

Buchelli v City of New York

2010 NY Slip Op 31857(U)

July 12, 2010

Supreme Court, New York County

Docket Number: 110820/04

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 52

Index Number : 110820/2004

INDEX NO. 110820/04

BUCELLI, LUCY

MOTION DATE _____

vs
CITY OF NEW YORK

MOTION SEQ. NO. 002

Sequence Number : 002

MOTION CAL. NO. _____

SUMMARY JUDGMENT

_____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/12/10

CYNTHIA S. KERN
J.S.C. *PK*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
LUCY BUCHELLI,

Plaintiff,

Index No. 110820/04

-against-

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF TRANSPORTATION,
WATERSIDE PLAZA LLC and
WATERSIDE HOUSING COMPANY, INC.,

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

FILED
JUL 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell due to a missing brick on the steps on the pedestrian bridge which extends across the FDR Drive from Waterside Plaza to 25th Street on August 4, 2003. Defendants Waterside Plaza LLC and Waterside Housing Company, Inc. (together, "Waterside") now move for summary judgment on the grounds that they did not own, maintain, control, repair or make special use of the portion of the bridge on which the accident occurred. Defendant the City of New York (the "City") cross-moves for summary judgment dismissing the complaint with respect to the City on the ground that plaintiff failed to provide the

City with prior written notice as required by Administrative Code §7-201. For the reasons set forth below, defendants' motions are granted.

The relevant facts are as follows. Plaintiff tripped and fell when her foot went into a hole created by a missing brick on the steps of the pedestrian bridge leading to Waterside Plaza. There was no debris on the steps. Waterside's director of maintenance, Alhusein Sarangi, testified that the bridge is partially owned by Waterside and partially owned by the City. The location where plaintiff fell is on the side owned by the City. Mr. Sarangi further testified that Waterside is not responsible for the repair and maintenance of any City property. However, he testified that for the convenience of the tenants of Waterside Plaza, Waterside employees clean the steps and remove snow from the steps on the pedestrian bridge.

Defendant Waterside is entitled to summary judgment because it is not the owner of the property where the accident took place and did not have any responsibility to maintain or repair that property. Liability for a dangerous condition must be "predicated upon a defendant's ownership, occupancy, control, or special use of the subject property." *Valmon v 4 M&M Corp.*, 291 A.D.3d 343, 344 (1st Dept 2002). It is undisputed that Waterside does not own the part of the pedestrian bridge where the accident took place. Moreover, plaintiff's argument that Waterside assumed a duty to repair and maintain the steps is without merit. Although Waterside undertook the responsibility of snow removal and cleaning from those steps, it never repaired the steps or assumed any responsibility for structural issues on the steps. Because plaintiff's fall was caused by a structural defect and not any debris on the steps, it is irrelevant whether Waterside undertook the responsibility for cleaning the steps. Accordingly, Waterside's motion for summary judgment is granted.

Defendant City is entitled to summary judgment because it had no prior written notice of the defect as required by 7-201 of the Administrative Code. That section provides:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

In the instant case, the City makes out its prima facie case that it did not receive prior written notice of the defective condition. However, the City can still be held liable for injuries resulting from a defective condition that it created through an affirmative act of negligence or if the roadway was used for a “special use” which conferred a special benefit upon the City. *See Oboler v. City of New York*, 8 N.Y.3d 888, 889 (2007). If plaintiff claims that the City caused or created the condition, plaintiff must show that the City created the defect through an affirmative act of negligence “that immediately result[ed] in the existence of a dangerous condition.” *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Bielecki v. City of New York*, 14 A.D.3d 301 (1st Dept 2005). In *Yarborough*, the Court of Appeals held that the City should be granted summary judgment because plaintiff failed to establish that the City had negligently performed a pothole repair which immediately resulted in a dangerous condition. *See* 10 N.Y.3d 726.

In the instant case, plaintiff fails to raise an issue of triable fact as to whether the City

