

Rivera v City of New York
2014 NY Slip Op 30655(U)
March 17, 2014
Sup Ct, New York County
Docket Number: 110975/11
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

Index Number : 110975/2011

RIVERA, KATHLEEN

vs

CITY OF NEW YORK

Sequence Number : 002

DISMISS

PART 5

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

CAL: # 78

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

 J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

Dated: 3-17-14

MAR 17 2014

- 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

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

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

----- X
KATHLEEN RIVERA,

Plaintiff,

- against-

THE CITY OF NEW YORK,

Defendant.
----- X

DECISION/ORDER

Index No. 110975/11

Seq. No. 002

FILED

MAR 18 2014

HON. KATHRYN E. FREED:

COUNTY CLERK'S OFFICE
NEW YORK

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

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	..1-2(Ex A-L)..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
AFFIRMATIONS IN OPPOSITION.....	..3,4(Ex A-H)..
REPLYING AFFIRMATION.....	..5(Ex A-B)....
OTHER.....

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

The City of New York (defendant) moves, pursuant to CPLR 3211 (a) (7) and 3212, for an order granting summary judgment dismissing the complaint.

This is an action to recover damages for personal injuries suffered by the plaintiff, Kathleen Rivera, in a trip and fall accident on a center median island, located at Park Avenue and 50th Street in Manhattan. Plaintiff alleges that, when she was crossing Park Avenue and reached the snow covered traffic island, she tripped over a raised up and uneven, one and one-half inch piece of concrete, attached to the bottom of a square lamppost base. The base did not have a lamppost attached to it.

In support of its motion, defendant argues that it did not receive prior written notice of the defect, did not make special use of the subject area, and did not cause or create the condition. Defendant also argues that, pursuant to a contract with Metro-North Commuter Railroad Company, it did not install, maintain, or control the lamppost.

In opposition, plaintiff argues that the motion should be denied as untimely. Plaintiff also argues that there is a question as to whether defendant affirmatively created the defect.

In reply, defendant argues that the parties entered into a written stipulation extending the deadline for filing a summary judgment motion.

"[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 issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

CPLR 3212 (a) requires that summary judgment motions must be made either within 120 days of the filing of the note of issue, or within a time period ordered by the court (*Brill v City of*

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New York, 2 NY3d 648 [2004]). Where a motion is untimely, the movant must demonstrate good cause for the delay, otherwise the late motion will not be addressed (*Kershaw v Hospital for Special Surgery*, __AD3d__, 978 NYS2d 13 [1st Dept 2013]).

In this case, it is uncontroverted that defendant's motion was not timely under the schedule set by the preliminary conference order dated February 23, 2012. Contrary to defendant's position, the deadline for making a summary judgment motion may not be extended by mutual agreement of the parties without court approval (*Coty v County of Clinton*, 42 AD3d 612 [3rd Dept 2007]).

Turning to the question of good cause shown, defendant does not even attempt to argue that good cause existed for making the late motion.

Finally, were the court to reach the merits of the motion, although a city generally may not be held liable for a defective condition on a municipal street or sidewalk unless it has received prior written notice, plaintiff raises triable questions of fact as to whether defendant created the defective condition through an affirmative act of negligence, and whether a special use conferred a special benefit upon it (*Groninger v Village of Mamaroneck*, 17 NY3d 125 [2011]; *Yarborough v City of New York*, 10 NY3d 726 [2008]). Whether defendant or its contractors created the defect, the City remains responsible for injury caused by a breach of its duty not to create a defective condition on the sidewalk.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City's motion for summary judgement is denied; and it is further,

ORDERED that a court mediation is scheduled in this matter for March 25, 2014 at 80 Centre Street, Room 103 at 11 a.m.; and it is further,

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

DATED: March 17, 2014

ENTER:



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

MAR 17 2014

KATHRYN E. FREED
JUSTICE OF SUPREME COURT

FILED

MAR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK