

Hollman v City of New York

2016 NY Slip Op 30063(U)

January 6, 2016

Supreme Court, New York County

Docket Number: 160861/13

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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CAROL HOLLMAN,

Plaintiff,

-against-

Index No.

THE CITY OF NEW YORK and 480 ASSOCIATES, INC.,

160861/13

Defendant.

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DONNA MILLS, J. :

Defendant 480 Associates, Inc. (Associates) moves for summary judgment dismissing all claims and cross claims brought against it. Associates previously cross-moved for summary judgment in response to defendant The City of New York (City)'s motion for summary judgment. This court denied the cross motion on procedural grounds. Associates now moves for the same relief, claiming that the previous cross motion was not denied on the merits.

This is a personal injury action in which plaintiff seeks a recovery for injuries she incurred in a trip and fall incident that occurred on December 2, 2012, outside 480 7th Avenue, New York, New York. Plaintiff commenced this action against Associates, the owner of the premises, and City, alleging negligence in creating a dangerous condition at the premises, and/or having actual or constructive notice of a dangerous condition and failing to remedy it in a timely manner.

In moving for summary judgment, Associates contends that it should be dismissed from this suit because it had no duty of due care toward plaintiff with respect to the accident.

Associates claims that its duty is to maintain a safe sidewalk at all times, but that the accident occurred on the roadway alongside the sidewalk. According to Associates, the roadway was the location of the accident, and since it is a public roadway, it is the property of City, not

Associates. Associates relies on plaintiff's deposition testimony and photographs of the defective roadway. Associates states that, even if plaintiff alleges that the accident occurred on the curb of the sidewalk, it would legally qualify as part of the roadway, and thus, be City property. Associates argues that all liability for plaintiff's damages must be focused on City, which has a duty to maintain the roadway.

Plaintiff opposes the motion, contending that there is an issue as to the exact location of the accident. At this time, plaintiff argues that it is not conclusive whether the accident occurred on the sidewalk or the roadway. Plaintiff refers to her testimony at the 50-h hearing, in which she stated that she tripped in the roadway very close to the curb as she was stepping onto the sidewalk. However, she later amended her notice of claim, stating that she was caused to trip and fall over an elevated grate which was not level with the sidewalk/roadway surface. She does not know whether she fell on the roadway or the sidewalk. If it is determined that the accident occurred on the sidewalk, plaintiff claims that Associates would be liable to her, pursuant to section 7-210 of the Administrative Code of the City of New York (Code).

Plaintiff also opposes the motion because she claims that Associates has not made out a prima facie case for summary judgment, failing to show that it was not negligent as a matter of law. In effect, plaintiff argues that, since Associates did not demonstrate a right to summary judgment, she does not have to raise an issue of fact in response.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law

will properly preclude the entry of summary judgment [internal quotation marks and citation omitted].” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008). “Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus is entitled to judgment as a matter of law.” *Flores v City of New York*, 29 AD3d 356, 358 (1st Dept 2006). “Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment.” *Id.*

Associates’ main argument in its motion for summary judgment is that it had no duty of due care towards plaintiff, because the accident occurred on the roadway and /or curb, which is City property. Since the accident allegedly did not occur on the sidewalk, it was not on Associates’ property.

The court shall grant the motion. Associates is right in claiming that the issue of duty is a question of law. *See Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 (1994). Plaintiff cannot demonstrate that the accident occurred on Associates’ property, since she fails to identify the location of the grate, specifically whether it is on the sidewalk or the roadway. As she is unable to locate the grate, there is no way to show whether Associates had actual or constructive notice of any defective condition. Thus, Associates cannot be held liable and shall be dismissed from this action.

Accordingly, it is

ORDERED that defendant 480 Associates, Inc.’s motion for summary judgment is granted and the complaint is dismissed in its entirety as against said defendant, with costs and

disbursements as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendant.

DATED: 1/06/16

ENTER:

Donna M. Mills

JUDGE DONNA M. MILLS