

Rivera v City of New York

2020 NY Slip Op 32820(U)

August 27, 2020

Supreme Court, New York County

Docket Number: 159520/2016

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

CLEMENTINA RIVERA,

Plaintiff,

- v -

THE CITY OF NEW YORK, KWNY MANAGEMENT, LLC.,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.

Defendant.

INDEX NO. 159520/2016
MOTION DATE N/A
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 71

were read on this motion to/for JUDGMENT - SUMMARY

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on June 11, 2016, as a result of a trip and fall on the sidewalk/curb in front of 171 East 115th Street, New York, New York. Defendant, the City of New York ("City"), moves for summary judgment seeking an order pursuant to CPLR § 3212 dismissing the complaint and all cross-claims. The City maintains that it is entitled to summary judgment on the grounds that pursuant to Section 7-210 of the Administrative Code of the City of New York ("7-210"), the City is not liable for plaintiff's injuries. In the alternative, the City argues that it did not have prior written notice of a defective condition on the curb and it did not cause or create the defective condition. Plaintiff and co-defendants oppose the instant motion contending that it is premature. For the reasons set forth below, the City's motion for summary judgment is granted in its entirety.

Summary Judgment Standard

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 NY2d 557, 562, 427 [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 NY2d 395 [1957]; *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 AD2d 331 [1st Dept 1984] *aff'd* 65 NY2d 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 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 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 AD2d 520 [1st Dept 1989]. Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957].

Administrative Code § 7-210

Section 7-210 provides in pertinent part 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.” *NY Admin Code* §7-210.

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.*

To determine if the City is liable under 7-210, the court will look at: (1) the location of the sidewalk where the alleged accident transpired; (2) the non-City ownership of the real property that abuts the location where the alleged accident occurred; and (3) the non-exempt building classification of the abutting property. *Id.*

Therefore, the City makes out *prima facie* entitlement to summary judgment by establishing that the location of an occurrence meets the definition of section 7-210, which the City has established in this case if the accident occurred on the sidewalk.

Administrative Code 7-201

In order to hold the City liable for injuries resulting from curb defects, a plaintiff must demonstrate that the City has received prior written notice of the subject condition (*see* Admin Code of the City of New York § 7-201(c)(2); *Amabile v City of Buffalo*, 93 NY2d 471 [1999]). The only recognized exceptions to the prior written notice requirement are where the municipality itself created the defect through an affirmative act of negligence or where the defect resulted from a special use by the municipality. (See *Yarborough v City of New York*, 10 NY3d 726 [2008]; *Amabile v City of Buffalo*, 93 NY2d 471[1999]).

In support of its motion, the City relies on a record search conducted by an employee of the New York City Department of Transportation (DOT). The DOT search revealed voluminous records; however, the City avers that no records retrieved impute the City with prior written notice of the specific defect that caused plaintiff’s accident.

A thorough review of the DOT records confirms the City's position. The Court finds that the defendant met its initial prima facie burden, entitling it to judgment as a matter of law, by submitting evidence that it did not have prior written notice of the alleged defect on the curb.

Accordingly, in opposition, "the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule — that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Plaintiff and co-defendants offer little more than speculation in an attempt to defeat the City's prima facie showing. The Court rejects any arguments that this motion is premature. Thus, plaintiff and co-defendants have failed to submit evidence demonstrating the applicability of an exception to NYC Admin. Code § 7-201 (c) (2).

Accordingly, it is hereby

ORDERED that the motion of defendant, The City of New York, to dismiss the complaint and all cross-claims herein is granted and the complaint and any and all cross-claims are dismissed in their entirety as against said defendant, 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); and it is further

ORDERED, that this matter be transferred to a non-City part as the City of New York is now out of the case.

8/27/2020
DATE


LYLE E. FRANK, J.S.C.

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

**HON. LYLE E. FRANK
J.S.C.**