

Foley v City of New York
2014 NY Slip Op 31441(U)
June 2, 2014
Supreme Court, New York County
Docket Number: 114390/2008
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

JANICE FOLEY and JEREMIAH FOLEY,

Plaintiffs,

INDEX NO. 114390/2008

MOTION DATE 5/29/14

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, H&M MADISON EXPRESS
INC., K.L. FATHER & SON INC., and NEW YORK CITY
TRANSIT AUTHORITY,

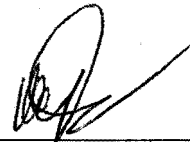
Defendants.

The following papers, numbered 1 to 7, were read on this motion to/for renew summary judgment.

Notice of Motion — Affirmation — Exhibits — Affidavit of Service	█ No(s). <u>1-3</u>
Affirmation in Opposition — Exhibits A-D — Affidavit of Service	█ No(s). <u>4-5</u>
Reply Affirmation — Affirmation of Service	█ No(s). <u>6-7</u>

Upon the foregoing papers, it is ordered that this motion to renew a prior motion for summary judgment by defendant K.L. Father & Son, Inc. is decided in accordance with the annexed memorandum decision and order.

Dated: 6/2/14
New York, New York



, J.S.C.

FILED

JUN 04 2014

COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

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

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

- | | |
|--|---|
| <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| <input checked="" type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED |
| <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> GRANTED IN PART |
| <input type="checkbox"/> DO NOT POST | <input type="checkbox"/> SUBMIT ORDER |
| <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> OTHER |
| <input type="checkbox"/> REFERENCE | |

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
JANICE FOLEY and JEREMIAH FOLEY,

Plaintiffs,

- against -

Index No. 114390/2008

THE CITY OF NEW YORK, H&M MADISON
EXPRESS INC., K.L. FATHER & SON INC., and
NEW YORK CITY TRANSIT AUTHORITY,

Decision and Order

Defendants.

FILED

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JUN 04 2014

HON. MICHAEL D. STALLMAN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiff Janice Foley alleges that on April 30, 2010, she tripped and fell due to a broken sidewalk/curb area surrounding the premises located at 197 Madison Street, near the corner of Madison Street and Rutgers Street in Manhattan.

In a prior decision and order dated January 27, 2010, this Court denied a motion for summary judgment by defendant K.L. Father & Son, Inc. The decision states, in relevant part, "Disclosure has not taken place and summary judgment is premature, especially because the other parties have not had an opportunity to discover whether KL Father Inc acted to repair or alter the subject curbstone. See CPLR 3212 (f)."

BACKGROUND

Plaintiff was deposed on April 30, 2010. (Neyra Affirm., Ex G at [Foley EBT].) At her deposition, plaintiff testified that she was stepping into the street to cross the street when “I caught my right foot on the curb and fell over.” at (*Id.* at 20-21.) Plaintiff testified that she tripped over a curbstone. (*Id.* at 46.) At her deposition, plaintiff was asked to pick a photograph from among those taken by her husband, which “best shows the condition that you tripped on at the time of the accident,” and that photograph was marked as Defendants’ Exhibit C1. (*Id.* at 47.)

K.L. Father & Son, Inc. was deposed on April 5, 2013.

Plaintiff filed the note of issue on November 14, 2013. Defendant K.L. Father & Son, Inc. now moves to renew its prior motion for summary judgment. (Motion Seq. No. 003). More than 120 days after the filing the note of issue, the City of New York moves to dismiss the complaint as against it, pursuant to CPLR 3211, on the ground that it did not have prior written notice of the alleged defective curb. (Motion Seq. No. 006.) This decision addresses both motions.

DISCUSSION

The City’s Motion to Dismiss

The City argues that the complaint should be dismissed as against it pursuant to CPLR 3211 because it did not have prior written notice of the alleged defective curbstone, as required under Administrative Code § 7-201 (c). However, lack of

prior written notice under Administrative Code § 7-201 (c) is not a valid ground for a motion to dismiss pursuant to CPLR 3211. A motion on that ground is in the nature of summary judgment, because the City must submit, as it did on this motion, proof outside of the pleadings to establish that it did not receive any prior written notice of the allegedly defective curbstone. (*See e.g. Brill v City of New York*, 2 NY3d 648 [2004].)

To the extent that the City's motion could be considered as a motion for summary judgment, plaintiff points out that such a motion would be untimely. The motion was clearly served more than 120 days after the filing of the note of issue.

Even if the motion were timely served, the motion would have been denied because a 2003 Big Apple Map appears to indicate a "broken, misaligned, uneven curb" defect along Madison Street, from 197 to 199 Madison Street. Although the City of New York points out that this marking is not at the corner of Madison and Rutgers Streets, factual disputes regarding the precise location of the alleged defect and whether it is designated on the map, generally should be resolved by the trier of fact (*see Perez v City of New York*, 110 AD3d 777, 778-779 [2d Dept 2013]), unless the defect shown is clearly different from that claimed (*D'Onofrio v City of New York*, 11 NY3d 581, 585 [2008].)

Therefore, the City's motion to dismiss is denied.

K.L. Father & Son Inc.'s Motion for Summary Judgment

K.L. Father & Son Inc. has demonstrated prima facie entitlement to summary judgment as a matter of law. Plaintiff testified that she tripped over a defective curbstone, which is depicted in the photograph that was marked as Defendants' Exhibit C1 at plaintiff's deposition. (Mattera Affirm., Ex G.) An abutting property owner has no duty under Administrative Law § 7-210 to maintain the curb. (*Yousef v Kyong Jae Lee*, 103 AD3d 542 [1st Dept 2013]; *Ascencio v New York City Hous. Auth.*, 77 AD3d 592 [1st Dept 2010]; *Garris v City of New York*, 65 AD3d 953 [1st Dept 2009].)

Plaintiffs fail to raise a triable issue of fact warranting denial of K.L. Father & Son Inc.'s motion for summary judgment. Plaintiffs cite the deposition of Mohammed Atieh, the owner of the grocery business that leased the ground floor of building at 197 Madison Street. Atieh testified at his deposition that he observed the landlord rebuild the sidewalk once or twice before 2006. (Reid Opp. Affirm., Ex D [Atieh EBT], at 30.) K.L. Father & Son Inc. contends that Atieh testified that repairs to the sidewalk were made only on the side of the property on Rutgers Street. (*See Atieh EBT*, at 47.)

However, it is not reasonable to infer from the testimony on sidewalk repair that the landlord performed any repair to the curb at issue, which is next to a sidewalk flag upon which a pedestrian walk signal for the intersection sits. (*See Mattera Affirm.*, Ex G.) When specifically asked about whether the sidewalk repairs would

also involve the curb, Atieh testified that the City of New York repaired part of the curb that joins up with Rutgers Street. (*Id.* at 31-32.) When asked about the curb that “joins up with Madison Street,” Atieh testified as follows:

“Q. Did you ever see that curb being worked on by anybody?

A. No.

Q. Did you see that curb being worked on by your landlord?

A. No, either.”

(Atieh EBT, at 32.)

Therefore, K.L. Father & Son Inc.’s motion for summary judgment is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for renewal by defendant K.L. Father & Son, Inc. (Motion Seq. No. 003) is granted, and upon renewal, summary judgment is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant K.L. Father & Son, Inc., with costs and disbursements to said defendant as taxed by the Clerk of the Court, and all cross claims by and against this defendant are dismissed, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the motion to dismiss by the City of New York (Motion Seq. No. 006) is denied.

Dated: June 2, 2014
New York, New York

ENTER:


J.S.C.

FILED

FILED

JUN 04 2014

COUNTY CLERK'S OFFICE
NEW YORK