

Shiryayev v Manhattan Arts & Antiques Ctr.
2020 NY Slip Op 30399(U)
February 10, 2020
Supreme Court, New York County
Docket Number: 151900/2015
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

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ALEKSANDR SHIRYAYEV,

Plaintiff,

INDEX NO. 151900/2015

MOTION DATE 07/19/2019

MOTION SEQ. NO. 003

- v -

MANHATTAN ARTS AND ANTIQUES CENTER, 56TH
REALTY, LLC, THE CITY OF NEW YORK,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 84, 85, 86, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 160, 161, 162, 163, 164, 165

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents,

This order reads on The City of New York's ("City") motion for summary judgment, CPLR 3212, dismissing the complaint and cross claims.

The instant action involves personal injuries sustained by plaintiff on October 10, 2014. Plaintiff alleges a co-worker was carrying a glass pane and this co-worker tripped and fell over a tree well fence located in front of 1050 Second Avenue, New York, New York. The glass pane carried by the co-worker fell onto plaintiff, causing plaintiff's injury.

Plaintiff commenced this action against the City on or about February 25, 2015, and issue was joined by City's service of an answer on or about March 20, 2015. Plaintiff served his verified bill of particulars on or about September 10, 2015, and appeared for a statutory hearing, per General Municipal Law §50-h on January 14, 2015. Plaintiff testified that his partner was

carrying a glass pane and “he didn’t notice that fence ... one corner touched upon his feet as he was walking. Did he trip over the fence? Yes, he lost his balance and fell on me.”

CPLR § 3212 (b) states that, “the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented” (see *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968]).

The New York City Department of Transportation (“DOT”) conducted a search of records for the sidewalk located at Second Avenue between 55th Street and East 56th Street. The New York City Department of Parks and Recreations (“DPR”) performed a search of complaints, pruning records, tree removal records, and work orders for the subject location for the past two years prior to and including October 10, 2014. A review of the applicable records reveals that The City of New York had no prior written notice of any subject condition, nor caused and created a subject condition. The tree well fence, that plaintiff’s co-worker tripped on was open and obvious and not inherently dangerous.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact” (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff opposes City’s motion for summary judgment because “discovery remains outstanding” and “the record searches conducted by defendant are auspiciously limited to two year prior to and including October 10, 2014.”

On summary judgment, facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr Corp*, 18 Ny3d 499, 503 [2012]).

A case scheduling order was issued on October 14, 2015 for examination's before trial and written discovery deadlines. An EBT was done on Sanel Hot, superintendent of the premises, 1050 2nd Avenue, New York, New York on June 24, 2019. Mr. Hot testified that the "fencing" was there prior to him living and working at 1050 2nd Avenue, New York, New York, and he did not know who installed the "fencing."

To establish a negligence cause of action, a plaintiff must demonstrate 1) a duty of care owed to the plaintiff; 2) a breach of that duty; 3) that the breach is a proximate cause of plaintiff's injury or damages; and 4) that the plaintiff suffered a legally cognizable injury or damages (see *Akins v Glens Falls City School District*, 44 NYS2d 644 [1981]).

A review of disclosure indicates that the tree-well fence was not defective, and the City did not breach a duty owed to plaintiff. Discovery further provides that even if there was a defect, the City did not receive prior written notice of the subject condition per New York City Administrative Code § 7-201(c)(2). Also, a photo of the tree well was exhibited which showed no inherent defect.

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, ... sidewalk, ... or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given [see NYC Administrative Code § 7-201(c)(2)]. It is well-settled that plaintiff has the burden of pleading and proving that the City

had prior written notice of the allegedly defective condition; plaintiff's failure to do so requires dismissal of the complaint (see *Katz v City of New York*, 87 NY2d 241, 243 [1995]).

The DOT and DPR review of records reveals no prior written notice of any alleged condition with the tree well or tree fence located at the site of plaintiff's incident.

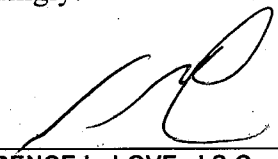
The City was also served copies of the Big Apple Map for the subject location and the "Key to Map Symbols." Big Apple Pothole and Sidewalk Protection Corporation served DOT the maps on October 23, 2003.

A landowner has a duty to maintain its premises in a reasonably safe condition, there is no duty to protect against an open and obvious condition which, as a matter of law, is not inherently dangerous (see *Gerner v Shop-Rite of Uniondale, Inc*, 50 NYS3d 459 [2017]).

ORDERED that defendant City of New York's motion for summary judgment is GRANTED and the complaint is dismissed with costs and disbursements to defendant, The City of New York, as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

2/10/2020
DATE


LAURENCE L. LOVE, J.S.C.

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