

Ramos v Marcy Baer Assoc., L.P.

2015 NY Slip Op 30576(U)

March 6, 2015

Sup Ct, Bronx County

Docket Number: 303304/12

Judge: Mitchell J. Danziger

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 BRONX

-----x

NORMA RAMOS,

Plaintiff(s),

- against -

MARCY BAER ASSOCIATES, L.P. AND THE CITY OF
NEW YORK,

Defendant(s).

-----x

DECISION AND ORDER

Index No: 303304/12

In this action for the negligent maintenance of the public sidewalk, defendant MARCY BAER ASSOCIATES, L.P. (Marcy), moves for an order granting it summary judgment, thereby dismissing the complaint. Specifically and saliently, Marcy avers that insofar as the defect alleged to have caused plaintiff's fall is immediately adjacent to a fire hydrant, Marcy had no duty to repair it and because Marcy did not create the defective condition, it is not liable as matter of law. Plaintiff opposes the instant motion on grounds that under prevailing law, Marcy does have a duty to maintain the portion of the sidewalk at issue and that as a result, insofar as Marcy has yet to produce a witness for depositions, the instant motion is premature pursuant to CPLR § 3212(f). Defendant THE CITY OF NEW YORK (the City) also opposes the instant motion on grounds similar to those asserted by plaintiff, namely that the duty to repair the sidewalk at issue is, under prevailing law, Marcy's.

For the reasons that follow hereinafter, Marcy's motion is hereby denied.

The instant action is for alleged personal injuries as a result of the alleged negligent maintenance of the public sidewalk. Plaintiff's complaint alleges that on May 11, 2011, plaintiff tripped and fell while traversing the sidewalk in front of premises located at 35 Marcy Place, Bronx, NY (35). Plaintiff alleges that defendants had the duty to maintain the sidewalk in a reasonably safe condition, were negligent in failing to do so, which negligence caused plaintiff's accident and the injuries stemming therefrom.

Marcy's motion seeking an order granting it summary judgement is denied insofar as the evidence it submits fails to establish that it had no duty to maintain the sidewalk upon which plaintiff fell and because the very evidence it submits raises an issue of fact with respect to constructive notice.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense,

and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his

failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(see also *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). When the proponent of a motion for summary judgment fails to establish

prima facie entitlement to summary judgment, denial of the motion is required "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Self serving affidavits, meaning those which contradict previous deposition testimony, will not be considered by the court in deciding summary judgment and cannot raise a triable issue of fact sufficient to defeat summary judgment (*Gloth v Brusco Equities*, 1 AD3d 294, 294 [1st Dept 2003]; *Lupinsky v Windham Construction Corp.*, 293 AD2d 317, 318 [1st Dept 2002]; *Joe v Orbit Industries, Ltd.*, 269 AD2d 121, 122 [1st Dept 2000]; *Kistoo v City of New York*, 195 AD2d 403, 404 [1st Dept 1993]). While it is clear that self serving affidavits from plaintiff him/herself, contradicting prior testimony shall be summarily disregarded, it is equally clear, that third-party affidavits, from witnesses, which contradict plaintiff's prior testimony shall be disregarded as well (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 324 1st Dept 2006) [Court discounted affidavit from an eyewitness when the same "was so completely at odds with plaintiff's deposition testimony."]; *Gomez v City of New York*, 304 AD2d 374, 375 [1st Dept 2003]; *Perez v South Park South Associates*, 285 AD2d 402, 404 [1st Dept 2001]; *Philips v Bronx Lebanon Hospital*, 268 AD2d 318, 320 [1st Dept 2000]). The rationale for disregarding self serving affidavits was best articulated in *Glick & Dolleck, Inc. v Tri-Pac Export Corp.* (22 NY2d 439, 441 [1968]) wherein the court stated

that while the court is generally proscribed from weighing credibility, it is free to do so when it is clear that the "issues [proffered] are not genuine, but feigned."

