

Rodriguez v City of New York
2020 NY Slip Op 32181(U)
July 2, 2020
Supreme Court, New York County
Docket Number: 153208/2017
Judge: Laurence L. Love
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PRESENT: HON. LAURENCE L. LOVE **PART** **IAS MOTION 62**

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INDEX NO. 153208/2017

MOTION DATE N/A

MOTION SEQ. NO. 002

- v -

**DECISION + ORDER ON
MOTION**

Defendant.

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_____ were read on this motion to/for _____ JUDGMENT - SUMMARY

Plaintiff commenced the instant action by filing a summons and complaint on or about April 5, 2017, alleging that she sustained injuries as a result of a trip and fall accident that occurred within a New York City tree well on the sidewalk abutting the premises located at 19 West 103rd Street, New York, New York on April 28, 2016. The moving defendant joined issue by serving and filing an Answer on or about June 22, 2017. Plaintiff appeared for a 50-H hearing on July 12, 2016 and appeared for an examination before trial on August 2, 2019. The transcripts of same establish as follows: On April 28, 2016 at approximately 8:00 am, plaintiff was walking on the west side of 103rd Street. While walking, plaintiff tripped in a hole that was contained entirely within a tree well. Plaintiff made no complaints regarding the condition of the sidewalk surrounding the tree well. In further support of plaintiff's motion, plaintiff submits the affidavit

of Dianara Fontanez, the managing agent for the subject premises since 2011. Said affidavit establishes that JRAC never performed any type of maintenance, repair or upkeep to any tree well nor made special use of any tree well.

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. Garo 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." "A tree well does not fall within the definition of 'sidewalk' as that term is defined by section 7-210 of the Administrative Code and thus, section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells." *Antonvuk v. Brightwater Towers Condo Homeowners' Assn, Inc.*, 147 A.D.3d 711, 712 (2d Dept. 2017); *Newkirk v. City of NY*, 129 A.D.3d 685, 686 (2d Dept. 2015) citing *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517, 521-522 (2008). As plaintiff fell in a tree well, defendant, JRAC Manhattan Realty, LLC has established a *prima facie* entitlement to summary judgment.

The sole opposition to JRAC's motion concerns whether the condition was open and obvious and whether the condition was not inherently dangerous as a matter of law. As said issues were not considered in deciding the instant motion and as the remaining defendant has not opposed the instant motion, the motion is granted in its entirety.

ORDERED that the motion of defendant JRAC Manhattan Realty, LLC for summary judgment, dismissing the complaint herein is granted and the complaint and any cross-claims are dismissed in their entirety as against said defendant, 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 defendants; 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).

<u>7/2/2020</u>			
DATE		LAURENCE L. LOVE, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART ☐ OTHER	
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT ☐ REFERENCE	