

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - January 23, 2018

MARK C. DILLON, J.P.
LEONARD B. AUSTIN
ROBERT J. MILLER
SYLVIA O. HINDS-RADIX, JJ.

2016-11159

DECISION & ORDER

Andre Brown, plaintiff-respondent, v City of New York, defendant-respondent, Julius Holley, et al., appellants, et al., defendant.

(Index No. 507984/14)

Richard T. Lau, Jericho, NY (Irene A. Schembri of counsel), for appellants.

Novo Law Firm, P.C., New York, NY (Ilya Novofastovsky of counsel), for plaintiff-respondent.

Zachary W. Carter, Corporation Counsel, New York, NY (Deborah A. Brenner of counsel), for defendant-respondent (no brief filed).

In an action to recover damages for personal injuries, the defendants Julius Holley and Vanessa Holley appeal from an order of the Supreme Court, Kings County (Lara J. Genovesi, J.), dated October 7, 2016. The order denied as premature the motion of the defendants Julius Holley and Vanessa Holley for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, with leave to renew upon completion of the depositions of the parties.

ORDERED that the order is reversed, on the law, with one bill of costs, and the motion of the defendants Julius Holley and Vanessa Holley for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is granted.

On June 10, 2013, the plaintiff allegedly tripped and fell on a defective section of sidewalk abutting two properties in Brooklyn. The defendants Julius Holley and Vanessa Holley

June 13, 2018

Page 1.

BROWN v CITY OF NEW YORK

(hereinafter together the Holleys) owned one of the abutting properties. The plaintiff allegedly sustained personal injuries as a result of this incident and subsequently commenced this action against, among others, the Holleys and the City of New York. The Holleys moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, contending that they did not create the alleged defect or cause it to occur through a special use of the sidewalk. They also argued that they were exempt from liability under the provisions of Administrative Code of the City of New York § 7-210(b). The plaintiff and the City opposed the motion on the basis that the motion was premature due to outstanding discovery. The Supreme Court denied the motion as premature, and the Holleys appeal.

In 2003, the New York City Council enacted Administrative Code of the City of New York § 7-210, the Sidewalk Law, to shift tort liability for injuries resulting from a defective sidewalk from the City to abutting property owners (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520; *Gelstein v City of New York*, 153 AD3d 604, 605; *Johnston v Manley*, 150 AD3d 1210, 1211). This provision does not apply to “one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes” (Administrative Code of City of NY § 7-210[b]). “The exemption was provided in recognition that it was inappropriate to expose ‘small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair’” (*Johnston v Manley*, 150 AD3d at 1211, quoting *Coogan v City of New York*, 73 AD3d 613, 614).

Here, the Holleys established their prima facie entitlement to judgment as a matter of law. They demonstrated that they were entitled to the exemption for owner-occupied residential property set forth in section 7-210(b) of the Administrative Code by showing that their property was a one-family, owner-occupied residence (*see DeBlasi v City of New York*, 157 AD3d 656; *Missirlakis v McCarthy*, 145 AD3d 772, 772-773; *Ippolito v Innamorato*, 136 AD3d 624, 625; *Shneider v City of New York*, 127 AD3d 956, 957). Thus, they established that they had no statutory duty to maintain the subject sidewalk (*see Missirlakis v McCarthy*, 145 AD3d at 773; *Ippolito v Innamorato*, 136 AD3d at 625).

Moreover, the Holleys established, prima facie, that they could not be held liable for the plaintiff’s injuries under common-law principles. “Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use” (*Meyer v City of New York*, 114 AD3d 734, 735; *see Missirlakis v McCarthy*, 145 AD3d at 773; *Romano v Leger*, 72 AD3d 1059, 1059). The Holleys established that they did not create the defective condition that allegedly caused the plaintiff’s fall or make a special use of that area of the sidewalk.

In opposition, the plaintiff and the City failed to raise a triable issue of fact. “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760; *see Reynolds v Avon Grove Props.*, 129 AD3d 932, 933). Here, the contentions of the plaintiff and the City that the Holleys’ motion was premature because discovery had not taken place were without merit. The plaintiff and the City failed to demonstrate that

discovery might lead to relevant evidence as to the alleged liability of the Holleys or that facts essential to justify opposition to the subject motion were exclusively within the knowledge and control of the Holleys (*see Lynn v McCormick*, 153 AD3d 688, 689; *Reynolds v Avon Grove Props.*, 129 AD3d at 933).

Accordingly, the Supreme Court should have granted the Holleys' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

DILLON, J.P., AUSTIN, MILLER and HINDS-RADIX, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court