Walter v City of New York
2014 NY Slip Op 33111(U)
August 19, 2014
Supreme Court, Queens County
Docket Number: 8724/11
Judge: Phyllis Orlikoff Flug

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

KAREN WALTER, Plaintiff, -against- THE CITY OF NEW YORK, DAVID SALEHANI, SHAHLA SALEHANI and CREATIVE LINEN HOUSE, INC. and NATIONAL GRID, Defendants.	Index Number..8724/11 Motion Date...6/4/14 Motion Cal. Number.....143, 144 Sequence No...11, 12

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Defendant, the City of New York (hereinafter "City"), moves *inter alia* for summary judgment, dismissing plaintiff's complaint and all cross-claims asserted against it. Defendants, David Salehani and Shahla Salehani (hereinafter, collectively, "Salehanis", separately move *inter alia* for summary judgment, dismissing plaintiff's Complaint and all cross-claims asserted against them. Defendant, Create Linen House, Inc. (hereinafter "Creative Linen") cross-moves *inter alia* for summary judgment, dismissing plaintiff's Complaint and all cross-claims asserted against it.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on October 10, 2010 as a result of a trip and fall due to a hole in the roadway adjacent to the premises located at 55-16 Myrtle Avenue, in the County of Queens, City and State of New York. The Salehanis are the owners of the

property abutting the subject defective condition and Creative Linen is a tenant in the property pursuant to a lease agreement with the Salehanis.

As an initial matter, although a cross-motion is an improper vehicle to seek affirmative relief against a nonmoving party, this technical defect may be ignored where there is no prejudice and the opposing parties had ample time to be heard on the motion (See Daramboukas v. Samlidis, 84 A.D.3d 719, 721 [2d Dept. 2011]; Kleeberg v. City of New York, 305 A.D.2d 549, 550 [2d Dept. 2003]).

Creative Linen's cross-motion was made returnable on the same date as the Salehani's motion, April 29, 2014, and both motions were adjourned for more than five weeks, to June 4, 2014. Under these circumstances, all opposing parties had ample opportunity to be heard and the cross-motion may be properly considered.

On a motion for summary judgment, the proponent "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" (Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 [1985]). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which requires a jury trial (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 [1986]).

Liability for personal injuries sustained as a result of a dangerous condition on a public sidewalk or street is generally placed on the municipality, and not on the owner or lessee of abutting property (See Farrell v. City of New York, 67 A.D.3d 859, 860 [2d Dept. 2009]; DiMaio v. Pozefsky, 35 A.D.3d 1136, 1136-37 [3d Dept. 2006]).

Nevertheless, an owner or lessee may be held liable for such injuries where he or she affirmatively created the dangerous condition, caused it to occur due to some special use or violated a statute or ordinance expressly imposing liability for the failure to maintain the public property (See Farrell, *supra* at 860-61; Hyland v. City of New York, 32 A.D.3d 822, 822-23 [2d Dept. 2006]).

There is no allegation that either the Salehanis or Creative Linen caused the defect to occur due to a special use.

Further, it is well settled that the responsibility for maintenance, repair and creation of roadway surfaces lies with the City of New York (See Garret v. City of New York, 50 A.D.3d 955, 955-56 [2d Dept. 2008]; Cabrera v. City of New York, 45 A.D.3d 455, 456 [2d Dept. 2007]; Tanzer v. City of New York, 41 A.D.3d 582 [2d Dept. 2007).

Moreover, while New York City Administrative Code § 7-210

imposes a duty on a landowner to maintain the public sidewalk abutting his or her premises, the curb is not part of the sidewalk for purposes of liability pursuant to this subsection (See Alleyne v. City of New York, 89 A.D.3d 970, 971 [2d Dept. 2011]; Ascencio v. New York City Hous. Auth., 77 A.D.3d 592, 593 [1st Dept. 2010]).

Contrary to plaintiff's contentions, plaintiff's deposition testimony clearly demonstrates that the accident occurred when plaintiff was stepping off the curb, onto the roadway, and was caused to fall due to a hole in the roadway.

As such, this deposition testimony is sufficient to establish that neither the Salehanis nor Creative Linen were under any obligation to maintain the area where plaintiff fell.

In addition, the Salehanis and Creative Linen have both established that they did not cause or create the subject defective condition by submitting *inter alia* the deposition testimony of Victor Arazi, the president of Creative Linen, that he observed co-defendant National Grid perform work at the subject location prior to plaintiff's accident and that he observed the defective condition immediately after National Grid completed its work (See, e.g., DeSilva v. City of New York, 15 A.D.3d 252, 254 [1st Dept. 2005]).

