Chomsky v City of New York
2017 NY Slip Op 32713(U)
December 20, 2017
Supreme Court, New York County
Docket Number: 156098/14
Judge: William Franc Perry, III
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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MARLENE CHOMSKY,

Plaintiff,

- against -

Index No. 156098/14

THE CITY OF NEW YORK, 125 WEST 72ND ASSOCIATES, LLC, and KCT PARTNERS, LLC,

Defendants.

Decision and Order

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HON. W. FRANC PERRY, J.:

In this personal injury action, defendant KCT Partners, LLC (KCT) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it (Motion Seq. No. 003). Defendant the City of New York (City) separately moves, pursuant to CPLR 3212, for similar relief (Motion Seq. No. 004). Plaintiff Marlene Chomsky opposes both motions.

BACKGROUND

Plaintiff alleges that, on October 2, 2013, she was injured when she tripped and fell on a raised portion of the sidewalk adjacent to 125 and 127 West 72nd Street between Columbus and Amsterdam Avenues in New York, New York. Plaintiff commenced this action against KCT, the owner of the property located at 127 West 72nd Street; 125 West 72nd Street Associates (Associates), one of the owners of the property located at 125 West 72nd Street; and the City. The defendants joined issue by serving answers to the complaint.

KCT moves for summary judgment on the grounds that it does not own or control the area of the alleged incident, nor did it cause or create the alleged defect. The City moves for summary judgment on the grounds that it is not liable for plaintiff's alleged injuries pursuant to

section 7-210 of the Administrative Code of the City of New York, and that it did not cause or create the alleged defect or receive prior written notice of it.

DISCUSSION

The standards for summary judgment are well settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted]).

The Administrative Code of the City of New York (Administrative Code) § 7-210 (b) provides that, "the owner of real property abutting any sidewalk . . . 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" (Administrative Code § 7-210 [b]; *see also Zorin v City of New York*, 137 AD3d 1116, 1117 [2d Dept 2016] ["Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property."]). Administrative Code § 7-210 (c) provides that, "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 . . .) in a reasonably safe condition," unless the injuries are caused by the City's affirmative acts (Administrative Code § 7-210 [c]; *Harakidas v City of New*

York, 86 AD3d 624, 627 [2d Dept 2011] [Section 7-210 "does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence."]).

KCT argues that the area where plaintiff allegedly fell does not abut KCT's property, therefore, KCT did not have a duty with respect to the subject area. In support of its argument, KCT submits photographs identified by plaintiff during her deposition, of the area where she allegedly fell (Gibbons affirmation, exhibits H-K); deposition testimony from Vincent Young, a managing partner at KCT (Gibbons affirmation, exhibit M [Young tr]); an affidavit from Saeid Jalilvand, a professional land surveyor (Gibbons affirmation, exhibit D [Jalilvand aff]); and deposition testimony from Jordan Hiller, one of the owners of Associates (Gibbons affirmation, exhibit N [Hiller tr]). During his deposition, Young was shown the photographs, identified by plaintiff, of the area where she allegedly fell (*see* Young tr at 30). Young testified that photograph A (Gibbons affirmation, exhibit H) shows the front of 125 West 72nd Street not 127 West 72nd Street, except for the upper right-hand corner (Young tr at 32). Jalilvand states in his affidavit that, on August 5, 2014, he performed a boundary survey of the sidewalk at or near 125 and 127 West 72nd Street, to determine the location of the raised sidewalk over which plaintiff claims she fell (Jalilvand aff, ¶¶ 3-4). Based on visiting the location where plaintiff claimed she fell, reviewing the deed to the property, and reviewing a photograph identified by plaintiff during her deposition, he determined "within a reasonable degree of surveying certainty" that "the raised sidewalk where plaintiff claims she fell is entirely within the sidewalk abutting 125 W. 72nd Street, and not on the sidewalk abutting 127 W. 72nd Street, New York, NY" (Jalilvand aff, ¶¶ 1, 5, 7). In opposition, plaintiff contends that KCT is responsible for maintaining the area where she allegedly fell. Plaintiff testified that she fell because "two squares of sidewalk were not even" as "one was higher than the other," and that the "two squares" were between "127

West 72nd Street and 125 West 72nd Street" (Gibbons affirmation, exhibit G [Plaintiff tr] at 44-45).

KCT, "as the owner[] of property abutting the public sidewalk, may be held liable in negligence for injuries resulting from sidewalk defects" *(Sehnert v New York City Tr. Auth.*, 95 AD3d 463, 464 [1st Dept 2012]). Although KCT argues that the area where plaintiff claims she fell is not in front of 127 West 72nd Street, this is a question of fact. Young testified that the circled area in photograph B is in front of 127 West 72nd Street, but that the dark line within the circled area is not part of the sidewalk that he was required to maintain (Young tr at 34-35). Moreover, it is not clear to the Court whether the dark line within the circled area of the two sidewalk flags, as depicted in photographs A and B (Gibbons affirmation, exhibits H, I), lies within the sidewalk abutting one property or both properties. Also, Hiller testified that he could not identify whether photographs A and B were in front of 125 West 72nd Street (Hiller tr at 33-36).

Furthermore, although KCT submitted Jalilvand's affidavit, stating that the raised sidewalk flag where plaintiff allegedly fell did not abut KCT's property, plaintiff argues that there is an issue of fact as to whether the defect was caused by KCT's sidewalk flag being lower, or Associates' sidewalk flag being higher, and that this issue should be determined by a jury. A defendant that establishes that a defective sidewalk flag does not abut its property can still be liable for plaintiff's injury, if the injury is proximately caused by the defendant's failure to adequately maintain the sidewalk for which it is responsible (*see Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 799-800 [2016] [the defendant's motion for summary judgment was denied, holding that the defendant needed to show more than that the plaintiff's fall happened on a sidewalk flag adjacent to the codefendant's property, and that the defect on which the plaintiff

tripped was on the codefendant's property, it must also show that its failure to maintain its sidewalk was not a proximate cause of plaintiff's fall]). Here, there is sufficient evidence— in the form of photographs and plaintiff's testimony—to create an issue of fact as to whether KCT breached its duty to adequately maintain the sidewalk flag abutting its property, and if so, whether that failure was a proximate cause of plaintiff's fall. Plaintiff testified that she fell because "two squares of sidewalk [at 125-127 West 72nd Street] were not even" as "one was higher than the other" (Plaintiff tr at 44-45). Although KCT did not have a duty to remedy any defects in front of Associates' property, section 7-210 (a) of the Administrative Code imposed a duty on KCT to maintain the sidewalk abutting its premises in reasonably safe condition. Moreover, section 7-210 (b) provides that KCT may be liable for plaintiff's injuries where its failure to maintain its sidewalk is a proximate cause of plaintiff's injuries. Because a reasonable jury could conclude that the sidewalk in front of 127 West 72nd Street was not properly maintained by KCT, and that KCT's failure to maintain the sidewalk was a proximate cause of plaintiff's fall, KCT's motion for summary judgment must be denied (*see Delgado v 5008 Broadway Assoc., LLC*, 149 AD3d 583, 583-584 [1st Dept 2017] [holding that "[t]he evidence . . . did not eliminate the possibility that [the defendant's] failure to maintain the sidewalk proximately caused [the] plaintiff's injuries by leaving a tripping hazard between the sidewalk and the codefendant's pedestrian ramp"]). In view of the foregoing, the court need not reach any of KCT's or plaintiff's remaining contentions. Therefore, KCT's motion for summary judgment (Motion Seq. 003) to dismiss the complaint and all cross claims asserted against it is denied.

As to the City's motion, the City argues that summary judgment should be granted in its favor because under Administrative Code § 7-210, the abutting owners of the property, not the City, had a duty to maintain the sidewalk in a reasonably safe condition, and the injury was not

proximately caused by the City's affirmative act of negligence (*see Zorin*, 137 AD3d at 1118). In support of its argument, the City submits an affidavit from David Atik, a Department of Finance (DOF) employee (Gibek affirmation, exhibit N [Atik aff]). In Atik's affidavit, he states that he conducted a search of the Real Property Assessment Division (RPAD) database records relating to 125 and 127 West 72nd Street, and the results showed that, on the date of plaintiff's incident, "October 2, 2013 the City of New York was not the owner of [either] property" and neither of the properties are classified as "one-, two-, or three-family solely residential real property" (Atik aff, ¶¶ 5-6). Thus, the City makes a prima facie showing to establish that, pursuant to section 7-210 of the Administrative Code, the City cannot be held liable for plaintiff's injuries because it is not the abutting owner of the subject sidewalk and the premises does not fall within any of the exceptions that would shift liability to it (*see Nicoletti v City of New York*, 77 AD3d 715, 716-717 [2d Dept 2010]; *see also Khywah v Persaud*, 47 Misc 3d 1223[A], 2015 NY Slip Op 50830[U], *1 [Sup Ct, Queens County 2015]).

The City also argues that it neither caused nor created the alleged defect, and had no prior notice of it. In support of its argument, the City submits records from the New York City Department of Transportation (DOT) of a search for records pertaining to 125 - 127 West 72nd Street (Gibek affirmation, exhibits K, L, O), and an affidavit from Kachikwu Nwosu, a Department of Environmental Protection (DEP) emergency construction employee (Gibek affirmation, exhibit P). The DOT records showed that eight permits were issued by DEP to a government contractor, Delany Associates (Delany), for "major installation sewer" work (Gibek affirmation, exhibit O). According to the City, these permits should not form a basis for liability because Delany passed all final inspections of its work, indicating that its work was completed pursuant to the permits. Nwosu states in his affidavit that no work was performed pursuant to

the DEP contract on the sidewalk in front of 125 and 127 West 72nd Street, as all eight permits were related to roadway work (Nwosu aff, ¶ 4). Thus, the City makes a prima facie showing that Delany's work could not have caused or created a defective condition in the sidewalk where plaintiff allegedly fell.

Plaintiff opposes the City's motion, arguing that there is a question of fact as to whether the City caused or created a defective condition in the sidewalk where plaintiff allegedly fell, because two of the permits submitted by the City show that the New York City Department of Design and Construction (DDC) was associated with the work performed, including concrete sidewalk work, on an undesignated area of West 72nd Street between Columbus and Amsterdam Avenues (*see* Cugini affirmation, exhibit G). In reply, the City argues that plaintiff's assertions, regarding DDC's involvement in any work done pursuant to the permits, are mere speculation, because DDC was named as the "sponsoring agency" to procure the permits on behalf of DEP, but DDC was not involved in any work done with respect to the permits (*see* Gibek reply affirmation, exhibit A [Jaromi aff]).

Thus, the City has demonstrated that it neither caused nor created the alleged defective condition, or had prior written notice of it. It is well settled that issuance of a permit by the City does not constitute prior written notice of a defective condition, and that the City cannot be held liable for merely issuing a permit (*see Meltzer v City of New York,* 156 AD2d 124 , 124 [1st Dept 1989]; *Acevedo v City of New York.,* 128 AD2d 488, 489 [2d Dept 1987]). The work permits issued by DDC, on behalf of DEP, to enable Delaney to perform work at the general location of West 72nd Street between Amsterdam and Columbus Avenues, but not at the precise location of the area where plaintiff allegedly fell, are insufficient to raise an issue of fact (*see also Cruz v Keyspan*, 120 AD3d 1290, 1291 [2d Dept 2014] [holding that "[t]he mere fact that a permit had

been issued to Verizon to open up the sidewalk was insufficient to raise a triable issue of fact as to whether Verizon performed work in the roadway where the accident occurred and created the alleged defect]). In any event, none of the work allowed under the permits would have caused or created the alleged condition because according to DEP employee Nwosu, the permits at issue related to roadway work (*see* Nwosu aff, ¶ 4). Therefore, the City's motion for summary judgment dismissing the complaint (Motion Seq. 004) is granted.

The City also moves for summary judgment dismissing the cross claims for indemnification asserted against it by KCT and Associates. These cross claims require a finding of negligence by the City (*see Wilk v Columbia Univ.*, 150 AD3d 502, 504 [1st Dept 2017). In the absence of any evidence of negligenceby the City in connection with plaintiff's alleged fall, that branch of the City's application for summary judgment dismissing the cross claims (Motion Seq. 004) is also granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant KCT Partners, LLC 's motion for summary judgment (Motion Seq. 003) is denied; and it is further

ORDERED that defendant the City of New York's motion for summary judgment (Motion Seq. 004) dismissing the complaint and any cross claims against it is granted, and the complaint against said defendant is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further.

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the clerk of this Court is directed to enter judgment dismissing the complaint in its entirety and any cross claims against defendant City; and it is further

ORDERED that the action is severed and shall continue with respect to all other defendants; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to the inventory of a non-City part and move it from part 5 inventory and all previously scheduled compliance conferences are hereby cancelled. Plaintiff shall serve a copy of this order on all parties and the Trial Support Office, 60 Centre Street, Room 158.

This is the decision and order of the Court.

Dated: DEC 2 0 2017

ENTER:

J.S.C.

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