

Urbistondo v City of New York

2007 NY Slip Op 30963(U)

April 19, 2007

Supreme Court, Queens County

Docket Number: 0019481/2004

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
MARIA URBISTONDO,

Plaintiff,

Index
Number: 19481/04

- against -

Motion
Date: 04/17/07

THE CITY OF NEW YORK,

Defendant,

Motion
Cal. Number: 2

Motion Seq. No. 1

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

MARIE M. FORGES,

Third-Party Defendant.

-----X
The following papers numbered 1 to 9 read on this motion by third-party defendant Marie M. Forges for summary judgment dismissing the third-party complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Forges for summary judgment dismissing the third-party complaint is granted.

Plaintiff allegedly sustained injuries as a result of tripping

and falling upon a raised/depressed portion of the public sidewalk abutting the premises 93-21 202 Street in Queens County on March 12, 2004. Said premises were owned by Forges at the time of the accident. Forges has submitted evidence, in admissible form, to establish that her premises is a residential two-family house occupied by her since 1995 and at the time of the accident, that she never performed or hired anyone to perform repairs or work on the subject sidewalk and did not make any special use of the sidewalk.

In order to obtain summary judgment, movant must make a prima facie showing that she is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Forges has met her burden. The City's opposition papers fail to raise an issue of fact.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or caused it through some special use, or unless a statute charges the homeowner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Section 7-210 of the New York City Administrative Code imposes liability upon property owners for injuries resulting from their failure to maintain and repair the public sidewalks abutting their properties. That section, however, specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]).

It is not disputed that 93-21 202 Street is a two-family home. But the City contends that there is a question of fact as to whether Forges occupied said premises, thereby precluding summary judgment. However, the City fails to proffer any evidence in admissible form to establish that Forges did not reside at said premises at the time of the accident.

The City, in its opposition papers, annexes a deposition transcript of Herbert Stempel, employed by the Department of Transportation as a record searcher. Stempel testified that he found a sidewalk violation issued to Forges on May 10, 2002 for the address 93-21 202 Street, but that it also listed her address as 150-11 88th Avenue. The violation was dismissed on March 4, 2005.

The City contends this violation indicates that Forges may have owned, but did not reside at 93-21 202 Street. However, this

evidence merely indicates that Forges owned both properties. It does not establish that she did not, in fact, reside at 93-21 on the date of the accident. Even if it could be construed as indicating that she resided at 150-11, the violation was issued almost two years prior to the accident and, therefore, does not constitute probative evidence of her place of residence on the date of the accident. Likewise, the fact that the violation was dismissed on March 4, 2005 does not constitute evidence that she resided at 150-11 on such date.

The City also annexes a copy of a printout from the database of the Department of Finance on May 18, 2004 listing Forges as the owner of 93-21 but also listing Forges and 150-11 as the file name and address. This printout is not certified and is, therefore, inadmissible. Moreover, even were it admissible, it is of no probative value, since it indicates that the information contained therein was entered on December 28, 1994. Even though the printout indicates that the database was accessed on May 18, 2004, the City fails to show any proof that the information contained therein was up to date through the date of the accident. The printout relates to real estate taxes and lists the billing name and address as Forges' mortgage company. The address 150-11 merely reflects the address on file as of 1994.

Forges testified in her deposition that she used to live at 150-11 but that since 1995 she resided at the 93-21 address exclusively. The City has proffered no evidence to the contrary.

Moreover, the City does not dispute Forges' testimony that she never did any work to the sidewalk or make a special use of the sidewalk. The City provides no evidence to rebut her testimony that she did not create the defect (see Nilsen v. City of New York, 28 AD 3d 625 [2nd Dept 2006]; Bachman v. Town of North Hempstead, 245 AD 2d 327 [2nd Dept 1997]).

Since the City has failed to rebut Forges' prima facie showing that 93-21 is a two-family residence occupied by her at the time of the accident and that she did not create the defective condition or make a special use of the sidewalk, Forges is not liable for injuries sustained as a result of her failure to maintain or repair the abutting sidewalk, as a matter of law.

Finally, the City contends that the instant motion must be denied as untimely, since it was made more than 120 days after the note of issue was filed (see CPLR 3212). The note of issue in this case was filed on October 24, 2005. The instant motion was served on January 31, 2007.

Forges contends that the instant motion was timely made, since an order was issued by Justice Davild Elliot on December 12, 2006, providing that Forges' "time to file dispositive motions is extended until 2/13/07." This Court notes, however, that said purported order was, in fact, a stipulation between the parties that was not so-ordered by the Court.

Although the Court views with displeasure and does not usually honor a private agreement made between the parties without court approval to extend the statutory time period to make a summary judgment motion (see, e.g., Balcerzak v. DNA Contracting, LLC, 9 Misc 3d 524 [Supreme Court, Kings County 2005]), in the instant matter, sufficient special circumstances and good cause has been demonstrated by Forges to allow the instant motion to be decided on the merits.

The action by plaintiff against the City was commenced on August 26, 2004. Discovery was conducted and a note of issue was filed on October 24, 2005.

The third-party complaint by the City against Forges was commenced over seven months after the note of issue was filed, on June 9, 2006. Forges interposed an answer with discovery demands on June 30, 2006.

Thereafter, Forges moved to sever the third-party action so as to allow discovery to be conducted while the main action proceeded to trial. Plaintiff cross-moved and the City moved to strike Forges' answer. The initial return date of the motion to sever was August 1, 2006. The motions were submitted on October 3, 2006.

By order of Justice Elliot, issued on November 17, 2006, the motions were denied and the parties were directed to appear for a discovery conference on December 12, 2006. The parties appeared for the conference on said date and entered into a stipulation agreeing to a discovery schedule, providing, inter alia, that Forges would appear for a deposition on January 19, 2007. The stipulation also provided that Forges' time to make dispositive motions was extended to February 13, 2007. The copy of the stipulation annexed to the moving papers has Justice Elliot's name written on it and a so-ordered signature line is drawn at the end thereof. However, the copy of the stipulation bears no signature.

Forges, in compliance with the stipulation, appeared on January 19, 2007 and the attorney for the City conducted her deposition. Thereafter, on January 31, 2007, Forges served the instant motion.

The instant situation is distinguishable from that in Balcerzak

v. DNA Contracting, LLC (supra), in that the stipulation herein was not merely a private agreement between the parties without the input of the Court, but rather, was the product of a discovery conference with the Court. Although the stipulation does not appear to have been so-ordered, it was the result of the conference which was ordered for the very purpose of resolving the outstanding discovery issues that had been the subject of the parties' respective motions. Therefore, it is reasonable that Forges would proceed under the assumption that the stipulation had the imprimatur of the Court. Indeed, the Court's case management system database has the motions marked as having been resolved by so-ordered stipulation. Forges complied with the stipulation, appearing for her deposition on January 19, 2007, as scheduled, and promptly moved for summary judgment on January 31, 2007, 13 days in advance of the deadline afforded her by the stipulation.

Moreover, in the instant case, movant is a third-party defendant who was not brought into the case until June 9, 2006, over seven months after the filing of the note of issue on October 24, 2005 and almost four months past the expiration of the 120-day period.

It is entirely disingenuous of the City to argue that Forges offered no excuse for her untimely "delay" in moving for summary judgment, since she was not impleaded by the City until after the 120-day period from the filing of the note of issue had expired and since the City had stipulated to extend Forges' time to move for said relief until February 13, 2007. Indeed, if there was any delay, it was on the part of the City in waiting an inordinate length of time to implead Forges.

In addition, from the time that Forges was brought into this matter by the City, she has proceeded in a diligent and expeditious manner. Therefore, Forges, having presented a satisfactory explanation for the delay in making the instant motion, has shown good cause sufficient to warrant allowing this Court to entertain it, notwithstanding that it was made beyond the 120-day time period allowed pursuant to CPLR 3212 (a) (see Brill v. City of New York, 2 NY 3d 648 [2004]). Although Forges has not moved for leave to serve a late summary judgment motion, pursuant to CPLR 3212 (a), the totality of the circumstances presented herein, including the fact that she relied upon the stipulation made by the City and did, in fact, set forth a sufficient explanation in her motion papers that constitutes good cause, this Court, in the interest of justice, deems the instant motion as one seeking leave to serve a late summary judgment motion and for summary judgment.

Accordingly, the motion is granted and the third-party complaint is dismissed as against Forges.

Dated: April 19, 2007

KEVIN J. KERRIGAN, J.S.C.