Velez v City of New York
2015 NY Slip Op 30807(U)
April 27, 2015
Sup Ct, Bronx County
Docket Number: 350103/2013
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10e

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Aida Velez as parent and natural guardian of
Jose Velez, an infant,

Plaintiff,

-against-

DECISION and ORDER
Index No 350103/2013

The City of New York and Deegan Motel Corp.,

Defendants.

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Deegan Motel Corp.,

Third-Party Plaintiff,

-against-

Third-Party Index No 84007/2013

Stadium Hotel Corp. a/k/a Stadium Center LLC,

Defendant.

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Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affidavits.....1
Affirmations in Opposition and annexed Exhibits.....2
Reply Affirmation.....3

Plaintiff Aida Velez, as parent and natural guardian of Jose Velez, claims that the negligence of defendant The City of New York ("NYC") and defendant/third-party defendant Deegan Motel Corp. ("defendant Deegan Motel") caused Jose to sustain serious injuries. Ms. Velez alleges that on 9/26/12, Jose left his home and was heading to his aunt's apartment in River Park Towers. He exited the number 13 bus at 167th Street and began walking towards Sedgwick Avenue. As he approached the intersection of 167th Street and Sedgwick, he stepped off and then back onto the sidewalk, took two steps on the sidewalk and then fell on a two-inch elevated portion of the sidewalk.

Defendant NYC moves for summary judgment and to dismiss the plaintiff's complaint against it pursuant to CPLR 3212 on the ground that it does not own the property adjoining the subject sidewalk and thus bears no liability. The plaintiff and defendant Deegan Motel oppose the

defendant's motion.

The parties are reminded that submissions in Bronx County should reference First Department cases.

DISCUSSION

CPLR 3212 provides that summary judgment is warranted if the movant shows through the submission of admissible evidence that the opposing party has no defense to the cause of action or that the cause of action or defense has no merit. (CPLR 3212[b].) Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY2d 361 [1974].)

A landowner is required to maintain its property in a reasonably safe condition to avoid the likelihood of injury to others. (*O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1996].) In the instant case, the alleged accident occurred after the 2003 enactment of the NYC Administrative Code § 7-210. The pertinent provisions of the NYC Administrative Code § 7-210 are as follows:

> b. Notwithstanding any other provision of law, 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. Failure 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. This 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.
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> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks 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) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

In support of its motion, defendant NYC proffers the affidavit of George Mark and an undated printout from the Department of Finance of the City of New York ("DOF"). Mr. Mark references the DOF printout in his affidavit dated 4/7/09, almost 2 ½ years before Jose Velez's

accident. The Court declines to consider the affidavit and the printout since both the currency and accuracy of the information are questionable. Defendant NYC also proffers the affidavit of Paul Cividanes and infant-plaintiff Jose Velez's 50-H hearing testimony.

During his hearing, Jose testified that he fell in front of a men's shelter located at 1260 Sedgwick Avenue, across the street from a construction site.

By affidavit dated 2/26/14, Mr. Cividanes, a paralegal employed by the Department of Transportation of the City of New York ("DOT"), states that his duties include searching for records maintained by DOT including permits, applications, corrective action requests, violation notices, inspections, maintenance and repair orders, contracts and complaints. On 2/25/14, he conducted a search relative to 167th and 168th Streets and Sedgwick Avenue from 9/26/10 to 9/26/12, the date of the accident. His search yielded "51 permits, 23 hardcopy permits, 32 applications, 1 OCMC file, 1 CAR and 38 inspections," none belonging to the City or any of its agencies. His search also yielded no contracts, maintenance and repair orders/records, complaints, sidewalk violations or reported special events. Mr. Cividanes conducted a Big Apple Maps search that included the area of the subject property. The most recent maps were served upon DOT by the Big Apple Pothole and Sidewalk Protection Corporation on 7/30/03.

In opposition to defendant NYC's motion, plaintiff Velez maintains that the motion is premature since none of the defendants have been deposed although directed to do so in a Preliminary Conference Order. The plaintiff proffers six photographs of the alleged defective sidewalk which is within 12 inches of a "water cap of valve and fuel caps." Also visible in the photos are orange and yellow construction markings in the street and on the sidewalk, a resurfaced roadway and what appears to be new concrete poured around the utility cap. The plaintiff asserts that 38 inspections occurred and there are questions as to which agency(ies) inspected the area.

Defendant Deegan Motel, like the plaintiffs, opposes defendant NYC's motion on the ground that it is premature due to outstanding depositions. Defendant Deegan Motel's counsel also maintains that his law firm was substituted in as counsel on 3/7/14, about two weeks prior to defendant NYC's motion, and has not been afforded an opportunity to conduct necessary discovery.

CONCLUSION

Defendant NYC's motion for summary judgment is grounded in its non-ownership of the abutting property and thus no liability for the sidewalk pursuant to the NYC Administrative Code

§ 7-210. After careful review and consideration, the Court finds that the defendant met its burden.

Plaintiff Velez and defendant Deegan Motel oppose defendant NYC's motion and therefore bear the burden to establish that a triable issue of fact exists. (*Bethlehem Steel Corp v Solow*, 51 NY2d 870 [1980]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Ms. Velez and Deegan Motel both assert that defendant NYC's motion is premature due to outstanding discovery. In order to support their position, they must present an evidentiary basis for their assertion that discovery may lead to relevant evidence (*Progressive Northeastern Insurance Company v Penn-Star Insurance Company*, 89 AD3d 547 [1st Dept 2011] *citing Bailey v New York City Tr. Auth.*, 270 AD2d 156 [1st Dept 2000]) and that facts essential to justify opposition to the motion may exist but could not be stated. (*Griffin v Pennoyer*, 49 AD3d 341 [1st Dept 2008].) The plaintiff states that the 38 inspectors of the subject area described by defendant NYC are unknown and may be city entities. Defendant NYC's search of "Dynamic Access System for HIQA (/DASH Office/)", however, yielded information, including but not limited to, the inspection date, permit number, the name of the permittee and the inspector, the reason for the inspection and the result. The identified inspectors are Crown Castle NG East Inc., Consolidated Edison, Cablevision Systems, Empire City Subway and HLS Builders Corp., none of which are city entities.

Based on the foregoing, the Court finds that plaintiff Velez and defendant Deegan Motel fail to meet their shifting burden of proof; they fail to establish that further discovery may lead to additional relevant evidence (*Progressive Northeastern Insurance Company v Penn-Star Insurance Company*, 89 AD3d 547, *supra*, citing *Bailey v New York City Tr. Auth.*, 270 AD2d 156, *supra*) or that facts essential to create a triable issue of fact may exist but could not be stated. (*Griffin v Pennoyer*, 49 AD3d 341, *supra*.)

Defendant NYC's motion for summary judgment and to dismiss the plaintiff's complaint against it is granted. The defendant shall serve a copy of this Decision and Order with notice of entry within 30 days.

This is the Decision and Order of the Court.

Dated: April 27, 2015

So ordered,

Hon. Lizbeth González, JSC