Johnson v Janklow
2013 NY Slip Op 32741(U)
October 24, 2013
Sup Ct, New York County
Docket Number: 102729/2010
Judge: Margaret A. Chan
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INDEX NO. 102729/2010
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN
Justice

PART 52

Index Number : 102729/2010
JOHNSON, SANDRA
vs
JANKLOW, LUCAS W.
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to 2, were read on this motion to/for summary judgment.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1
Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s).

Upon the foregoing papers, it is ordered that this motion is

MOTION DETERMINED PURSUANT TO ANNEXED DECISION AND ORDER

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

Dated: 10/24/13

, J.S.C.

HON. MARGARET A. CHAN

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

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

PRESENT: Hon. Margaret A. Chan
Justice

PART 52

INDEX 102729/2010

SANDRA JOHNSON,

Plaintiff,

- vs. -

LUCAS W. JANKLOW and JULIE DANIELS,

Defendants.

LUCAS W. JANKLOW and JULIE DANIELS,

INDEX 591067/2010

Third-Party Plaintiffs,

- vs. -

THE CITY OF NEW YORK ,

Third-Party Defendant.

Plaintiff Sandra Johnson brought suit for injuries she sustained on October 2, 2008, after she tripped and fell on a raised metal grate located around a tree (tree grate) in front of 16 West 12th Street, in the City and State of New York. Plaintiff brought this action against the adjacent property owners, defendants Lucas W. Janklow and Julie Daniels (the property owners). The property owners brought a third-party action against the City of New York (the City).

The motions decided herein are: (1) motion sequence #003, the City's joint motion to dismiss and for summary judgment; (2) motion sequence #004, the property owners' motion for summary judgment against the plaintiff; and (3) motion sequence #005, an order to show cause made by the property owners for this court to accept their late opposition to the City's motion in motion sequence #003, which was filed late due to law office failure. The decision and order is as follows:

First addressing the City's joint motion to dismiss and for summary judgment (motion sequence #003), the City argued that the property owners failed to plead that the City received prior written notice of the defective condition pursuant to Administrative Code § 7-201(c)(2) (known as the "Pothole Law"). Additionally, in favor of its summary judgment motion the City reiterated that it did not have prior written notice and argued that the City did not cause or create the subject condition.

The court accepts the property owners' late opposition to the City's motion, and thus, grants the property owner's order to show cause (motion sequence #005). The property owners' opposition was silent as to the requirements of pleading prior written notice. They, instead, argued that there is a question of fact as to whether or not the City caused or created the subject defective condition.

The property owners contended that the City might have installed the defective tree grate and that the property owners certainly did not.

As to prior written notice in the motion to dismiss, the First Department recently held in *Tucker v. City of New York*, 84 AD3d 640 (2011), that an alleged tree well defect squarely falls under the Administrative Code § 7-201(c)(2). In discussing the language of the statute the First Department placed the burden on plaintiff "to show that the City received prior written notice of the alleged tree well defect" (*id* at 643). Failure to plead prior written notice of the defect appears then to be detrimental to the action and the third-party complaint as against the City shall be dismissed.

In any event, beyond the pleadings, plaintiff failed to show that the City had prior written notice of the subject defective condition. In support of its summary judgment motion, the City provided evidence from two Department of Transportation (DOT) record searchers. The City supplied the examination before trial (EBT) transcript of one employee and the affidavit of different DOT employee. Both employees searched DOT records for two years prior to the subject accident and the only item that was revealed in both searches was a Big Apple Map served on the City in 2003 (*see* City's Motion, Exh I, J, K). The map does not indicate a raised tree well grate at the subject location (*see* City's Motion, Exh K).

The City also provided the EBT testimony of William Steyer, the director of the Department of Parks and Recreation Forestry Division. He testified that he conducted a ten year search of records for the subject location. As a result of his search, he retrieved a map of the block indicating where the trees are located and a record that indicated that a tree in front of the subject property was pruned by the City in April 1999 (*see* City's Motion, Exh M). No results were found relating to permits for installation of a tree grate or for any other type of permit. At his EBT, Mr. Steyer testified that a census was taken of the trees on the subject block, but no record was made as to the subject tree. Mr. Steyer stated his department is the only City department that installs tree grates (*see* Pltf Opp, Exh B, p 40). He further testified that his department does not install the type of tree grate at issue in front of private residences (*see* Pltf Opp, Exh B, pp 32-33).

Plaintiff argued that Mr. Steyer's testimony created an issue of fact. Plaintiff pointed out that when asked if the City owned the tree grate Mr. Steyer stated that he did not know (*see* Pltf Opp, Exh B, p 10). Mr. Steyer also testified that from looking at a photograph of the defect shown to him at the EBT he could see that the trunk of the tree was partially lifting the tree grate (*see* Pltf Opp, Exh B, pp 37-38). Plaintiff argued that the City might be affirmatively negligent in failing to fix the defect. Plaintiff further argued that Mr. Steyer can only speak for the procedures of the Department of Parks and Recreation and cannot speak definitively to the other City departments and thus, an issue of fact remains.

