Caban v Akinsanmi
2020 NY Slip Op 30578(U)
January 22, 2020
Supreme Court, Richmond County
Docket Number: 152534/2018
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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MADELINE CABAN,

Plaintiff,

-against-

ESMEMARY AKINSANMI, ROBERT AKINSANMI, MORNINGSTAR CENTER INC., and THE CITY OF NEW YORK,

Defendants.

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DECISION AND ORDER

Index No.: 152534/2018

Motion No: 3982-001

Recitation of the papers as required by CPLR 2219[a], the following papers numbered "1" through "4" were fully submitted on the 20th day of November 2019:

	Papers Numbered
Defendant City of New York's Motion for Summary Judgment, Affirmations, Affidavits in Support with Supporting Exhibits (Dated: September 17, 2019)	1, 2
Plaintiff's Affirmation in Opposition with Supporting Exhibits (Dated: October 2, 2019)	3
Affirmation in Opposition of Defendants Akinsanmi and Morningstar Center, Inc., with Supporting Exhibits (Dated: November 13, 2019)	4

Upon the foregoing papers, the motion of the defendant, the City of New York (hereinafter the "City") (Mot. Seq. 001) for summary judgment dismissing the complaint is granted, and the complaint and all cross claims as asserted against the City are severed and dismissed.

This matter arises out of a trip and fall occurring on October 16, 2017, on the sidewalk in front of 286 Jewett Avenue, Staten Island, New York. Plaintiff alleges that she sustained extensive personal injuries to, *inter alia*, her knees and left shoulder when she tripped over an elevated sidewalk flag (*see* Plaintiff's April 11, 2019 deposition, p. 22, ll 12-13; City's Exhibit E). Plaintiff instituted this action against the City and the abutting property owners, defendants Esmemary and Robert Akinsanmi (hereinafter "Akinsanmis"), as well as Morningstar Center Inc.---the daycare center---which has been owned and operated by the Akinsanmis from their residence since 2000.[1] It is undisputed that the subject property is classified as a one-family home owned exclusively by the Akinsanmis (*see* September 10, 2019 Affirmation of Department of Finance employee David C. Atik; City's Exhibit G).

The City moves for summary judgment pursuant to CPLR 3212 arguing that it is not liable for plaintiff's injuries under New York City Administrative Code §7-210 because: (1) the City did not own the premises abutting the accident location, (2) none of the exceptions to Administrative Code §7-210 are applicable herein[2] and (3) the City did not cause or create the allegedly defective condition. In support, the City submits the deposition of Esmemary Akinsanmi (*see* City's Exhibit F) who testified, *inter alia* that the first floor of the residence is divided into two rooms, one of which is set up "as a classroom [with] desks, chairs, library

[1] Defendant Akinsanmi testified that she and her husband Robert have owned and resided at 286 Jewett Avenue for the past thirty years and have owned and operated Morningstar Daycare Center out of their home since 2000 (*see* City's Exhibit F, pp 8-9). Morningstar Center, Inc. is a New York State "licensed group family daycare" (*id.*, p. 13, ll 10-14), which can accommodate 16 children, and is open daily between 8:00 A.M. and 5:30 or 6:00 P.M. (*id.*, p. 14, ll 8-19). On the date of the accident the daycare employed at least one person in addition to the Akinsanmis (*id.*, pp 10-11).

[2] City maintains that any alleged negligent failure to maintain the subject sidewalk is the responsibility of the abutting property owners, Akinsanmis, under Administrative Code §7-210(b), (c), since their home is **not used "exclusively for residential purposes"**.

books, arts and crafts, supplies" (*see* City's Exhibit F, p. 44, ll 11-16), and "in the other room…a crib, soft toys, building blocks, science center, kitchen, a little toy kitchen" (*id.*, p. 44, ll 18-20). Additionally, the City submits the September 4, 2019 Affidavit of the Department of Transportation's Alex Genao (*see* City's Exhibit H), who searched electronic databases for records of permits, applications, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the two year period prior to and including the date of the accident, uncovering 4 applications, 4 permits, 4 hardcopy permits, 9 inspections and 1 complaint for the subject sidewalk. According to the City, these documents prove as a matter of law that it did not affirmatively create the allegedly hazardous condition or make special use of the sidewalk.

Plaintiff and co-defendants oppose the motion, with the latter arguing that material issues of fact preclude summary judgment because (1) operation of the day care business may have been "merely incidental" to Akinsanmis' residential use of the property and (2) the complaint of a "completely broken" sidewalk filed with the City five months before the accident (*i.e.*, on May 24, 2017) places the City on notice, rendering an award of summary judgment inappropriate.

In 2003, the New York City Council enacted Administrative Code §7-210 to shift tort liability for injuries resulting from defective sidewalk conditions from the City to abutting property owners (*see Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517, 519-520 [2008]). Subsection (c) specifically provides: "[n]otwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks…in a reasonably safe condition" (*New York City Administrative Code §7-210[c]*). However, this liability-shifting provision does not apply to "one, two or three-family residential real property that is (i) in whole or in part, owner occupied, and (i i) used

exclusively for residential purposes" (*Administrative Code §7-210[b]*; *see Cosme v. City of New York,* 169 AD3d 762 [2d Dept. 2019];[*internal citations omitted]*). "The purpose of the exception in the Code is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair" (*Johnston v. Manley*, 150 AD3d 1210, 1211 [2d Dept. 2017], *quoting Coogan v. City of New York*, 73 AD23d 613 [1st Dept. 2010]).

Here, the City has sufficiently established through, *e.g.,* the deposition testimony of Esmemary Aksinanmi, that while she and Robert Aksinanmi are the sole owners of a one-family residence located at 286 Jewett Avenue, that residence is not "exclusively used for residential purposes," but "actually used" to operate a day care facility. Accordingly, the Aksinanmis, as owners of the abutting property, are liable for the allegedly defective condition of the sidewalk (*see, e.g., Aurelien v. City of New York*, 15 Misc.3d 1116[A], finding that "actual use" is to be considered where non-residential use is alleged).

Contrary to those cases where the conduct of business from home was found to be "merely incidental" to the residential use of the property (*see, e.g., Koronkevich v. Dembitzer*, 147 AD3d 916 [2d Dept. 2017], where home address was used to receive camp mail during off season; *Coogan v. City of New York*, 73 AD3d 613 [1st Dept. 2010], where homeowner may have used laptop for research for employer; *Story v. City of New York*, 24 Misc.3d 325 [Kings County 2009], where property was used as a "mail drop at most" for home owner son's law practice, and *Font v. Lopez*, 2018 WL 4188491 [Sup. Rich. 2018], where owner used address for annual renewal of New York City taxi medallion), the facts underlying this case (*i.e.*, the daily operation of a daycare business licensed by New York State) demonstrates, as a matter of law, that the

premises were not used exclusively for residential purposes (*see, e.g., Sisler v. City of New York*, 84 AD3d 638 [1st Dept. 2011]).

The City has demonstrated as a matter of law that: (1) the accident occurred on the sidewalk in front of a building owned by co-defendants; (2) none of the exceptions to the Administrative Code apply, since the abutting property owner was not using the residential building exclusively for residential purposes, and (3) it did not affirmatively create the allegedly hazardous condition or make special use of the sidewalk. Accordingly, the City has met its *prima facie* burden on the motion for summary judgment.

In opposition, plaintiff and codefendants have failed to raise a triable issue of fact to defeat summary judgment. Any alleged prior written notice to the City of the supposed defective sidewalk does not render summary judgment inappropriate, where the New York City Administrative Code is unequivocal that the duty and liability rests on the homeowner if the premises are not used exclusively for residential purposes.

Accordingly, it is

ORDERED, that the City's motion for summary judgment is granted, and it is further

ORDERED, that plaintiff's complaint and any cross-claims asserted against the City are dismissed with prejudice; and it is further

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

----------X

MADELINE CABAN,

Plaintiff,

-against-

Index No.: 152534/2018

ESMEMARY AKINSANMI, ROBERT AKINSANMI, and MORNINGSTAR CENTER INC.,

Defendants.

----------X

and it is further

ORDERED, that defendant THE CITY OF NEW YORK shall serve this Order with Notice of Entry upon all parties.

This constitutes the decision and order of the Court.

Dated: January 22, 2020

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.