

Sheerin v City of New Rochelle
2016 NY Slip Op 33189(U)
January 4, 2016
Supreme Court, Westchester County
Docket Number: Index No. 63665/2015
Judge: Terry Jane Ruderman
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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

-----X
PATRICIA SHEERIN and WILLIAM SHEERIN,

Plaintiff,

-against-

DECISION AND ORDER

Motion Sequence No. 1

Index No. 63665/2015

THE CITY OF NEW ROCHELLE, CONSOLIDATED
EDISON INC., CON EDISON OF NEW YORK, INC.,
PERSICO CONTRACTING & TRUCKING, INC.,
and WHITE OAK COOPERATIVE HOUSING CORP.,

Defendants.
-----X

RUDERMAN, J.

The following papers were considered in connection with the defendant City of New Rochelle's motion for summary judgment:

Papers	Numbered
Notice of motion, affirmation, Exs. A - L, memorandum of law	1
Affirmations in opposition	2, 3, 4
Reply, Exs. A, B	5

Defendant City of New Rochelle (City) moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross-claims of the co-defendants. Plaintiffs, and co-defendants White Oak Cooperative Housing Corp. (White Oak) and PCT Contracting LLC s/h/a Persico Contracting & Trucking, Inc. (Persico) oppose the motion.

The plaintiffs commenced this action to recover damages for injuries sustained in a trip and fall accident by plaintiff Patricia Sheerin on May 23, 2014, as a result of a defective sidewalk located at 60 White Oak Street in New Rochelle. Photographs of the accident site show that a repair

was made between two concrete sidewalk slabs with asphalt, which is raised above the level of the adjoining slabs. (Notice of motion, Ex. J [plaintiff's deposition], at 13 – 14.)

The defendant City moves for summary judgment dismissing the complaint based on two grounds. Initially, the City relies on City Charter Article XII, §127A, which requires that written notice be served on the Commissioner of Public Works in order to bring any action against the City based on a sidewalk defect. The City also relies on City Charter Article XII, §197(i), (j), which shifts liability for any sidewalk defect to the abutting owner. In support of the motion, the City submits the affidavit of James Moran, Deputy Commissioner of the Department of Public Works, who states that a search of the records revealed no written notice of the condition, and in addition, that “the City was not performing any work on the sidewalk . . . on or prior to May 23, 2014.” (Notice of motion, Ex. K, at par. 4 – 6.)

In opposition, defendant White Oak argues that the City did not establish that it did not affirmatively create the defect. White Oak contends that work permits issued to Consolidated Edison (Notice of motion, Ex. K) show that sidewalk and roadway “cutouts” were allowed in the area of the accident in February and April, 2014. White Oak argues that the City has not established that it did not have other contractors place the asphalt at the location of the accident, and that summary judgment is premature before the completion of discovery. Defendant Persico and the plaintiff make similar arguments.

In reply, the City submits an additional affidavit from Deputy Commissioner Moran, who asserts that “the City was not performing any work on the sidewalk area in question here, did not contract with any entity to do that work, and did not place the fresh blacktop gravel over the sidewalk. . . .” (Reply, Ex. A.)

Analysis

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

In *Factor v. Town of Islip* (134 A.D.3d 984 [2d Dept. 2015]), the Court set forth the burdens of proof on a motion on a motion for summary judgment in a prior written notice case. The Court explained:

“Once a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate that a question of fact exists as to one of the exceptions to the prior written notice requirement, either that the municipality affirmatively created the alleged hazardous condition or caused the hazardous condition to occur by the special use of the area in question (*see Groninger v Village of Mamaroneck*, 17 NY3d 125, 127-128, 950 NE2d 908, 927 NYS2d 304 [2011]; *Yarborough v City of New York*, 10 NY3d 726, 728, 882 NE2d 873, 853 NYS2d 261 [2008]; *Amabile v City of Buffalo*, 93 NY2d 471, 474, 715 NE2d 104, 693 NYS2d 77 [1999]; *Hanover Ins. Co. v Town of Pawling*, 94 AD3d 1055, 1056, 943 NYS2d 152 [2012]).” (Id at 985.)

The initial Moran affidavit established the absence of prior written notice. (*Bachvarov v. Lawrence Union Free Sch. Dist.*, 131 A.D.3d 1182 [2d Dept. 2015] [County established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, the affidavit of a County employee, which indicated that she had conducted a search of the relevant records covering the period of five years prior to the date of the accident and had found no prior written notice of a defective condition corresponding to the condition alleged by the plaintiff].)

Neither the plaintiffs nor the opposing defendants have contested the absence of prior written notice. Instead, they maintain that the City failed to meet its burden of establishing that it did not affirmatively create the defect. However, as made clear in *Factor v. Town of Islip (supra)*, as the City established a prima facie case of the absence of prior written notice, “the burden shifts” to the opposing parties to raise an issue of fact as to whether the City created the defect. In this regard, the plaintiffs and the opposing defendants have not adduced any evidence, and offer only speculation and conjecture that the repair was performed by a contractor hired by the City.

Moreover, even if the burden was placed on the City, the second Moran affidavit established that the City did not hire any contractor to perform the work, or otherwise create the sidewalk condition. Although a party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court, evidence submitted in response to allegations raised for the first time in the opposition papers is appropriate. (*Citimortgage, Inc. v. Espinal*, 134 A.D.3d 876 [2d Dept. 2015].) Here, the further averments made by Moran were directly responsive to the argument that a contractor may have been hired by the City to perform the work.

No opposing party has identified any documents not provided in discovery, nor any basis, other than speculation, to surmise that additional discovery may uncover some evidence that the City was responsible for the asphalt repair. (*Martens v. County of Suffolk*, 100 A.D.3d 839 [2d Dept. 2012] [County established its entitlement to judgment as a matter of law by demonstrating, prima facie, that it did not have prior written notice of the defect on the sidewalk that allegedly caused the plaintiff to fall; County's motion was not premature, as the plaintiffs failed to demonstrate how discovery may reveal or lead to relevant evidence].)

Based upon the foregoing, it is hereby,

ORDERED that the motion of defendant City of New Rochelle for summary judgment is granted, and all claims and cross-claims against it are dismissed; and it is further

ORDERED that all parties appear in the Compliance Part as previously directed on January 20, 2017 at 9:30 a.m., in room 800 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 4, 2016


HON. TERRY JANE RUDERMAN, J.S.C.