Pursuant to section 7-201(c)(2) of the New York City Administrative Code,

[n]o civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Accordingly, generally, a municipal defendant bears no liability under a defect falling within the ambit of section 7-201(c) "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt

of written notice" (*Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]). Even when there is evidence that the municipality had prior written notice of a defective condition, liability for the same is obviated upon evidence that the same was repaired prior to a plaintiff's accident (*Lopez v Gonzalez*, 44 AD3d 1012, 1013 [2d Dept. 2007] [Municipal defendant granted summary judgment because, *inter alia*, while it had prior written notice of the condition alleged, it had repaired it and no further written notice existed at least 15 days prior to plaintiff's accident]). An exception to the foregoing exists, however, where it is claimed that the municipal defendant affirmatively created the condition alleged to have caused plaintiff's accident, in which case, the absence of prior written notice is no barrier to liability (*Elstein v City of New York*, 209 AD2d 186, 186-187 [1st Dept 1994]; *Bisulco v City of New York*, 186 AD2d 85, 85 [1st Dept 1992]). A plaintiff seeking to proceed on a theory that the municipality created the defect alleged, however, must establish that the defective condition was improperly installed so as to bring the defect out of the ambit of ordinary wear and tear (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]). Stated differently, the proponent of a claim that a municipal defendant created a dangerous condition must establish that work performed by the municipal defendant was negligently performed such that it "immediately result[ed] in the existence of [the]

dangerous condition" alleged (*Yarborough* at 728 [internal quotation marks omitted]).

Notwithstanding the foregoing, on September 14, 2003, with the passage of § 7-210 of the New York City Administrative Code, maintenance and repair of public sidewalks and any liability for a failure to perform the same, was shifted, with certain exceptions, to owners whose property abutted the sidewalk (*Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009], *revd on other grounds* 14 NY3d 779 [2009]; *Klotz v City of New York*, 884 AD3d 392, 393 [1st Dept 2004]); *Wu v Korea Shuttle Express Corporation*, 23 AD3d 376, 377 [2d Dept 2005]).

Specifically, §7-210 states, in pertinent part, that

[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition. . . [, that] 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. . . [, that][f]ailure 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. . . [,and that] [t]his subdivision shall not apply to one-, two- or three-family

residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

As noted above, because of § 7-201, prior to that the passage of § 7-210, the duty to repair and maintain the public sidewalks in a reasonably safe condition rested with the municipality within which the sidewalks were located (*Ortiz* at 24; *Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004]; *Belmonte v Metropolitan Life Insurance Company*, 304 AD2d 471, 474 [1st Dept 2003]). Accordingly, before § 7-210, an abutting landowner had no duty to maintain the public sidewalk and was not liable for an accident occurring thereon unless he/she created the dangerous condition alleged or derived a special use from the sidewalk (*Weiskopf* at 203; *Belmonte* at 474). Accordingly, whereas tort liability for an accident involving a defective condition on a public sidewalk was once premised only upon the abutting owner's affirmative acts in making the sidewalk more hazardous, i.e., causing or creating a dangerous condition (*Ortiz* at 24), with the enactment of § 7-210, it is now well settled that an owner of property abutting a public sidewalk is liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*id.* at 25; *Martinez v. City of New York*, 20 A.D.3d 513, 515 [2d Dept 2005]). Despite the enactment of § 7-210, the City nevertheless remains responsible to maintain certain sidewalks such as those abutting "one-, two- or three-family residential real property that is (i) in whole or in

part, owner occupied, and (ii) used exclusively for residential purposes" (New York City Administrative Code § 7-210[c]), and is liable for defects existing on the sidewalks abutting exempt properties or in cases (*id.*). Additionally, the City remains liable to maintain the curbs abutting public sidewalks because § 7-210 only shifted the responsibility of sidewalk maintenance to an abutting landowner, which is defined as "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" (New York City Administrative Code § 19-101(d); see also *Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010] [Defendant, abutting property owner granted summary judgment in an action arising from an accident on a defective portion of the sidewalk when the evidence established that the accident occurred on the curb.]; *Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009]). For this reason, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" (*Vucetovic v Espom Downs*, 10 NY3d 517, 521 [2008]), and, provided there is prior written notice of a defect existing thereon, the City remains liable (*id.* ["Here, sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. Significantly, tree wells are not mentioned in sections 19-152,

16-123 or 7-210. And while section 7-210 employs the phrase 'shall include, but not be limited to,' this clause applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk. Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210. If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal."]). The City also remains responsible for the maintenance of the sidewalk within 12 inches of any covers or gratings upon a sidewalk, such as a fire hydrant's gate box (*Flynn v City of New York*, 84 AD3d 1018, 1019 [2d Dept 2011], lv denied 17 NY3d 709 [2011]) ["Accordingly, the responsibility for maintaining the condition of the area where Flynn fell lies with the City, and not the Estate. We agree with the Appellate Division, First Department, that there is nothing in Section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner."]). In such case, of course, meaning cases where the City remains responsible for the maintenance of the sidewalks despite § 7-210,

liability against the City requires evidence that the City had prior written notice of the condition alleged or that the City caused or created the defect alleged (*Adamson v City of New York*, 104 AD3d 533, 533 [1st Dept. 2013]; *Batts v City of New York*, 93 AD3d 425, 427 [1st Dept. 2012]; *Tucker v City of New York*, 84 AD3d 640, 644-645 [1st Dept. 2011]).

Despite the advent of § 7-210, owners of exempt property remain liable for injuries caused by defective sidewalks if they caused or created a dangerous condition thereon or derived a special use from the public sidewalk (*Meyer v City of New York*, 114 AD3d 734, 734-735 [2d Dept. 2014] [Court granted motion by defendants for summary judgment on grounds that the property was exempt under § 7-210 and because they established that they neither created the condition alleged to have caused plaintiff's accident nor did they derive a special use from the public sidewalk.])

Thus, as is the case with any action sounding in premises liability, an owner of real property abutting a public sidewalk is now liable if it is proven that he or she created the dangerous condition, had prior actual or constructive notice of its existence (*Weinberg v 2345 Ocean Associates, LLC*, 108 AD3d 524, 525 [2d Dept. 2013]; *Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809 [2d Dept. 2011]), or enjoyed a special use of the public sidewalk (*Terilli v Peluso*, 114 AD3d 523, 523 [1st Dept. 2014]; *Rodriguez v City of Yonkers*, 106 AD3d 802, 803 [2d Dept. 2013]). As in any case

premised on the negligent maintenance of real property, it is well settled that a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of the premises (*Balsam v Delma Engineering Corporation*, 139 AD2d 292, 296-297 [1st Dept. 1998]; *Hilliard v Roc-Newark Assoc.*, 287 AD2d 691, 693 [2d Dept 2001]). Absent evidence of ownership, occupancy, control, or special use, liability cannot be imposed (*Balsam* at 297).

In support of the instant motion, Marcy submits a transcript of plaintiff's 50-h hearing, wherein she testified, in pertinent part, as follows. On May 11, 2011, at approximately 7:20AM, plaintiff tripped and fell on the sidewalk abutting 35. Plaintiff resided within 35, a seven story, multiple dwelling. She had just exited the building intending to go to work. As she walked out of 35's front door, she took about five steps and tripped and fell on a portion of uneven sidewalk located about eight inches from a fire hydrant. Plaintiff indicated that she had previously seen this condition inasmuch as it had been that way for many years.

Marcy also submits an affidavit from Ellener Tuitt (Tuitt), property manager employed by Marcy, who states that Marcy owns 35, which premises abuts the location of plaintiff's alleged accident. With respect to the location of the accident, Tuitt states that Marcy neither repaired nor created the condition alleged and that Marcy did not derive a special use of that portion of sidewalk.

Here, on this record, Marcy fails to establish that under prevailing law, it had no duty to repair the portion of sidewalk upon which plaintiff alleges to have fallen. In fact, this record and the controlling law establish the opposite - that Marcy was duty-bound to maintain the location of plaintiff's accident. As noted above, whereas tort liability for an accident involving a defective condition on a public sidewalk was once premised only upon the abutting owner's affirmative acts in making the sidewalk more hazardous, i.e., causing or creating a dangerous condition (*Ortiz* at 24), with the enactment of § 7-210, it is now well settled that an owner of property abutting a public sidewalk is liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*id.* at 25; *Martinez* at 515). Significantly, despite the enactment of § 7-210, the City remains liable to maintain, *inter alia*, the curbs abutting public sidewalks because § 7-210 only shifted the responsibility of sidewalk maintenance to an abutting landowner, which is defined as "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" (New York City Administrative Code § 19-101(d); see also *Ascencio* at 593; *Garris* at). For this reason, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" (*Vucetovic* at 521), and, provided there is prior

written notice of a defect existing thereon, the City remains liable (*id.*). Additionally, the City also remains responsible for the maintenance of the sidewalk within 12 inches of any gratings or covers upon a sidewalk (*Flynn* at 1019).

Based on the foregoing, given the location of the instant accident, which as per plaintiff's 50-h hearing testimony was on the sidewalk abutting a hydrant, such sidewalk falls within the ambit of § 7-210, as defined by § 19-101(d) and, thus, Marcy had a duty to maintain the same in a reasonably safe condition. Contrary to Marcy's assertion, cases such as *King v Alltom Props., Inc.* (16 Miscd3 1125[A] [Supreme Court Kings County 2007]), are inapposite and nevertheless constitute non-binding persuasive authority. Specifically, in *King*, the court granted summary judgment to the abutting property owner because plaintiff fell on the remainder of metal signpost which protruded from the sidewalk (*id.*) In holding that the abutting property owner had no duty to repair or remove the signpost, the court properly concluded that no such duty was imposed because 7-210 sought to shift responsibility for the maintenance of the sidewalk with respect to conditions listed within section 19-152 of the Administrative Code, none of which included protrusions, such as the signpost at issue (*id.*). At best then, *King* stands for the proposition that much like the signpost therein, the City is liable to repair any defects with the hydrant itself (*id.* ["What becomes apparent is that things such as

signposts, fire hydrants, and lightposts are intended to protrude from the sidewalk and do not fall within the ambit of section 19-152."]). Here, of course, the allegation and indeed, the uncontroverted facts establish that the defect alleged is not a defective or missing hydrant but a depressed portion of the sidewalk which surrounds it. The former would, of course, obviate Marcy's liability, the latter while not necessarily making Marcy liable, at the very least gives rise to a duty imposed upon Marcy to repair the sidewalk upon notice that it was defective.

Flynn, is particularly instructive in that it discusses the limits of the 12-inch rule, limiting it those appurtenances on sidewalks, which fall within the ambit of the definition prescribed by 34 RCNY 2-01. In that case, plaintiff tripped and fell upon stepping into a sunken and depressed gate box, which housed a fire hydrant's valve (*id.* at 1019). Plaintiff sued both the City and the owner of the property that abutted the sidewalk upon which plaintiff had fallen (*id.*). In granting summary judgment to the abutting property owner, the court noted that because

there is nothing in Section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) [which provisions require, along with 34 RCNY 2-01, that owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending 12 inches outward from the perimeter of the hardware, and for ensuring that the hardware is flush with

the surrounding street surface] and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner


(*id.* at 1019), defendant, the abutting property owner, was not liable to plaintiff for the defectively maintained gate box (*id.*). Against this backdrop, it is clear that the obligation to maintain the area around hardware pursuant to RCNY 2-01 is limited to, as per the clear words of the regulation, covers and gratings and not, as pertinent here, fire hydrants.

Having determined that Marcy had a duty to maintain the sidewalk upon which plaintiff fell, Marcy's own evidence, namely, plaintiff's testimony that the condition upon which she fell existed for years prior to her fall, raises an issue of fact with respect to whether Marcy had constructive notice of the condition alleged. As is in any action sounding in premises liability, an owner of real property abutting a public sidewalk is now liable if it is proven that he or she created the dangerous condition, had prior actual or constructive notice of its existence (*Weinberg* at 525; *Anastasio* at 809), or enjoyed a special use of the public sidewalk (*Terilli* at 523; *Rodriguez* at 803). A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Here, while Tuitt's affidavit establishes that Marcy did not create the condition at issue, it is not only silent on the issue of actual notice, but plaintiff's testimony establishes that the condition alleged, an uneven portion of the sidewalk, was visible, apparent, and existed for years, such that it existed for a period of time which a jury might conclude is sufficient to have permitted Marcy to discover and ameliorate it. Thus, Marcy fails to establish prima facie entitlement to summary judgment and the Court need not address the sufficiency of plaintiff's opposition papers (*Winegrad* at 853). It is hereby

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : March 6, 2015
Bronx, New York



Mitchell J. Danziger, ASCJ