

Dendy v City of New York
2019 NY Slip Op 33315(U)
November 1, 2019
Supreme Court, New York County
Docket Number: 150404/2011
Judge: Lyle E. Frank
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK

PART

IAS MOTION 52EFM

Justice

-----X

INDEX NO. 150404/2011

PHYLLIS DIANNE CORDELL DENDY,

MOTION DATE 10/30/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, 605 WEST 42ND
OWNER LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 72, 73, 77, 78, 79, 80, 81, 82

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

This action arises out of alleged injuries sustained by plaintiff as a result of a trip and fall over a round object embedded in a public sidewalk. Defendant, 605 West 42nd Owner LLC (605 West), moves for summary judgment on the grounds that the defect that plaintiff alleges caused her accident was caused and created by the defendants, City of New York and New York City Department of Transportation (City). Both the City defendants and plaintiff oppose the instant motion.

It is undisputed that at some point, over two years before the alleged accident, the City, through private contractors, installed a bike rack at the subject location. It also appears undisputed that the round object embedded in the sidewalk is a portion of the base on which the bike rack would be installed.

Summary Judgment Standard

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 [1980].

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 AD2d 331 [1st Dept 1984] *aff'd* 65 NY2d 732 [1985].

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]. Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957].

Administrative Code § 7-210

Section 7-210 provides in pertinent part that “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.” *NY Admin Code* §7-210.

Also, “[n]otwithstanding 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.” *Id.*

The crux of 605 West’s argument is that the installation of the bike rack on the sidewalk adjacent to the property renders the area, where the metal plate is located, not part of the sidewalk for the purposes of Administrative Code §7-210. The City and plaintiff, both argue in opposition that 605 West has failed to meet its prima facie burden in establishing that Administrative Code §7-210 does not apply. The Court agrees.

The First Department has held that because the abutting landowner failed to show that the City caused and created the alleged defect or had prior written notice of the same, it did not meet its prima facie burden, *Sehnert v New York City Transit Authority*, 95 AD3d 463 [1st Dept 2012]. In *Sehnert* plaintiff alleged that the cause of her injuries was a piece of metal protruding from the sidewalk that she contended was a signpost that was installed and removed by the City. *Id.* at 464. The First Department affirmed the Supreme Court’s ruling on the grounds that plaintiff submitted no evidence that the City installed or removed a sign post, and that the co-defendant, abutting land-owner may be held liable pursuant to Admin Code § 7-210. *Id.*

While it is true that here, we have undisputed evidence that the City did in fact install the bike rack, the bike rack was not the defect alleged that caused plaintiff’s accident. Rather, the metal base is the defect alleged by the plaintiff and how it came to be exposed is a question of fact. Analogous to *Sehnert*, there has been no evidence that the City removed the bike rack thereby causing and creating the condition complained of. In fact, there has been no evidence as to how the bike rack was removed at all. Based on the forgoing, 605 West’s motion is denied.

Additionally, the Court has considered the City's request to search the record and grant it summary judgment if applicable; however, the Court declines the City's request at this juncture to prevent any prejudice on behalf of the other parties to this action. Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant, 605 WEST 42ND OWNER LLC, is DENIED.

This constitutes the Decision and Order of the Court.

11/1/2019
DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☒

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

LYLE E. FRANK J.S.C.

HON. LYLE E. FRANK
J.S.C.