Goodhope v St. Luke's Roosevelt Hosp. Ctr. Found., Inc.
2019 NY Slip Op 31981(U)
July 9, 2019
Supreme Court, New York County
Docket Number: 159782/2016
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 52

JOHN GOODHOPE,

Plaintiff,

- against -

ST. LUKE'S ROOSEVELT HOSPITAL CENTER FOUNDATION, INC., POLONES CONSTRUCTION CORP., CITY RESTORATION & MAINTENANCE INC. AND THE CITY OF NEW YORK,

Defendants.

Index No.: 159782/16

DECISION AND ORDER

ALEXANDER M. TISCH, J.:

In this action, plaintiff John Goodhope (Goodhope) sues to recover for injuries allegedly sustained when he tripped and fell on a sidewalk tree well in front of premises owned by St. Luke's Hospital located at 1111 Amsterdam Avenue, near West 114th Street, New York, New York. Defendant City of New York (City) moves, and defendant St. Luke's Roosevelt Hospital Center Foundation, Inc. (St. Luke's) cross-moves, for summary judgment dismissing the complaint and all cross claims against them (motion seq. no. 001). By separate motions, defendant City Restoration & Maintenance Inc. (Restoration) (motion seq. no. 002) and defendant Polones Construction Corp. (Polones) (motion seq. no. 003) also move for summary judgment dismissing the complaint and all claims against them. The motions are consolidated for disposition purposes.

BACKGROUND

On November 4, 2015, at approximately 2:30 p.m., plaintiff was injured when he tripped and fell allegedly due to a hole in a tree well in the sidewalk in front of St. Luke's Hospital on Amsterdam Avenue near 114th Street. Plaintiff filed a Notice of Claim with the City in January 2016, claiming that plaintiff was injured when he tripped and fell "as a result of an upraised tree well" on the sidewalk in front of 1111 Amsterdam Avenue. Notice of Claim, NYSCEF Doc. No. 47. A 50-h hearing was held in March 2016, and plaintiff commenced this action in November 2016.

At the 50-h hearing, plaintiff testified that he was walking north on Amsterdam Avenue, about 40-50 yards from 114th Street, was near the curb, getting ready to cross the street to go to his car, when he stepped into a tree well, lost his step due to gravel and a hole where he stepped down, and "just went down." Transcript of 50-h hearing, NYSCEF Doc. No. 52, at 20-21, 26-29. There was, he said, no construction on the sidewalk, no work of any kind going on, no barricades, warning signs, cones or tape. *Id.* at 23-24. In his bill of particulars, plaintiff also states that while he was walking on the sidewalk in front of 1111 Amsterdam Avenue, "he was caused to fall and be violently precipitated to the ground as a result of an upraised defective tree well on said sidewalk." Supplemental Verified Bill of Particulars, April 3, 2017, NYSCEF Doc. No. 51.

At his deposition, plaintiff further explained that, after leaving St. Luke's hospital following a visit to his sister, he was heading north toward his car, walking on the sidewalk near the curb, getting ready to cross the street, when he lost his balance and fell after stepping into a tree well with his left foot, stepping into a hole in one corner of the tree well, and falling into the street. Deposition of Goodhope (Pl. Dep.), February 6, 2018, NYSCEF Doc. No. 65, at 41-42, 53-54, 61-64. He testified that he was walking with both feet on the sidewalk and then his left foot stepped into a tree well, an area of "grass, rock, gravel, whatever," different that the sidewalk material (65), and that the sidewalk was clear but when he walked near the gravel, he stepped down into a hole, and stepping into the gravel in the tree well area caused him to lose his balance and fall. *Id.* at 64-66.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. *See* CPLR 3212 (b); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the

opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562.

The evidence must be viewed in a light most favorable to the nonmoving party (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, or where the issue is "arguable." *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). However, "the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist." *Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 (1st Dept 1983), *affd* 62 NY2d 686 (1984); *see Rotuba Extruders, Inc.*, 46 NY2d at 231; *see IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1st Dept 2011), *affd* 19 NY3d 850 (2012). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*, 49 NY2d at 562.

Administrative Code

Section 7-210 of the Administrative Code of the City of New

York (Administrative Code), enacted in 2003, and sometimes referred to as the "sidewalk law," shifted tort liability for injuries caused by defective sidewalk conditions from the City to abutting property owners, and "imposes tort liability on property owners who fail to maintain city-owned sidewalks in a reasonably safe condition." *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 519 (2008). For purposes of Administrative Code § 7-210, however, "a tree well is not part of the 'sidewalk.'" (*id.* at 518-519), and the City may be held liable for injuries resulting from its failure to maintain them, subject to the prior written notice requirements of Administrative Code § 7-201, also known as the "pothole law." *See Tucker v City of New York*, 84 AD3d 640 (1st Dept 2011); *Donadio v City of New York*, 126 AD3d 851 (2d Dept 2015).

Administrative Code § 7-210 thus generally "does not impose civil liability on abutting property owners for injuries that occur in city-owned tree wells." *Vucetovic*, 10 NY3d at 521; *see Barrios v City of New York*, 172 AD3d 668, 97 NYS3d 516, 517 (2d Dept 2019); *Newkirk v City of New York*, 129 AD3d 685, 686 (2d Dept 2015); *Donadio*, 126 AD3d at 852. An abutting property owner may, however, be held liable for injuries caused by a defect in a tree well if "it affirmatively created the dangerous condition, negligently made repairs to the area, or caused the dangerous condition to occur through a special use of the area." *Fernandez*

v 707, Inc., 85 AD3d 539, 540 (1st Dept 2011), citing *Vucetovic*, 10 NY3d at 520; *see Grier v 35-63 Realty, Inc.*, 70 AD3d 772, 773 (2d Dept 2010); *Gera v 500 E. 76th St. LLC*, 2012 WL 4472561, 2012 NY Misc LEXIS 4588, *4-5, 2012 NY Slip Op 32450(U) (Sup Ct, NY County 2012).

CITY'S MOTION (seq. no. 001)

By plaintiff's own testimony, his accident occurred when he stepped into a hole in a tree well, which was two to three inches lower than the sidewalk, lost his balance and fell into the street. The City is responsible for maintaining tree wells, and may be held liable for accidents arising from defective tree wells, subject to prior written notice, or where it affirmatively caused or created the defect. The City moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not receive prior written notice pursuant to Administrative Code § 7-201 of the alleged injury-causing condition, and it did not cause or create the condition.

In support of its motion, the City submits records, including work permits, inspection reports, and Big Apple maps, together with affidavits from employees who conducted searches for records, which provide there was no prior written notice of a defective condition in or around the tree well. *See* Response to Case Scheduling Order, NYSCEF Doc. No. 53; Affidavits of Talia Stover, Florence Ellis-Ward, and Yelena Bogdanova, NYSCEF Doc.

Nos. 54, 55, 56. The record searchers also attest that there are no records of any work performed by or on behalf of the City in or in the vicinity of the tree well during the two years prior to plaintiff's accident. The City thus has made a prima facie showing that it cannot be held liable for injuries sustained by plaintiff when he tripped and fell at the tree well location. *See Cardona v City of New York*, 305 AD2d 303 [1st Dept 2003]; *Yarborough v City of New York*, 10 NY3d 726 [2008].

In opposition, plaintiff does not dispute that the City did not have prior written notice of the alleged defective condition, and does not argue that the City created the hazard or defective condition through an affirmative act of negligence, or otherwise make clear what opposition it has to the City's motion. *See* Affirmation of Howard Schatz in Opposition (Schatz Aff.), NYSCEF Doc. No. 89. To the extent that plaintiff argues that all defendants' motions are premature because he has not had an opportunity to depose defendants, plaintiff "neither submitted an affidavit demonstrating the existence of an issue of fact nor made any attempt to show that facts essential to justify . . . [his] opposition to the [City's] motion existed that could not be stated absent a deposition of [defendants]" and that his opposition "is supported by something other than mere hope or conjecture." *Safier v Saggio Rest., Inc.*, 151 AD3d 543, 544 (1st Dept 2017); *see* CPLR 3212 (f) (it must "appear from affidavits

submitted in opposition to the motion that facts essential to justify opposition may exist"); *Auerbach v Bennett,* 47 NY2d 619, 636 (1979) *Guaman v Ansley & Co., LLC,* 135 AD3d 492, 492 (1st Dept 2016); *Kent v 534 E. 11th St.,* 80 AD3d 106, 114 (1st Dept 2010); *Arpi v New York City Tr. Auth.,* 42 AD3d 478, 479 (2d Dept 2007).

Plaintiff's assertion that he is entitled to "thoroughly inquire, as to the role of each defendant in this matter" (Schatz Aff., ¶ 10) is insufficient to warrant denial of the City's summary judgment motion. Further, contrary to plaintiff's claim that "no documentary evidence has been exchanged (*id.*), the City submits proof of service on plaintiff and defendants, in 2017, of numerous documents, including those on which it relies on this motion, provided in response to the court's case scheduling order. *See* Response to Case Scheduling Order, NYSCEF Doc. No. 53. As none of the co-defendants submits any opposition to the City's motion, and for reasons stated above, it is granted.

ST. LUKE'S CROSS MOTION (seq. no. 001)

St. Luke's moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that the accident occurred when plaintiff stepped into a tree well, and St. Luke's had no responsibility to maintain the tree well and performed no repair or maintenance or other work in or around the tree well prior to plaintiff's accident.

In support of its motion, St. Luke's relies on the testimony of plaintiff to show that the location of the accident was a tree well for which the City was responsible, and that there was no defect in the adjoining sidewalk. At his deposition, plaintiff described his accident as occurring when he stepped into a tree well, which was not level with the sidewalk, and into a hole in the corner of the tree well; and he testified that the sidewalk was clear, but there was grass or rock or gravel around the tree when he stepped with his left foot into the tree well, which caused him to lose his balance and fall. *See* Affirmation of Katrine Beck in Support of St. Luke's Motion (Beck Aff.), NYSCEF Doc. No. 73, ¶¶ 14-17; Pl. Dep., NYSCEF Doc. No. 65, at 63-65.

St. Luke's also submits an affidavit of its Director of Engineering, James Pajuelo (Pajuelo), who attests that he has been employed by St. Luke's since May 2016, that St. Luke's did not own or install the subject tree well, had no duty to repair or maintain it, did not perform any work inside the tree well or receive any complaints about the tree well. *See* Pajuelo Affidavit, NYSCEF Doc. No. 84. Pajuelo, however, does not attest that he, who was not employed by St. Luke's at the time of plaintiff's accident, has any personal knowledge of the condition of the tree well or the sidewalk adjacent to it at the time of the accident or before, and neither he nor St. Luke's offers any evidentiary support for his statements.

The evidence on which St. Luke's relies, including Pajuelo's affidavit, is insufficient to make a prima facie showing of entitlement to summary judgment as a matter of law. Plaintiff, further, is entitled to conduct discovery in connection with Pajuelo's statements and St. Luke's claims that it did not cause or create a defective condition in or around the tree well.

RESTORATION'S MOTION (seq. no. 002)

Restoration moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it had no responsibility for the condition of the tree well where plaintiff's accident occurred and it performed no work on the sidewalk at, near, or in a tree well on Amsterdam Avenue between 114th and 115th Streets.

While it acknowledges that it received a permit in May 2014 to perform a sidewalk repair on Amsterdam Avenue between 114th and 115th Streets, Restoration contends that it did not actually perform sidewalk repair work on Amsterdam Avenue between 114th and 115th Streets. In support of its motion, Restoration submits an affidavit of Naveed Ahmed (Ahmed), who attests that he is the husband of the owner of Restoration and manages the company, and that he obtained the street repair permit for his cousin to do work for non-party New York Builders Solutions Inc (Builders). *See* Ahmed Affidavit, dated March 6, 2018, NYSCEF Doc. No. 68.

According to Ahmed, after Restoration obtained the permit,

his cousin was advised that the work was not to be performed in the area identified in the permit, but between 113th amd 114th Streets. *Id.*, ¶ 7. Ahmed also stated that he did not know whether Builders obtained a permit for work between 113th and 114th Streets, but his cousin's agreement with Builders was to repair the sidewalk between 113th and 114th Streets and no work was done in the area where plaintiff was injured. *Id.*, ¶¶ 8-9. Notably, Ahmed does not state that he had personal knowledge of what work was done pursuant to the permit issued to Restoration or where such work was done.

