

Lopez-Rivera v City of New York

2015 NY Slip Op 30589(U)

March 18, 2015

Sup Ct, Bronx County

Docket Number: 308484-11

Judge: Fernando Tapia

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**SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13**

YVONNE LÓPEZ-RIVERA

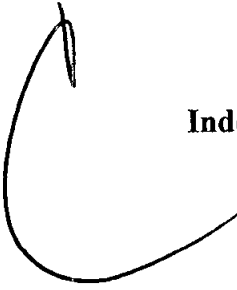
Plaintiff,

v.

**THE CITY OF NEW YORK, MABSTOA, and
NEW YORK CITY TRANSIT AUTHORITY,**

Defendants.

Index No. 308484-11



DECISION

This is a slip and fall case in which Plaintiff-Yvonne López-Rivera sustained injuries when she fell on icy chunks of snow in front of the BxM1 bus stop that was heading towards Manhattan on 230th Street and Broadway in Bronx, NY, on January 20, 2011, approximately 5:40 a.m.

Defendants-MABSTOA and New York City Transit Authority [Authority] filed their Motion to Dismiss under CPLR 3211 and 3212, claiming that Authority does not own and/or control the subject location and buses. Defendant-City of New York [the City] also cross-moved to dismiss Plaintiff's Complaint and grant summary judgment in its favor.

After careful review of the motion papers, this Court hereby decides the following:

- Defendants-MABSTOA and Authority's motion is **GRANTED**
- Defendant City's cross-motion is **DENIED**

Are Defendants liable for Plaintiff's injuries? Too many genuine issues of fact exist.

Summary Judgment And Its High Threshold

One of the recognized purposes of a summary judgment motion is to determine if any material facts exist. *Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 (App Div, 1st Dept 1976). Furthermore, under CPLR 3212(b), a motion for summary judgment must be supported by affidavit, a copy of its pleadings, and any other available proof. With respect to the affidavit, not only must it have a recitation of material facts, but it must also show that there is no defense to the action, or that the defense is meritless.

Because a motion for summary judgment has an extremely high burden [“as a matter of law”], it is a drastic remedy for any movant to use. *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (App Ct 1978). It is therefore the movant’s burden to produce evidence as would be required in a trial. *Oxford Paper Co. v. S.M. Liquidation Co., Inc.*, 45 Misc2d 612, 614 (Sup Ct, NY Cty 1965). Lastly, the purpose of the motion court is issue-finding, and not issue-determination. *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996).

MABSTOA And The Authority's Motion For Summary Judgment/Dismiss

MABSTOA and the Authority assert that because they are distinct and independent from the City [who owns and controls the public streets], they are not the liable parties in this case. See November 27, 2013 Aff. at ¶¶ 5-7. In addition, they rely on NYC Charter § 383¹ [“Inalienable property”] for reinforcement.

Although Plaintiff’s attorney argues that MABSTOA and the Authority’s Motion to Dismiss was previously denied² and that the Authority’s affidavit from Mr. Calvin Alston plainly

¹ “The rights of the city in and to its . . . streets, avenues, highways . . . and all other public places are hereby declared to be inalienable.”

² In a short form Decision dated September 4, 2012, Justice Larry S. Schachner denied MABSTOA and the Authority’s Motion to Dismiss, with leave to renew: See April 11, 2014 MABSTOA Opp. at Exh. B.

attested that the Department of Transportation maps³ show that the Authority has no control over the subject bus stop, MABSTOA is a subsidiary of the Authority and is therefore not a city agency or an entity synonymous with the City. See Public Authorities Law § 1203-a ["Subsidiary corporation"]; see also *Papts Food Corp. v. City of New York*, 107 AD2d 643, 645 (App Div, 1st Dept 1985) (where Plaintiff-pizzeria, contested littering summonses that were at an abutting bus stop, but admitted that MABSTOA passengers [and not MABSTOA itself] did the littering). As such, they are improper parties to this case. See Public Authorities Law §§ 1202 & 1204 ["Purposes of the authority;" "General powers of the authority"].

Plaintiff attached an incomplete affidavit City witness, Marshall Harris, which attempted to show the extent of MABSTOA and the Authority's involvement. See April 11, 2014 Opp. at Exh. C. This, however, cannot be taken into account in its piecemeal form.⁴ Although the Authority made its own attempt to have Plaintiff withdraw her claim, see November 27, 2013 Aff at Exh. C, both MABSTOA and the Authority do not own and/or control the sidewalk at the subject bus stop. The duty to maintain public sidewalks and roadways-including those adjacent to bus stops-in a reasonably safe condition and good repair, free from any defect, falls upon the City. *Cabrera v. City of New York*, 45 AD3d 455, 456 (App Div, 1st Dept 2007).

The City's Cross-Motion for Summary Judgment/Dismissal

According to the City, Plaintiff cannot prevail because the City did not receive actual or constructive notice of the alleged dangerous condition. See December 13, 2013 Aff. at ¶¶ 16 & 21. Furthermore, the City states that any claim of it having any notice would only be conjecture. Id. at ¶ 25.

³ Plaintiff's attorney pointed out that the Authority did not attach any DOT maps in evidentiary form.

⁴ The complete transcript is in the December 31, 2013 Aff. at Exh. E.

Whether or not the snowfall was in progress or whether there was a respite creates a triable issue of fact, preventing the City from a grant of summary judgment. *Pipero v. NYCTA*, 69 AD3d 493 (App Div, 1st Dept 2010). It is the formation of ice, along with a combination of freezing temperatures and packing of snow from pedestrians that constitutes the hazardous sidewalk condition after a heavy snowfall. *Foley v. City of New York*, 95 AD 374, 376 (App Div, 1st Dept 1904). Lastly, whether a condition that is under the control of a defendant is sufficiently hazardous to create liability is generally a question of fact to be resolved by a jury on the facts that are particular to the case. *Argenio v. Metropolitan Transportation Authority*, 277 AD2d 165, 166 (App Div, 1st Dept 2000).

Here, Ms. López-Rivera was at the same designated public bus stop that she used during the weekdays to go to work. See January 9, 2012 Tr. at p. 19, lines 10-18. She attested at her 50-h hearing that the fall occurred on the sidewalk where there were icy chunks. Id. at p. 11, lines 19-24; see also April 11, 2014 Opp. at ¶ 11. In contrast, the City counters that Plaintiff must show that the sidewalk owners had notice of a dangerous condition and that the owner had a reasonable amount of time to remedy it. See April 23, 2014 Reply at ¶ 4.

Because Ms. López-Rivera uses the same bus stop to get to work, she attested that the day before, there was still snow on the ground at that time, but that there were no chunks of ice. She further attested that someone must have broken up the ice. See January 9, 2012 Tr. at p. 19, lines 21-25. The fact that there were now icy chunks is proof that there was notice of the dangerous condition for someone to change its form. Liability on a slip and fall case requires proof of a dangerous condition and the defendant's actual or constructive knowledge of that condition prior to the fall. *Navdeo v. 250 Willis Avenue Supermarket*, 290 AD2d 246, 247 (App div, 1st Dept 2002). Moreover, the dissent in *Valentine v. City of New York*, 86 AD3d 381, 389

(App Div, 1st Dept 1982) underscored that it is a question for jurors to decide how much time is needed for the City to be reasonably expected to take affirmative action on behalf of the public.

Here, the City counters that it did not have a reasonable amount of time to remedy the dangerous condition. See April 23, 2014 Reply at ¶ 8. Mr. Harris, the City's witness, attested that there was a front end loader [FEL] that went out to clean from midnight to 8 a.m. on January 20, 2011. See Harris Tr. at p. 28, lines 3-24; p. 33, lines 11-25. Such an attestation shows that the City cleaned the snow and therefore had notice. Accordingly, questions abound that prevents the City from prevailing on its summary judgment motion.

WHEREFORE, MABSTOA and the Authority do not own and control the sidewalk where the subject bus stop accident occurred, based on case law and statutes. Their motion is therefore **GRANTED**. The City, however, maintains the public sidewalk; genuine issues of fact also exist regarding notice. Its cross-motion is therefore **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: March 18, 2015
Bronx, NY



Hon. Fernando Tapia, J.S.C.