate.

Q. It was the actual metal plate itself?

A. Yes.

Q. It wasn't anything around the metal plate or next to the metal plate?

A. No, it was stuck in the plate.

Q. It was the plate?

A. Yes.

Q. So yes, it was the plate just to be clear?

A. Yes.

(*id.* At 46:10-47:3).

Plaintiff was also unable to specifically identify the condition on the service box that caused her to fall:

Q. Is there anything about the plate at all where your tire got stuck that you can describe besides just saying that it's the plate? Was there a hole in the plate? Any kind of issue with the plate that you recall?

A. No.

(*id.* At 47:5-10; 43:18-44:3).

The photographs depicting the subject metal service box reveal a flat surface, with joints perpendicular to the direction plaintiff was traveling when she fell, and cracked pavement surrounding the service box (NYSCEF #98). The photographs do not reveal, as alleged by plaintiff, a raised metal plate, or any "trap or major defect" on the service box (*Cintron v New York City Transit Auth.*, 77 AD3d 410, 411 [1st Dept 2010]).

In opposition, plaintiff argues that she fell because the "front tire [of her bicycle] hit the subject metal plate of the roadway" and that the photographs depict "[b]roken and missing asphalt that prevents the metal plate from being flush against the surrounding roadway, which caused the [p]laintiff's accident" (NYSCEF # 101 at 6-7). However, plaintiff's argument is not supported by her testimony. Indeed, plaintiff specifically testified that the defect was on the metal service box itself, and thus, whether there was broken concrete next to the service box is irrelevant. Plaintiff's opposition does not argue that the defect was on the service box, as plaintiff has clearly testified. Further, as discussed above, whether plaintiff was "unable to pinpoint on photographs the exact location of her fall" is not at issue (*Martinez v City of New York*, – NYS3d –, 2021 Slip Op 00261 [1st Dept 2021]). Accordingly, the complaint and crossclaims are dismissed as against all defendants.

In any event, Vali demonstrates its entitlement to dismissal of the complaint and crossclaims on the additional basis that it did not perform work on the subject service box. Vali submits the un rebutted affidavit of its president, Vincent Ali, wherein he states the company never performed, or subcontracted, any work on the subject service box (NYSCEF # 120 at ¶ 8). Con Ed's attorney's affirmation stating that "Vali performed work on the roadway adjacent to the subject building at or about the time of the incident" (NYSCEF # 135 at ¶ 11), without out citing to any supporting documents, is on its own, insufficient to demonstrate an issue of fact as

to whether Vali performed work on the subject service box (see *Zuckerman v City of New York*, 49 ny2d 557, 563 [1980]).

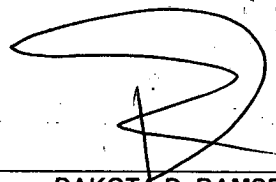
As for Con Ed's crossclaim for indemnification against Vali, "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Here, the indemnification provision relied on by Con Ed requires that Vali indemnify Con Ed for damages resulting from work connected to Vali. As discussed above, Vali did not perform work on the subject service box, and thus, the indemnification provision is not triggered. Accordingly, the complaint and crossclaims are dismissed against Vali.

Accordingly, it is hereby

ORDERED that defendants respective motions pursuant to CPLR 3212 are granted, and the complaint is dismissed as to all parties and all crossclaims are dismissed as to all parties; and it is further

ORDERED that counsel for defendant Con Ed shall serve a copy of this decision and order within ten (10) days of entry.

This constitutes the decision and order of the court.



DAKOTA D. RAMSEUR, J.S.C.

1/26/2021
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE