SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

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Richard Mora

Index №. 23188/2018E

-against-

Hon. Paul L. Alpert

Justice Supreme Court

Deb-bie Realty Associates LLC.,
The Morgan Group LLC.,
Consolidated Edison of New York, Inc.

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The following papers numbered 1 to _____ were read on this motion (Seq. No. 1)
for _____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Motion is Respectfully Referred to Justice: _____
Dated: _____

The defendant's motion is decided in accordance with the annexed decision and order of the court.

Dated: July 5, 2022

Hon. _____
HON. PAUL ALPERT **J.S.C.**

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

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RICHARD MORA,

Plaintiff,

-against-

DEB-BIE REALTY ASSOCIATES LLC,
THE MORGAN GROUP LLC,
CONSOLIDATED EDISON OF NEW YORK, INC.

Defendants.

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Index No:23188/2018E

DECISION/ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the order to show cause as indicated below:

Papers	**Numbered**
Notice of Motion & Affirmation in Support & Exhibits	**1**
Affirmation in Opposition by Co-Defendant	**2**
Affirmation in Opposition by Plaintiff	**3**
Defendants' Affirmation in Reply to Con Ed's Opposition	**4**
Defendants' Affirmation in Reply to Plaintiff's Opposition	**5**

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

This is an action for personal injury arising from a trip and fall over a shunt on the sidewalk abutting the property of Deb-Bie Realty Associates LLC and The Morgan Group LLC (hereinafter Defendants). The shunt was installed by Co-Defendant Consolidated Edison of New York, Inc. (hereinafter ConEd) on June 12, 2017 to safely restore power to the Defendants' building after an outage and to allow pedestrians to safely cross the temporary wires. The Plaintiff tripped over the shunt on January 23, 2018 and sued the Defendants and ConEd for

negligence. Defendants move for an order awarding summary judgment and dismissing the complaint in its entirety.

A party moving for summary judgment must make a showing of entitlement to judgment as a matter of law (CPLR 3212[b]). The party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or an acceptable excuse for the failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 [1980]). On a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party (*Vega v. Restani Construction Corp.*, 18 N.Y.3d 499, 503 [2012]). The non-moving party's burden may not be met by unsubstantiated assertions or speculations about the facts of the case (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 327 [1986]).

Defendants argue that they were under no duty to the Plaintiff because ConEd was solely responsible for the installation and maintenance of the shunt. Defendants also claim that the shunt was an open and obvious hazard surrounded by numerous other warning devices so there may be no liability for any damages it caused. Defendants finally argue that the Plaintiff cannot state with certainty what caused his fall, which is fatal to a case for negligence (*Taub v Art Students League of New York*, 39 A.D.3d 259, 260 [1st Dept 2007]; *Mallen v Dekalb Corp.*, 181 A.D.3d 669, 669-70 [2d Dept 2020]).

ConEd opposes the motion and argues that Defendants have made a special use of the sidewalk containing the shunt. A special use exists when the abutting landowner derives a benefit from public property that is in no way connected with the public use (*Kaufman v. Silver*, 90 N.Y.2d 204, 207 [1997]). Liability may be imposed on such a landowner if they fail to keep that public land in a reasonably safe condition (*Id.*). It is typically an issue of fact to determine whether an electrical shunt constitutes a special use of the sidewalk (*Doyley v. Steiner*, 107

A.D.3d 517, 517 [1st Dept 2013]). Additionally, ConEd contends that Defendants are at fault because the shunt remained in place for seven months due to Defendants' failure to remove scaffolding around the shunt necessary for ConEd to safely complete the repairs.

Plaintiff contends that Defendants misinterpret the open and obvious hazard doctrine. Rather than eliminating the property owner's liability, an open and obvious hazard merely eliminates the property owner's responsibility to warn of the hazard (*Matos v. Azure Holdings II, L.P.*, 181 A.D.3d 406, 407 [1st Dept 2020]). It does not eliminate the property owner's responsibility to maintain the property in a reasonably safe condition (*Id.*). At most, an open and obvious hazard creates an issue of comparative fault (*Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69, 72-73 [1st Dept 2004]). Plaintiff also contends that he recognized the cause of his fall immediately after getting up, which is reflected in his deposition testimony. This is different from the cases relied upon by the Defendants where the injured plaintiffs returned to the scene of their accidents and identified potential causes in the days or weeks afterward (*Taub*, supra at 260; *Mallen*, supra at 669-70).

Here, there are several issues of fact that warrant the denial of Defendants' motion. There is an issue of fact as to whether the shunt constitutes a special use of the sidewalk that creates a duty of care for the Defendants. There is an issue as to whether the dangerous condition was open and obvious, whether there was an appropriate level of warning, and what level of fault belongs to each party. Additionally, there is a question of fact as to whether the Plaintiff recognized the cause of his fall or was merely speculating. Taking these considerations in the light most favorable to the Plaintiff, there are factual issues that prohibit an award of summary judgment.

Accordingly, Defendants' motion for summary judgment is denied.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the Defendants' motion for summary judgment is denied.

ORDERED AND ADJUDGED, that the Defendants shall serve a copy of this decision and order upon the Plaintiff and Co-Defendant within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: July 5, 2022

Hon. Paul L. Alpert, J.S.C.