

Tramontano v 106 Rivington Enter., L.L.C.
2019 NY Slip Op 33815(U)
December 31, 2019
Supreme Court, New York County
Docket Number: 157271/2012
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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ROBERT TRAMONTANO,

Plaintiff,

- v -

106 RIVINGTON ENTERPRISE, L.L.C., K.Y.W
ENTERPRISE CORP., SAM WU, JANE WU,

Defendant.

-----X

106 RIVINGTON ENTERPRISE, L.L.C., K.Y.W ENTERPRISE
CORP., SAM WU, JANE WU

Plaintiff,

-against-

106 IN THE L.E.S., LLC.

Defendant.

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INDEX NO. 157271/2012
MOTION DATE 06/05/2019
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

Third-Party
Index No. 90946/2013

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for

JUDGMENT - SUMMARY

In this personal injury action, the plaintiff alleges to have suffered injuries after tripping on what appeared to be a utility pipe protruding from a sidewalk adjacent to the curb in front of the defendants' property on Rivington Street in Manhattan on August 26, 2012.1 According to

1 By order dated August 2, 2013, this court (Scarpulla, J.) granted the plaintiff's motion for leave to enter a default judgment against defendants 106 Rivington Enterprises, LLC and KYW Enterprise Corp. on the issue of liability, damages to be determined at an inquest or trial. Thereafter, by so-ordered stipulation dated August 12, 2013, the parties agreed to vacate the default judgment and extend the defendants' time to answer. The defendants commenced a third-party action against the lessee of the property, 106 In The L.E.S., LLC, seeking indemnification and contribution. The third-party defendant failed to answer or appear. By order dated December 31, 2014, the court denied, without prejudice, the defendants/third-party plaintiffs' motion for leave to enter a default judgment against the third-party defendant. Thereafter,

the plaintiff, the open pipe was square and approximately 6" x 6", and protruded up from the sidewalk about 2 inches, surrounded by cracked cement. The plaintiff was walking around a group of people gathered on the sidewalk and did not see the pipe before he fell. He was holding a glass bottle in his left hand which shattered and cut his hand when his hand hit the sidewalk, and both knees were scraped. He was treated with sutures and underwent two surgeries on his hand. Defendant K.Y.W. Enterprise Corp. (KYW) owned the property, defendant 106 Rivington Enterprises, LLC (106 Rivington) was the nominee shareholder of KYW, defendants Sam Wu and Jane Wu are alleged to have ownership interest in the property or the corporate defendants. The defendants now move pursuant to CPLR 3212 seeking summary judgment dismissing the complaint in its entirety. The plaintiff opposes the motion. The motion is denied.

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 establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2nd Dept. 1970).

a temporary stay arising from the liquidation of Castlepoint Insurance Co. was imposed. Discovery ensued after the stay was lifted in December 2017.

A landowner and its managing agent have a duty to maintain premises in a reasonably safe condition. See Gronski v County of Monroe, 18 NY3d 374 (2011); Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). Landowners and their agents may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017).

The defendants have not met their burden on the motion in the first instance. They principally rely upon the deposition testimony of Charles Wu, the son of defendants Sam Wu and Jane Wu, and an affidavit of Sam Wu. Charles Wu seemingly had little knowledge of the property or circumstances of the accident. He admitted that KYW, his family's company, owned the property since he was a child and that he performs administrative duties for the company at his father's direction. He also works as a messenger or other "side jobs" using his computer science degree. Charles testified that he did not know whether or not his mother, Jane Wu, had any association with KYW. He testified that a tenant named Abraham had performed maintenance and repairs on the building in the past but he could not recall Abraham's last name. A friend of Charles named Jeff resided in a residential unit and a music related business occupied the commercial space around the time of the accident. Charles could not recall what the sidewalk in front the building looked like, never noticed its condition or any cracks in the cement and, when shown a photo of the sidewalk depicting the square pipe, testified that he had never noticed it prior to the plaintiff's accident. He denied receiving any complaints from tenants about the sidewalk, and could not recall if anyone else had fallen on the sidewalk in front of the building. However, Charles did recall seeing a receipt or invoice for repair of the sidewalk in 2008, given to him by his father Sam, and saw a group of men hired by his father with cement in wheelbarrows on the sidewalk. At his deposition, Charles identified several photographs depicting construction work being performed on the sidewalk. With their motion, the defendants also submit a single photograph of the sidewalk area directly in front of the property and a close-up shot of the square protruding from the sidewalk directly in front of the front stairway of the building, surrounded by cracked or eroded cement.

In his brief affidavit, Sam Wu, who was not deposed, states only that KYW was the title owner of the property at the time of the accident, that Jane Wu has no ownership interest in the property or in the corporate defendants, that he was "unaware as to when the gas main was

installed or its purpose, other than it is some form of utility", that none of the defendants had exclusive access or control over the gas main and no one made repairs to it. Defendant Jane Wu was not deposed and did not submit an affidavit.

This proof falls far short of demonstrating the absence of any triable issue of fact. Indeed, it actually presents issues of fact as to what the square pipe actually was, whether it constituted a dangerous condition, who owned or installed the pipe, and whether the defendants caused or created the condition or had constructive notice of the condition. The conflicting factual assertions of Charles Wu and Sam Wu present issues of credibility, which are to be resolved at trial, not on a summary judgment motion. See S.J. Capelin Assoc. v Globe Mfg. Corp., 24 NY2d 338 (1974); DeSario v SL Green Mgt., 105 AD3d 421 (1st Dept. 2013).

In opposition, the plaintiff submits several more photographs of the sidewalk and an attorney's affirmation. Since counsel claims no personal knowledge of the underlying facts, both the contents of the complaint and the affirmation of the plaintiff's counsel are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). In any event, since the defendants failed to meet their burden on the motion, the sufficiency of the opposing papers is of no moment. The court notes, however, that plaintiff's counsel accurately observes that the defendants, while asserting that the square pipe was a gas main or some other utility pipe not under their control, provide no basis for such a conclusion beyond the plaintiff's description of its appearance and a photograph which does not advance their position.

Thus, in reply, the defendants append documents received as a result of a Department of Transportation FOIL request showing, *inter alia*, that Con Edison and EnTech Corp. may have performed work in the area in 2002 or 2003, and that Empire City Subway and Halcyon Construction Corp. may have performed work in 2006, since street opening permits had been granted. The defendants do not explain why these documents, obtained in 2014 per the attached cover letter from the DOT, were not submitted with the initial motion papers. See Gonzalez v City of New York, 127 AD3d 632 (1st Dept. 2015); Schulte Roth & Zabel, LLP v Kassoover, 28 AD3d 404 (1st Dept. 2006). In any event, neither the reply affirmation nor the FOIL documents entitle the defendants to summary judgment. They merely raise further questions of fact.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is denied, and it is further

ORDERED that the parties shall appear for a settlement conference on March 12, 2020, at 3:00 p.m.

This constitutes the Decision and Order of the court.

12/31/2019

DATE



NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

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: