

Mejia v Sobro Dev. Corp.
2017 NY Slip Op 30440(U)
March 3, 2017
Supreme Court, New York County
Docket Number: 152535/2015
Judge: W. Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY, J.S.C.

PART 5

MARCELINO A. MEJIA,

Plaintiff,

-against-

INDEX NO. 152535/2015
MOT. DATE February 15, 2017
MOT. SEQ. NO. 002

SOBRO DEVELOPMENT CORPORATION, SOUTH
BRONX OVERALL ECONOMIC DEVELOPMENT
CORPORATION, THE CITY OF NEW YORK, and THE
NEW YORK CITY TRANSIT AUTHORITY,

Defendant(s)

SOBRO DEVELOPMENT CORPORATION, SOUTH
BRONX OVERALL ECONOMIC DEVELOPMENT
CORPORATION,

Third-Party Plaintiffs,

-against-

MOVIMIENTO MISIONERO MLTNDIAL, INC.,

Third-Party Defendant.

The following papers were read on this motion for Summary Judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through Q
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS DOC No(s). 1-13
ECFS DOC No(s). _____
ECFS DOC No(s). _____

Defendant City of New York (“the City”) moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross-claims against it. No opposition has been filed or served by any other party. After reviewing the papers presented, the exhibits attached thereto, all relevant statutes and case law, the Court grants the motion for the reasons that follow.

FACTUAL BACKGROUND

This is an action for personal injuries allegedly sustained by the Plaintiff, MARCELINO MEJIA (hereinafter “Plaintiff”), on January 16, 2015 at approximately 12:50 a.m. Plaintiff filed a notice of claim alleging that he slipped and fell on snow and ice due to the negligence of the City. Plaintiff claims that he was walking on the “sidewalk, and/or driveway and/or walkway “when he was “caused to slip and fall on snow and ice.” Plaintiff subsequently and without leave of Court filed an amended notice of claim upon the City indicating that the accident occurred on January 25, 2015, not January 16, 2015. The alleged incident occurred in “front of the parking garage located at 1769 Fort George Hill A/K/A 1759/1771 St. Nicholas Avenue, County of New York, State of New York.” Plaintiff subsequently commenced this action by filing a summons and complaint on or about March 14, 2015. Issue was joined by the City and the other defendants on April 13, 2015 and August 16, 2015, respectively. Thereafter defendant Sobro Development commenced an impleader action against third party defendant Mo-

vimiento Misionero Mundial, Inc. All claims against defendant New York City Transit Authority were dismissed on December 22, 2015. Thereafter discovery ensued and plaintiff appeared for a deposition.

At his deposition Plaintiff testified the he was on his way home from work when the accident occurred. He testified that it was not snowing at the time of the accident but that the sidewalk at the accident location had not been cleared of snow from an earlier storm. A small path on the sidewalk had been created from people walking on it and not as the result of someone shoveling the snow, according to the Plaintiff's deposition testimony. Plaintiff claimed that he took four to five steps before slipping and falling on snow and ice. Plaintiff claims that he sustained injuries as a result of his alleged fall.

Based on the location of the accident as determined by Plaintiffs Notice of Claim, and informed by his Bill of Particulars, deposition testimony, and marked photographs, the City performed a New York City Department of Sanitation (hereinafter "DOS") record search for the relevant location. The search was designated based upon the date and location as described in the Notice of Claim (as well as the incident date indicated in Plaintiffs Amended Notice of Claim/Bill of Particulars). The search "revealed that no employee or contractor hired by the DOS performed any snow or ice removal from the sidewalk located in front 1769 Fort George Hill AKA 1759/1771 St. Nicholas Avenue, in the County, City, and State of New York for the period January 2, 2015 through and including January 25, 2015.

