Rivera v Minuto
2018 NY Slip Op 31330(U)
May 21, 2018
Supreme Court, Bronx County
Docket Number: 303653-2013
Judge: Fernando Tapia
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C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

JORGE RIVERA

Plaintiff,

Index: 303653-2013

- against -

FRANK MINUTO, 19 W. 183RD STREET REALTY INC., CITY OF NEW YORK, MIDAS TOUCH REALTY CORP., P&J JEWELRY AND JULIA FERMIN

Defendants.

DECISION

The instant action stems from a trip and fall injury near a fire hydrant that occurred on the sidewalk adjacent to real property located at 3 West 183rd Street, Bronx New York. Defendant City of New York (CONY) moves pursuant to CPLR § 3212 for summary judgment in their favor against the plaintiff.

Defendant argues that under §7-210 of the Administrative Code of the City of New York (Section 7-210), CONY is not liable for plaintiff's injuries and there is no evidence that CONY caused or created the defective sidewalk condition or had prior notice of the said condition. Plaintiff opposes on the grounds that while generally public sidewalks within New York City have become the responsibility of adjacent commercial property owners when CONY has equipment such as a fire hydrant embedded in the ground, they are obligated to maintain at least twelve (12) inches around the installation and ensure that it is safe. Furthermore, plaintiff posits that CONY had been noticed in the form of a map that was filed with CONY from the Big Apple Pot Hole Corporation 10 years before the accident indicating defective sidewalk condition.

In a motion for summary judgment under CPLR § 3212, it is well settled that the non-movant is entitled to the evidence being viewed in the light most favorable and affording them with the benefit of every favorable inference that can be drawn when assessing a summary

judgment motion. [1] On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". [2] Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. [3] In a trip and fall action, the moving defendant bears the burden "to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition." [4] "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". [5]

Section 7-210 imposes an affirmative duty on abutting landowners to maintain the sidewalk in a reasonably safe condition. Plaintiff argues that section 7-210 does not shift liability for injuries caused by defective sidewalk where the condition and the area extend 12 inches outward from the location of the fire hydrant. [6] The responsibility for maintaining sidewalk covers, plates, and grating and the area extending 12 inches outward from the perimeter of such hardware remains solely with the owners of the same. [7] CONY in its reply asserts that plaintiff did not trip over hardware or gratings; but instead allegedly over the broken sidewalk. [8]

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[1] *See Kesselman v. Lever House Restaurant*, 29 AD3d 302 [1st Dept 2006]; *Goldman v. Metropolitan Life Ins. Co.*, 13 A.D.3d 289 [1st Dept 2004].
[2] *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 852 (1985).
[3] *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 (1986).
[4] *Mitchell v City of New York*, 29 AD3d 372, 374 (1st Dept 2006).
[5] *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008).
[6] *See Flynn v City of New York*, 84 AD3d 1018, 1019 [2d Dept 2011) ("We agree with the Appellate Division, First Department, that there is nothing in Section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner.").
[7] *Id*; *See also Torres v Sander's Furniture, Inc.*, 134 A.D 3d 803, 804 (2nd Dept. 2015).
[8] CONY Reply Affirmation at 8.

CONY's argument that broken sidewalk surrounding the fire hydrant are unpersuasive. Chapter 57 Section 1403(a)(1) (a) of the New York City Charter provides that the City's Department of Environmental Protection has exclusive control over fire hydrants. This court agrees with plaintiff that the above regulations make the City responsible for the hydrant, as well as any sidewalk defects surrounding them. The question of whether the defect in the sidewalk was 12 inches away from the fire hydrant is a question of fact. The burden is on the movant to eliminate any question of facts and therefore entitlement to judgment as a matter of law. Furthermore, it is evident from the pictures submitted by the plaintiff that the area surrounding subject fire hydrant is in a defective condition. [9] The defective sidewalk condition starts at the fire hydrant and extends far beyond 12 inches. [10] There is a question of whether the untreated defective sidewalk condition within 12 inches of the perimeter caused and created the subsequent cracks and defective condition in areas outside of the statutory perimeter.

To be held liable, the CONY must have received prior written notice of the specific defect involved, and not merely a similar condition. [11] Plaintiff in his opposition provided a map from the Big Apple Pot Hole Corporation which was filed with CONY on July 30, 2003, approximately 10 years before the accident in question. That map indicates a defective sidewalk condition immediately adjacent to the property located at 3 West 183rd Street, Bronx New York, the area of the subject accident. CONY in their reply posits that the aforementioned map did not specify the alleged condition that caused the plaintiff to trip. Plaintiff has established an issue of fact that marking on the Big Apple Map references the defect where plaintiff fell. Accordingly, it

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[9] Plaintiff's Exhibit I (Pictures of the defective sidewalk area).
[10] *Id.*
[11] *Belmonte v. Metro Life Ins. Co.*, 759 N.Y.S.2d 38 (1st Dep't 2003).

is **ORDERED** that the motion by defendant THE CITY OF NEW YORK to dismiss the complaint and cross-claims are denied in their entirety;

This constitutes the decision of the court.

Dated: May 21, 2018

Bronx, New York

Hon. Fernando Tapia J.S.C.