| **Bartlett v City of New York** |
| --- |
| 2016 NY Slip Op 30916(U) |
| April 1, 2016 |
| Supreme Court, Queens County |
| Docket Number: 702085/15 |
| Judge: Howard G. Lane |
|  |
|  |

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
**Justice**

---

TRISHA BARTLETT,

Plaintiff,

-against-

CITY OF NEW YORK, et al.,

Defendants.

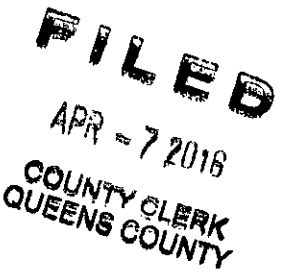
---

Index No. 702085/15

Motion
Date February 1, 2016

Motion
Cal. No. 8

Motion
Seq. No. 1




| | Papers Numbered |
|---|---|
| Notice of Motion..... | HC-A |
| Notice of Cross Motion..... | HC-B |
| Notice of Cross Motion..... | EF 3 |
| Aff. In Support..... | EF 4 |
| Memo of Law in Support..... | EF 5 |
| Exhibits..... | EF 8-15 |
| Acknowledgment of Service..... | EF 16 |
| Aff. In Opposition..... | EF 17 |
| Reply Affirmation..... | HC-C |
| Aff. In Reply..... | EF 24 |
| Exhibits..... | EF 25-31 |
| Aff. Of Service..... | EF 32 |

Upon the foregoing papers it is ordered that this motion by defendant, the City of New York ("the City") for summary judgment pursuant to CPLR 3212 against plaintiff, Trisha Bartlett and dismissing the Verified Complaint and all crossclaims against it is hereby granted.

This is a personal injury action whereby on February 4, 2014, plaintiff, Trisha Bartlett allegedly slipped and fell during the course of her employment with the City due to the negligence of defendants. She alleges that while employed by the New York City Department of Parks and Recreation, she slipped and fell on the roof of the "Passerelle Ramp" located in Flushing Meadow Corona Park, Queens, New York, injuring her right ankle.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendants to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (*see, id.*).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (*see, Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability (*Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et.al.*, 1 AD3d 578 [2d Dept 2003]).

Moving defendant, the City, established a prima facie case that plaintiff's exclusive remedy is through the Workers'

Compensation Law. Generally, an injured person's sole remedy against his or her employer is recovering under the Worker's Compensation Law (*Hageman v. B&G Bldg. Servs.*, LLC, 33 AD3d 860 [2d Dept 2006]). A plaintiff is barred from bringing a separate common-law against her employer if she has accepted Workers' Compensation benefits from that employer (*Talcove v. Buckeye Pipe Line Co.*, 247 AD2d 464 [2d Dept 1998]). Moving defendant established that plaintiff filed a claim with the State of New York Workers' Compensation Board and the Workers' Compensation Board has continued to award plaintiff benefits for lost wages and medical treatment and care. As there is no opposition to the motion, the case shall be dismissed as against defendant, the City.

That branch of the crossmotion by defendants, New York City Transit Authority ("NYCTA") and Metropolitan Transportation Authority ("MTA") seeking to dismiss the Complaint and all cross claims against MTA pursuant to CPLR 3212 on the grounds that there are no triable issue of fact is hereby granted without opposition. A prima facie case has been established that the MTA is not a proper party to an action involving allegedly negligent conduct in the operations of a transit system. "[I]t is well settled, as a matter of law that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility (*Cusick v. Lutheran Medical Center et. al.*, 105 AD2d 681 [2d Dept 1984]). Accordingly, that branch of the cross motion is granted and the case is dismissed as against the Metropolitan Transportation Authority.

That branch of the cross motion by defendants, NYCTA and MTA seeking to dismiss the Complaint and all cross claims against the NYCTA pursuant to CPLR 3211 on the grounds that plaintiff has failed to state a cause of action pursuant to CPLR 3211(a)(7) is hereby denied as untimely pursuant to CPLR 3211(e).

That branch of the cross motion by defendants, NYCTA and MTA seeking to dismiss the Complaint and all cross claims against the NYCTA pursuant to CPLR 3212 on the grounds that there are no triable issue of fact is hereby granted.

Cross-moving defendant, NYCTA presented sufficient evidence to establish that it owed no duty to plaintiff and it satisfied its prima facie burden of establishing the absence of triable issues of fact. Cross-Moving defendant established that did not own, operate, maintain, inspect, repair, or control the subject sidewalk area (*see, Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238

AD2d 540 [2d Dept 1997]). In support of its cross motion, defendant, NYCTA attaches, inter alia, the Affidavit of Carmelite Cadet, wherein she avers, inter alia, that: she is a Civil Engineer employed by the NYCTA, "the NYCTA does not own, operate, maintain, repair or control the 'walkway' or 'roof of the Passerelle Building' where the plaintiff alleges that she slipped and fell;" and plaintiff's own statutory hearing transcript testimony.

The burden then shifted to plaintiff to present triable issues of fact. Plaintiff failed to present any evidentiary, non-conclusory proof sufficient to establish the existence of material issues of fact, as plaintiff maintains that she takes no position on this portion of the cross motion (*see, Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The cross motion by defendant, Long Island Rail Road s/h/a Long Island Railroad ("LIRR") seeking an order granting summary judgment to the LIRR dismissing plaintiff's complaint and all other claims in this action is hereby denied without prejudice. As the record reflects that the parties have not completed discovery, and that discovery remains outstanding defendant, LIRR's cross motion for summary judgment is denied without prejudice as it is premature (*see,* CPLR 3212[f]; *Groves v. Lands End Housing Co.*, Inc., 80 NY2d 978 [NY 1992]; *Ramos v. DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH*, 2007 NY Slip Op 1714 [2d Dept 2007]; *Yadgarov v. Dekel*, 2 AD3d 631 [2d Dept 2003]; *George v. New York City Transit Authority*, 306 AD2d 160 [1st Dept 2003]). Accordingly, defendant, LIRR's cross motion for summary judgment is hereby denied "with leave to renew when discovery . . . is complete." (*see, Ramos, supra*).

This constitutes the decision and order of the Court.

Dated: April 1, 2016

.....
**Howard G. Lane, J.S.C.**