

Alcala v Lindsay Park Hous. Corp.

2019 NY Slip Op 30347(U)

January 22, 2019

Supreme Court, Kings County

Docket Number: 508004/2015

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of January, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
SYLVIA ALCALA,
Plaintiff,

Index No.: 508004/2015
DECISION AND ORDER

- against -

Motions Sequence #5, #6

LINDSAY PARK HOUSING CORP. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4</u>
Opposing Affidavits (Affirmations).....	<u>5.</u>
Reply Affidavits (Affirmations).....	<u>6.</u>

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from a trip and fall incident that allegedly occurred on June 8, 2015. The Plaintiff, Sylvia Alcala (hereinafter "the Plaintiff") allegedly injured herself on the sidewalk adjacent to the premises located at 8718 Ridge Boulevard, Brooklyn, New York (hereinafter "the Premises" or "Property").

Defendants 8718 Ridge Blvd, LLC and Bay Ridge Management Corp. d/b/a Bay Ridge Management (hereinafter "Defendant Bay Ridge") now move (motion sequence #6) for an order

pursuant to CPLR 3212 granting summary judgment and dismissing the complaint of the Plaintiff. Defendant Bay Ridge contends that it bears no liability for the Plaintiff's alleged injuries given that the defect at issue is a trivial defect for which Defendant Bay Ridge cannot be held liable. Defendant Bay Ridge also argues that it did not create the condition at issue or have actual or constructive notice of the alleged defect. In opposition, the Plaintiff argues that the motion by Defendant Bay Ridge should be denied. Specifically, the Plaintiff argues that based upon the testimony of the Plaintiff and the Affidavit of its professional engineer, Daniel Burdett, the Plaintiff has raised a material issue of fact relating to whether there was a defect in the area between the two sidewalk flags at issue that was a proximate cause of the Plaintiff's injuries and that Defendant Bay Ridge had actual and/or constructive notice thereof.¹

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible

¹ As an initial matter, the motion (motion sequence #5) by Defendant Munir Ahmed, d/b/a Real Construction Co., for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint of the Plaintiff and any cross-claims is granted without opposition.

form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter “the Sidewalk Law”). The Sidewalk Law provides in pertinent part that:

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

c. Notwithstanding any other provision of law, 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 that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

An owner subject to the Sidewalk Law must “provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff’s

injuries.” See *James v. Blackmon*, 58 A.D.3d 808, 809, 872 N.Y.S.2d 179, 180 [2nd Dept, 2009].

“Thus, in support of a motion for summary judgment dismissing a cause of action pursuant to Section 7–210, the property owner has the initial burden of demonstrating, *prima facie*, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.” *Harakidas v. City of New York*, 86 A.D.3d 624, 627, 927 N.Y.S.2d 673, 676 [2nd Dept, 2011]. “Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.” *Fasano v. Greenwood Cemetery*, 21 A.D.3d 446, 446, 799 N.Y.S.2d 827, 828 [2nd Dept, 2005]. Such facts and circumstances include “ the width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place and circumstance’ of the injury.” *Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 978, 688 N.E.2d 489, 490 [1997], quoting *Caldwell v. Vill. of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 [1952].

Turning to the merits of the instant motion, the Court finds that Defendant Bay Ridge has provided sufficient evidence to meet its *prima facie* burden. In support of their motion, Defendant Bay Ridge relies primarily on the deposition testimony of the Plaintiff, the deposition testimony of Jose Manjarrez, a superintendent for Defendant Bay Ridge, the deposition and affidavit testimony of Paula Zacharakos, the property manager for Defendant Bay Ridge, and an affidavit from Ian Velasquez. Jose Manjarrez, the Property’s superintendent, testified that he is responsible for cleaning the sidewalk adjacent to the building, that he sweeps the sidewalk every two days, and that since he has held this position in 2013 he has not noticed any problems with the sidewalk adjacent to the Property. He also represented that he has not received any complaints from tenants or others or received a citation or summons from the City (see

Defendant Bay Ridge's Motion, Exhibit P, Pages 15-19). Paula Zacharakos, the manager for Defendant Bay Ridge at the Property, stated in her deposition that she has herself inspected the sidewalk adjacent to the Property, met with contractors regarding buildings repairs and has not seen any indication of a sidewalk defect or been informed of such a defect from building employees or tenants (see Defendant Bay Ridge's Motion, Exhibit Q, Pages 8-18). This testimony, taken together, is sufficient for Defendant Bay Ridge to meet its *prima facie* burden that it did not have actual or constructive notice regarding the sidewalk adjacent to the premises.

However, the Plaintiff has raised a material issue of fact regarding whether the space between the sidewalk flags created a dangerous condition on the sidewalk which serves to impose liability on the part of Defendant Bay Ridge. In her deposition testimony, the Plaintiff testified that she tripped as a result of a gap between two sidewalk flags (see Defendant Bay Ridge's Motion, Exhibit K, Pages 36-37). The Plaintiff also stated in her Affidavit that the defect that caused her accident was an unsafe, wide seam between two sidewalk flags (see Affirmation in Opposition Exhibit A, Paragraph 7). Also, the Affidavit of Daniel S. Burdett, P.E. supports the Plaintiff's position that the condition at issue was defective and otherwise not trivial or *de minimis*. In his Affidavit, Mr. Burdett states that it his expert opinion, the open and unfilled expansion joint was not properly filled and created the condition at issue that led to the Plaintiff's injuries (see Affidavit of Daniel S. Burdett, P.E., Paragraph 12). This testimony, taken together, is sufficient to create an issue of fact that would prevent this Court from granting summary judgment in favor of Defendant Bay Ridge.


Based on the foregoing, it is hereby ORDERED as follows:

The motion (motion sequence #5) by Defendant Munir Ahmed, d/b/a Real Construction Co. is granted and the action is dismissed as against him.

The motion (motion sequence #6) by Defendant Bay Ridge is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino
J.S.C.

KINGS COUNTY CLERK
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