

Rodriguez v City of New York
2014 NY Slip Op 31917(U)
July 18, 2014
Supreme Court, Richmond County
Docket Number: 10049/13
Judge: Thomas P. Aliotta
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

Part C2

DANIEL RODRIGUEZ,

Plaintiff(s),

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

Index No. 100491/13

CITY OF NEW YORK and ANTHONY E.
SOSCIA,

Motion No. 165 - 003

Defendant(s).

The following papers numbered 1 to 5 were marked fully submitted on 22nd day of
May, 2014.

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant ANTHONY E. SOSCIA, with Supporting Papers and Exhibits (dated December 30, 2013)	1
Affirmation in Opposition by Defendant THE CITY OF NEW YORK, with Exhibits (dated April 17, 2014)	2
Affirmation in Partial Opposition by Plaintiff, with Exhibits (dated January 13, 2014)	3
Reply Affirmation of Defendant ANTHONY E. SOSCIA, (dated February 6, 2014)	4
Reply Affirmation of Defendant ANTHONY E. SOSCIA to the Affirmation in Opposition by Defendant THE CITY OF NEW YORK, with Exhibits	

(dated May 19, 2014) 5

Upon the foregoing papers, the motion for summary judgment of defendant ANTHONY E. SOSCIA is granted.

Plaintiff DANIEL RODRIGUEZ commenced this action to recover damages for injuries purportedly sustained when he tripped and fell after his foot became caught on an indented portion of concrete surrounding a manhole cover located on the sidewalk in front of the driveway of a home owned by defendant ANTHONY E. SOSCIA (hereinafter SOSCIA). It is alleged that the height discrepancy between the manhole cover and the surrounding cracked pavement was the cause of his fall.

As a result of said fall, plaintiff sustained, *inter alia*, multiple injuries to his head, spine, shoulders and left ankle, including a fractured nose, organic brain damage, trauma to his cervical and thoracic spine, including disc bulges and herniations, injury to his right and left shoulders, and a sprain of his left ankle. All of these injuries are said to be permanent in nature.

Thereafter, plaintiff commenced this action against THE CITY OF NEW YORK (hereinafter THE CITY) and SOSCIA, based on their alleged failure to maintain the manhole cover and the sidewalk surrounding it in a reasonably safe condition.

In the current application, SOSCIA moves for summary judgment dismissing the complaint and all cross claims against him on the ground that he is exempt from liability pursuant to New York City Administrative Code §7-210. According to SOSCIA, a homeowner with property abutting a public sidewalk is not liable for damages sustained by a pedestrian in a trip-and-fall accident in the absence of proof establishing that the owner created the condition which caused the

RODRIGUEZ v. CITY OF NEW YORK, et al.

fall or made a special use of the sidewalk and was statutorily obligated to maintain the sidewalk in a reasonably safe condition.

Here, SOSCIA contends that the property abutting the subject sidewalk is a one-family residence that he owns and occupies. In addition, he argues that did not create the condition that allegedly caused plaintiff to trip and fall, nor did he make any special use of the sidewalk. Therefore, he is entitled to judgment dismissing the complaint against him.

In opposition, THE CITY contends that SOSCIA has not met his burden of establishing his prima facie entitlement to judgment as a matter of law. To the contrary, THE CITY argues that SOSCIA has not established, either through affidavit, EBT testimony or otherwise, that the property abutting the location of the accident was a one, two, or three-family residence that was used exclusively for residential purposes. As a result, it is THE CITY's position that SOSCIA has not established as a matter of law that his property is exempt from liability under Administrative Code §7-210.

In addition, THE CITY argues that factual issues exist as to whether SOSCIA caused or created the hazardous condition by making a special use of the sidewalk, *i.e.*, as a driveway. According to THE CITY, the Appellate Division, Second Department has held that a driveway constitutes a special use (*see Campos v. Midway Cabinets, Inc.*, 51 AD3d 843), and therefore, the homeowner's exemption in Administrative Code §7-210 is not applicable to SOSCIA. THE CITY further argues that where the defect occurs in a part of the sidewalk which is used as a driveway, to succeed on a motion for summary judgment, the abutting landowner bears the burden of establishing that he or she did nothing to cause or create the defective condition through the use of

RODRIGUEZ v. CITY OF NEW YORK, et al.

the sidewalk as a driveway. According to THE CITY, SOSCIA has submitted no proof sufficient to meet his burden. Therefore, his motion for summary judgment should be denied.

In partial opposition to SOSCIA's motion, plaintiff contends that the motion should be denied to the extent that it might be interpreted as warranting the dismissal of the complaint as against THE CITY. In particular, plaintiff contends that, as the owner of the subject manhole cover (which bears the casting "NYC Sewer"), THE CITY had a statutory duty to maintain both the cover and the 12-inch perimeter surrounding it, "flush" with the surrounding pavement (*see* 34 RCNY §2-07[b]). Thus, it is argued that the complaint as against THE CITY should not be dismissed.

SOSCIA's motion for summary judgment is granted.

In the opinion of this Court, defendant SOSCIA has sufficiently established through, *e.g.*, his EBT testimony, that he is the sole owner of the subject property, which he uses as a second home, and that he sleeps there approximately four times a week. In addition, SOSCIA testified at his EBT that he performed no work at the subject location and that he never hired anyone else to do so. Accordingly, SOSCIA has established *prima facie* that he is exempt from liability under the Administrative Code. In opposition, THE CITY has failed to submit any evidence to rebut this testimony or otherwise raise a triable issue of fact (*see* Zuckerman v. City of New York, 49 NY2d 557, 562).

As for the allegations of "special use", it is well settled that "liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, [or] control ... [and that w]here none is present, a party cannot be held liable for injuries caused by the dangerous

RODRIGUEZ v. CITY OF NEW YORK, et al.

or defective condition of the property. [Nevertheless, t]he principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part [so] used is subject to his control, to maintain [that] part ... in a reasonably safe condition to avoid injury to others" (Minott v. City of New York, 230 AD2d 719, 720 [internal quotation marks and citations omitted]; see Kaufman v. Silver, 90 NY2d 204, 207; Balsam v. Delma Eng'g Corp., 139 AD2d 292, 298 [1988]). While THE CITY is correct in arguing that the use of a sidewalk as a driveway constitutes a special use (see Katz v. City of New York, 18 AD3d 818, 819), this case involves the presence of a second special use, *i.e.*, the manhole cover owned and maintained by THE CITY. According to plaintiff, the indentation of the concrete immediately adjacent to the manhole cover is the defective condition which caused him to fall. Plaintiff's EBT testimony and photos of the subject area firmly establish that the defective condition fell within the 12-inch perimeter of the manhole cover, thereby placing the burden of proving proper maintenance of the cover (including its 12-inch perimeter), and the liability for any injuries resulting from its absence with THE CITY (see RCNY §2-07; see also Storper v. Kobe Club, 76 AD3d 426; Roman v. Bob's Discount Furniture of NY, LLC, 116 AD3d 940).

At bar, there is no proof that the subject area, *i.e.*, the manhole cover, including the 12-inch perimeter surrounding it, either benefitted SOSCIA or was subject to his control or repair; hence, he cannot be held responsible for the alleged lack of maintenance. In fact, the opposite is true. According to the EBT testimony of a CITY witness, William McDermott, the subject manhole cover was owned by THE CITY, which was solely responsible for its inspection and maintenance

RODRIGUEZ v. CITY OF NEW YORK, et al.

(*see* Lewis v. City of New York, 89 AD3d 410, 411; *cf.* Kaufman v. Silver, 90 NY2d at 208 [wherein both the landlord and tenant had joint control over a special use consisting of an iron grate in the sidewalk adjacent to the premises; as a result, both were found subject to joint and several liability for any injuries attributable to a lack of proper maintenance]).

In brief, there being no proof that SOSCIA had access to or the ability to exercise control over the manhole cover, he cannot be held liable for any injuries sustained as a result of the dangerous or defective condition thereof (*see* Breland v. Bayridge Air Rights, Inc., 65 AD3d 559). “[T]he duty to maintain and repair a special use located on adjacent property is necessarily premised upon the abutting landowner’s access to and ability to exercise control over the special use” (*see* Kaufman v. Silver, 90 NY2d at 207).

The balance of THE CITY’s arguments against dismissal have been considered and rejected.

Accordingly, it is

ORDERED that motion for summary judgment of defendant ANTHONY E. SOSCIA dismissing the complaint and all cross claims against him, is granted, and it is further

ORDERED that the complaint as against this defendant is severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

RODRIGUEZ v. CITY OF NEW YORK, et al.

HON. THOMAS P. ALIOTTA

Dated: July 18, 2014

J.S.C.