

Rozon v Consolidated Edison Co. of N.Y., Inc.
2019 NY Slip Op 32078(U)
July 15, 2019
Supreme Court, New York County
Docket Number: 154015/2017
Judge: Julio Rodriguez III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM

Justice

MIGUEL ROZON, Plaintiff, - v - CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., 135 EAST 57TH STREET LLC, WILLIAM F. WALLACE AND STRATFORD C. WALLACE, AS TRUSTEES UNDER A CERTAIN DEED OF TRUST DATED JUNE 2ND, 1969, STARBUCKS CORPORATION, THE CITY OF NEW YORK Defendants. INDEX NO. 154015/2017 MOTION DATE 05/16/2019 MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 81

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff commenced this action seeking to recover damages allegedly sustained in a trip and fall accident on April 29, 2016, on a sidewalk in front of a Starbucks coffee shop located at 135 East 57th Street, New York, New York. Defendant City of New York ("City") now moves for summary judgment, and plaintiff opposes the motion. Additionally, defendant Starbucks Corporation ("Starbucks") cross-moves for summary judgment. Defendant Starbucks' cross-motion is opposed by plaintiff and defendants 135 East 57th Street LLC, William F. Wallace and Stratford C. Wallace as trustees under a certain Deed of Trust dated June 2, 1969 ("the Wallace LLC defendants").

In support of its motion, defendant City submits copies of the notice of claim, pleadings, bill of particulars, plaintiff's 50-h hearing transcript, photographs marked at plaintiff's 50-h hearing, an affidavit from a paralegal and records searcher for the City Department of Transportation ("DOT"), and a set of DOT records. Defendant City argues that it is entitled to summary judgment because 1) its records reflect that defendant City did not have prior written notice of the defect alleged to have cause plaintiff's accident, and 2) there is no evidence that defendant City caused or created the subject condition.

In support of its cross-motion, defendant Starbucks submits (in addition to the case-related documents attached to defendant City's motion) copies of the relevant lease agreement and an affidavit from a Starbucks store development director. Defendant Starbucks argues that it

1 Additionally, plaintiff filed a "cross-motion" on September 7, 2018, to compel responses to its discovery demands dated September 7, 2018. This "cross-motion" will be addressed at the end of this decision.

is entitled to summary judgment because 1) plaintiff failed to plead that defendant Starbucks caused or created the alleged defect, 2) defendant Starbucks is a tenant of the subject building and is therefore not responsible for maintaining the sidewalk pursuant to New York City Administrative Code (“NYC Admin. Code”) 7-210, and 3) defendant Starbucks’ duties under the lease do not comprehensively and exclusively displace the landowner’s duty to maintain the sidewalk.

In opposition to defendant Starbucks’ cross-motion, the Wallace LLC defendants argue that the cross-motion should be denied because plaintiff indeed pled that defendant Starbucks created the alleged dangerous condition and that Starbucks’ duties under the lease include sidewalk maintenance and repair of issues caused by Starbucks’ use or occupancy of the sidewalk.

In opposition, plaintiff argues that defendants’ motions are premature and that further discovery is necessary. Plaintiff contends that the photographs of the alleged defect demonstrate that it was created by a “cut” in the sidewalk and thus that the defect was dangerous immediately after the cuts were made. With respect to Starbucks’ cross-motion, plaintiff adopts the arguments of the Wallace LLC defendants.

In reply, defendant City further argues that plaintiff failed to create a question of fact as to whether defendant City caused or created the alleged condition and that incomplete discovery does not require denial of its motion.

In its reply papers, defendant Starbucks maintains that its submitted affidavit from a Starbucks store development director carried its *prima facie* burden and that the parties’ oppositions have not rebutted this showing.

The proponent of a motion for summary judgment must tender sufficient evidence to show the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, “the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so” (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

Pursuant to NYC Admin. Code 7-210, “[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition” and the property owner “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”. This provision does not apply to owner-occupied one-, two-, or three-family properties “used exclusively for residential purposes” (NYC Admin. Code 7-210). “[T]he city shall not be liable for any injury to

property or personal injury, including death, proximately caused by the failure to maintain sidewalks” unless the sidewalk abuts an exempted property or city-owned property (*id.*).

“Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous roadway[, sidewalk, or encumbrance] condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies” (*Phillips v. City of New York*, 107 A.D.3d 774 [2d Dept 2013] citing *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; see NYC Admin. Code 7-201 and 7-210; *Madonia v City of New York*, 164 AD3d 1320, 1322 [2d Dept 2018]).

“Where the City establishes that it lacked prior written notice under the Pothole Law [NYC Admin. Code 7-201], the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality (see *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Additionally, the affirmative negligence exception ‘is limited to work by the City that immediately results in the existence of a dangerous condition’ (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis omitted], quoting *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005])” (*Yarborough v City of New York*, 10 NY3d 726 [2008]; see *Chambers v City of New York*, 147 AD3d 471 [1st Dept 2017]).

Under CPLR 3212 (f), “[a] party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant.” (*Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965, 965-966 [2d Dept 2014]; see *Global Minerals and Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006] [“The party invoking the section must provide a proper evidentiary basis supporting its request for further discovery”]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion.” (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]; see *Oates v Marino*, 106 AD2d 289 [1st Dept 1984] [“[T]o speculate that something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under the authority of CPLR 3212 (f)”] [internal quotation omitted]).

Here, defendant City submitted an affidavit from a DOT records searcher and paralegal as well as the documents that resulted from a search for documents within the two-year period up to and including the alleged accident date, April 29, 2016. The affidavit and submitted documents indicate that defendant City of New York did not have notice of the alleged defect—a cut hole surrounding a street light/lamppost on the sidewalk located outside the Starbucks coffee shop on Lexington Avenue between East 57th and 58th Streets. In opposition, plaintiff was required to submit evidence to create a question of fact as to whether defendant City caused or created the defect at issue or otherwise justify denial of the instant motion.

In opposition, plaintiff submitted a copy of the notice of claim as well as photographs marked at plaintiff’s 50-h hearing. The photographs demonstrate that the defect at issue was caused by a cut in the concrete sidewalk flag immediately surrounding the street light/lamppost. Pursuant to 34 RCNY 2–20, “private citizens [are prohibited] from ‘install[ing], repair[ing],

us[ing] or work[ing] within three (3) feet of any type of City electrical equipment or non-City electrical equipment attached to City Property” (*Doyley v Steiner*, 107 AD3d 517, 518 [1st Dept 2013]; 34 RCNY 2–20 [a] [2]). This rule “further direct[s] that “[n]o person shall break, deface, remove, or interfere with any lamp, gas, communication or electrical apparatus, or any part thereof, which shall be hung or fixed in any street or public place ... except as authorized by the Department [of Transportation]” (*Doyley* at 518; 34 RCNY 2–20 [a] [7]).

Given DOT’s authority over the street light/lamppost and the immediate vicinity of the sidewalk “cut” defect at issue—as demonstrated by plaintiff’s submission of the marked photographs from plaintiff’s 50-h hearing—this court finds that plaintiff has established that further discovery is necessary in this matter pursuant to CPLR 3212 (f) (*see Baghban v City of New York*, 140 AD3d 586 [1st Dept 2016]; *Figueroa v City of New York*, 126 AD3d 438 [1st Dept 2015]).

As to defendant Starbucks, the affidavit submitted in support of their cross-motion for summary judgment is insufficient to establish their *prima facie* showing. Defendant Starbucks failed to establish that they did not cause or create the defect at issue, as required (*see Kellogg v All Saints Housing Development Fund Co., Inc.*, 146 AD3d 615, 617 [1st Dept 2017]; *Abramson v Eden Farm, Inc.*, 70 AD3d 514 [1st Dept 2010]), or that the defect was not caused by Starbucks’ use or occupancy of the sidewalk. The affidavit from Mr. Shallit, a store development director, fails to describe the personal knowledge on which his asserted conclusions are based, including that “the conditions of Article 17 (c) of the Lease were not triggered and Starbucks had no obligation to operate, maintain or make necessary repairs to the sidewalk pursuant to the Lease” (Shallit aff. at ¶ 16). Moreover, Mr. Shallit’s connection to *this* Starbucks’ coffee shop is not described, and Mr. Shallit fails to address the issue of whether defendant Starbucks caused or created the defect other than to (incorrectly) state that “[p]laintiff’s complaint did not allege... that the crack in the sidewalk was caused by Starbucks” (*id.* at ¶ 15; *cf.* *Fixler* aff. in opp. at ¶ 6; Starbucks aff. in supp. of cross-motion, Exhibit A, plaintiff’s summons and complaint at ¶ 57 [“in negligently... causing and creating a dangerous condition”]). Notably, Mr. Shallit does not assert that defendant Starbucks did not cause or create the alleged condition during the relevant tenancy (*see* Shallit aff.). Consequently, this court finds that defendant Starbucks has failed to make its *prima facie* showing of entitlement to judgment.

In light of the foregoing, this court now turns to plaintiff’s “cross-motion” to compel discovery. Plaintiff’s motion must be denied because plaintiff’s affirmation of good faith is “insufficient, because [it] do[es] not include the time, place, and nature of the consultations that counsel had with [opposing] counsel to try to resolve the issues raised by the motion (22 NYCRR 202.7 [c]; *see 241 Fifth Ave. Hotel, LLC v. GSY Corp.*, 110 A.D.3d 470, 471–472, 973 N.Y.S.2d 129 [1st Dept. 2013]; *see also Loeb v. Assara N.Y. I, L.P.*, 118 A.D.3d 457, 457–458, 987 N.Y.S.2d 365 [1st Dept. 2014])” (*Cashbamba v 1056 Bedford LLC*, 172 AD3d 415 [1st Dept 2019]). Moreover, and as noted by defendant Starbucks, the disclosure demand for which plaintiff seeks a compelled response is dated September 7, 2018, the same date that plaintiff’s “cross-motion” to compel discovery was filed; this naturally limits the possibility that a good faith resolution was indeed sought. Furthermore, it is an improper “cross-motion” as it seeks to compel responses from all defendants, including Consolidated Edison Company of New York, Inc. (“Con Ed”) and the Wallace LLC defendants (*see Kershaw v Hospital for Special Surgery*,

114 AD3d 75, 88 [1st Dept 2013] [“The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party”). Accordingly, this court finds that plaintiff’s “cross-motion” to compel discovery must be denied as improper.

In the interest of judicial economy, however, and in view of 1) the nature of the alleged defect as depicted in the photographs and 2) DOT’s authority over street lights/lampposts of this kind (34 RCNY 2–20 [a] [7]), defendant City is directed to provide a response to “Plaintiff’s Supplemental Discovery Demands” dated September 7, 2018, within 45 days of service of this order with notice of entry, such service to be performed by plaintiff.

Additionally, defendant City’s motion for summary judgment, though denied, is denied with leave to renew following the exchange of the ordered discovery response and presentation of a witness for deposition (see *Figueroa v City of New York*, 126 AD3d 438 [1st Dept 2015] citing *Cannon v New York City Police Dept.*, 104 AD3d 454 [1st Dept 2013] [summary judgment improper before depositions where “examinations might have led to additional information and discovery, none of which plaintiff had been able to obtain or compel prior to the court’s decision”]).

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Accordingly, it is ORDERED that defendant City of New York is to provide a response to “Plaintiff’s Supplemental Discovery Demands” dated September 7, 2018, within 45 days of service of this order with notice of entry; and it is further

ORDERED that defendant City of New York’s motion for summary judgment is denied, with leave to renew; and it is further

ORDERED that defendant Starbucks Corporation’s motion for summary judgment is denied, with leave to renew; and it is further

ORDERED that plaintiff is to serve a copy of this order with notice of entry upon all parties and the General Clerk’s Office within 15 days of this order.

This constitutes the decision and order of the court.

July 15, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: