

Rodriguez v City of New York
2019 NY Slip Op 33803(U)
December 27, 2019
Supreme Court, New York County
Docket Number: 156847/2015
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

-----X

LIZZETTE JIMENEZ RODRIGUEZ,
Plaintiff,

INDEX NO. 156847/2015

MOTION DATE 09/26/2019

MOTION SEQ. NO. 005, 006

- v -

THE CITY OF NEW YORK, 2033 THIRD AVE CORP., S & N
DISCOUNT INC.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 119, 125

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 123, 124, 126, 127, 128

were read on this motion to/for JUDGEMENT - SUMMARY

Plaintiff commenced this action seeking to recover damages allegedly sustained in a trip and fall accident on October 16, 2014, on a sidewalk in front of 2031-2033 Third Avenue, New York, New York. Defendant-tenant S&N Discount Inc. ("S&N") now moves for summary judgment on motion sequence 005; plaintiff and defendant City of New York ("City") oppose the motion. Additionally, defendant-owner 2033 Third Avenue Corporation ("2033 Corp.") moves for summary judgment on motion sequence 006; plaintiff and defendant City similarly oppose the motion.

In support of its motion, defendant S&N attaches as exhibits copies of the pleadings, this court's order dated February 15, 2019 (which consolidated another action [Index No. 158075/2017] with the instant action), plaintiff's bill of particulars, the transcript of plaintiff's 50-h hearing, the transcript of plaintiff's deposition dated July 30, 2018, a photograph marked as Exhibit B at plaintiff's deposition, plaintiff's discovery response dated January 25, 2019, an affidavit of an S&N vice president, the lease between defendant S&N and defendant 2033 Corp., and plaintiff's notice of claim with attachments. Defendant S&N argues that it is entitled to summary judgment because 1) it did not owe plaintiff a duty of care, 2) it did not cause or create the condition at issue, and 3) it did not make special use of the curb.

In support of its motion, defendant 2033 Corp. attaches as exhibits (in addition to the case-related documents attached to defendant S&N's motion) copies of the pleadings in plaintiff's now-

consolidated action (Index No. 158075/2017), an order dated September 8, 2017, and an affidavit of an officer and director of 2033 Corp. Defendant 2033 Corp. argues that it is entitled to summary judgment because 1) it does not have a responsibility to maintain the curb under New York City Administrative Code (“NYC Admin Code”) 19-101 (d), 2) it did not cause or create the subject condition, and 3) it did not make special use of the curb.

In opposition, plaintiff argues that defendants’ motions are premature and that further discovery is necessary, including depositions of defendant-movants. Additionally, plaintiff argues that a triable issue of fact exists as to whether the condition at issue was located on the sidewalk or the curb. Furthermore, plaintiff contends that the photographs of the alleged defect demonstrate that it was created by the disintegration of concrete that filled in a curb cut. Consequently, plaintiff argues that triable issues of fact exist as to whether defendants S&N and 2033 Corp. made special use of the sidewalk and curb and whether defendants S&N and 2033 Corp. caused or created the defect at issue. Moreover, plaintiff seeks to discern the identity of the entity responsible for maintenance and repair of the sidewalk and curb. To that end, plaintiff seeks disclosure of records and information related to subsequent repair of the defect.

In its opposition to defendants S&N and 2033 Corp.’s motions for summary judgment, defendant City joins plaintiff’s positions.

In reply, defendant S&N relies on an excerpt of plaintiff’s testimony where she stated that a piece of concrete that came loose during her accident was “definitely part of the curb, yes” (*see* *Castronuovo* aff, Ex E, plaintiff’s deposition transcript at 64-70). Additionally, defendant S&N reiterates its earlier positions that it was not responsible for maintaining the curb nor made special use of the area.

In its reply papers, defendant 2033 Corp. similarly relies on plaintiff’s deposition testimony, argues that defendant City is solely responsible for maintaining the curb, and further argues that there is a lack of evidence on the issues of creation of the defect and special use.

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). NYC Admin Code “7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk” (*Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]).

Rather than being categorized as part of the sidewalk (NYC Admin Code 19-101 [d]), the “curbstone” is included under “[t]he term ‘street’” (NYC Admin Code 7-201 [c] [1] [a]).

Where a party can establish that it does not own or was not responsible for a certain area, it can establish its entitlement to judgment by making a prima facie showing that it did not cause or create the defective condition at issue (*Camacho v City of New York*, 135 AD3d 482 [1st Dept 2016]; see *Levine v City of New York*, 101 AD3d 419 [1st Dept 2012]).

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, defendants S&N and 2033 Corp.’s motions for summary judgment argue that the evidence establishes that plaintiff’s accident occurred as a result of a curb defect. Most pointedly, S&N and 2033 Corp. rely on an excerpt from plaintiff’s deposition where she testified: “It was definitely part of the curb, yes” (Castronuovo aff, Ex E, plaintiff’s deposition transcript at 70). However, that specific statement describes “the piece that came off” (*id.* at 67) during her accident rather than the cause of her fall. Although plaintiff testified at her deposition that she “felt something crack and...went right under” and that it was the “curb” that cracked (*id.* at 46-47), she also testified at her 50-h examination that the cause of her accident was “broken pavement” on “both” the sidewalk and curb (Castronuovo aff, Ex D, plaintiff’s 50-h examination transcript at 18).

Assuming *arguendo* that it was indeed a curb defect that caused the alleged accident, the manner in which plaintiff’s accident occurred—to wit, complete detachment of a section of curb—as well as the contents of the photographs exchanged by plaintiff (see *Castronuovo* aff, Ex G, photographs; *Marchese* aff, Ex M, photograph marked at plaintiff’s deposition) suggest that a prior repair may have been performed to the curb at issue. Furthermore, plaintiff’s annexed Google Street View images show that a curb cut may have been present at the location at some time prior to repair. Although plaintiff concedes that these images are inadmissible, uncertified documents and information may properly be considered in opposition to a motion for summary judgment so

long as such information is not an opposing party's sole basis for opposition (see *Edwards v Rosario*, 166 AD3d 453, 454 [1st Dept 2018]).

Ultimately, based upon the above-described indications, defendant 2033 Corp.'s non-delegable duty to maintain the subject sidewalk, and the lease provision by which defendant S&N is responsible for maintenance and non-structural repair of the curb (Castronuovo aff, Ex H, at 6 ["Tenant shall...take good care of the...sidewalks and curbs adjacent thereto...and...make all...non-structural repairs thereto"]), 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]).

Accordingly, it is ORDERED that defendant S&N Discount Inc.'s motion for summary judgment is denied, with leave to renew; and it is further

ORDERED that defendant 2033 Third Avenue 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 30 days of this order; and it is further

ORDERED that the parties are to appear for the scheduled compliance conference at Room 106, 80 Centre Street, New York, New York, on January 9, 2020, at 2:00 p.m.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

December 27, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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