

**Trinidad v Verizon N.Y. Inc.**

2023 NY Slip Op 31628(U)

May 15, 2023

Supreme Court, New York County

Docket Number: Index No. 157393/2021

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 157393/2021

RESCALVO MERCENARIO TRINIDAD,

MOTION SEQ. NO. 001

Plaintiff

- v -

VERIZON NEW YORK INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK

DECISION AND ORDER ON MOTION

Defendant

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

For the reasons that follow, the motion for summary judgment by Defendant New York City Transit Authority (Transit) is granted.

Background

This personal injury matter arises of an alleged trip and fall incident on May 31, 2020 at about 8:05 p.m. at or about the intersection of Essex Street and Stanton Street in Manhattan. Plaintiff alleges that while riding a bicycle he fell to the ground by tripping on a defective roadway condition (NYSCEF Doc. #25).

As a result, Plaintiff filed a negligence action on August 6, 2021, against Defendants, VERIZON NEW YORK INC., CONSOLIDATED EDISON COMPANY OF NEW YORK (Con Ed), TRANSIT and the CITY OF NEW YORK (the City). As to Transit, Plaintiff alleges that Transit was negligent in its "ownership, operation, management, maintenance and control" of the subject roadway, and that Transit allegedly created the subject condition by negligently performing work (NYSCEF Doc. #1).

Plaintiff, in his notice of claim also alleges that the City and Transit were negligent for the roadway condition described as "obstructed, cracked, uneven, raised, depressed, missing and/or deteriorated." Although the specific location of the alleged condition is not identified (i.e. whether

the defect was east or west of the intersection, or its distance from the intersection or curb line), photos are annexed to the notice of claim which purportedly depict the condition complained of.<sup>1</sup>

Transit now moves pre-note of issue for summary judgment pursuant to CPLR §3212. Transit argues that it is not liable because it does not own, control or maintain the roadway, nor any street hardware, at the subject location. Plaintiff and Con Ed oppose.

#### *Discussion*

Pursuant to CPLR §3212 any party, in any action, including in a negligence action may move for summary judgment (CPLR §3212 [a]; *Andre v. Pomeroy*, 35 NY2d 361[1974]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party seeking summary judgment has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (*see* CPLR §3212 [b], *Alvarez*, 68 NY2d 320). Once the movant establishes this burden, the sufficiency of opposing papers will be considered (*Alvarez*, 68 NY2d 320).

Here, Transit submits Plaintiff's notice of claim with corresponding photographs, Plaintiff's transcript of the 50-hearing, and an affidavit from an associate project manager (NYSCEF Doc. #24, 25, 26, 27). In addition, Transit relies upon the New York City Charter §383 to argue that it does not own and is not in control of the subject roadway, and that it is the duty of the City to maintain the roadway, including any bus pads.

The Affidavit of Heriberto Hernandez, Associate Project (Hernandez Affidavit) (NYSCEF Doc. #27), avers that he relied upon the Plaintiff's notice of claim with the corresponding photographs to conduct a search to locate any property that may have been "owned, installed, operated, managed, controlled, maintained, repaired or used" by Transit in either the roadway or crosswalk on Essex Street near the intersection of Stanton Street.

Hernandez further states that his search, including the running of an Oasis map search for Transit property, revealed that Transit did not own any street hardware at the subject location, including any "vaults, grates, manholes or bus pads", either at the time of the accident, or at the time the search was conducted on September 29, 2022.

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<sup>1</sup> The submitted notice of claim contains a page (pg 5) following the verification that appears to pertain to a different incident as: 1) the respondents on page 5 are not the same as the rest of the notice of claim; 2) the incident appears to involve a condition at a bus stop on the BX15 line, which would not correspond to the subject accident location; and 3) the incident appears to concern a slip and fall due to a snow/ice condition, not a defective condition in the roadway. It is unclear when or how this errant page became part of the notice of claim for the subject May 31, 2020 accident. As the page appears to have nothing to do with the instant accident or motion, it has not been considered by this Court.

Upon review, Transit has established that it did not own, maintain, manage, or control the subject roadway. Further, this responsibility has routinely been held by the City and it includes areas adjacent to bus stops, as "...bus lanes, like other elements of the City's infrastructure, are the responsibility of the City and do not constitute a 'special use' by the transit defendants." (*Towbin v. City of New York*, 309 AD2d 505 [1<sup>st</sup> Dept 2003]; see *Cabrera v. City of New York*, 45 AD.3d 455 [1<sup>st</sup> Dept 2007]; *Weiters v. City of New York*, 103 AD3d 509 [1<sup>st</sup> Dept 2013]; *Gonzalez v. City of New York*, 136 AD3d 418 [1<sup>st</sup> Dept 2016]). Accordingly, Transit established a *prima facie* right to judgment as a matter of law.

In opposition, neither Plaintiff nor CON ED submit any affidavits by someone with knowledge, nor any admissible evidence that contradicts Transit's position. Both Plaintiff and CON ED argue that the motion should be denied because it is premature as there has been no discovery to date to establish which defendant owned, installed or maintained the bus pad. Yet, Plaintiff nor Con Ed submit evidence establishing that further discovery might lead to relevant evidence supporting [the] claim that Transit was responsible for maintaining the area of the alleged accident (*Cruz v. City of New York*, 135 AD3d 644 [1<sup>st</sup> Dept 2016]). Nor has either opposition shown that the evidence necessary to oppose this motion is solely in the control of Transit (see CPLR §3212[f], *Kent v. 534 E. 11th St.*, 80 AD3d 106 [1<sup>st</sup> Dept 2010]).

In addition, Con Ed's further argument that Transit may be responsible for the alleged defect due to "special use" of the bus stop, is not convincing nor supported by evidence (see *Cabrera, supra.*, citing *Shaller v. City of New York*, 41 AD3d 697 [2d Dept 2007] that held that "The City of New York, not the NYCTA, is responsible for the maintenance of bus stops within the City of New York, including the roads, curbs, and sidewalks attendant thereto"). Thus Plaintiff nor Con Ed raise a triable issue of fact warranting denial of Transit's motion (*Alvarez*, 68 NY2d 320 [1986]).

Accordingly, it is hereby

ORDERED that Defendant NEW YORK CITY TRANSIT AUTHORITY's motion for summary judgment is granted and the complaint and all cross-claims are dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Defendant NEW YORK CITY TRANSIT AUTHORITY, dismissing the claims and cross-claims, 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 action is severed and continued against the remaining Defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal against Defendant NEW YORK CITY TRANSIT AUTHORITY and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Defendant NEW YORK CITY TRANSIT AUTHORITY shall serve a copy of this order with notice of entry; and it is further

ORDERED that this action is transferred to a City Part since the New York Transit Authority is no longer a party to this action.

5/15/2023

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

HON. DENISE M. DOMINGUEZ J.S.C.