

<b>Moore v City of New York</b>
2015 NY Slip Op 30214(U)
February 5, 2015
Supreme Court, Queens County
Docket Number: 19176/12
Judge: Kevin J. Kerrigan
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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.,

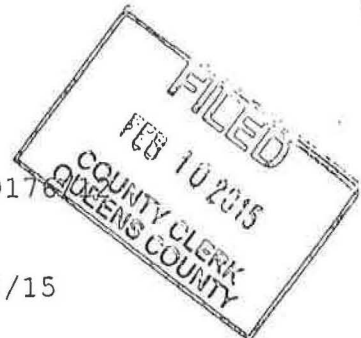
Defendants.  
-----X

Index  
Number: 19176

Motion  
Date: 1/28/15

Motion  
Cal. Number: 96

Motion Seq. No.: 3



**UNRECORDED**

The following papers numbered 1 to 12 read on this motion by defendant, FB Burgers LLC, for summary judgment.

Papers  
Numbered

- Notice of Motion-Affirmation-Exhibits..... 1-4
- Affirmation in Opposition(KFC)-Exhibits..... 5-7
- Affirmation in Opposition(Pltf)-Exhibits..... 8-10
- Affirmation in Opposition(City)..... 11-12

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by FB Burgers 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.

FB Burgers moves for summary judgment upon the ground that it did not create the defective condition and was not responsible for maintaining the area and, therefore, that it owed no duty of care to plaintiff.

Craig Cohen, managing partner of FB Burgers, avers in his affidavit in support of the motion that FB Burgers did not install the paving stones at Fox Square Plaza, did not make any repairs to the pavers or sidewalk at the subject location, and was not responsible for making any repairs to the pavers. He also avers that he contacted the DOT and the New York City Department of Consumer Affairs and was advised that FB Burgers could not touch any of the pavers adjacent to the subject premises. No evidence to the contrary is proffered in opposition.

Since the un rebutted evidence, on this record, is that FB Burgers did not create the condition that caused plaintiff to trip and fall, FB Burgers did not owe plaintiff any duty of care and, therefore, FB Burgers is entitled to summary judgment dismissing the complaint and the City's cross-claim for contribution against it. Moreover, pursuant to the order of this Court issued herewith granting defendant KFC's companion motion for summary judgment (see Calendar No. 4), this Court determined that Fox Square Plaza is not a sidewalk within the meaning of §7-210 of the Administrative Code and therefore, in the absence of any evidence in opposition that it created the condition or caused it through a special use of the area, KFC was entitled to summary judgment dismissing the complaint and all cross-claims against it. Thus, FB Burgers is also entitled to dismissal of KFC's cross-claims against it for indemnification.

Plaintiff's argument in opposition that FB Burgers is statutorily liable pursuant to §7-210 of the Administrative Code because a public square, such as Fox Square Plaza, is a sidewalk, is without merit. In the first instance, this Court, in its order determining KFC's companion motion, has determined that Fox Square Plaza is not a sidewalk but is part of the street and, therefore, §7-210 does not apply to impose statutory liability. But in any event, FB Burgers was not the owner of the adjacent property but the tenant. Section 7-210 does not impose liability upon tenants. It expressly states that responsibility to repair and maintain the public sidewalk and liability for the breach of that duty rest upon the owner of the abutting real property. Since §7-210 imposes a nondelegable duty upon the owner, no liability may be imposed upon a tenant under that statute (see Collado v Cruz, 81 AD 3d 542 (1<sup>st</sup>

Dept 2011)). Therefore, no cause of action lies against FB Burgers under §7-210 of the Administrative Code as a matter of law.

Plaintiff's remaining argument that FB Burgers has failed to meet its prima facie burden of showing evidence that it did not have actual or constructive notice of the condition is also without merit. Since plaintiff has proffered un rebutted evidence that FB Burgers did not create the condition, and since it was not statutorily responsible to maintain and repair the area, it owed no duty of care to plaintiff. Since FB Burgers owed plaintiff no duty of care to maintain and repair the subject area, whether or not it had notice of the condition is irrelevant.

The City also fails to raise any triable issue of fact in opposition.

Accordingly, the complaint and all cross-claims are dismissed against FB Burgers. As heretofore noted, the complaint and all cross-claims are also dismissed against KFC, pursuant to the order of this Court issued herewith granting KFC's companion motion for summary judgment.

Finally, this Court takes judicial notice that the New York City Department of Transportation is not a cognizable legal entity but is merely a department, or agency, of the City, and, thus, may not sue or be sued. Accordingly, this Court, sua sponte, hereby orders that the caption of this action is hereby amended so as to delete the New York City Department of Transportation as a defendant.

The caption of this action is hereby amended to read as follows:

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Travis Moore,

Plaintiff,

Index  
Number: 19176/12

- against -

The City of New York,

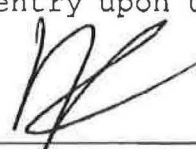
Defendant.

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Serve a copy of this order with notice of entry upon the Clerk of the Court without undue delay.

Dated: February 5, 2015

  
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KEVIN J. KERRIGAN, J.S.C.