Nasso v City of New York
2007 NY Slip Op 32826(U)
September 11, 2007
Supreme Court, Queens County
Docket Number: 0014447/2005
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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THERESA NASSO,

Plaintiff,

- against -

THE CITY OF NEW YORK, and HARPELL CHEMISTS, INC.,

Defendants.

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Index Number: 14447/05

Motion Date: SEPT. 4, 2007

Motion Cal. Number: 18

Motion Seq. No. 1

The following papers numbered 1 to 18 read on this motion by defendant Harpell Chemists, Inc. for summary judgment dismissing cross-claims and cross-motion by defendant City of New York for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits..............	1-4
Notice of Cross-Motion-Affirmation-Exhibits........	5-8
Affirmation in Opposition to Motion-Exhibits.......	9-11
Reply Affirmation..................................	12-13
Reply Affirmation..................................	14-16
Reply Affirmation..................................	17-18

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

Motion by Harpell for summary judgment dismissing the cross-claims asserted against it by the City in its answer is granted. Cross-motion by the City for summary judgment dismissing the complaint and any cross-claims asserted against it is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a sidewalk pedestrian ramp located at 150th Street and 14th Avenue in Queens County adjacent to the drugstore owned by Harpell. Plaintiff alleges that the toe of her shoe became caught in a groove in the ramp, causing her to fall.

The attorneys for plaintiff and Harpell entered into a stipulation, dated April 13, 2007, discontinuing the action as against Harpell with prejudice. Counsel for the City did not sign the stipulation. There is no indication that the stipulation was so-ordered by the Court. Consequently, a proper discontinuance of the action was not effected (see CPLR 3217[2]). Harpell now moves to dismiss the cross-claims asserted against it by the City in its answer.

In order to obtain summary judgment, movant must make a prima facie showing that it 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]). Harpell has met its burden.

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

The record on this motion and cross-motion establish that the pedestrian ramp was neither constructed by, on behalf of or for the benefit of Harpell. Indeed, the City concedes that the evidence presented indicates that the City had the ramp constructed approximately one year before the accident. Plaintiff alleges that what caused her to fall was a groove in the ramp. The photograph of the ramp annexed to the moving papers shows that it was constructed with a series of parallel grooves cut into its surface. The City's witness at her deposition testified that she knows that the contractor who installed the ramp for the City installed grooves. It was one of these grooves that plaintiff identifies as being the groove that caught the toe of her shoe.

The City, in its opposing papers, fails to raise an issue of fact as to whether Harpell created the condition or caused it through a special use. Moreover, the City fails to demonstrate that there is any statute or ordinance that would impose liability upon Harpell under the facts of this case. The City's contention that §7-210 of the Administrative Code imposed liability upon Harpell for any injuries sustained by pedestrians as a result of its failure to maintain or repair the ramp, which is part of the sidewalk, is without merit.

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. In the instant case, there is no issue of Harpell's failure to maintain the sidewalk and there is no allegation that the sidewalk was broken or otherwise in a state of disrepair. Indeed, counsel for the City concedes that the "ramp is devoid of any defect whatsoever." Rather, the groove that plaintiff alleges caused her to fall was part of the design of the ramp and was created by the contractor who made the ramp on behalf of the City. Therefore, §7-210 does not apply to the facts of this case.

Since the City has failed to proffer any evidence that Harpell created the alleged condition, has failed to demonstrate or even allege that the ramp served a special use benefitting Harpell and has failed to either demonstrate or allege that the ramp was in a state of disrepair such that Harpell would be statutorily liable for failing to maintain or repair it, Harpell is entitled to summary judgment dismissing the City's cross-claim against it.

Moreover, even though the stipulation of discontinuance of the action against Harpell was ineffective, this Court, pursuant to its discretionary power to grant summary judgment to any party, upon searching the record, and for the reasons heretofore stated, hereby also grants summary judgment in favor of Harpell dismissing plaintiff's complaint as against it.

Cross-motion by the City for summary judgment must be denied. The ground upon which the City cross-moves for summary judgment is that plaintiff did not serve a timely notice of claim as a prerequisite to commencement of the underlying action against it, pursuant to §7-201(c) of the New York City Administrative Code. The City contends that there are no exceptions to §7-201(c). Therefore, argues, counsel for the City, Harpell remains liable for any condition of the ramp even if the City constructed the ramp. The City's position finds no support in the controlling case law.

It is settled law that one exception to the prior written notice requirement is where the municipality "created the defect or hazard through an affirmative act of negligence" (<u>Amabile v. City of Buffalo</u>, 93 NY 2d 471,474 [1999]). The affirmative act of negligence exception to the notice requirement, within the meaning of <u>Amabile</u> contemplates "work by the City that immediately results in the existence of a dangerous condition"as opposed to a condition that develops over time (<u>Bielecki v. City of New York</u>, 14 AD 3d 301, 301 [1st Dept 2005]).

It is undisputed that the City had the ramp constructed and that the grooves in the ramp were made as part of its design and construction. Therefore, the defect alleged by plaintiff did not develop over time, but was created by the City's contractor as part of the construction of the ramp. Therefore, the lack of prior

written notice to the City, under the facts of this case, is not fatal to plaintiff's action against the City.

Since the defect which plaintiff alleges caused her injuries falls within the exception to the prior written notice requirement and the record on this motion and cross-motion raise an issue of fact as to whether the groove in the pedestrian ramp was a dangerous condition that caused plaintiff to fall, the City's cross-motion for summary judgment must be denied.

Accordingly, the motion is granted and the complaint and the cross-claim asserted against Harpell are dismissed. The cross-motion for summary judgment is denied.

Dated: September 11, 2007

KEVIN J. KERRIGAN, J.S.C.