SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

RAMONA BONIFACIO,
Plaintiff,
-against-

C-TOWN, LLC., NEW YORK CITY HOUSING AUTHORITY, and C-TOWN SUPERMARKET
Defendants.

INDEX NO. 157163/2013
MOTION DATE 10-21-2015
MOTION SEQ. NO 002
MOTION CAL. NO

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5, 6,
Replying Affidavits	7

Cross-Motion: ☐ Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered, that defendants C-TOWN, LLC. And C-TOWN SUPERMARKET's (herein "C-Town") motion for summary judgment dismissing the complaint is granted.

This action arises from personal injuries sustained by plaintiff on March 9, 2011 when she slipped and fell on a patch of black ice on a public sidewalk. At the time of her fall, plaintiff did not see any ice or snow on the sidewalk. Plaintiff commenced this action against the New York City Housing Authority (herein "NYCHA") and C-Town. NYCHA owns the property abutting the sidewalk area where plaintiff slipped. C-Town is a commercial tenant and neighbor of NYCHA.

C-Town has a gate that opens up from C-Town's loading dock onto the sidewalk abutting NYCHA's property. On the date of her fall, plaintiff testified that she saw accumulations of snow and melting ice on the sidewalk in the gap or opening between a fence owned by NYCHA and the open gate owned by C-Town.

Plaintiff testified that on March 9, 2011 she was walking to the train on her way to work. At approximately 5:00 am she was on a sidewalk abutting NYCHA buildings when she slipped and fell on ice located on NYCHA's portion of the sidewalk (see NYSCEF Doc. No. 42, Pg. 13-15, 20, 37-43). Plaintiff initially slipped on the NYCHA side of the sidewalk but fell onto the C-Town portion of the sidewalk (id.). At the time of her fall, plaintiff did not see anyone that she could call for help (Id., Pg. 47-48). Plaintiff called home and asked her husband to come help her (Id., Pg. 47-50). Plaintiff first noticed the ice she slipped on while she laid on the sidewalk (Id., Pg. 38-41). The ice was stuck behind the gate and was melting (Id., Pg. 34-35, 41-42).

Timothy Johnson, a Janitorial Caretaker for NYCHA, testified that NYCHA and the Department of Sanitation were responsible for removing the snow and ice on the sidewalk in question (see NYSCEF Doc. No 46, Pg. 50; Doc. No. 47, Pg. 14). NYCHA employees would plow the snow with a tractor and any snow left by the tractor would be manually shoveled (see NYSCEF Doc. No. 47, Pg. 18, 21-22). On multiple occasions, Johnson observed accumulated snow behind the gate owned by C-Town, that was left open onto the portion of the sidewalk belonging to NYCHA (see Id., Pg. 25-29, 40, and 77).

NYCHA employees would not close the gate and remove the snow caught behind it on NYCHA's portion of the sidewalk (Id., Pg. 46-47). Johnson stated that NYCHA employees didn't care about the snow and ice behind the gate because the gate was not NYCHA property, and NYCHA employees were told in their training not to touch non-NYCHA property (Id., Pg. 25, 40, 46-47, and 77). Although the gate was never closed in order to remove the snow and ice accumulation behind it, Johnson claims that the gate never interfered with NYCHA's removal of snow and ice from the sidewalk in question (Id., Pg. 38-42). There is no evidence that NYCHA ever requested that C-Town close the gate in question, maintain the gate closed, and only open the gate up to C-Town's property line.

Steven A. Rosario, General Manager for C-Town, testified that C-Town's operating hours were Monday through Saturday 8:00am - 9:00pm and Sunday 8:00am to 7:00pm (see NYSCEF Doc. No. 44, Pg. 12). C-Town had one employee that was in charge of snow removal. During heavier snowfall, other employees would assist in snow removal (Id., 15-17). C-Town never received complaints for snow and ice accumulation (Id., Pg. 86). C-Town employees only removed snow and ice from the C-Town portion of the sidewalk in question, and never removed snow and ice from the NYCHA portion of the sidewalk (see Id., Pg. 39-42). Rosario does not recall seeing snow and ice trapped under the gate on NYCHA's portion of the sidewalk (Id., Pg. 80).