Plaintiff arguments are not persuasive. The City produced sufficient admissible evidence to demonstrate that it did not have written prior notice of the defective tree grate, and that it did not cause or create the subject defect. The instant case is not one that falls into the narrow exception of affirmative negligence. "The affirmative negligence exception to the notice requirement [is] limited to work by the City that immediately results in the existence of a dangerous condition" (*Bielecki v*

City of New York, 14 AD3d 301 [1st Dept 2005]). This is not the situation in the case at bar where there is no showing that the City performed any work related to the tree grate at the subject location. Without an exception to the prior written notice rule, plaintiff has failed to proffer that the City received prior written notice of the defective tree grate as proscribed under the Pothole Law. Therefore, the City is not liable and its motion to dismiss and for summary judgment is granted in its entirety.

Finally, turning to the property owner's motion for summary judgment against the plaintiff (motion sequence #004), defendant Janklow, at his EBT, testified that he did not know if the tree grate was part of his property when he and his wife purchased the abutting property in January 2005. He stated that he never performed work on the tree grate and that he did not consider it part of his property (*see* Deft Mot, Exh D, pp 26 - 29). Defendant Daniels further stated that she did not maintain the tree grate nor did she ever receive any complaints about it (*see* Deft Mot, Exh E, pp 39 - 41). Plaintiff stated at her EBT that on the date of the accident she stepped around a bicycle rickshaw that was parked in front of the property owner's home (*see* Deft Mot, Exh C, pp 13-14). Mr. Janklow confirmed he owns a bicycle rickshaw and occasionally parked it in front of his home (*see* Deft Mot, Exh D, pp 43-44).

A movant seeking summary judgment in its favor 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." (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*see Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Moreover, on a motion for summary judgment, a court must view the evidence in the light most favorable to the nonmoving party, affording them the benefit of every favorable inference which can be drawn from the evidence (*Haseley v Abels,* 84 AD3d 480 [1st Dept 2011] *citing Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920 [2005]).

Administrative Code of the City of New York §7-210 imposes tort liability on property owners that fail to maintain adjacent city-owned sidewalks in a reasonably safe condition. The Court of Appeals in *Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517 (2008), further interpreted Section 7-210, holding that civil liability can not be imposed on property owners for injuries that occur in City-owned tree wells. The First Department provided an exception to the *Vucetovic* case by holding that a " 'property owner may still owe a duty relating to a tree well if it creates a defective condition on it or uses it for a special purpose, such as when it installs an object on it, or varies its construction' " (*Kleckner v Meushar 34th St., LLC*, 80 AD3d 478, 479 [2011] *quoting Skinner v The City of New York*, 2010 NY Slip Op 31068[U] [Sup Ct, NY Cty 2010]).

Here it is still unknown what party installed the tree grate, although this Court – as discussed above – credits the City's evidence and finds that the City did not install it. As plaintiff argued, the defendant property owners here have failed to eliminate triable issues of fact regarding the tree well. It is curious to this court that neither plaintiff nor the property owners addressed the special use of the portion of the sidewalk that Mr. Janklow used to store his bicycle rickshaw. Plaintiff's deposition testimony did not pointedly address if the placement of rickshaw diverted her into the tree well. This gap alone creates a triable issue of fact (*see Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 311 [1st Dept 2008], *cf Kaminer v Dan's Supreme Supermarket/Key Food*, 253 AD2d 657 [1st Dept 1998][occasional deliveries do not constitute a special use of the sidewalk]). Therefore, the property owner's motion is denied.

Accordingly, it is hereby,

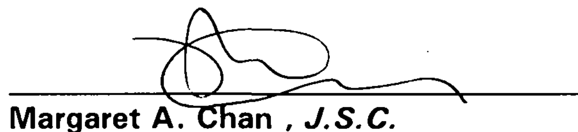
ORDERED, motion sequence #003, the City's joint motion to dismiss and for summary judgment is granted. As the City is no long a party in this action the remainder of the action shall be transferred to an IAS part forthwith and the caption shall be amended. The City shall serve a copy of this order with notice of entry on the trial support office to effectuate the transfer of the action and the amendment of the caption, and it is further

ORDERED, motion sequence #004, the property owner's motion for summary judgment against the plaintiff is denied, and it is further

ORDERED, motion sequence #005, an order to show cause made by the property owners for this court to accept their late opposition to the City's motion in motion sequence #003 is granted.

This constitutes the decision and order of the court.

Dated: October 24, 2013



Margaret A. Chan , *J.S.C.*