Wesley v City of New York
2010 NY Slip Op 33102(U)
October 25, 2010
Supreme Court, New York County
Docket Number: 110947/09
Judge: Barbara Jaffe
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SCANNED ON 10/29/2010

[* 1]

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

PRESENT: BARBARA JAFFE J.S.C. PART 5

Index Number : 110947/2009
WESLEY, BLOSSOM
vs
CITY OF NEW YORK
Sequence Number : 001
SUMMARY JUDGMENT
CAL #104

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. 104

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 29 2010
NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 10/25/10
OCT 25 2010

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

BLOSSOM WESLEY,

Plaintiff,

-against-

THE CITY OF NEW YORK and
SIX AVENUE CHELSEA, INC.

Defendants.

---x

Index No. 110947/09
Motion Date: 9/21/10
Motion Seq. No.: 001
Calendar No.: 104

DECISION & ORDER

FILED
OCT 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated June 28, 2010, defendant City moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff and co-defendant Six Avenue Chelsea, Inc. oppose. For the reasons that follow, the motion is denied.

I. UNDISPUTED FACTS

Plaintiff alleges that on May 5, 2008, she tripped and fell on a raised portion of the sidewalk on the west side of Sixth Avenue between 14th and 15th Streets, adjacent to a building at 539 Sixth Avenue. (Affirmation of Andrew Lucas, ACC, dated June 28, 2010 [Lucas Aff.], Exhs. A, B, E).

At a deposition held on May 7, 2010, Leslie Smalls, a record searcher for the New York City Department of Transportation (DOT), testified as to the results of a sidewalk, address, and block record search conducted by another DOT employee for the location of Sixth Avenue

between 14th and 15th Streets. (Lucas Aff., Exh. F at 6-7). The search recovered 10 permits, two applications for permits, 11 notices of violation related to the permits, five corrective action requests related to the permits, twelve inspection reports related to the permits, and a Big Apple map and legend. (*Id.*). Smalls, who looked at the records for the first time hours before the deposition, testified that she did not know whether work was conducted at that location between May 2006 and May 2008. (*Id.* at 11). One permit for the location at 539 Sixth Avenue was issued to Consolidated Edison, "for a maximum length of six feet for the purpose of repair gas protected." (*Id.* at 13-14). Other permits are illegible, and Smalls testified that she was unable to interpret the notices of violation relating to the permits (*id.* at 14), did not know if trees were planted on the sidewalk in that area (*id.* at 11), and could not identify the permittees (*id.* at 13). Although able to identify a document generated by HIQA, an agency of DOT, she was unable to discuss its contents. (*Id.* at 11). Given Smalls's inability to testify as to many aspects of the case, counsel requested another City witness with pertinent knowledge. (*Id.* at 17).

II. PERTINENT PROCEDURAL BACKGROUND

Plaintiff timely filed a notice of claim on July 17, 2008 (Lucas Aff., Exh. A), specifying the location of her accident, and commenced this action by serving defendants a summons and complaint on or around July 31, 2008 (*id.*, Exh. C). Discovery is incomplete.

III. CONTENTIONS

City disclaims liability for plaintiff's injuries on the grounds that New York City Administrative Code § 7-210 relieves it of responsibility for the sidewalk, and that it neither caused or created a defective condition nor enjoyed special use of the sidewalk. (Lucas Aff.). It submits, in support, Small's deposition testimony (Lucas Aff., Exh. F), the results of DOT's

records search (*id.*, Exh. G), and the affirmation of David C. Atik, an attorney in City's Department of Finance, who states that a search of its Property Assessment Roll database reflects that it does not own the property abutting the sidewalk and that it is not a one, two, or three-family, exclusively residential property (*id.*, Exh. H).

In opposition, plaintiff and Six Avenue Chelsea argue that there exist issues of fact as to whether City performed work at the accident location, and thus issues of fact as to whether City created the defect, relying on Smalls's deposition and the search results reflecting the possibility that work was performed by other City agencies. (Bruno Aff.; Affirmation of Alexander Kran, III, Esq., dated Aug. 18, 2010 [Kran Aff.]). Six Avenue Chelsea also maintains that as plaintiff is unable to identify the precise location of her accident, the complaint must be dismissed. (Bruno Aff.).

In reply, City argues that plaintiff and Six Avenue Chelsea offer nothing other than speculation that it created a defect, that the case must be summarily dismissed if plaintiff cannot establish the cause or location of her fall, and, through its attorney, that work conducted by other agencies would have been reflected in the records provided. (Reply Affirmation of Andrew Lucas, ACC, dated Aug. 27, 2010).

IV. ANALYSIS

It is well-settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs,*

Inc., 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). Accordingly, it is City's burden here, as movant, to demonstrate its entitlement to judgment, and must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff to establish that there exists a triable issue of fact.

Pursuant to § 7-210, the owner of real property abutting any sidewalk, and not City, has the duty of maintaining it in a reasonably safe condition, and is liable for injury proximately caused by its failure to so maintain the sidewalk. (*Vucetovic v Epson Downs, Inc.*, 10 NY3d 517 [2008]). Courts have recognized two exceptions under which City may still be liable: where it caused or created a defective condition, or made special use of the sidewalk which resulted in an injury. (*Adler v City of New York*, 52 AD3d 549 [2d Dept 2008]).

Although there is no dispute that City had no duty to maintain this sidewalk, plaintiff and co-defendant have raised legitimate concerns that City has not performed a comprehensive search proving that it performed no work at the accident location. Given the paucity of answers elicited from City's record searcher regarding the records on which City relies in support of its motion, the other parties promptly requested the production of another City witness. City's argument in reply, specifying where relevant work would have been reflected in the search, is of no evidentiary value as it is not advanced by a party with knowledge. (*Kelly v Rubin*, 224 AD2d 262 [1st Dept 1996] [facts alleged only in counsel's affirmation are without evidentiary value]). Having failed to demonstrate, through an employee with sufficient knowledge, that the records reflect that City had not performed work at the location, City has not sustained its *prima facie* burden of demonstrating

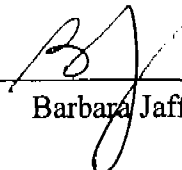
that it neither caused nor created the defect. Moreover, because the documents recovered reflect work performed by a City agency on behalf of which the witness could not testify, there is an issue of fact as to whether City created the defect. (*See Cabrera v City of New York*, 21 AD3d 1047, 1048 [2d Dept 2005] [summary judgment denied where City testimony regarding its records raised issue of fact as to whether it caused or created defect]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED that City's motion for summary judgment is denied.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC

DATED: October 25, 2010
New York, New York

OCT 25 2010

BARBARA JAFFE
J.S.C.

FILED

OCT 29 2010

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