Gomez v 39-43 Sch. St., Inc.
2015 NY Slip Op 32995(U)
September 22, 2015
Supreme Court, Westchester County
Docket Number: Index No. 58288/2015
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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RENE A. GOMEZ,

Plaintiff,

-against-

Index No. 58288/2015
DECISION & ORDER
Motion Sequence 1

39-43 SCHOOL STREET, INC., S&R AUTO REPAIR SHOP & TIRE SHOP and ROMERO AUTO REPAIR,

Defendants.
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The following papers numbered 1 through 14 were received and considered in connection with the above-captioned matter:

PAPERS	NUMBERED
Notice of Motion/Affirmation/Exhibits A-G	1-9
Affirmation in Opposition/Exhibits A-C	10-13
Reply Affirmation	14

On December 29, 2010, the plaintiff allegedly slipped on ice and fell on the sidewalk adjacent to the property known as 39-43 School Street, Yonkers, New York. The plaintiff

alleges to have sustained injuries as a result of the fall and filed a Summons and Complaint on March 3, 2011 in Bronx County, alleging that the defendants were negligent in the ownership, operation, management, maintenance and control of the walkway and seeking damages from the plaintiff. 39-43 School Street, Inc. ("School Street") filed an Answer, issue was joined, discovery completed, a Trial Readiness Order issued and a Note of Issue filed. The remaining defendants did not interpose any Answer and default judgment was granted against those defendants. Upon motion by School Street, the matter was then transferred to Westchester County.

School Street now makes this motion for summary judgment pursuant to CPLR § 3212 for dismissal of the complaint arguing that there is no statute or ordinance shifting the obligation to maintain the public sidewalk to School Street to make it liable for injuries resulting from a failure to perform that duty and that there is no evidence to conclude that School Street caused or created the alleged dangerous condition or had actual or constructive notice of it. The plaintiff opposes the motion.

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718(1980). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324(1986). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. *See*, e.g., *Winegrad v. New York Univ. Med. Ctr.*, 64

N.Y.2d 851, 853 (1985). In other words, the burden shifts to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of their position.

"Imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises" *Velez v. Captain Luna's Mar.*, 74 A.D.3d 1191, 1192, 904 N.Y.S.2d 474; *Logatto v. City of New York*, 51 A.D.3d 984, 859 N.Y.S.2d 469; *Canaan v. Costco Wholesale Membership, Inc.*, 49 A.D.3d 583, 584–585, 854 N.Y.S.2d 442; *Schwalb v. Kulaski*, 29 A.D.3d 563, 564, 814 N.Y.S.2d 696). " 'Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property' " Velez, 74 A.D.3d at 1192, 904 N.Y.S.2d 474, quoting *Turrisi v. Ponderosa, Inc.*, 179 A.D.2d 956, 957, 578 N.Y.S.2d 724; *Usman v. Alexander's Rego Shopping Ctr., Inc.*, 11 A.D.3d 450, 451, 782 N.Y.S.2d 757.

As a general rule, a landowner has no affirmative duty to keep abutting public sidewalks and streets in a safe or passable condition. *Mullins v. Siegel-Cooper Co.*, 183 N.Y. 129, 136, 75 N.E. 1112, 1114 (1905), *see also Berkowitz v. Spring Cr., Inc.,* 56 A.D.3d 594 (2008). "An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty" *Morelli v. Starbucks Corp.* 107 A.D.3d 963, 964, 968 N.Y.S.2d 542, 544 (2d Dept. 2013)

quoting Hevia v. Smithtown Auto Body of Long Is., Ltd., 91 A.D.3d 822, 822-823, 937 N.Y.S.2d 284.

Here, there is no ordinance placing an obligation on the defendant to maintain the sidewalk. Therefore, this Court must determine if the plaintiff raises a triable issue of fact as to whether the defendant created the alleged defective condition or caused it to occur due to a special use. *Rodrigues v. City of Yonkers*, 106 A.D.3d 802, 803, 965 N.Y.S.2d 527 (2d Dept. 2013). There is no allegation that the defendant caused the alleged defective condition to occur due to a special use, therefore, the Court turns to whether the defendant created the alleged defective condition.

"An abutting property owner or occupant may not be held liable for injuries sustained in a fall on ice or snow in a sidewalk where such owner or occupant did not have control over, or was not responsible for the maintenance of, the sidewalk on which the accident occurred." 86 N.Y.Jur.2d Premises Liability § 354.

In this case, School Street submitted an affidavit by David McIntyre, averring that he is responsible for overseeing the property and that at no time did School Street perform any snow and ice removal on the property or retain anyone to do so. David McIntyre further states that is was the sole responsibility of the tenants on the property to maintain the sidewalks and that he has no information as to who may have removed snow and ice from the sidewalks. School Street also submitted the examination before trial of Ursula McIntyre, the president of School Street, who testified that the tenants were responsible for all snow removal on the property and that she just went to the property to pick up the rent and her brother, David McIntyre would go to the property to pick up the rent and check

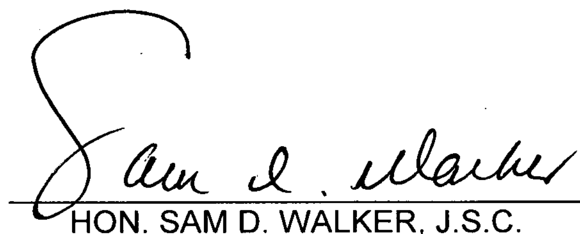
if the tenants were cleaning the area. The evidence supports that School Street was an out-of-possession landowner and did not remove the snow or ice from the sidewalk and therefore, did not cause a dangerous or hazardous condition.

The plaintiff argues numerous procedural defects and insufficiency of documentation in School Street's motion, none of which the Court finds meritorious. School Street has made a prima facie showing of entitlement to judgment by showing that it had no obligation to clear the sidewalk of snow and ice, and by establishing that neither it nor anyone on its behalf shoveled the sidewalk. *Mourounas v. Shahin*, 291 A.D.2d 537, 737 N.Y.S.2d 647, 648 (2d Dept. 2002).

Therefore, the defendant's motion for summary judgment is GRANTED.

The remaining parties are directed to appear before the Settlement Conference Part in Courtroom 1600 on October 6, 2015 to schedule an inquest on damages. To the extent any relief requested in motion sequence 1 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 22, 2015



HON. SAM D. WALKER, J.S.C.