

Trotta v E G A Assoc. Inc.

2013 NY Slip Op 31075(U)

May 15, 2013

Supreme Court, New York County

Docket Number: 115236/2010

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. KATHRYN FREED

PRESENT: JUSTICE OF SUPREME COURT

PART 5

Justice

TROTTA, ELIZABETH ANN

INDEX NO.

115236/10

MOTION DATE

- v -

LEGA ASSOCIATES, City of N.Y.

MOTION SEQ. NO.

001

MOTION CAL. NO.

89

The following papers, numbered 1 to _____ 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


DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAY 16 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-15-13
MAY 15 2013


HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
ELIZABETH ANN TROTTA,

Plaintiff,

-against-

E G A ASSOCIATES INC., THE CITY OF NEW
YORK AND NEW YORK CITY DEPARTMENT
OF TRANSPORTATION,

Defendants.
-----X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NOTICE OF PETITION AND AFFIDAVITS ANNEXED..... 1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS..... 3-8.....
OTHER.....

FILED
NUMBERED
MAY 16 2013
NEW YORK
COUNTY CLERK'S OFFICE

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants' The City Of New York and New York City Department Of Transportation (hereinafter, "The City"), moves for an Order pursuant to CPLR§ 3211 dismissing plaintiff's complaint; or in the alternative, for an Order pursuant to CPLR§ 3212 granting summary judgment dismissing the complaint and all cross-claims against it. No opposition has been submitted.

After a review of the instant motion, all relevant statutes and case law, the Court grants said motion.

Factual and procedural background:

Plaintiff brings the instant action to recover monetary damages for personal injuries allegedly

sustained when on November 16, 2009, she tripped and fell on the sidewalk in front of 424-326 East 66th Street, a building located in the County of New York. Consequently, on January 28, 2010, plaintiff served a Notice of Claim on the City of New York. On August 23, 2010, she appeared for a hearing pursuant to General Municipal Law §50-h. Plaintiff commenced the instant action via the service of a Summons and Complaint on November 22, 2010. The City served its Answer on December 22, 2010. On August 19, 2011, plaintiff served her Bill of Particulars as to the City of New York.

In her Notice of Claim, plaintiff alleges that her accident occurred when she “tripped over broken, uneven, misaligned, un-leveled, unrepaired, raised and defective sidewalk” “adjacent to the premises known as 324-326 East 66th Street” (*see* Notice of Claim annexed as Exhibit “A”). Plaintiff subsequently testified at her §50-h hearing that she fell when her right foot struck a “raised section of the sidewalk” (*see* §50-h transcript, pp. 11-12, Exhibit “B”). Additionally, both plaintiff’s Complaint and Verified Bill of Particulars state that the subject accident occurred “on the sidewalk adjacent to the premises known as 324-326 East 66th Street, New York, New York” (*see* plaintiff’s Verified Bill of Particular at ¶ 2, Exhibit “F” and Complaint, Exhibit “C”).

The City asserts that pursuant to Administrative Code of the City of New York §7-210, effective September 14, 2003, it is not liable for plaintiff’s alleged injuries. The City argues that the promulgation of Section § 7-210 shifted liability for injuries arising from defective conditions on sidewalks from the City to the owner of real property abutting said sidewalks. As support for its position, the City also refers to and relies on the Affirmation of David C. Atik, Esq. of the Department of Finance of the City of New York. In his affidavit, Mr. Atik avers that his duties include responding to subpoenas and other demands for information concerning Finance’s various

property records. He also avers that his own personal search of the Property Assessment Role database revealed that on November 16, 2009, the City was not the owner of 324-326 East 66th Street, New York, New York. Additionally, Mr. Atik avers that his search results reveal that 324-326 East 66th Street, was classified as Building Class C7 (walk-up apartments, over 6 families, with stores), and not as a one-, two-, or three family solely residential property.

The City also argues that no evidence exists which indicates that it caused or created the subject condition. It argues that in context with New York City Administrative Code § 7-201(c)(2), also known as the "Prior Written Notice Law," courts have found that a municipality meets its burden and establishes its prima facie entitlement to summary judgment when it has demonstrated the absence of prior notice. The burden then shifts to the party opposing the motion to demonstrate a question of fact that defeats summary judgment, including an exception to the Prior Written Notice Law. Thus, the City argues that plaintiff will be unable to meets its burden, as she cannot proffer proof that the City created the condition which caused her accident.

As support for this argument, the City relies on and refers to an affidavit of Alan Borja, annexed as Exhibit "G." In his affidavit, Mr. Borja, a paralegal employed with the Department of Transportation of the City of New York, (hereinafter "DOT"), avers that at the request of the New York City Law Department, he personally conducted a search in the pertinent electronic databases, researching records of permits, applications for permits, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple maps for the sidewalk at 324-326 East 66th Street, County of New York.

Said search encompassed a period of two years prior to and including the date of the accident, November 16, 2009. Mr. Atik avers that said search revealed no records except for a Big

Apple Map which was labeled Volume 6E, page 58. Said map was served upon DOT by the Big Apple Pothole and Sidewalk Protection Corporation on October 23, 2003. Mr. Borja also avers that this is the most recent map served on DOT, at least 15 days prior to the date of the subject accident.

The City argues that given the results of Mr. Borja's search, there is no indication that it nor its contractors performed any work on or to the subject sidewalk for two years prior to the date of the subject accident. Thus, it cannot be held liable for any defects on the sidewalk.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (Dallas-Stephenson v. Waisman, 39 A.D.2d 303, 306 [1st Dept. 2007], citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1995]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (*see* Zuckerman v. City of New York, 49 N.Y.2d 557 [1989]; People ex rel Spitzer v. Grasso, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (Morgan v. New York Telephone, 220 A.D.728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Grossman v. Amalgamated Hous. Corp., 298 A.D.2d 224[1st Dept. 2002]).

Section§ 7-210 of the Administrative Code of the City of New York provides in pertinent part that:

- b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any

[* 6]

injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to 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.

c. 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. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

In the case at bar, the Court finds that the City has sufficiently demonstrated that it may not be held liable for plaintiff's injury pursuant to the express language of § 7-210 (b) and (c). Moreover, not only has the City established its prima facie entitlement to judgment as a matter of law by presenting evidence that it did not own, operate, or control the subject premises, it also has met its burden of demonstrating the absence of prior notice (*see Yarborough v. City of New York*, 10 N.Y.3d 726 [2008]; *Roman v. City of New York*, 38 A.D.3d 442 [1st Dept. 2007]). Furthermore, plaintiff has failed to submit any evidence which indicates with any semblance of certainty, that the City caused or created the defect which caused her injury (*see Johnson v. City of New York*, 15 N.Y.3d 676 [2010], *rearg denied* 16 N.Y.3d 807 [2011]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City's motion for summary judgment is granted and the complaint and any cross-claims are hereby severed and dismissed against said defendant, and the Clerk is

directed to enter judgment if favor of said defendant; and it is further

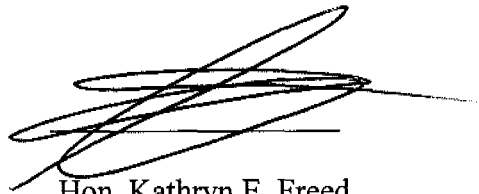
ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Defendant City shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: May 15, 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED

MAY 15 2013

MAY 16 2013

NEW YORK
COUNTY CLERK'S OFFICE