

Konstantinidis v City of New York
2020 NY Slip Op 30459(U)
February 18, 2020
Supreme Court, New York County
Docket Number: 150612/2018
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART IAS MOTION 5

Justice

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INDEX NO. 150612/2018

PANAGIOTIS KONSTANTINIDIS,
Plaintiff,

MOTION DATE 2/18/20

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, SELKIRK 308 WEST 82ND STREET, LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this personal injury action, Plaintiff Panagiotis Konstaninidis alleges that on August 4, 2017, at approximately 1:00 p.m., he tripped and fell on the sidewalk at 308 West 82nd Street, New York, New York (the "subject property") due to a "broken, raised, sunken, cracked, dilapidated, missing, pitted, uneven, hazardous, and defective sidewalk" (NYSCEF 32 [Notice of Claim]). Defendant City of New York (the "City") moves, pursuant to CPLR 3212, for summary judgment (motion sequence 002). Co-Defendant Selkirk 308 West 82nd Street, LLC ("Selkirk"), the sidewalk's abutting property owner, and Plaintiff oppose. After oral argument and having considered the papers, the Court grants the City's motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (Zuckerman v City of New York, 49 NY2d 557 [1980]; Jacobsen v New York City Health and Hospitals Corp., 22 NY3d 824 [2014]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (Jacobsen, 22 NY3d at 833). If the moving party fails to make its prima facie showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (Winegrad v New York Univ. Med. Center, 4 NY2d 851, 853 [1985]).

However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (Zuckerman, 49 NY2d at 560; Jacobsen, 22 NY3d at 833; Vega v Restani Construction Corp., 18 NY3d 499, 503 [2012]). Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (id.).

The case against the City is governed by New York City Administrative Code § 7-210, which “shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner” (*Fisher v City of New York*, 128 AD3d 763, 764 [2d Dept 2015], citing *Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517 [2008]). Administrative Code § 7-210(c) provides, in pertinent part, that “the [C]ity shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (*other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes*) in a reasonably safe condition (emphasis added).” Phrased another way, the City is only responsible for sidewalks abutting owner-occupied one-, two-, or three-family, exclusively residential property.

Here, the City has established *prima facie* entitlement to judgment as a matter of law by submitting evidence demonstrating that it did not own the property abutting the sidewalk where plaintiff slipped and fell, and that the abutting property was not an owner-occupied residential property with three or fewer units (*Crimlis v City of New York*, 2020 NY Slip Op 00514 [1st Dept]). Specifically, pursuant to Plaintiff’s allegations, the City conducted a search of the Property Tax System (“PTS”) database for records relating to the subject property, identified as Block 1244, Lot 81 in New York County (*NYSCEF 40* [Atik Aff]). The search revealed that on the date of Plaintiff’s injury, the City did not own the subject property, which was classified as Building Class D1 (elevator apartment) and contained 49 apartments (*id.* at ¶ 6; *Gahr v T.L.S. New York Real Estate, LLC*, 2012 NY Slip Op 30613[U] [Sup Ct, NY County 2012] [finding that Atik affidavit attesting to ownership search was sufficient to demonstrate that subject property was not City-owned or a one-, two-, or three-family residential property], citing *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [dismissing action against City as plaintiff fell on sidewalk abutting property owned by corporate entity and not exempt]). Notably, neither Selkirk nor Plaintiff contest that the City does not own the subject property, or that the property is not a one-, two-, or three- family residential property.

In its opposition, Selkirk argues that an issue of fact remains “as to whether the City conducted an adequate permit search” for the subject property because “there is clearly a tree bed in close proximity to where Plaintiff’s incident allegedly occurred...” (*NYSCEF 44*). However, at Plaintiff’s 50-h hearing, he testified that his “right foot hit on a mislevel, a higher part of the cement...” and that that was the sole cause of his fall (*NYSCEF 36* [50-h Transcript] 19:14-16, 35:16-36:16 [“Q: Was there any tree well in the area? A: Nothing”]). Plaintiff also confirmed that he fell on the sidewalk in his Verified Bill of Particulars (*NYSCEF 38*), and circled only the sidewalk proper, to the exclusion of the nearby tree well (*NYSCEF 37* [50-h Resp Exh A]). Even if the tree well had been the cause of Plaintiff’s fall, however, neither Selkirk nor Plaintiff articulate any theory as to the tree well’s defects. Accordingly, Selkirk fails to highlight any issue of fact which would preclude summary judgment.

Plaintiff also makes three arguments in opposition. First, Plaintiff argues that Atik’s affidavit is insufficient to meet the City’s *prima facie* burden. The Court disagrees, as numerous courts have held that such affidavits are sufficient (*Gahr*, 2012 NY Slip Op 30613[U]; *Velez v City of New York*, 97 AD3d 813, 814 [2d Dept 2012] [sworn affidavit and deposition testimony that subject property was a three-family owner-occupied building used for exclusively residential purposes sufficient to meet burden for summary judgment]; *Meyer v City of New York*, 114

AD3d 734, 735 [2d Dept 2014] [despite certificate of occupancy providing that the abutting one-story structure's permissible use was commercial, and deposition testimony establishing that the structure had been used commercially prior to 1993, granting summary judgment based on deposition testimony and affidavits averring that structure was respondent's home and used exclusively for storage of the family's personal belongings]). To the extent that Plaintiff also argues that Atik's affidavit should not be considered because Atik was not previously disclosed as a witness during the discovery process, Atik is not "an individual with personal knowledge regarding the facts and circumstances of the instant accident" (*NYSCEF 47 [Pl/Baez Affirm]* ¶ 5-8); *cf Francis v Super Clean Laundromat, Inc.*, 117 AD3d 898, 899 [2d Dept 2014] [holding that motion court should not have considered general manager's affidavit because the defendants did not previously disclose the general manager as a witness and did not provide a reasonable excuse for their failure to identify her during the discovery process]). There is also nothing in the record which indicates that Atik's identity was withheld despite due demand (*id.*).

Second, Plaintiff argues that the City's motion is premature because additional facts may be revealed in discovery, including depositions which have not yet been held. Because Plaintiff does not identify facts essential to opposition that are within the City's control, summary judgment is not premature (*A & W Egg Co., Inc. v Tufo's Wholesale Dairy, Inc.*, 169 AD3d 616, 617 [1st Dept 2019]).

Third, Plaintiff argues that the City failed to meet its *prima facie* burden because the City did not demonstrate a lack of prior written notice or that the City did not cause or create the subject defective condition. Like Selkirk, Plaintiff focuses on the tree well to attempt to inject an issue of fact that the 50-h testimony already dispelled; indeed, Plaintiff's selective quotation omits the portion of Plaintiff's testimony explicitly excluding the tree well as a potential cause of Plaintiff's fall (*compare NYSCEF 36 35:16-36:16 and NYSCEF 47 [Pl/Baez Affirm]* ¶ 50). In any event, however, as the City argues in reply, its Second Supplemental Case Scheduling Order Response (the "CSO Response") did not locate any record of work performed on the tree well in question in the two years prior to Plaintiff's fall (*NYSCEF 49 [City/Washington-Childs Affirm]* ¶ 21, citing *NYSCEF 39* at p 401). The only sidewalk defect in the CSO response, as addressed by Plaintiff, is an August 20, 2015 sidewalk dismissal inspection report stating that a notice of violation was to be dismissed, which does not introduce any issue of fact as to whether the City caused or created any defective condition (*Pl Exh B*). Accordingly, summary judgment for the City is appropriate. It is therefore

ORDERED and ADJUDGED that the motion of the City of New York for summary judgment dismissing the complaint and cross-claims (001) is GRANTED, and the Clerk of Court shall enter judgment accordingly; and it is further

ORDERED that because the City is no longer a party to this action, the remainder of the claims shall be severed and the action be transferred to a non-City IAS part; and it is further

ORDERED that the City shall, within 10 days of this order, serve and e-file a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the Court.



2/18/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

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: