

Levenkova v City of New York
2014 NY Slip Op 32350(U)
July 30, 2014
Supreme Court, Kings County
Docket Number: 501104/2011
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on July 30, 2014.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

-----X

JANETTA LEVENKOVA,

Index No.: 501104/11

Plaintiff,

- against -

DECISION AND ORDER

THE CITY OF NEW YORK, BIANA LITVAK and MARK LITVAK,

Defendant(s).

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of:

- 1) Defendants Biana Litvak and Mark Litvak's ("Litvak") Notice of Motion for Summary Judgment for an Order Dismissing the Complaint and All Cross-Claims Against Defendants Litvak, Pursuant to CPLR 3212, dated February 3, 2014;
- 2) Plaintiff Janetta Levenkova's ("Levenkova") Affirmation in Opposition, dated April 1, 2014;
- 3) Defendants Litvak's Reply Affirmation, dated April 3, 2014, all of which submitted May 30, 2014.

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FILED

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	Defendant 1 [Exh. A-O] Defendant 2 Supplemental Affirmation [Exh. C]
Notice of Cross-Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits.....	
Answering Affidavits.....	Plaintiff 3 [Exh. A]
Replying Affidavit.....	Defendant 4
Supplemental Affidavits.....	
Exhibits.....	
Other [Memoranda of Law]	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: Defendants Litvak's

Motion for Summary Judgment for an Order dismissing the complaint pursuant to *CPLR 3212* is granted [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

PROCEDURAL HISTORY AND BACKGROUND

This action is to recover damages for personal injuries allegedly sustained by Plaintiff Levenkova on January 27, 2011 between 2:00 p.m. and 3:00 p.m. Plaintiff tripped and fell on a raised flag on the sidewalk about a hundred meters from the front of a residential house at 2531 East 63rd Street, Brooklyn, New York. The house is owned by Defendants Biana Litvak and Mark Litvak (“Litvak”) [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Plaintiff Levenkova appeared for her *50-h* hearing on June 21, 2011 [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Plaintiff served a Summons and Complaint with the Kings County Clerk’s office on November 25, 2011. The time for Defendants Biana Litvak and Mark Litvak to respond to the complaint was extended by stipulation to January 9, 2012. Defendants Biana Litvak and Mark Litvak joined issue by serving their answer on January 9, 2012. The Bill of Particulars was filed February 16, 2012. The Note of Issue was e-filed on December 17, 2013 [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Plaintiff Levenkova appeared for her Examination Before Trial (“EBT”) on November 29, 2012. Brian McDermott appeared for Defendant City of New York at an EBT on January 29, 2013. Defendants Mark Litvak and Biana Litvak appeared for their EBT’s on February 18, 2013. Fulu Bhowmick appeared for Defendant City of New York at an EBT on October 21, 2013) [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Defendants Biana Litvak and Mark Litvak filed their Notice of Motion for Summary Judgment to Dismiss the Complaint pursuant to *CPLR 3212*, dated February 3, 2014 [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Plaintiff Levenkova’s attorney filed his Affirmation in Opposition, dated April 1, 2014 [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Defendants Litvak filed their Reply Affirmation, dated April 3, 2014 [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

ARGUMENTS

In their February 3, 2014 motion, Defendants Litvak argue that the instant action should be dismissed for the following reasons: 1) Defendants Litvak are exempt from liability for injuries resulting from a defective sidewalk adjacent to their home because they own and reside in an one-family home pursuant to *New York City Administrative Code Section 7-210(b)*; 2) Plaintiff’s claims arising from an icy condition should be dismissed because there is no proof that an icy condition existed in the area where Plaintiff fell; and 3) the Litvaks did not

have actual or constructive notice of the existence of an icy condition [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

As support for their arguments, Defendants Litvak point to the *50h* and EBT testimonies of Plaintiff, Defendant Biana Litvak, Defendant Mark Litvak as well as City witnesses Brian McDermott and Fulu Bhowmich [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

At her *50 h* hearing, Plaintiff testified that when she reached the spot where the accident happened, some of the snow was cleaned from that area. While her left foot slipped, she merely speculated that it was perhaps a thin layer of ice. She was unsure if it was actually ice. Because her right foot hit the piece of the broken and raised ground, she lost her balance and her right foot went forward, causing her to fall. She stated that it was the raised portion of the ground that actually caused her to fall [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

In her EBT testimony, Plaintiff testified that as she was walking home, she slipped somewhat with her left foot because of an alleged thin layer of ice. However, she did not actually see the ice. Because she tripped with her right foot over the sidewalk since it was uneven, she fell onto her right leg. When she looked to see what caused her to fall, she saw the uneven surface of the concrete flag. Other than the crack in the sidewalk, she did not see anything else that caused her fall. Prior to the date of the accident on January 27, 2011, Plaintiff had never seen the raised portion of the sidewalk where her right foot tripped. She believed that the raised portion of the sidewalk was from the tree roots. She never saw any work in the area or the flag of the sidewalk in front of the gate being repaired. Prior to her accident, Plaintiff never complained about the sidewalk to the City of New York [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Defendant Mark Litvak testified that he resides with his wife, Defendant Biana Litvak and their three children in their one-family, two story owner-occupied house at 2531 East 63rd Street, Brooklyn, New York 11234. He did not recall if there had been any snow on the ground on January 27, 2011 or for the week or two prior to that date. He dutifully cleans the snow in front of his home when it snows. His wife and children never clean the snow. He never hires anyone to do the work. His neighbor to the left of his front door is Larry Strugatsky, but he has never seen Mr. Strugatsky clean the snow in front of Mr. Litvak's house. His neighbor to the right is Vincent Rossati. On rare occasions Mr. Rossati cleans the snow because they live in attached houses. However, Mr. Litvak could not recall if Mr. Rossati ever cleaned the snow in January 2011 [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

During the time of Mr. Litvak's residency at 2531 East 63rd Street, he was never aware of anyone who did repair work and he never hired a contractor to do repair work for the sidewalk adjacent to his home. However, Mr. Litvak received correspondence in 2005 or 2006 from the City of New York regarding the condition of the sidewalk in front of his house. In its correspondence, the City alerted Mr. Litvak that it was in the process of looking at the sidewalk. Before it would ask Mr. Litvak to do any repairs, the City stated that it would send a forester to see if anything needed to be done to the roots of the tree. The City's correspondence in 2005 or 2006 was the only notification Mr. Litvak received about the condition of the sidewalk. Consequently, Mr. Litvak never made any repairs and never did any maintenance around the sidewalk in front of his house. Mr. Litvak has also never hired a contractor or anybody to do any work on the sidewalk adjacent to the house of his neighbor, Mr. Rossati. Mr. Litvak never received any violations about the condition of the

sidewalk in front of his house. Aside from Plaintiff, he is not aware of anyone falling near his house [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Defendant Biana Litvak testified that she has lived with her husband and children at 2531 East 63rd Street, Brooklyn, New York 11234 for eight years. She did not recall January 27, 2011; she did not know if there was any snow on the ground that day; and she did not remember if it had snowed in the month of January 2011. It is her husband who cleans the snow in front of the house. She was unaware of anyone else who might do so. She has never hired anyone to clean the snow. Prior to January 27, 2011, she has never hired anyone to do work and she has not seen anyone doing any repair work on the sidewalk in front of her house in the eight years that she has lived there. She was not aware of any complaints about the sidewalk, and she never received complaints about the raised portion of the sidewalk. Her children never complained about the uneven sidewalk in front of the house. She stated that the Litvaks did receive a letter from the City which advised them that it would take care of the sidewalk [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Brian McDermott, a supervisor at the New York City Department of Sanitation (“DOS”) testified that his job includes the maintenance and regulation of facilities, the allocation of equipment and manpower and the assignment of tasks. Mr. McDermott brought to his deposition a sanitation carting book which shows all DOS equipment on any given day for sanitation. He also brought a DS1174 or “snow book” for January 2011 which depicts tracking events for the snow and recorded events for January 27, 2011 including snow piles on Nostrand Avenue M to Kings Highway. The books do not tell the amount of snowfall. Mr. McDermott could not tell if any snow piles were recorded for 2531 East 63rd Street. The snow book did not show the last snowfall prior to January 27, 2011. Mr. McDermott pointed out that DOS does not generally clean the sidewalks of snow but is only required to clean the sidewalks of its own buildings. Sanitation workers are trained not to allow snow to be moved onto the adjacent sidewalk. Mr. McDermott testified that the snow began to fall on Wednesday, January 26 and salters were sent out at 7:00 a.m. on January 26. The plows are sent out when there is three inches of snow on the ground. Neither the snow book nor carting book shows on what route East 63rd Street is. The snow book reports when one hundred percent of all the routes are completed following snowfall based upon the time the shift completed the work. The snow book revealed that on Thursday, January 26 on the 7:00 a.m. to 7:00 p.m. shift one hundred percent of all routes were completed. In addition, on January 27, spreaders and plows were sent out at midnight, came back and went out again at 7:00 a.m. [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Fulu Bhomick testified that she works as a records searcher and testifier for the New York City Department of Transportation (“DOT”). When Ms. Bhomick receives a request from the Law Department, she searches the designated records. A record search for the property at 2531 East 63rd Street from Bassett Avenue to Mayfair Drive North was performed on June 18, 2012 for the period January 27, 2009 to January 27, 2011 for permits, applications, CARs, NOVs, inspections, maintenance and repair records, sidewalk violations, contracts and complaints. However, nothing was found for that period [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

In his Affirmation in Opposition, dated April 1, 2014, Plaintiff’s attorney argues that summary judgment must be denied because: 1) Defendants have not established that they did not cause and/or create the condition that caused Plaintiff’s accident and 2) Plaintiff claims that there is a question of fact whether there was an icy condition and whether Defendants had actual and/or constructive notice of the icy condition [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

In their Reply Affirmation, dated April 3, 2014, Defendants refute Plaintiff’s allegations. They stress that they are not liable for an alleged defect in the sidewalk in front of their home because: 1) They did not create the alleged defect; 2) They did not cause it to occur through a special use; and 3) They are not liable

under *New York City Administrative Code Section 7-210(b)* since they own and occupy a one-family residential property. They underscore that there is no evidence that any icy condition was observed at the time and place of the accident. Moreover, there is no evidence in the record of the appearance of an icy condition. They refer to Plaintiff's EBT testimony that other than the crack in the sidewalk, she did not see anything else that caused her to slip and fall. Thus, there is only idle speculation that the Litvaks had actual or constructive notice of any alleged icy condition [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

COURT RULINGS

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues of material fact. See *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate an absence of any material issues of fact. See *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. See *Alvarez v. Prospect Hospital, supra*.

Turning to the merits of the Litvak's motion, the Court finds that the EBT testimonies of Defendants Biana Litvak and Mark Litvak demonstrate, *prima facie*, that the Litvaks live in a single family owner occupied residence. Biana Litvak and Mark Litvak testified that they have resided at 2531 East 63rd Street, Brooklyn, New York 11234 for eight years in their one-family, two story house owned by the them [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

Since the Litvaks' home is deemed to be an owner occupied single family home, the Litvaks are not liable as a matter of law for the injury under *Section 7-210 of the Administrative Code of the City of New York (the "Sidewalk Law")* which imposes tort liability upon certain property owners for the negligent failure to remove snow and ice from the sidewalk abutting their property. The legislative purpose of the *New Sidewalk Law* was to shift liability away from the City to commercial property owners and to exempt small private home owner from liability. See *Meyer v. City of New York*, 114 AD3d 734, 980 NYS2d 482 (2nd Dept., 2014). *Section 7-210(b) of the Administrative Code of the City of New York* states that:

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 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 part, owner occupied, and (ii) used exclusively for residential purposes.

Consequently, this Court finds that there is nothing to show that the Litvaks negligently failed to remove snow and ice from the sidewalk adjacent to their home on January 27, 2011, the date of Plaintiff's

accident. See *Section 7-210(b) of the Administrative Code of the City of New York; Meyer v. City of New York, supra*. As a result, the Litvaks may only be held liable for the hazardous condition on the sidewalk if they either undertook snow and ice removal efforts that made the naturally-occurring condition more hazardous, or as a result of a special use. See *Cuapio v. Skrodzi*, 106 AD3d 769, 966 NYS2d 438 (2nd Dept., 2013); *John v. City of New York*, 77 AD3d 792, 909 NYS2d 142 (2nd Dept., 2010); *Bi Chan Lin v. Po Ying Yam*, 62 AD3d 740, 879 NYS2d 172 (2nd Dept., 2009); *Bruzzo v. County of Nassau*, 50 AD3d 720, 854 NYS2d 774 (2nd Dept., 2008). However, this Court observes that there is no evidence in the record of the appearance of an icy condition or special use. It further notes that Plaintiff testified at her EBT that other than the crack in the sidewalk, she did not see anything else that caused her to slip and fall [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

This Court also finds that there is nothing in the record to show that the Litvaks created the alleged defect in the sidewalk in front of their house or caused it to occur through a special use. Since they own and occupy a one-family residential property, they are not liable under See *Section 7-210(b) of the Administrative Code of the City of New York; Meyer v. City of New York, supra*. This Court notes that Mark Litvak testified that he received correspondence about the condition of the sidewalk in front of his house in 2005 or 2006 from the City of New York. According to Mr. Litvak’s EBT testimony, the City stated that it was in the process of looking at the sidewalk and would send a forester to see if anything needed to be done to the roots of the tree before it asked Mr. Litvak to do any repairs [Defendant 1, Exhs. A-O; Defendant 2 Supplemental Affirmation, Exh. C; Plaintiff 3, Exh. A; Defendant 4].

In opposition, Plaintiff failed to provide any evidence to raise a triable issue of fact. No evidence was introduced as to the origin of the ice that allegedly cause the condition, and as to whether the Litvaks had sufficient time to remedy the dangerous condition. Any assertion that the Plaintiff slipped on an icy condition that had accumulated because of the January 27, 2011 snowstorm is based upon pure speculation, which is insufficient. See *Gray v. City of New York*, 33 AD3d 857, 825 NYS2d 481 (2nd Dept., 2006); *Jones v. New York City Housing Authority*, 298 AD2d 500, 748 NYS2d 400 (2nd Dept., 2002); *Bernstein v. City of New York*, 69 NY2d 1820, 511 NE2d 52 (1987); *Nazario v. Chavez*, 306 AD2d 391, 761 NYS2d 490 (2nd Dept., 2003).

As a result, the Litvaks are entitled to summary judgment dismissing the complaint against them.

Based on the foregoing, it is hereby ORDERED as follows:

The complaint against the Litvaks is dismissed, and the Clerk is directed to enter judgment accordingly dismissing the complaint against the Litvaks.

This constitutes the Decision and Order of this Court.

Date: July 30, 2014
Levenkova v. The City of New York et al
(Index Number 501104/11)


Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta
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