

Firpi v City of New York
2016 NY Slip Op 31152(U)
May 20, 2016
Supreme Court, Bronx County
Docket Number: 307399/2010
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

-----X
ALEXIS FIRPI,

Index No.: 307399/2010

Plaintiff(s),

-against-

DECISION/ORDER

Present:

HON. MITCHELL J. DANZIGER

THE CITY OF NEW YORK and ROSAURA
MORALES,

Defendant(s).

-----X
ROSAURA MORALES,

Plaintiff(s),

-against-

JUANA ROJAS and JULIE SUPERMARKET,

Defendant(s).

-----X
Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion to renew

Papers Numbered

Notice of Motion, Affirmation and Affidavits	
in Support with Exhibits	<u>1</u>
Affirmation in Opposition by defendant Morales	<u>2</u>
Reply Affirmation in Support	<u>3</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendant CITY OF NEW YORK (hereinafter "City") moves to renew a prior court order dated April 4, 2011 (Schachner, J.) that denied the City's previous motion for summary judgment with leave to renew upon completion of discovery. In light of the prior court order not being decided on the merits and the inclusion of leave to renew upon completion of discovery, the court grants that portion of the motion seeking renewal and now addressed the City's substantive motion for summary judgment.

In this case, plaintiff alleges that he was injured on December 31, 2009 when he was walking on a sidewalk during a snow storm. Plaintiff's amended Notice of Claim alleges that the accident took place on a defective or broken part of the sidewalk in front of 635 Courtlandt Avenue, Bronx, New York (hereinafter, "the premises"). The City argues that summary judgment dismissing the complaint is warranted pursuant to §7-210 of the Administrative Code of the City of New York. The City further argues that it had no prior written notice of any alleged defect in the sidewalk and that, in any case, plaintiff was injured while a snow storm was in progress.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

Pursuant to section 7-210(b) of the New York City Administrative Code,

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.

The section further provides at subsection (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.

Courts have recognized that §7-210 effectively shifts liability for injuries arising from a negligent failure to maintain a sidewalk from the municipality for injuries arising from a negligent failure to maintain a sidewalk from the municipality to the non-exempt abutting landowners (*Cook v. Consolidated Edison of N.Y. Inc.*, 5 A.D. 3d 447 [1st Dep't., 2008], *Zekester v. City of New York* 18 A.D. 3d 869 [2d Dep't., 2005]).

In support of the motion, the City submits the affidavit of David Schloss, employed by the New York City Law Department as a Senior Title Examiner. Mr. Schloss attests that he conducted a title search for 635 Courtlandt Avenue, Bronx, New York. The said search revealed that title to the premises is in the name of defendant ROSAURA MORALES, pursuant to a deed recorded on June 13, 1994. A copy of the deed was also submitted by the City. Further, plaintiff testified the he fell in front of a bodega and pictures of the location of plaintiff's accident confirm that a commercial bodega is being operating at the premises. Based on the forgoing, the premises is not solely residential and therefore, the City is shielded from liability pursuant to §7-210. Plaintiff has failed to raise any issue of fact in opposition to the motion.

Defendant Morales' opposition to the motion is unpersuasive. Morales argues that it is unclear whether the plaintiff was caused to fall by a defect on the sidewalk or on the curb. Therefore, Morales argues, the City may be liable because a municipality is liable for defects in a curb. That argument is also set forth in Morales' separate motion for summary judgment which the court

address in a separate order. For purposes of this motion, the court notes that Plaintiff's notice of claim and complaint both allege that his accident occurred on the sidewalk and not on the curb. Moreover, plaintiff himself testified that he fell on the sidewalk. Further, the court previously denied a motion to permit plaintiff to file a second amended notice of claim changing the location of his fall from the sidewalk to the curb (see order dated April 4, 2011, Schachner, J.). Based on the forgoing, summary judgment dismissing the complaint against the City is warranted.

Notwithstanding the above, the City has also submitted proof that it had no prior written notice of any alleged defect in the sidewalk or on the curb. Pursuant to section 7-201(c)(2) of the New York City Administrative Code,

[n]o civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Generally, a municipal defendant bears no liability under a defect falling within the ambit of §7-201(c), "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within reasonable time after receipt of written notice" (*Poirier v. City of Schenectady*, 85 N.Y. 2d 310, 313 [1995]). The statute mandates that for purposes of liability, prior written notice must be received at least 15 days prior to any accident alleged (*Ock v. City of New York*, 34 A.D.3d. 542 [2d Dep't., 2006]; *Baez v. City of New York*, 128 A.D.2d 488, 489 1st Dep't., 2000]). Thus no liability will lie for an accident occurring within 15 days after which the municipality defendant receives written notice (*Silva v. City of New York*, 17 A.D.3d 566, 567 [2d Dep't., 2005]). The

failure to demonstrate prior written notice leaves a plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying the alleged defect (*Katz v. City of New York*, 87 N.Y.2d 241, 243 [1995]).


The City has submitted an affidavit of Charlene Mui employed by the New York City Department of Transportation ("DOT"). Mui conducted a search of DOT records of the sidewalk where plaintiff's accident occurred for two year prior to an including the date of the accident. The search revealed no records relating the alleged defect, a broken or defective sidewalk, which plaintiff claims he tripped over. Plaintiff has failed to raise an issue of fact as to whether the City received prior written notice of the alleged defect. Further, the plaintiff has failed to assert that the City caused or created the alleged defect. Therefore, summary judgment is also warranted based on lack of prior written notice.

Moreover, plaintiff testified that it was snowing heavily at the time he fell. It is well settled that a municipality is not liable for injuries involved in an accident on a public sidewalk or public roadway, while a storm is still in progress (*Valentine v. City of New York*, 86 A.D.2d 381 [1st Dep't., 1982] aff'd 57 N.Y.2d 932 [1983]; *CalFuentes v. City of New York*, 237 A.D.2d 103 [1st Dep't., 1997]).

Based on the foregoing, the motion is granted and the complaint is dismissed against the City of New York. The clerk of the court is directed to transfer this matter in its entirety to a "non-city" part.

This constitutes the decision and order of the court.

Dated: 5/20/16
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.