

Reed v Guerero

2019 NY Slip Op 32998(U)

October 3, 2019

Supreme Court, Kings County

Docket Number: 500796/2017

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK KINGS COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

RONNIE REED,

Plaintiff,

- against -

INDEX NO.

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Seq. No

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**RAMON GUERERO and LM REALTY
SERVICE, CORP.,**

Defendants.

In accordance with CPLR 2219(a), the following papers were read on this motion by defendants, pursuant to CPLR 3212.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Answering Affidavits — Exhibits (Memo)	<u>2</u>
Replying Affidavits (Reply Memo)	<u>3</u>

This is an action commenced by Ronnie Reed (plaintiff) via Summons and Verified Complaint on January 13, 2017 against Ramon Guerero (Guerero) and LM Realty Service, Corp. (collectively, defendants) seeking to recover for personal injuries allegedly sustained on October 14, 2015 at approximately 7:40 p.m. when he tripped and fell on a cracked sidewalk in front of defendants' building located at 895 Gates Avenue in Brooklyn, New York (see Notice of Motion, exhibit C [Verified Complaint]; exhibit D [Verified Bill of Particulars]). Specifically, plaintiff alleges that he stepped into a hole on the sidewalk at the bus stop after alighting from the rear doors of the B-46 bus on Malcolm X Boulevard near its intersection with Gates Avenue in Brooklyn, New York (see exhibit D at 21). Issue was joined when defendants interposed an

Answer on November 1, 2017.¹ The Note of Issue has been filed herein.

Before the Court is a motion by defendants, pursuant to CPLR 3212, for summary judgment dismissing the Verified Complaint. In support of their motion, defendants submit, *inter alia*, a copy of the pleadings; transcript from plaintiff's 50-h hearing; plaintiff's deposition testimony; Guerero's deposition testimony; and, photographs marked at plaintiff's deposition.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a *prima facie* case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light

¹ Plaintiff's motion for a default judgment as against defendants was withdrawn.

most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

Defendants maintain that they are entitled to summary judgment pursuant to New York City Administrative Code § 7-210. Defendants assert that the City of New York (the City) has a common law duty to maintain the sidewalks within the bus stop adjacent to commercial property, and that abutting property owners, such as defendants, have no duty to maintain the bus stop pursuant to § 7-210. According to defendants, the photograph produced by plaintiff clearly depicts the location of his accident as the bus stop including the B-46 bus as well as the removal of the adjacent sidewalk flag. Moreover, defendants maintain that the photograph depicts a tree well abutting defendants property, thus since the time of plaintiff's accident and the time the photograph was taken, a tree was planted by the City which created the purported defect. However, defendants also assert that Guereo testified at his deposition that, in October 2015, bus stop was not located adjacent to the property the defendants owned at 895 Gates Avenue but rather at another location on Malcolm X Boulevard.

In opposition, plaintiff asserts that defendants failed to establish their prima facie case, and at a minimum, left open factual questions about plaintiff's accident which require denial of their motion. Specifically, plaintiff maintains that defendants did not cite to any evidence from a knowledgeable source that the subject sidewalk defect was within a bus stop, and in fact Guerero denied that the defect was within a bus stop at all. Moreover, plaintiff contends that

defendants did not produce evidence that the subject cracks and hole were within a tree hole and failed to substantiate their claim that the planting of a tree caused the subject cracks and hole where plaintiff was injured, especially given Guerero's testimony that a tree was not present at the subject location when plaintiff fell.

"Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner" (*Scuteri v 7318 13th Ave. Corp.*, 150 AD3d 1172, 1173 [2d Dept 2017]; *Antonyuk v Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 AD3d 711 [2d Dept 2017]; *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]). However, "[t]he City of New York . . . is [still] responsible for the maintenance of bus stops within the City of New York, including the roads, curbs, and sidewalks attendant thereto" (*Davila v New York City Tr. Auth.*, 66 AD3d 952, 953 [2d Dept 2009]; see *Shaller v City of New York*, 41 AD3d 697, 698 [2d Dept 2007]). "A bus stop is not delimited to the roadway where buses operate but includes the sidewalk where passengers board and disembark from the bus" (*Bednark v City of New York*, 127 AD3d 403, 404 [1st Dept 2015]).

Upon review of the papers submitted herein, the defendants' motion for summary judgment must be denied as they fail to meet their prima facie burden to establish the absence of triable issues of fact. Specifically, defendants fail to demonstrate that the accident occurred within a designated bus stop, thus absolving them from their duty to maintain that sidewalk pursuant to Admin Code § 7-210 (see *McCormick v City of New York*, 165 AD3d 565 [1st Dept 2018] [finding that a triable issue of fact exists as to whether the part of the sidewalk where plaintiff fell is within a designated bus stop that the City is required to maintain]; *Bednark*, 127 AD3d at 403 [finding that a triable issue of fact exists as to whether plaintiff fell within a designated bus stop]). In fact, the Court notes that defendants assert both that plaintiff fell at a bus stop, which they have no duty to maintain, while also citing to testimony by Guereo that the

accident location as identified by plaintiff at his deposition did not have a bus stop. Moreover, the defendants fail to proffer any evidence sufficient to substantiate their assertion that the sidewalk where plaintiff fell was part of a tree-well the City was obligated to maintain and/or that the City created the purported defect when it created the tree-well and planted a tree. Accordingly, the Court cannot determine as a matter of law whether defendants owed plaintiff a duty to maintain the subject sidewalk in a reasonably safe condition and/or whether their failure to do so was a proximate cause of plaintiff's injuries (*see generally Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793 [2016]). Since defendants failed to meet their prima facie burden, the Court need not address the sufficiency of the plaintiff's papers submitted in opposition (*see Buonviaggio v Parkside Assoc., L.P.*, 120 AD3d 460 [2d Dept 2014]).

CONCLUSION

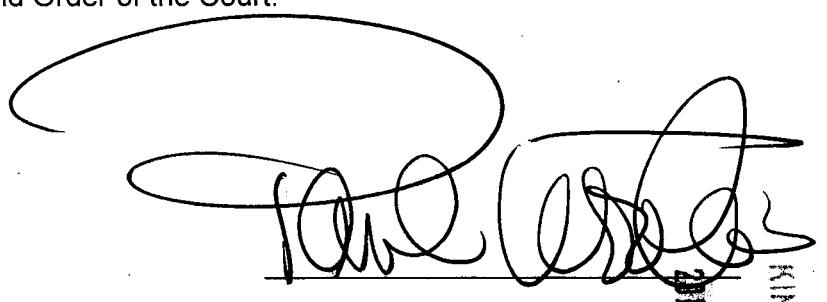
Based upon the foregoing, it is hereby,

ORDERED that defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the Verified Complaint is denied; and it is further,

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 10/3/19



PAUL WOOTEN J.S.

2019 OCT -9 AM 8:12
 FILED
 KINGS COUNTY CLERK