Restoration also submits an affidavit from Ahmed's cousin, Taher Ilyas (Ilyas), who similarly attests that Ahmed obtained the permit for him as a favor after he contracted with Builders to do repair work on the sidewalk located near 1111 Amsterdam Avenue between 114th and 115th Streets. *See* Ilyas Affidavit, dated March 6, 2018, NYSCEF Doc. No. 69. Ilyas states that, despite the permit being issued for work to be done between 114th and 115th Streets, he subsequently was told by Builders to perform work between 113th and 114th Streets and that is where he performed work. *Id.*, ¶¶ 6-7, 9. Ilyas, not an employee of Restoration, also has no personal knowledge of whether or what work was done by Restoration at or near the location of plaintiff's accident.

The permit issued to Restoration in May 2014 states that

permission is granted to "open the sidewalk at" 1111 Amsterdam Avenue between 114th and 115th Streets, to "repair sidewalk and patch curb 20'" for a length of 200 feet. *See* NYC Department of Transportation Sidewalk Construction Permit, dated May 16, 2014, NYSCEF Doc. No. 53. Neither Ahmed nor Ilyias could state whether a permit was obtained for work between 113th and 114th Streets, neither offers any explanation as to why the permit states work was to be done between 114th and 115th Streets, and neither submits evidence to show that no work was performed by Restoration on the sidewalk area described in the permit. Considering the evidence submitted by Restoration in the light most favorable to plaintiff, the affidavits serve at best to raise material issues of fact as to who performed work pursuant to the permit and where such work was performed. Restoration thus fails to make a prima facie showing of entitlement to summary judgment.

POLONES' MOTION

Polones moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it had no duty to plaintiff because he fell in a tree well, which it did not own, maintain or repair; and it did not cause or create the defective condition and did no work on Amsterdam Avenue.

In support of its motion, Polones submits copies of two permits issued to it in March 2013 for sidewalk replacement, and

an affidavit from its President, Tomasz Stasiulewicz (Stasiulewicz). The permits issued to Polones on March 1, 2013, grant permission to open the sidewalk for a maximum of 100 feet on West 114th Street from Amsterdam Avenue to Morningside Drive, "AKA 1111 Amsterdam Ave. submitted as West 114 Street Amsterdam Avenue Morningside Drive"; and to open the sidewalk for a maximum of 100 feet on West 115th Street from Amsterdam Avenue to Morningside Drive, "AKA 1111 Amsterdam Ave. submitted as West 115 Street Amsterdam Avenue Morningside Drive." *See* NYC Department of Transportation Sidewalk Construction Permits, NYSCEF Doc. No. 113.

In his affidavit, Stasiulewicz attests that, notwithstanding the permits' identification of the area of work as 1111 Amsterdam Avenue, the work performed by Polones was limited to replacing sidewalks on West 113th, 114th, and 115th Streets, as the two submitted permits indicate. Stasiulewicz also attests that he supervised work performed by his employees and visited the site at 113th, 114th, and 115th Streets where work was being done, and no work was performed on Amsterdam Avenue. In view of the description of the work in the permits and Stasiulewicz's affidavit based on personal knowledge of what work was done, Polones has made a prima facie showing that it did not perform work in the area of plaintiff's accident. In opposition, plaintiff does not raise a triable issue of fact. To the extent

that he contends that Polones obtained a permit in 2014 to perform repairs on the sidewalk on Amsterdam Avenue between 114th and 115th Streets (*see* Schatz Aff., ¶ 8), plaintiff submits no evidence that another permit was issued in 2014.

Accordingly, it is

ORDERED that the City's motion (seq. no. 001) is granted and the complaint and all cross claims against it are dismissed; and it is further

ORDERED that Polones' motion (seq. no. 003) is granted and the complaint and all cross claims against it are dismissed; and it is further

ORDERED that the cross motion of St. Luke's (seq. no. 001) is denied; and it is further

ORDERED that Restoration's motion (seq. no. 002) is denied.

Dated: July 9, 2019

ENTER:

ALEXANDER M. TISCH, J.S.C.
HON. ALEXANDER M. TISCH