Plaintiff's opposition relates solely to the issue of whether the Salehanis had a duty to maintain the subject area and does not contest the Salehanis' claim that neither they, nor Creative Linen, affirmatively created the subject defect.

The claim that Creative Linen did not have actual notice of the defect, made by Creative Linen's attorney in his affirmation in support of the cross-motion, lacks probative value and fails to raise any triable issue of fact regarding who created the subject defect (See Wolfson v. Rockledge Scaffolding Corp., 67 A.D.3d 1001, 1002 [2d Dept. 2009]).

Notably, the deposition testimony of Walter Stone, formerly a record searcher for co-defendant National Grid, confirms that National Grid performed work at the subject location and National Grid does not submit any opposition to either the motion or cross-motion.

The City contends it is entitled to judgment on the ground that it lacked prior written notice, as required by New York City Administrative Code § 7-201[c][2] and submits *inter alia* the deposition testimony of Omar Codling, a record searcher for the New York City Department of Transportation.

Mr. Codling testified that he personally conducted a search for records pertaining to the entire block on which plaintiff's accident occurred. The records located by the search and produced

on this motion consist of three permits, one permit application which revealed the existence of three permits, one permit application seven notices of violation, seventeen inspections, one repair order, two gang sheets, one 311 complaint and a big apple map. None of the documents found as a result of the search provided the City with the requisite prior written notice.

As an initial matter, the repair order and gang sheets pertain to a pothole located at 55-35 Myrtle Avenue, and do not in any way relate to the defect that allegedly caused plaintiff's accident.

In addition, it is well settled that records memorializing a telephonic compliant do not satisfy the requirement of prior written notice (See McCarthy v. City of White Plains, 54 A.D.3d 828, 829-30 [2d Dept. 2009]; Akcelik v. Town of Islip, 38 A.D.3d 483, 484 [2d Dept. 2007]; Cenname v. Town of Smithtown, 303 A.D.2d 351, 352 [2d Dept. 2003]).

The permits, permit applications and notices of violation issued for the surrounding area are likewise insufficient as the records indicate that the area was inspected following the issuance of the subject violations and permits and resulted in a "pass" (See Lopez v. Gonzalez, 44 A.D.3d 1012, 1012-13 [2d Dept. 2007]; Khemraj v. City of New York, 37 A.D.3d 419, 420 [2d Dept. 2007]; see also Abott v. City of New York, 114 A.D.3d 515, 516 [2d Dept. 2014]).

The issuance of a work permit fails to constitute evidence of prior written notice in any event (See Gee v. City of New York, 304 A.D.2d 615, 617 [2d Dept. 2003]; see also DeSilva v. City of New York, *supra*, at 253).

Finally, while there is a Big Apple Map depicting an extended section of broken and misaligned curb at the subject location, the map does not depict any roadway defects and, as such, fails to constitute prior written notice of the specific defect at issue here (See Cuccia v. City of New York, 22 A.D.3d 516 [2d Dept. 2005]; Camacho v. City of New York, 218 A.D.2d 725, 726 [2d Dept. 1995]).

Plaintiff fails to raise a triable issue of fact in opposition. Contrary to plaintiff's contentions, the unsigned deposition transcript of Omar Codling is admissible as it was submitted by the party deponent himself and, as such, was adopted as accurate (See Rodriguez v. Ryder Truck, Inc., 91 A.D.3d 935, 936 [2d Dept. 2012]; Ashif v. Won Ok Lee, 57 A.D.3d 700 [2d Dept. 2008]).

In addition, the City was not required to plead lack of prior written notice as an affirmative defense (See generally Cipriano v. City of New York, 96 A.D.2d 817 [2d Dept. 1983]).

Finally, plaintiff's claim that the City created the defective condition by negligently preforming a repair in response to the 311 compliant is wholly speculative.

It is well settled that "mere conclusion, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). "A shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment" (Polanco v. City of New York, 244 A.D.2d 322 [2d Dept. 1997]; see also Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 [1978]; Capelin Assoc. v. Globe Mfg. Corp., 34 NY 2d 338, 341 [1974]; Blankman v. Incorporated Village of Sands Point, 249 A.D.2d 349, 350 [2d Dept. 1998]; Colonial Commercial Corp. v. Breskel Assocs., 238 A.D.2d 539 [2d Dept. 1997]; Aaron Pitter & Co. v. Segal, 173 A.D.2d 159, 160 [1st Dept. 1991]).

Accordingly, the motions and cross-motion are granted, in their entirety, and plaintiff's complaint and all cross-claims are dismissed as asserted against defendants the City of New York, David Salehani, Shahla Salehani and Creative Linen House, Inc., only.

August 19, 2014

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J.S.C.