

Torres v City of New York

2012 NY Slip Op 33011(U)

December 18, 2012

Supreme Court, Richmond County

Docket Number: 101640/10

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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LAURIE TORRES and SEAN TORRES, DCM Part 1

Plaintiffs, Present:

-against-

HON. THOMAS P. ALIOTTA

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,
DAN EILAM and NIRA EILAM,

DECISION AND ORDER

Index No. 101640/10

Motion No. 2403-001

Defendants.

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The following papers numbered 1 to 5 were marked fully submitted on the 24th day of October, 2012.

Papers
Numbered

Notice of Motion for Summary Judgment by Defendant City of New York with Supporting Papers and Exhibits (dated August 3, 2012).....	1
Plaintiffs' Affirmation in Opposition (dated September 10, 2012).....	2
Reply Affirmation in Opposition (dated September 21, 2012).....	3
Affirmation in Opposition by Defendant Dan Eilam and Nira Eilam (dated October 23, 2012).....	4
Reply Affirmation to Opposition by Dan Eilam and Nira Eilam (dated October 24, 2012).....	5

Upon the foregoing papers, the motion by defendant, The City of New York (hereinafter the "City") for an order granting it summary judgment and dismissal of the complaint as against it is granted.

The instant action was brought by plaintiff, Laurie Torres to recover damages for personal injuries sustained when on November

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22, 2009, she allegedly tripped and fell on the sidewalk in front of 375 Ross Avenue, Staten Island, New York. It is undisputed that the property adjacent to the sidewalk where that accident occurred was owned by co-defendants Dan and Nira Eilam, who both testified at their depositions (1) that the home in question is a rental property; (2) that neither of them live there; and (3) that they have both lived in Israel for the last 22 years (see Defendants' Exhibit "G", Testimony of Dan Eilam, p 7; see also Defendants' Exhibit "G", Testimony of Nira Eilam, p 7).

It is well established that pursuant to changes in New York City's Administrative Code § 7-210, (effective September 14, 2003), that the City would no longer be liable for injuries arising from a defective sidewalk, and that the liability therefore would now be borne by the adjacent landowner except where the adjacent property is an owner-occupied one-, two-or three-family dwelling. Thus, section 7-210 now provides at subdivision (c) that

"Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting 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) in a reasonably safe condition."

Here, based upon the date of plaintiff's accident and the undisputed deposition testimony of defendants Dan and Nira Eilam,

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the City has established prima facie that under the terms of the above provision, the house at 375 Ross Avenue was neither "in whole or in part ,owner occupied" at the time of plaintiff's injury and is not exempt from the liability-shifting effect of the amended Administrative Code provision. Hence, the City has carried its initial burden of establishing its right to dismissal as a matter of law.

In opposition, plaintiffs and the remaining defendants properly note that the City can still be held liable for injuries resulting from a defective sidewalk condition "caused or created" by it, or if the sidewalk in question constituted a "special use" which conferred a special benefit upon the City (*cf. Scavuzzo v. City of New York*, 47 AD3d 793, 795). Here, there has been no showing of any special use, and while the female plaintiff testified at her examination before trial that her accident was the result of the presence of tree roots that had caused the sidewalk to become broken and uneven (see Defendants' Exhibit "F", p 49), the undisputed fact that the City had removed the tree on June 10, 2009 without removing the stump does not constitute an act of active negligence for which the City may be held liable (*id.*). Moreover, plaintiffs have adduced no evidence in support of their speculative assertion that the removal of the tree in this case "created" the

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alleged sidewalk defect (see Delgado v County of Suffolk, 40 AD3d 575).

Moreover, this Court agrees with those trial courts which have considered the issue and found that "it is clear that the New Sidewalk Law, when dealing with a non exempt property under § 7-210, where the sidewalk may have been damaged by the tree roots of [a] curbside tree, the owners of the property abutting the defective sidewalk are responsible for remedying the condition and are liable for damages that may occur because of the defect" (see Hidalgo v City of New York, 33 Misc3d; 1236A [Sup Ct NY Co 2011], quoting Satram v City of New York, 24 Misc 3d 1233A [Sup Ct Kings Co 2009]; see also DiGregorio v City of New York, 19 Misc3d 1135A [Sup Ct Kings Co 2008]). Equally persuasive are those cases holding that the liability for accidents occurring due to the growth of tree roots does not rest upon the City even if caused by a City-owned tree (see Seplow v Solil Mgmt., 15 Misc3d 1138A [Sup Ct NY Co 2007]).

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant The City of New York is granted, and the complaint and any cross claims as against this defendant are severed and dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

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E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: December 18, 2012