DISCUSSION OF LEGAL STANDARD AND ANALYSIS

The City seeks an Order dismissing the complaint and all cross-claims against it on the ground that New York City Administrative Code §7-210 relieves it of liability for injuries arising from defective sidewalk conditions in front of certain properties and shifts liability from the City to abutting property owners. The City argues that section 7-210 requires the Court to review three issues to determine the City's liability, specifically: 1. The sidewalk location; 2. The non-City ownership of the property abutting the location where the alleged accident occurred; and 3. The non-exempt building classification of the abutting property. According to the City, the Plaintiff's testimony, notice of claim, bill of particulars and marked photograph, all submitted in support of the instant motion, demonstrate that the alleged accident occurred on the sidewalk abutting 1769 Fort George Hill. As to the second and third issues, the City contends that its search of real property records maintained by the Department of Finance, are dispositive. According to the City, the documents submitted in support of the instant motion reveal that on January 16 and 25, 2015, the City was not the owner of the property where the accident occurred. Moreover, the City argues that the abutting property does not fall within any of the exemptions set forth in section 7-210 and thus, the property owner is not exempt from the liability shifting provisions of the statute. Finally, the City contends that Defendants, Sobro Development and Bronx Overall Development have admitted ownership of all three relevant tax lots as alleged by Plaintiff in the Notice of Claim.

Based on the documents submitted in support of the instant motion, the City contends that pursuant to the provisions of section 7-210, the City is not liable to the plaintiff and all cross claims asserted against it must be dismissed. Instead, the liability shifting provision of 7-210 passes the burden onto the abutting property owner. In addition, the City argues that it is entitled to summary judgment because it did not cause and create the alleged defective condition that caused plaintiff to sustain the injuries alleged. The City submitted the Zeno affidavit which indicates that the DOS does not have any records indicating that it performed snow or ice removal at the location of the accident, prior to and including the date of the accident.

When deciding a summary judgement motion, the Court's role is solely to determine if there are any triable issues of fact, not to determine the merits of any such issues. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985). The Court must view the evidence

NYSCEF DOC. NO. 94

RECEIVED NYSCEF: 03/06/2017

in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Sosa v. 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 (1st Dept. 2012). If there is any doubt as to the existence of a triable fact, the motion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002).

Summary judgement is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgement as a matter of law. See, e.g., *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 NYS2d 923 (1986); *Andre v. Pomeroy*, 35 NY2d 361, 364, 320 N.E.2d 853, 362 NYS2d 131 (1974). The party moving for summary judgement must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. *Santiago v. Filstein*, 35 AD3d 184, 185-186, 826 NYS2d 216 (1st Dept. 2006), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985). A failure to make such a showing, requires denial of the motion. See, *Smalls v. AJI Indus., Inc.*, 10 NY3d 733, 735, 883 N.E.2d 350, 853 NYS2d 526 (2008).

Here, the City established, through the Atik affidavits, that it did not own the property where the accident occurred and thus has established that it may not be held liable for plaintiff's injuries. *Rodriguez v. City of New York*, 70 AD3d 450, 895 NYS2d 358 (1st Dept. 2010) [City entitled to dismissal of complaint as it did not own property on which plaintiff fell, and as property was vacant lot and thus not exempt pursuant to section 7-210]. Additionally, the Atik affidavits establish that the premises were not a one-two, or three-family residential property in whole or in part owner-occupied and used exclusively for residential purposes, the premises did not fall within this exception to §7-210. As the motion before the Court is unopposed, no issue of fact has been raised to oppose the City's contentions, which are supported by the documentary evidence. As such, the City is entitled to summary judgment.

To the extent that the City may be held liable if it caused or created a defective condition, *Yarborough v. City of New York*, 10 NY3d 726, 882 NE2d 873, 853 NYS2d 261 (2008), the Zeno affidavit establishes that the City neither caused nor created any condition on the sidewalk where the accident occurred. Moreover, as the motion is unopposed, no issue of fact has been raised with respect to this issue and the City has thus demonstrated its entitlement to summary dismissal of the complaint and any cross-claims asserted against it. Accordingly, dismissal of the complaint and cross-claims is warranted. *Rodriguez v. City of New York*, supra.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant City of New York's motion for summary judgment is granted and the complaint and any cross-claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further,

ORDERED that the caption is amended accordingly; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Counsel for said moving defendant shall serve a copy of this Order on all other parties and on the Trial Support Office, 60 Centre Street.

NYSCEF DOC. NO. 94

RECEIVED NYSCEF: 03/06/2017

This constitutes the decision and Order of this Court.

Dated: March 3, 2017
New York, New York



HON. W. FRANC PERRY, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST

FIDUCIARY APPOINTMENT REFERENCE