Scola v City of New York
2019 NY Slip Op 33844(U)
November 7, 2019
Supreme Court, Queens County
Docket Number: 702092/19
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Christina Scola,

Plaintiff,

- against -

The City of New York, Thomas Donovan, Linda Donovan, Vay Min Hom and Siu Chue Hom,

Defendants.

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Index Number: 702092/19

Motion Date: 10/28/19

Motion Seq. No.: 1

The following papers numbered 1 to 25 read on this motion by defendants, Thomas Donovan and Linda Donovan, to dismiss; cross-motion by defendants, Vay Min Hom and Siu Chue Hom, for summary judgment; and cross-motion by plaintiff to strike or to compel discovery.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation-Exhibits	5-8
Notice of Cross-Motion-Affirmation-Exhibits	9-12
Affirmation in Opposition-Exhibit	13-15
Affirmation in Opposition	16-17
Affirmation in Opposition-Exhibits	18-20
Reply-Exhibit	21-22
Reply-Exhibits	23-25

Upon the foregoing papers it is ordered that the motion and cross-motions are decided as follows:

Motion by defendants Donovan to dismiss the complaint against them, pursuant to CPLR 3211(a)(7), for failure to state a cause of action is denied. Cross-motion by Hom for summary judgment dismissing the complaint and cross-claims against them is granted, and cross-motion by plaintiff to strike the answers of defendants for failure to appear for depositions or, in the alternative, to compel defendants to appear for depositions is moot with respect to Hom and is denied without prejudice as to Donovan and the City to seeking said discovery at a conference in the Compliance Conference Part.

The complaint alleges that plaintiff sustained injuries as a result of tripping and falling on a defective raised sidewalk flag

in front of either 71-05 or 71-07 Nansen Street in Queens County on January 24, 2018. The 71-05 property was and is owned by defendants Donovan and the 71-07 property was and is owned by defendants Hom. The complaint alleges, inter alia, that Donovan and Hom were negligent in either creating the defective condition of the sidewalk or allowing the sidewalk to remain in a defective condition and failing to repair it notwithstanding that they knew or should have known of it and had ample time to correct the condition (i.e., that they had actual or constructive notice of the condition).

Abutting property owners are not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the owners created the defective condition or caused it through some special use, or unless a statute charges the owners with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon them for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]). The only statutory provision imposing liability upon property owners in the City of New York for failing to repair and maintain the public sidewalks abutting their property is §7-210 of the New York City Administrative Code, and that section specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]). Where §7-210 is inapplicable and thus no statutory liability may be imposed, the only grounds for liability against the abutting property owners would be if they actually created the defective condition or caused it through a special use, in which case liability would be based upon principles of common law negligence.

Donovan's counsel contends that the complaint fails to state a cause of action against Donovan because their abutting property is a one-family exclusively residential home and therefore they are exempt from liability for the failure to maintain the sidewalk abutting their property under §7-210 of the New York City Administrative Code. In support of this contention, he annexes real property tax records that designate the property as a one-family home. However, counsel is entirely silent as to whether the Donovans were in occupancy of their property on the date of the accident or at any time. But in any event, even had counsel represented in his affirmation that the property was an owner-occupied exclusively residential property of less than four families, which he has not done, his averment, which is not claimed to be based upon personal knowledge, is of no probative value. No affidavit of either Thomas or Linda Donovan is annexed averring that their property, even if a one-family home, was occupied by either one of them on the date of plaintiff's accident or at any time. Therefore, movants have failed to demonstrate that they are exempt from statutory liability to plaintiff under §7-210(b) of the Administrative Code. In addition, counsel is also entirely silent

as to whether the Donovans made any repairs or alterations to the sidewalk that created the defective condition, but even had he so represented, such representation would be of no probative value in the absence of any affidavit from either of the Donovans. Therefore, movants have failed to establish that they did not owe plaintiff any duty of care under common law negligence.

The affidavit of Linda Donovan annexed for the first time to her counsel's reply in an attempt by counsel to remedy the insufficiency of his moving papers may not be considered as evidence to support the granting of the motion to dismiss pursuant to CPLR 3211(a)(7) (see Kevin Kerveng Tung, P.C. v JP Morgan Chase & Co., 105 AD 3d 709 [2nd Dept 2013]).

Donovan's counsel alternatively contends that the complaint fails to state a cause of action because the City inspected the sidewalk defect in question and determined that they "will not be charged if the city makes the repairs", thus constituting an admission by the City that it was responsible for the condition of the sidewalk and remained liable for failing to repair it. Annexed to the moving papers is a copy of a preliminary inspection report of the sidewalk in front of Donovan's property showing a diagram of the sidewalk flags several of which were highlighted with an "X" mark through them. The report describes the sidewalk flag defects as "broken", "freestanding", "trip hazard" and "improper slope". A legend at the bottom right of the report states "All sidewalk defects marked with an 'X' will not be charged if the city makes the repairs." Another box below it is checked which states, "Requires Inspection by Forestry."

This Court is at a loss to understand why counsel believes that this bare preliminary inspection report, standing alone, constitutes conclusive evidence that Donovan are not statutorily liable to plaintiff so as to support the granting of dismissal for failure to state a cause of action. The report informs that the property owner remains responsible for all repairs. That it also informs that the City will not charge the property owner if it makes the repairs to the flags identified as containing defects, such statement is qualified by the additional statement that such requires inspection by the Forestry Division. The only sense that this Court makes of this report is to take judicial notice of the sidewalks program promulgated by the City of replacing defective sidewalk flags at no charge to the abutting property owner that have been raised as a result of the growth of roots from curbside trees by more than a specific degree. A determination that the sidewalk was damaged by a curbside tree must be made by the Forestry Division that is responsible for the City's trees and vegetation. The report attached to the moving papers is thus merely a preliminary, not a final, report. But in any event, even if the Forestry Division had inspected the sidewalk and any curbside tree

and had determined that the sidewalk damage was due to the growth of tree roots, and even if the City had issued a final report that apprised the property owner that it was willing to replace the damaged flags free of charge, such would have no effect on the Donovans' liability to a third party pedestrian under §7-210 of the Administrative Code. No authority is offered by movants' counsel that an option given by the City to the abutting property owner to replace damaged sidewalk flags free of charge after an inspection by the Forestry Division, or to allow the property owner to replace the sidewalk at the owner's expense if the owner did not want the City to perform the work abrogates the statutory liability of the abutting owner to third parties under §7-210. On the contrary, the report specifically informs "All defects are the responsibility of the property owner." Furthermore, as this Court has noted, the annexed report is merely a preliminary report.

Therefore, this preliminary report, annexed to the moving papers supported by no evidence or law but only referenced in counsel's supporting affirmation in which he makes the bare conclusory statement that the report constitutes an admission by the City that it is responsible for the repair of the sidewalk does not support the granting of dismissal for failure to state a cause of action.

Thus, the instant motion, which does not address the sufficiency of the pleadings but is based upon evidence annexed in the form of the preliminary report and the real property tax records, does not support dismissal for failure to state a cause of action under CPLR 3211(a)(7) since the tax records only indicate that the property is a one-family home and the preliminary report does not constitute an admission by the City that it is liable for the condition of the sidewalk. Not only do these annexed documents not conclusively establish that plaintiff has no cause of action against movants, they do not constitute any evidence of movants' non-liability at all.

Cross-motion by Hom for summary judgment dismissing the complaint and all cross-claims against them is granted. They have proffered unrebutted evidence in the form of their affidavits that their abutting property, 71-07 Nansen Street, is a one-family home that was occupied by them, thus establishing their non-liability, pursuant to §7-210(b) of the Administrative Code, for failing to repair the sidewalk abutting their property, and that they performed no repairs or work to the sidewalk and thus did not create the defective condition thereof, establishing that they did not owe plaintiff any duty of care under common law negligence. In addition, the submissions on this cross-motion do not raise any issue of fact as to whether the defective area of sidewalk was in an area where Hom made a special use thereof. No triable issue of fact is raised in opposition. Plaintiff's counsel contends that the

Hom affidavits are not in admissible form and must be disregarded because "Notably absent from Exhibits "G" and "H" are any signature pages of the defendants, Vay Min Hom and Siu Chue Hom, whose signatures would have had to be taken before a Notary Public." This Court is puzzled by counsel's statement, since both affidavits, annexed as exhibits "G" and "H" to Hom's cross-moving papers, are signed by them and notarized by a notary public on the last page of each affidavit.

Counsel also contends that the affidavits are inadmissible because they "do not denote the County in which said oath was administered, as evidenced by the blank line next to the words 'COUNTY OF.'" Both affiants' affidavits were duly sworn and dated and contain proper jurats by notaries whose County of Qualification (Queens) and notary registrations, and dates of expiration of their terms are clearly set forth in the affidavits. That the venue heading omits the County, stating "State of New York, County of_____" is a mere irregularity that is not fatal to the validity of the affidavits and may be ignored, since the affidavits were properly sworn in every respect. Indeed, plaintiff's counsel has not cited any authority in support of his argument that the omission of the County from the venue heading renders an affidavit invalid.

This Court also notes that it has not considered plaintiff's counsel's sur-reply to Homs' counsel's reply to plaintiff's opposition to their cross-motion. Plaintiff's counsel merely contends in his sur-reply that the Court should not consider the affidavits of Hom or the complete deposition transcript of plaintiff annexed to their reply. The affidavits contained in the reply are not new affidavits but copies of the same affidavits annexed to Homs' cross-moving papers which omit the County in the venue heading and that plaintiff's counsel inexplicably is of the impression omit the affiants' signatures and the jurat. This Court does not understand why Homs' counsel annexed copies of these same affidavits to his reply. The inclusion of a copy of plaintiff's full deposition transcript is also entirely irrelevant and thus has not been considered. Indeed, counsel for the parties will notice that this Court has made no mention of plaintiff's deposition testimony, excerpts of which have been annexed to both plaintiff's moving papers and the cross-moving papers. This is because her deposition testimony is entirely irrelevant to the issues presented on the motion and cross-motions.

Plaintiff's counsel's contention in opposition that Homs' cross-motion for summary judgment is premature because depositions of defendants are outstanding and "a myriad of questions...need to be answered" is without merit. The mere hope that discovery might yield evidence favorable to the parties opposing summary judgment is insufficient to warrant denial of summary judgment (see Goldes

v City of New York, 19 AD 3d 448 [2nd Dept 2005]).

Finally, plaintiff's cross-motion to strike the answers of defendants for failure to appear for depositions or, in the alternative, to compel defendants to appear for depositions must be denied without prejudice to seeking the discovery requested with respect to Donovan and the City at a conference in the Compliance Conference Part. The compliance conference of this matter was scheduled for October 7, 2019, and the note of issue is not due until March 13, 2020. The instant cross-motion for discovery, made on September 16, 2019, is thus premature and violative of this Court's Part Rules which explicitly enjoin parties from making any discovery-related motions in this Part until the note of issue is due, and also ignores the directive of the compliance conference order which advises plaintiff to contact the chambers of the Compliance Conference Part at least six weeks before the note of issue is due if plaintiff needs more time to file the note of issue. It was improper of plaintiff to make the instant discovery motion not only prior to the due date of the note of issue but prior to the date of the compliance conference. Any discovery issues regarding the City and Donovan must therefore be addressed at a conference before the presiding Justice of the Compliance Conference Part. With respect to Hom, since the action is dismissed as against them, plaintiff's motion to compel their depositions is moot.

Accordingly, the caption of this action is amended to read as follows:

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Christina Scola,

Plaintiff,

- against -

The City of New York, Thomas Donovan and Linda Donovan,

Defendants.

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Index Number: 702092/19

Dated: November 7, 2019

KEVIN J. KERRIGAN, J.S.C.

FILED
NOV 15 2019
COUNTY CLERK
QUEENS COUNTY