

Carney v City of New York

2020 NY Slip Op 31008(U)

April 22, 2020

Supreme Court, New York County

Docket Number: 157258/2018

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

**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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JOSEPH CARNEY,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, CEDAR
LAKE EVENTS, LLC, NWL REAL ESTATE LLC

Defendant.

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INDEX NO. 157258/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33

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

Upon the foregoing documents, the motion is decided as follows:

The instant action arises out of plaintiff's alleged trip and fall accident which allegedly occurred on November 28, 2017 on the sidewalk outside of 547 West 26th Street, New York, New York. Plaintiff commenced this action by the filing of a Summons and Complaint in the Supreme Court of the State of New York, New York County, on August 3, 2018. Issue was joined by the service of defendants, Cedar Lake Events, LLC and NWL Real Estate, LLC's answer on November 16, 2018 and the service of the City of New York's answer. Defendants Cedar Lake Events, LLC and NWL Real Estate, LLC now move for summary judgment, dismissing this action.

In support of defendants' motion, defendants submit plaintiff's 50-h hearing transcript and the affidavit of Kyle McCurry, an authorized person for NWL Real Estate, LLC and manager of Cedar Lake Events, LLC, which establish as follows: At approximately 6:00 p.m., on the date of the alleged accident, plaintiff was walking on 26th Street, between 10th and 11th Avenue. Plaintiff was walking to Penn Station from work. Plaintiff's hands were in his pockets. It was "pitch black."

Plaintiff was looking straight ahead. Plaintiff's shins hit the front of tree well which did not contain a tree. Plaintiff did not see the tree well before he fell. Plaintiff fell, landing face first on the other side of the tree well. Kyle McCurry has been the owner of NWL Real Estate, LLC since 2011. NWL owned the property located at 547 West 26th Street, New York, New York. On November 10, 2015, NWL leased the property Cedar Lakes, LLC. McCurry was the manager of Cedar. Cedar was an event venue, and under the same ownership as NWL at the time of the incident. Cedar closed its business and ceased operations at the property in February 2018. Neither Cedar nor NWL performed any construction, repair, or renovation of the tree well or the sidewalk, nor did Cedar or NWL hire anyone to do so. Neither Cedar nor NWL planted trees or uprooted any trees from the tree well, nor did Cedar or NWL hire anyone to do so.

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, 427 N.Y.S.2d 595 (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, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d 331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (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 carefully 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).

Section 7-210 states that “the owner of real property abutting any sidewalk, including, but not limited to; the intersection quadrant for corner property shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” *N.Y. Admin. Code, N.Y.C., N.Y.* §7-210 (2003). The section further indicates that “[t]his subdivision shall not apply to 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.” *Id.* Also, “[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 (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. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.” *Id.* Although N.Y.C. Admin. Code 7-210(a) places a duty on property owners who fail to maintain abutting city-owned sidewalks in a reasonably safe condition, a property owner's responsibility does not extend to tree wells. See *Vucetovic v. Epsom Downs. Inc.*, 10 N.Y.3d 517 (2008). An abutting landowner can be held liable only if the owner affirmatively created the dangerous condition, negligently made repairs or used the sidewalk in in a special manner for its own benefit. As plaintiff's testimony establishes that he tripped over a vacant tree well and does not indicate any defect in the sidewalk outside of defendants' premises and as defendants have established that

they did not create the allegedly dangerous condition, defendants, Cedar Lake Events, LLC and NWL Real Estate, LLC have established a *prima facie* entitlement to summary judgment.

In opposition, plaintiff argues that defendant's affidavit should not be considered as Mr. McMurry was not disclosed as a witness in prior discovery, see, *Francis v Super Clean Laundromat, Inc.*, 117 A.D.3d 898 (2d Dept. 2014). Said argument cannot be evaluated as plaintiff has not submitted defendants' discovery responses as part of its opposition papers. Plaintiffs further argue that the instant motion is premature as defendants have not yet appeared for a deposition. The motion is not premature as plaintiffs failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the movant's knowledge and control (see CPLR 3212[f]; *Espada v. City of New York*, 74 A.D.3d 1276, 1277 (2d. Dept. 2010). Further, the Court notes that the City's response to the Case Scheduling Order dated July 22, 2019 indicates that on June 14, 2016, Tim McMurry (an employee of Cedar Lake Events, LLC) requested that the City remove two dead trees in front of the building and plant new ones. The City's service request indicates two dead trees were removed. On September 6, 2016, Tim McMurry requested the City to plant a new tree. The City's service request indicates no action was taken by the City. Plaintiff further argues that the affidavit of its expert, Dr. William Marletta, Ph.D., CSP, establishes that the subject tree well and accident location are dangerous and defective conditions. While Dr. Marletta's affidavit contains an in depth evaluation of the ways in which the accident location was dangerous and violated various statutes and regulations, it is entirely irrelevant to the instant motion as plaintiff tripped over a City owned tree well, which the moving defendants had no duty to maintain. As such, plaintiff has failed to raise an issue of fact to defeat defendants' *prima facie* case.

ORDERED that the motion of defendants Cedar Lake Events, LLC and NWL Real Estate, LLC for summary judgment, to dismiss the complaint herein and any cross-claims is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

4/22/2020

DATE



LAURENCE L. LOVE, 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:

