Kuhnreich v. Paragon JV Prop III LLC

Supreme Court of New York, New York County

December 9, 2025, Decided

INDEX NO. 154421/2023

Reporter
2025 N.Y. Misc. LEXIS 10058 *; 2025 NY Slip Op 34728(U) **; 2025 LX 665951

[1]** ROBERT **KUHNREICH**, Plaintiff, - v -PARAGON JV PROP III LLC, LEEDING BUILDERS GROUP LLC, C.A.C. INDUSTRIES INC., Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

asphalt, sidewalk, patch, pavement, summary judgment motion, affirmative defense, temporary, install, street, constructive notice, issue of fact, trip, partial summary judgment, trial preference, note of issue, differential, permanent, paragon, notice, vacate, moot

Judges: **[*1]** PRESENT: HON. JUDY H. KIM, Justice

Opinion by: JUDY H. KIM

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 96, 97, 98, 99, 100, 102, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 206, 208, 210, 211, 212, 223 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 128, 129, 130, 131, 139, 140, 141, 142, 143, 144, 145, 146 were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 119, 120, 121, 122, 123, 124, 125, 126, 127, 132, 133, 134, 135, 136, 137, 138 were read on this motion to/for ORDER OF PROTECTION.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, **[*2]** 167, 168, 169, 170, 171, 172, 173, 205, 207, 209, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action, plaintiff alleges that on March 27, 2023, he tripped and fell on the sidewalk near the southwest corner Broadway and 96th Street in Manhattan because of a height differential between the sidewalk and an asphalt patch on the sidewalk. As this asphalt patch resulted from work performed in connection with the development of a residential building at 2551-2555 **[**2]** Broadway, New York, NY (the "Property"), plaintiff asserts negligence claims against the owner of the Property, Paragon JV Prop III LLC ("Paragon"), and its general contractor, Leeding Builders Group LLC ("Leeding"), and subcontractor, C.A.C. Industries, Inc. ("CAC").

In motion sequence 001, plaintiff moves: (1) for partial summary judgment as to defendants' liability or, alternatively, on the issue of defendants' actual or constructive notice of the condition on which plaintiff tripped; (2) for partial summary judgment "on the issue of causation," i.e., that "the accident caused plaintiff's hip fracture and total hip replacement" (3) to dismiss various **[*3]** affirmative defenses asserted by defendants; and (4) for a trial preference (NYSCEF Doc No. 97, order to show cause). In motion sequence 002, CAC moves to vacate the note of issue and compel plaintiff to comply with certain outstanding discovery demands. In motion sequence 003, plaintiff moves to quash the Notice of Examination Before Trial and subpoena that CAC served on non-party witness Jose Escobar. In motion sequence 004, CAC moves for summary judgment dismissing the complaint and all cross-claims against it. These motions are consolidated for disposition.

FACTUAL BACKGROUND

Plaintiff's EBT Testimony

Plaintiff testified that after entering the southwest corner of Broadway and West 96th Street, his left foot tripped on a raised black asphalt patch on the sidewalk, causing him to fall (NYSCEF Doc No. 74, **Kuhnreich** EBT at 30). He testified that the asphalt patch had been present for weeks or months (*id.* at 42). He did not remember the weather conditions on the date in question, except that it was not raining (*id.* at 48). He also recalled that the ground was dry and there were no "foreign substances" on the ground (*id.* at 48-49).

[3]** *Rocky Panetta EBT*

CAC Supervisor Rocky Panetta testified **[*4]** that CAC was hired by ConEd to replace and upgrade gas main and install gas service in connection with the construction project (NYSCEF Doc No. 179, Panetta EBT at 13-15). This work involved excavating a trench, installing the pipe, making a gas connection, backfilling the trench with sand or soil, and then covering that top layer with asphalt as temporary pavement (*id.* at 22-23). The asphalt patch was used because full restoration could not be completed due to scaffolding and support expansions on the sidewalk (*id.* at 23). CAC performed its work from June 6, 2022 to July 1, 2022 (*id.* at 42). Panetta testified that Joseph Scully had inspected CAC's work and then instructed CAC to "smooth the transition" from the asphalt patch to the sidewalk (*id.* at 82-83, 100-101). Panetta further testified that CAC left the asphalt patch "flush with the surrounding area" (*id.* at 104).

Joseph Scully EBT Testimony

Joseph Scully, Leeding's Construction Manager on the project, testified that construction started in the summer of 2020 and concluded in September 2023 (NYSCEF Doc No. 177, Scully EBT at 16-17). Scully walked along the sidewalk on Broadway "almost every day" and if he noticed something that **[*5]** needed to be fixed he would make sure that the necessary repair was made by Leeding or the appropriate subcontractor (*id.* at 19-25). Scully testified that CAC opened the sidewalk at the site of plaintiff's accident to allow ConEd to install electrical and gas service (*id.* at 24-25). At the conclusion of CAC's work, in June or July of 2022, it patched the sidewalk with asphalt, at Scully's instigation (*id.* at 39, 101-102). At that time, Scully was satisfied that the asphalt was properly "feathered," meaning that the asphalt patch had been tapered so that it was "smooth," with the surrounding sidewalk (*id.* at 119).

The condition of this asphalt patch did not change between when Scully first observed it and when he left the job site (*id.* at 51).

[4]** In support of their respective motions for summary judgment, plaintiff and CAC each submitted expert affidavits. Plaintiff's expert, Scott Silberman, P.E., stated that he visited the site of plaintiff's fall on April 25, 2023, and measured the vertical grade differential of the condition that caused plaintiff to fall as over 7/8th of an inch high and with a "vertical face" that had a "rough and jagged texture" (NYSCEF Doc No. 62, Silberman aff). **[*6]** Silberman opined that this condition is a tripping hazard under Highway Rules section 2-09(f) and *Administrative Code section 19-152(a)*, concluding that

> [t]he hazardous and defective conditions ... was not only violative of the abovementioned codes, rules, standards and regulations, but ... also a deviation from good and accepted practice ... [and] that if this sidewalk was maintained as required by the above codes, rules, regulations as well as good and accepted practice a safe means of travel would have been provided to the general public, including Robert **Kuhnreich**

(*id.*).

In his affidavit, defendant's expert, Robert T. Fuchs, P.E., stated that:

> The installation of the asphalt pavement is consistent with the temporary restoration of the sidewalk following the excavation (i.e. street opening) that was performed by C.A.C. to access the underground gas utilities ... The use of asphalt as a temporary pavement is acceptable in the engineering and construction industries. For example, according to A Guide for Maintaining Pedestrian Facilities for Enhanced Safety that is published by the Federal Highway Administration (FHWA): "[Asphalt pavement is] suitable as a temporary repair. Highly recommended as a quick response corrective measure when tripping hazards **[*7]** are reported until a more permanent repair can be made."
>
> In addition, §2-11(e)(9) of the New York City Department of Transportation (DOT) Highway Rules provides that: "Temporary asphaltic pavement...(i) Immediately upon completion of the compaction of the backfill of any street opening, the permittee shall install a temporary pavement of an acceptable asphalt paving mixture not less than four inches in thickness after compaction, flush with the adjacent surfaces ...
>
> My review of street view images dated September 19 and September 21, 2022, less than three months after the work performed by C.A.C., found the edge of the asphalt pavement was feathered to provide a gradual transition with the concrete sidewalk (see Figures 3 and 4, below). The September 19 and 21, 2022 images also show the **[**5]** asphalt pavement is intact in the area where the accident occurred. Subsequent street view images dated March 26, 2023, the day prior to the accident, show the asphalt pavement along the north portion of the patch had become cracked, broken out, and missing in the area where the accident occurred, thereby creating an uneven walking surface ...
>
> The cracked, broken, and missing condition of the asphalt pavement had not developed suddenly and was caused by progressive deterioration due **[*8]** to normal wear and tear in the approximately 9 months after it was installed. Such wear and tear includes differential expansion and contraction from changes in temperature and moisture content, repeated freeze-thaw cycles during the winter of 2022-2023, along with exposure to any construction vehicles and other equipment that traversed the sidewalk to access the adjoining construction site at 250 West 96th Street. For such reasons, temporary asphalt pavement is not capable nor intended to be a long-term permanent solution ...
>
> Therefore, based upon my review and analysis of the evidence in this matter, and in conjunction with my education, experience, and training, I have determined within a reasonable degree of engineering and safety certainty that:

> a. The temporary asphalt pavement that was used by C.A.C. to patch the opening in the sidewalk progressively cracked, broke apart, and dislodged in the approximately 9 months between its installation and the date of the accident, thereby creating an uneven walking surface.
>
> b. The final permanent restoration of the sidewalk should have been performed prior to the August 2022 expiration date of the DOT permits associated with the gas work. **[*9]** However, the permanent restoration work could not be performed since the sidewalk contained numerous framing supports for sidewalk sheds that were erected in front of the underconstruction building at 250 West 96th Street, thereby precluding the replacement of the sidewalk. The party responsible for the permanent installation of the new sidewalk was Nystrom, a subcontractor engaged by Leeding Builders, and not C.A.C
>
> c. C.A.C. did not create the condition of the sidewalk that existed at the time of the accident and was not responsible for periodically inspecting or maintaining the temporary asphalt patchwork after installation. Any failure to maintain the sidewalk in a good and safe condition, including the temporary asphalt pavement, would be an omission on behalf of the adjoining property owner, general contractor, and/or other parties involved with the construction project at 250 West 96th Street.

(NYSCEF Doc No. 154, Fuchs aff [emphasis added]).

[6]** The photos referenced by Fuchs, and included in his affirmation, document that the subject asphalt patch dramatically receded between September 2022 and March 2023. On the earlier date, the patch extends well into the adjacent sidewalk flag. **[*10]** However, by March 2023, the asphalt stops at the edge of the sidewalk flag (*id.* at 4-6).

Finally, plaintiff submits the *CPLR 3101(d)* expert disclosure for CAC's expert witness, Dr. Neil Roth, who attests that on July 18, 2024 he performed an independent medical examination during which Dr. Roth:

> thoroughly examined Mr. **Kuhnreich**, as well as reviewed his medical records and diagnostic studies that were available to me. Based on my review of the above, it is my opinion Mr. **Kuhnreich** sustained a fall on March 27, 2023, in which he sustained a nondisplaced fracture of his left hip femoral neck. He was admitted at Mount Sinai Medical Morningside Campus and underwent a left total hip replacement on March 29, 2023, by Dr. David Forsh. He was treated appropriately with this surgical procedure, and subsequent inpatient rehabilitation admission. He was discharged home to outpatient physical therapy and has completely recovered from this incident from March 27, 2023.

(NYSCEF Doc No. 199, Roth aff).

DISCUSSION

CAC's Motion for Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the **[*11]** absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]* [internal citations omitted]).

[7]** CAC's motion for summary judgment is granted. "To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*Kenney v City of New York, 30 AD3d 261, 262, 817 N.Y.S.2d 264 [1st Dept 2006]* [internal citations omitted]). A contractor who has contracted to render services does not owe a third party, such as plaintiff, a duty of care unless: (1) the contracting party, in failing to exercise

reasonable care in the performance of its duties, "launches a force or instrument of harm"; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has "entirely displaced the other party's duty to maintain the premises safely" (*Medinas v MILT Holdings LLC, 131 AD3d 121, 13 N.Y.S.3d 81 [1st Dept 2015]* *quoting* *Espinal v Melville Snow Contrs., 98 NY2d 136, 140, 773 N.E.2d 485, 746 N.Y.S.2d 120 [2002]*). There is no dispute that the latter two **[*12]** conditions do not apply, and CAC has established that it did not create the alleged hazard at issue here.

Specifically, the testimony of Scully and Panetta, taken together with Fuch's affirmation and the photos referenced therein, establish that the condition which allegedly caused plaintiff's fall developed after CAC's work concluded (*see* *Fernandez v 707, Inc., 85 AD3d 539, 540-41, 926 N.Y.S.2d 408 [1st Dept 2011]* [defendant established it did not create misleveled tree well through testimony of its president that when work was completed, approximately one month before the accident, tree well was level with sidewalk and was approved by the property owner's senior project manager]; *McDaniel v City of New York, 211 AD3d 535, 536, 181 N.Y.S.3d 42 [1st Dept 2022]*). "That the asphalt eroded over time is not the exacerbation of a dangerous condition or the launching of a force or instrument of harm" (*Baxter v The City of New York*, 2009 WL 10671709 [Sup Ct, NY County 2009]).

In opposition, plaintiff has failed to raise a triable issue of fact. The Google Map image from July 2022 he submits in support of his motion for summary judgment is taken from such a distant vantage point as to be of no probative value beyond demonstrating that the asphalt patch **[**8]** was in place on that date, which is undisputed (*see* *Gogu v Gap, Inc., 180 AD3d 439, 440, 118 N.Y.S.3d 587 [1st Dept 2020]* ["The photographs that were submitted do not clearly depict the dimensions of the defect, since they were taken **[*13]** from a distance"]). By contrast, the September 21, 2022 photo included in Fuchs' establishes that that condition at issue did not exist until after that date (and therefore did not exist in July 2022, when CAC's work concluded). In short, "plaintiffs' proof does not permit a reasonably reliable inference that the defect was a consequence of defendant's allegedly negligent work rather than 'normal' ... deterioration over time" (*Cardona v City of New York, 305 AD2d 303, 759 N.Y.S.2d 323 [1st Dept 2003]* [internal citations omitted]).

Plaintiff's Motion for Summary Judgment

Plaintiff's motion for summary judgment as to CAC is denied, for the reasons set forth above. That branch of plaintiff's motion seeking partial summary judgment as to Leeding and Paragon's actual or constructive notice of the condition on which plaintiff tripped is denied. In order to provide a defendant with constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v Am. Museum of Nat. History, 67 NY2d 836, 837-38, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]* [internal citations omitted]). At present, the length of time this condition existed is unknown. As a result, it cannot be determined that this condition existed for a sufficient length of time for **[*14]** these defendants to be deemed to have had constructive notice of it. Contrary to plaintiff's claim, the fact that Scully frequently inspected the subject area is not grounds for summary judgment but creates an issue of fact for trial (*see* *Picaso v 345 E. 73 Owners Corp., 101 AD3d 511, 512, 956 N.Y.S.2d 27 [1st Dept 2012]* [defendants' motion for summary judgment denied where testimony of defendant owner's manager that he inspected stairs daily and plaintiff's testimony that defective condition **[**9]** existed for at least two weeks prior to accident left triable issue of fact as to defendants' constructive notice]).

Finally, that branch of plaintiff's motion for partial summary judgment determining that plaintiff's fall caused the injuries alleged is denied. Dr. Roth's conclusion that there was such a causal connection is based on his review of medical records that are not in evidence and therefore cannot support summary judgment (*see* *Elbagdadi v Silverman, 237 AD3d 904, 906, 232 N.Y.S.3d 545 [2d Dept 2025]*; *Vanegas-Lopez v Roland, 2013 N.Y. Misc. LEXIS 871, 2013 NY Slip Op 30447[U] [Sup Ct, Suffolk County 2013]*).

Plaintiff's Motion to Dismiss Defendants' Affirmative Defenses

Plaintiff's motion to dismiss CAC's affirmative defenses is mooted by the foregoing. Plaintiff's motion to dismiss Paragon and Leeding's second, third, sixth, seventh, eighth, and thirteenth affirmative **[*15]** defenses is granted without opposition as to the second, third, seventh, and eighth affirmative defenses. However, the motion denied as to sixth and thirteenth affirmative defenses.

As to the remaining defendants' sixth affirmative defense, that they did not cause or create the defective condition or have actual or constructive notice of it, Paragon is liable for Leeding's negligence (*Emmons v City of New York, 283 AD2d 244, 245, 725 N.Y.S.2d 29 [1st Dept 2001]* [internal citations omitted]), and whether Leeding caused or created this defect remains unresolved. Whether Leeding had actual or constructive notice of same also remains unresolved, as discussed above. As to the remaining defendants' thirteenth affirmative defenses, that the condition was trivial and therefore not actionable, this is an issue for the jury to determine based on the surrounding circumstances including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere v County of Suffolk, 90 NY2d 976, 978, 688 N.E.2d 489, 665 N.Y.S.2d 615 [1997]* [internal citations and quotations omitted]). Contrary to plaintiff's position, a **[**10]** defect of seven eighths of an inch is not, as a matter of law, actionable per se (*see Trionfero v Vanderhorn, 6 AD3d 903, 904, 774 N.Y.S.2d 612 [3d Dept 2004]* [height differential between 5/8" and 7/8" trivial under the circumstances]). Plaintiff's **[*16]** argument that this affirmative defense should be dismissed because this differential is a "substantial defect" under *Administrative Code §19-152(a)(4)* is unavailing. Conditions that violate *Administrative Code §19-152(a)(4)* and *34 RCNY §2-09(f)(5)(iv)* are "not per se non-trivial, and therefore actionable as a matter of law" (*McGrane-Mungo v Dag Hammarskjold Tower, 242 AD3d 458, 458-59, 243 N.Y.S.3d 52 [1st Dept 2025]* quoting *Trinidad v. Catsimatidis, 190 A.D.3d 444, 445, 140 N.Y.S.3d 482, [1st Dept. 2021]*). Rather, such a violation is but "one factor to consider when deciding the issue of triviality (*id.*).

Plaintiff's Motion to Quash

Plaintiff's motion to quash the deposition notice served on Jose Escobar is denied as mooted by CAC's withdrawal of that notice as well as its dismissal from this action.

Plaintiff's Motion for a Trial Preference

Plaintiff's motion for a trial preference is granted. Plaintiff is over 70 years old, as he was born in 1949, and is therefore entitled to a trial preference pursuant to *CPLR 3403(a)(4)* (*see Tytel v Battery Beer Distributors, Inc., 194 AD2d 330, 598 N.Y.S.2d 227 [1st Dept 1993]*).

CAC's Motion to Vacate the Note of Issue

CAC's motion to vacate the note of issue is denied as mooted by its dismissal from this action.

[11]** Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff's motion to dismiss defendants' affirmative defenses is granted, without opposition, as to Paragon and Leeding's second, third, seventh, and eighth affirmative defenses, **[*17]** and otherwise denied; and it is further

ORDERED that plaintiff's motion to quash the subpoena served on non-party witness Jose Escobar is denied as moot; and it is further

ORDERED that plaintiff's motion for a trial preference is granted; and it is further

ORDERED that CAC's motion for summary judgment dismissing the complaint and all cross-claims asserted against is granted; and it is further

ORDERED that CAC's motion to vacate the note of issue is denied as moot; and it is further

ORDERED that counsel for CAC shall, within fifteen days of the date of this decision and order, serve a copy of this order, with notice of entry, on all parties as well as the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases*, accessible at the court's website; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order on the Clerk of the Trial Support Office (Room 158), who is directed to place this case on the trial calendar at the head **[**12]** of said calendar except **[*18]** for actions in which a preference was previously granted.

This constitutes the decision and order of the Court.

12/9/2025

DATE

/s/ Judy H. Kim

HON. JUDY H. KIM, J.S.C.

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