Bonifacio v C-Town. LLC.
2016 NY Slip Op 31231(U)
June 29, 2016
Supreme Court, New York County
Docket Number: 157163/2013
Judge: Manuel J. Mendez
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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 05/25/16
MOTION SEQ. NO 003
MOTION CAL. NO

The following papers, numbered 1 to 6 were read on this motion for leave to renew.

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

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 defendant New York City Housing Authority's (herein "NYCHA") motion for leave to renew This Court's October 28, 2015 Order granting defendant C-TOWN, LLC. and C-TOWN SUPERMARKET's (herein "C-Town") motion for summary judgment is granted. Upon renewal NYCHA's motion is denied.

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 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 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 at approximately 5:00 AM on March 9, 2011, she was walking 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 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, or 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 moved for summary judgment dismissing the complaint, arguing that it cannot be held liable for 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 opposed the motion arguing that C-Towns' use of the gate constituted a special use of NYCHA's portion of the sidewalk because C-town's gate encroached on NYCHA property, and that C-Town failed to maintain this special use of NYCHA's portion of the sidewalk.

In an Order dated October 28, 2015, This Court granted C-Town's motion for summary judgment dismissing the complaint as against it, rejecting NYCHA's special use argument and holding that the portion of the sidewalk where plaintiff fell was NYCHA's portion of the sidewalk. The Order further stated that Section 7-210(b) imposes a duty on NYCHA to maintain the sidewalk in a reasonably safe condition.

NYCHA now seeks leave to renew This Court's October 28, 2015 Order on the ground that the case law relied upon by This Court was subsequently overturned by the Court of Appeals on February 11, 2016.

CPLR § 2221(e) states that a motion for leave to Renew (1) shall be identified specifically as such, (2) shall be based upon facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination, and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.

A motion for leave to renew is addressed to the sound discretion of the court (Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp., 64 A.D.3d 85, 878 N.Y.S.2d 97 [2nd Dept., 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Renna v. Gullo, 19 A.D.3d 472, 472, 797 N.Y.S.2d 115 [2nd Dept., 2005] citing to Rubinstein v. Goldman, 225 A.D.2d 328, 329, 638 N.Y.S.2d 469 [1st Dept., 1996]; see CPLR § 2221[e]).

NYCHA has stated a basis for leave to renew by showing a change in the law that occurred subsequent to This Court's decision that would change the prior determination. Renewal of This Court's October 28, 2015 decision is granted.

This Court based its October 28, 2015 decision, granting C-Town summary judgment and dismissing the complaint against it, on the following:

"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.)." (See Mot. Exh. D).

This Court further found that "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)." It was held that C-Town made a prima facie showing of entitlement to summary judgment, and that NYCHA and plaintiff failed to rebut this showing through evidence to the contrary to create an issue of fact.

On February 11, 2016, The Court of Appeals reversed the First Department's decision in Sangaray v. West River Associates, LLC, (supra), holding that the First and Second Departments "engrafted onto section 7-210 a 'location requirement'" and that "...the location of the alleged defect and whether it abuts a particular property is significant concerning that particular property owner's duty to maintain the sidewalk in a reasonably safe condition. That does not, however, foreclose the possibility that a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained." (Sangaray v. West River Associates, LLC, 26 N.Y.3d 793, 48 N.E.3d 933, 28 N.Y.S.3d 653 [2016]).

The Court of Appeals went on to hold that to the extent "cases interpreting section 7-210 can be interpreted as holding that only the landowner whose property abuts the defect upon which the plaintiff trips may be held liable, they should no longer be followed for that premise." (Id.)

"Simply put, section 7-210(b), by its plain language, does not restrict a landowner's liability for accidents that occur on its own abutting sidewalk where the landowner's failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a proximate cause of a plaintiff's injuries." (Id.) The Court stated that the defendant moving for summary judgment only focused on the location of the defect..."and ignored its burden of demonstrating that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of plaintiff's injuries." (Id., see also James v. Blackmon, 58 A.D.3d 808, 872 N.Y.S.2d 179 [2nd Dept. 2009]).

NYCHA argues that under the Sangaray decision, liability under section 7-210 can be imposed on a neighboring owner where that neighbor's activities contributed to the creation of a defective condition, and that the evidence raises an issue of fact as to whether or not C-Town's opening the gate either caused accumulating snow to be pushed against NYCHA"s fence or that by C-Town leaving the gate open during the storm snow was caused to accumulate in the gap between C-Town's open gate and NYCHA's fence.

NYCHA further argues that plaintiff's testimony that the sidewalk was otherwise clear except for the melting snow between C-Town's open gate and NYCHA's fence, and Supervisor Johnson's testimony that he previously had seen snow between C-Town's open gate and NYCHA's fence, raises issues of fact as to whether the condition on which plaintiff claims she slipped and fell was due to C-Town's use of the gate.

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]).

It is undisputed that the portion of the sidewalk upon which plaintiff tripped and fell is the responsibility of NYCHA per section 7-210(b). It is also clear from the Court of Appeals recent decision in Sangaray, that section 7-210(a) imposes a duty on a neighboring property owner to maintain its sidewalk abutting its premises in a reasonably safe condition, and that section 7-210(b) may hold a neighboring property owner liable for injuries where its failure to maintain its sidewalk is a proximate cause of those injures.

NYCHA's argument is misplaced however. The Sangaray case pertained to defendant West River failing to demonstrate as a matter of law that it did not breach its duty of maintaining the sidewalk flag abutting its property. Here, C-Town offered testimony, as evidenced above, that it maintained its property in a safe condition. NYCHA's argument that C-Town's open gate may have pushed snow against its fence thereby causing a slip and fall hazard is unavailing, especially in light of the fact that the duty to clean its property of snow and ice rests with NYCHA, and especially when it is alleged that the plaintiff fell around 5:00 am on March 9, and the storm had ended sometime in the afternoon of March 8. Further, NYCHA's Supervisor's testimony clearly stated a failure by NYCHA employees to clean behind C-Town's gate if it was open and resting against NYCHA's fence.

Accordingly, it is ORDERED, that defendant New York City Housing Authority's motion for leave to renew This Court's October 28, 2015 Order, that granted defendant C-Town summary judgment dismissing the complaint as against defendants C-Town, LLC, and C-Town Supermarket, is granted, and it is further,

ORDERED, that upon renewal defendant New York City Housing Authority's motion is denied.

ENTER:

Dated: June 29, 2016

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

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