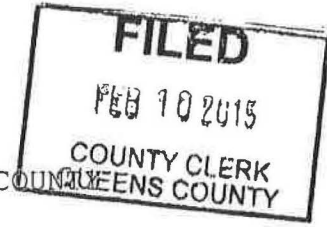


Moore v City of New York
2015 NY Slip Op 30213(U)
February 5, 2015
Supreme Court, Queens County
Docket Number: 19176/12
Judge: Kevin J. Kerrigan
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This opinion is uncorrected and not selected for official publication.



Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Travis Moore,

Plaintiff,

- against -

The City of New York and New York City
Department of Transportation, FB Burgers
LLC, and Kansas Fried Chicken Inc.,

Defendants.

-----X

Index
Number: 19176/12

Motion
Date: 1/28/15

Motion
Cal. Number:

Motion Seq. No.: 4



The following papers numbered 1 to 17 read on this motion by defendant, Kansas Fried Chicken, Inc., for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affirmation in Partial Opposition(FB).....	7-8
Affirmation in Opposition(Pltf)-Exhibits.....	9-11
Affirmation in Opposition(City).....	12-13
Reply.....	14-15
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Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by KFC for summary judgment dismissing the complaint and all cross-claims against it is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling while walking on Fox Square Plaza in front of 1 Flatbush Avenue in Kings County on April 3, 2012. Said premises is owned by defendant Kansas Fried Chicken (KFC) and leased to FB Burgers which operates a Five Guys restaurant at said premises.

Fox Square Plaza is paved with decorative square concrete

pavers. Plaintiff alleges that he tripped and fell when his left foot went into a hole that was the result of a missing paver. It is undisputed that this plaza was constructed by the City's Department of Transportation.

Annexed to the moving papers is an aerial photograph of Fox Square showing it as a triangular pedestrian square with public seating at the intersection of Flatbush Avenue and Fulton Street. Also annexed are photographs of a City sign identifying the area as a NYC plaza named Fox Square Plaza and listing various activities that are prohibited by order of the DOT Commissioner. Indeed, the City does not dispute that Fox Square Plaza is a public square.

KFC contends that this area is not a sidewalk that KFC was required to maintain pursuant to §7-210 of the Administrative Code and, therefore, did not owe plaintiff any duty of care. Plaintiff and the City contend that Fox Square is a sidewalk and is statutorily liable for failing to maintain it pursuant to §7-210.

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability remained exclusively upon the City.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes (see Puello v. City of New York, 35 AD 3d 294 [1st Dept 2006]).

KFC, co-defendants and plaintiff cite §§1-112, 19-101 and 7-201(c) of the Administrative Code as supporting their respective interpretations of whether or not Fox Square is a sidewalk within the meaning of §7-210.

Section 1-112 of the Administrative Code, which sets forth the general rules of construction of various terms used in the Code, provides, in pertinent part: "Unless expressly otherwise provided, whenever used in the code, the following terms shall mean or include: ... 13. 'Street'. Any public street, avenue, road, alley, lane, highway, boulevard, concourse, parkway, driveway, culvert, sidewalk, crosswalk, boardwalk, viaduct, square or place, except marginal streets."

Section 19-101, concerning the construction, maintenance, repair obstruction and closure of streets and sidewalks provides, in pertinent part, "Definitions. Whenever used in this title: ... d. 'Sidewalk' shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians."

Section 7-201 of the Administrative Code sets forth the requirement of service of a notice of claim upon the City as a prerequisite to suits against the City. It provides, in relevant part:

c.1. As used in this subdivision:

(a) The term "street" shall include the curbstone, an avenue, underpass, road, alley, lane, boulevard, concourse, parkway, road or path within a park, park approach, driveway, thoroughfare, public way, public square, public place, and public parking area.

(b) The term "sidewalk" shall include a boardwalk, underpass, pedestrian walk or path, step and stairway.

KFC contends that since public squares or plazas can encompass vast areas, it would be unreasonable to interpret the foregoing provisions in such a manner as would qualify squares and plazas as sidewalks for §7-210 liability and thus make a property owner responsible for the maintenance and repair of entire public squares. Rather, contends plaintiff, they should be harmonized so as to define a sidewalk for §7-210 liability purposes as a boardwalk, underpass, pedestrian walk or path, step or stairway located between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians and, thus, a public square or plaza, such as Fox Square, would be excluded from the definition of sidewalk.

Plaintiff argues that since a "square or place" is included in the definition of "street" in §1-112, and since §19-101 defines a sidewalk as the area of the "street" between the curb and the property intended for pedestrians, then Fox Square, which abuts KFC's property and the curbs, is a sidewalk within the meaning of §7-210.

The issue of whether a public square or plaza is a sidewalk within the contemplation of §7-210 appears to be one of first impression, as none of the parties cite, and this Court is unaware of, any cases on point. Therefore, this Court must glean the intent of the Legislature by looking to the plain language of the various

provisions of the Code and interpreting said language according to established rules of construction.

Section 1-112 merely sets forth generalized definitions of certain terms used in the Administrative Code. There is no definition of sidewalk, but only of "street", which includes everything from streets, roads and highways to sidewalks and squares. Moreover, it apprises that the use of these terms in the Code are limited to public streets, sidewalks, squares, etc. This section does not purport to impose its general definition of street to every instance of the use of the word in every section of the Code, so that "street" everywhere in the Code must include sidewalks and squares as well as roadways.

This section is prefaced with the qualifying language, "Unless expressly otherwise provided". Section 1-112 instructs that the term "street" is used in the Administrative Code merely in the broad sense of all public outdoor areas, unless more narrowly defined in other Titles or sections of the Code to address the matters set forth in those Titles and sections. Moreover, these public outdoor areas are listed separately, and thus, are not synonyms or interchangeable.

Indeed, this section lists "public street" itself among the list of various places included under the general definition of "street". "Public street", "sidewalk" and "square or place", although all forming part of "the streets of New York" at large, are listed separately, thus showing that the Legislature did not necessarily intend "street" specifically to mean the same thing as "sidewalk" or for "sidewalk" to mean the same thing as "square or place". When used in its specific sense, a "street" is different from a "sidewalk" and a "sidewalk" is different from a "square".

Section 19-101 does not require a different analysis. It merely defines the boundaries constituting a sidewalk. This section is part of subchapter 1 of Title 19, dealing with the construction, maintenance, repair, obstruction and closure of streets and sidewalks, as is §19-152. The latter section, as heretofore stated, imposes upon property owners the obligation to maintain and repair sidewalks abutting their properties. Moreover, since §1-112 differentiates between sidewalks and squares and 19-152 refers only to sidewalks, there is no reasonable basis for interpreting §19-101 as requiring that "square" be substituted for "street" and that it be read as defining a sidewalk as a public square between the curb or roadway and the boundary lines of an adjacent property, and thus interpreting §19-152 as requiring property owners to maintain and repair public squares adjacent to their properties. On the contrary, a plain reading of these sections requires that §19-152

be interpreted as not referring to squares but to sidewalks as commonly understood, which are narrow paths or walks running parallel to the roadways on one side and to the boundaries of real property on the other.

The scope of an adjacent property owner's liability regarding the repair and maintenance of sidewalks imposed by §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code section[s] 19-152" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore, §7-210 and §19-152 must be read in conjunction. Moreover, the Legislature, in its discussion of §7-210 and §19-152 in the Report, speaks only of sidewalks as commonly understood, and gives no indication that public squares are intended to be included within the scope of a property owner's duty to maintain and repair.

Both §§7-201 and 7-210 are part of Title 7, chapter 2 of the Administrative Code concerning actions against the City. Therefore, the Court must look to the definition of sidewalk set forth in §7-201(c)(1)(b) in determining its meaning in §7-210, not the general definition of street set forth in §1-112. In harmony with §19-101, §7-201 defines a sidewalk in the way it is commonly understood, as a pedestrian walkway or path, as opposed to a street which is the roadway and curb. Section 7-201 further narrows the definition of sidewalk by excluding public squares and places, relegating these areas to the category of "street".

Section 7-201(c)(1) expressly otherwise provides that "street" does not include "sidewalk" or "square or place". "Street" and "sidewalk" are defined separately and both list completely different items. "Street" includes "a public square" but sidewalk does not.

Therefore, a plain reading of the language of the foregoing sections of the Administrative Code requires that the term "sidewalk" in §7-210 be given its commonly understood meaning, and to comprise those areas of "a boardwalk, underpass, pedestrian walk or path, step and stairway" "between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb". In contrast, a "public square" and "public place" are part of the street. This is the only rational interpretation of the meaning of the term "sidewalk" in §7-210, in light of a plain reading of the foregoing sections of the Administrative Code and the intent of the Legislature as gleaned in its Report of the Committee on Transportation.

Moreover, this Court is also guided by the general principle

of statutory construction that a statute should not be interpreted in a manner that would produce absurd results. This Court dismisses as patently absurd any suggestion that the Legislature intended §7-210 to require an adjacent property owner to be the custodian of a public square, a major architectural feature which may be hundreds of feet in diameter and which contains public seating, and which was constructed by the City for the use of the public to mill about and congregate. The aerial photograph of Fox Square Plaza shows it to be a large triangular public plaza. It is clearly not a sidewalk.

Therefore, since Fox Square Plaza is not a sidewalk within the meaning of §7-210, KFC may not be held statutorily liable to plaintiff for failing to maintain and repair it. Since KFC had no duty to repair and maintain the public square, it was plaintiff's and/or co-defendants' burden to show evidence that it was nevertheless responsible because it created the defect or caused it through some special use (see Pratt v. Villa Roma Country Club, Inc., 277 AD 2d 298, 299 [1st Dept 2000] ["No ordinance or statute is alleged here. Thus, it was incumbent upon the plaintiffs to raise a triable issue of fact that the defendant either created or caused the defective condition, or derived a special benefit from the abutting property unrelated to public use Since the plaintiffs failed to come forward with any opposing evidence demonstrating that the defendant created or caused the defective condition, or made a special use . . . the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint"]). Plaintiff and co-defendants have failed to proffer any evidence that KFC created the condition or that it made a special use of the area so as to raise any triable issue of fact.

Since KFC owed no duty of care to plaintiff and is entitled to summary judgment dismissing the complaint and all cross-claims against it, the remaining branches of the motion for summary judgment on its cross-claims against FB Burgers and for an order barring the City from contesting its ownership of Fox Square Plaza are moot.

Accordingly, the complaint and all cross-claims are dismissed against KFC.

Dated: February 5, 2015



 KEVIN J. KERRIGAN, J.S.C.

FILED
 FEB 10 2015
 COUNTY CLERK
 QUEENS COUNTY