C-Town now moves for summary judgment dismissing the complaint. C-Town argues that it cannot be held liable for the defective condition causing plaintiff's fall because it did not own the property where plaintiff fell; it did not create the defective condition; and it did not have actual or constructive notice of the defective condition.

NYCHA and Plaintiff oppose the motion dismissing the complaint as against C-Town. They argue that C-Towns' use of the gate in question encroached on NYCHA's property and constitutes a special use of NYCHA's portion of the sidewalk. NYCHA and Plaintiff contend that C-Town may be held liable for its failure to maintain the special use of NYCHA's portion of the sidewalk.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied

these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

"To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence. In the case of actual or constructive notice, plaintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation" (Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 856 N.Y.S.2d 573, 575 [1st Dept., 2008]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (Ceron v. Yeshiva University, 126 A.D.3d 630, 7 N.Y.S.3d 66, 68 [1st Dept., 2015]).

Section 7-210(b) of the Administrative Code provides that "the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition" (see New York City Administrative Code § 7-210[b]; Sangaray v. West River Associates, LLC, 121 A.D.3d 602, 604, 996 N.Y.S.2d 13, 15 [1st Dept., 2014]). "When strictly construing the Code provision, it is irrelevant that the hazard here could only have been corrected by the two neighboring property owners together;" what matters is that "the condition on which plaintiff actually tripped" - the ice patch - "was located on the portion of the sidewalk that abutted [NYCHA's] property, and therefore only [NYCHA] is liable under the provision" (Id.).

It is undisputed that the area where plaintiff slipped was on the NYCHA portion of the sidewalk. Section 7-210(b) imposes a duty on NYCHA to maintain the sidewalk in a reasonably safe condition.

NYCHA and plaintiff's contention that there is a "special use" exception to the general rule is inapplicable here. "The doctrine of special use imposes an obligation on the abutting landowner or occupier to maintain a public sidewalk in a reasonably safe condition to avoid injury to others, where it puts part of the sidewalk to a special use for its own benefit and that part of the sidewalk is subject to its control" (Beda v. City of New York, 4 A.D.3d 317, 318, 772 N.Y.S.2d 339, 340 [2nd Dept., 2004]).

There is no testimony that C-Town's gate encroaching on NYCHA's portion of the sidewalk was under the exclusive possession and control of C-Town for the alleged special use of the area (see O'Toole v. City of Yonkers, 107 A.D.3d 866, 967 N.Y.S.2d 751 [2nd Dept., 2013]). Johnson testified that NYCHA employees saw the

gate encroaching on NYCHA's portion of the sidewalk and chose not to move the gate so as to remove the snow and ice on NYCHA's portion of the sidewalk. C-Town did not exclusively possess and control the gate, nor did it perform any affirmative acts of negligence that would cause it to be liable under Section 7-210(b).

C-Town makes a prima facie showing of entitlement to judgment as a matter of law. NYCHA and plaintiff do not rebut C-Town's prima facie showing through contrary evidence in admissible form creating an issue of fact.

Accordingly, it is ORDERED, that defendants C-TOWN, LLC. and C-TOWN SUPERMARKET's motion for summary judgment dismissing the complaint as against them is granted, and it is further,

ORDERED, that all claims and cross-claims asserted against defendants C-TOWN, LLC. and C-TOWN SUPERMARKET are severed and dismissed, and it is further,

ORDERED, that the Clerk enter judgment accordingly, and it is further,

ORDERED, that the caption is amended as follows:

RAMONA BONIFACIO

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

, and it is further,

ORDERED, that the moving defendants serve a copy of this Order with Notice of Entry upon the remaining parties, the General Clerk's Office (Room 119), and the County Clerk (Room 141B), who, upon service of a copy of this Order with Notice of Entry, are directed to amend the caption and the Court's records.

ENTER: MANUEL J. MENDEZ J.S.C.

Dated: October 28, 2015

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE