

Bruce v City of New York
2020 NY Slip Op 30291(U)
February 3, 2020
Supreme Court, New York County
Docket Number: 160681/2016
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62

Justice

-----X INDEX NO. 160681/2016

THERESA BRUCE, MOTION DATE 12/19/2019

Plaintiff, MOTION SEQ. NO. 002

- v -

CITY OF NEW YORK, 495 SECOND AVENUE
LLC, ALBSHARI ABDULWAHAB D/B/A BASAL DELI
GROCERY

DECISION + ORDER ON MOTION

Defendant.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motions are decided as follows:

Plaintiff, Theresa Bruce, claims that on October 24, 2015 she tripped and fell over a defective/cracked sidewalk and/or curb located at the southwest corner of 28th Street and Second Avenue, adjacent to the corner store located at 495 Second Avenue, in New York County. Plaintiff commenced this action by filing a Summons and Complaint dated December 20, 2017. Defendant, 495 Second Avenue, LLC interposed a Verified on January 27, 2019. Co-defendant The City of New York joined issue by service of its Answer on or about January 12, 2017 and co-defendant Albshari Abdulwahab d/b/a Basal Deli Grocery joined issue by service of its Answer on April 10, 2017. Defendant, 495 Second Avenue, LLC moves for summary judgment, dismissing this action and any cross-claims asserted against them and defendant, Albshari Abdulwahab d/b/a Basal Deli Grocery cross-moves for the same relief.

In support of the motions, defendants submit the plaintiff's 50-h hearing testimony, plaintiff's EBT testimony, pictures identified by plaintiff, and the EBT testimony of Wai Chung

Lee for 495 Second Ave, LLC and Albshari Abdulwahab. Plaintiff's testimony establishes that she fell on a pedestrian sidewalk ramp while attempting to help a man in a wheelchair cross the street. Plaintiff further indicted that the crack which she allegedly tripped over is located in the roadway, bordering the sidewalk ramp. Mr. Lee testified that he is the owner of 495 Second Avenue, LLC, which owns the building abutting the location of plaintiff's accident. He further established that he had no obligation to maintain the pedestrian ramp and did not cause or create the allegedly defective condition. Mr. Abdulwahab testified that he is the lessor of the premises, that he did not receive any complaints regarding the curb or pedestrian ramp that is on the corner of Second Avenue and East 28th Street in October of 2015 and that neither the landlord nor The City of New York made any repairs to the sidewalk or curb adjacent to 495 Second Avenue since Mr. Abdulwahab signed the lease in 1999.

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 N.Y.2d 557, 562 (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 N.Y.2d 395 (1957); Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 (1st Dept., 1984) *aff'd* 65 N.Y.2d 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 N.Y.2d 320 (1986); Winegrad v. New York University Medical Center, 64 N.Y.2d 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 in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp., 153

A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957).

Ordinarily a landowner owes no duty to the public to maintain the public street abutting his or her property. Llanos v. Stark, 151 A.D.3d 836. Thus, an owner of land abutting a public street is not liable for injuries sustained as a result of dangerous or defective conditions unless he or she has been instrumental in creating the alleged defect or where a statutory provision provides for both maintenance and liability for failure to maintain such area. Werner v. City of New York, 135 A.D.3d 740, 23 N.Y.S.3d 324 (2d Dept 2016). It is well settled that "[t]o hold an abutting landowner liable to a pedestrian injured by a defect in a public sidewalk [or street], the landowner must have either created the defect, caused it to occur by a special use, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk." Reich v. Meltzer, 21 A.D.3d 543, 544, 800 N.Y.S.2d 593 (2nd Dep't 2005). The enactment of New York City Administrative Code §7-210 transferred to the owner of real commercial property abutting any sidewalk the duty to maintain the sidewalk in a reasonably safe condition. Vucetovic v Epsom Downs, Inc., 10 N.Y.3d 517, 520 (2008) However, Courts interpreting the Administrative Code have clearly established that the obligations and duties imposed upon an adjacent landowner for sidewalk maintenance and repair pursuant to New York City Code § 7-210(b) apply exclusively to sidewalk flags. Specifically, the New York City codes defines sidewalks as, "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." In all subsequent sidewalk cases, the courts have held that an abutting landowner is not obligated to maintain the curb or the street. In Ascencio v. New York City Hous. Auth., 77 A.D.3d 592, 593 (1st Dept. 2010), the Appellate Division held that defendant land owner was entitled to summary judgment where the affidavits

of the Defendant's Superintendent and Supervisor of Grounds attested that defendant made no repairs to, or any special use of, the curb on which Plaintiff fell. In Trent-Clark v. City of New York, 114 A.D.3d 558, 558 (1st Dept 2014) the Court held that the photographic evidence demonstrated that the purported defect was on the curb which the abutting landowner had no duty to maintain and dismissed the case against abutting landowner.

Here, by Plaintiff's own admission, her accident occurred in a hole in the public street. Further, in the photographs marked by Plaintiff at the 50-H hearing, Plaintiff clearly indicated she tripped on the public street next to the pedestrian ramp and not on any defect of the sidewalk. Further, defendants established that they do not have any ownership interest in the street, never performed any work in the public street and has never maintained or repaired the public street or curb adjacent to the sidewalk. As such, the moving defendants have established a *prima facie* entitlement to summary judgment.

In opposition, plaintiff fails to establish an issue of fact precluding summary judgment.

ORDERED that the motions for summary judgment of defendants 495 Second Avenue, LLC and Albshari Abdulwahab d/b/a Basal Deli Grocery are granted and the complaint is dismissed against them; and it is further

ORDERED that the cross-claims against said defendants are dismissed; and it is further

ORDERED that the said claims and cross-claims against defendant The City of New York are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants

2/3/2020

DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
		<input type="checkbox"/>	DENIED		

APPLICATION:

CHECK IF APPROPRIATE:

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE