Baccale v City of New York
2020 NY Slip Op 32907(U)
July 28, 2020
Supreme Court, Richmond County
Docket Number: 150329/2019
Judge: Thomas P. Aliotta

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

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ALEXI BACCALE,

Plaintiff,

-against-

THE CITY OF NEW YORK and GRAZYNA KLEPACKA,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 150329/2019
Motion No.: 001 & 002

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "8" were fully submitted on the 15th day of July 2020.

	Papers Numbered
Defendant, CITY OF NEW YORK's, Notice of Motion and Affirmation with Exhibits (MS_001 - NYSCEF DOC. 15 – 26)	1, 2
Plaintiff's Affirmation in Opposition (MS_001 - NYSCEF DOC. 29 – 34)	3
Reply Affirmation (MS_001 - NYSCEF DOC. 56)	4
Defendant, KLEPACKA's, Notice of Motion and Affirmation with Exhibits (MS_002 - NYSCEF DOC. 35 – 48)	5, 6
Plaintiff's Affirmation in Opposition (MS_002 - NYSCEF DOC. 49 – 51)	7
Reply Affirmation (MS_002 - NYSCEF DOC. 52 – 55)	8

Upon the foregoing papers, the motion by defendant, THE CITY OF NEW YORK, for summary judgment dismissing the complaint, together with all cross-claims, pursuant to CPLR 3212 is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on July 20, 2018 when she tripped and fell on the sidewalk on Greeley Avenue abutting the premises known as 350 Grimbsy Street, Staten Island, New York (hereinafter "the premises").

Plaintiff testified that while jogging on Greeley Avenue in the direction of Grimbsy Street, she tripped over a raised sidewalk. She was unaware of any complaints regarding this condition and had never observed it prior to that day.

The witness on behalf of the New York City Department of Transportation testified that a search was conducted for the time frame of two years prior to and including the date of plaintiff's accident. This search returned eight permits, eight applications, one inspection, one sidewalk inspection and one Big Apple map. The two inspections related to the pedestrian ramp at the corner of Grimsby Street and Greeley Avenue. The search conducted by the Staten Island Borough Forestry Division revealed no complaints or records. The homeowner, Grazyna Klepacka, testified that she owned the home since 2004, but neither repaired the sidewalk, received a violation nor made complaints regarding its condition prior to the alleged incident.

Therefore, the City argues in support of its motion that as it did not have prior written notice of the condition and none of the exceptions thereto apply (Administrative Code §7-201[c]), summary judgment is appropriate.

In opposition, plaintiff argues that based upon the testimony of the homeowner, the City's motion is premature as discovery is not complete. Following Klepacka's deposition, plaintiff served further discovery demands upon the City regarding an emailed complaint

allegedly made by Klepacka's neighbor to the City for a repair of the uneven sidewalk in question. The demands were for a search that expanded beyond the parameters initially searched by the City and relied upon in their motion. This emailed complaint, coupled with the existence of an additional Big Apple Map received by plaintiff through a F.O.I.L. request and Google Maps photograph, demonstrate the existence of a question of fact with regard to constructive notice. However, without the benefit of the results of the expanded search which forms the basis of plaintiff's post-deposition discovery demands, plaintiff alleges that defendant's motion is premature and should be denied.

Defendant Klepacka has also moved for summary judgment based upon Administrative Code §7-210, i.e., 350 Grimsby Street is a one-family home used exclusively as her residence. Moreover, the defect that allegedly caused plaintiff's accident is southeast of Klepacka's driveway, between the fire hydrant and a tree located between the public sidewalk and the street's curb. Therefore, since neither the complaint nor the bill of particulars allege that Klepacka caused and created the defect through a special use of the sidewalk and, further, that the defect is not located within or near Klepacka's driveway, summary judgment must be granted. Klepacka attests that her complaint to the City regarding the sidewalk was submitted online after plaintiff's accident. In opposition, plaintiff reiterates the argument that the outstanding discovery is to confirm that the complaints were made post-accident rather than before the accident. In reply, Klepacka argues that regardless of when the complaints were made, she is entitled to summary judgment since she qualifies for the one-family residential exemption under Administrative Code § 7-210. In reply, Klepacka submitted a further affidavit and a response to plaintiff's outstanding demand for discovery. Annexed to the affidavit and discovery response are copies

of post-accident emails between Klepacka and the City dated March 15, 2019 through March 28, 2019.

The City takes no position with respect to Klepacka's motion. However, in reply to plaintiff's opposition to the City's motion, the City concurs with Klepacka that any notice allegedly furnished regarding the condition were after the plaintiff's accident. Further, the Big Apple Map only depicts one marking at the curb line and not alongside Klepacka's house at or near the corner of Grimsby Street where plaintiff's accident occurred. Therefore, an expanded search is not warranted and the City's motion must be granted.

Upon consideration of a motion for summary judgment, the Court's sole function to identify the existence of material issues of fact [or point to the lack thereof] rather than making determinations regarding the credibility of the evidence (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 505 [2012]) or the movant's version of events (see *Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). Thus, "the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Id.). Once this showing is made, "the burden of proof shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (Id.). The non-movant must also do so by evidentiary proof in admissible form (*Ayers v. City of Mount Vernon,* 176 AD3d 766 [2d Dept. 2019]). Since summary judgment is the equivalent of trial, any significant doubt as to the existence of a material fact mandates a denial of the motion (*Matter of New York City Asbestos Litigation,* 33 NY3d 20, 26 [2019] and *Phillips v. Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). However, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment"

(*Gilson v. Metropolitan Opera,* 5 NY3d 574, 578 [2005]). A party contending that a motion for summary judgment is premature must demonstrate that "discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Vaccaro v. Town of Islip,* 181 AD3d 751, 752 [2d Dept. 2020]). The party opposing summary judgment has the burden to demonstrate more than mere hope or speculation that the outstanding discovery will lead to evidence sufficient to defeat the motion (Id.).

The Administrative Code of the City of New York, § 7-210 shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner (*see Pevzner v. 1397 E. 2nd, LLC*, 96 AD3d 921, 922 [2nd Dept. 2015]). The exceptions to the shifting of liability are one, two and three family residential property where the property (1) is owner-occupied, and (2) is used exclusively for residential purposes (*see Meyer v. City of New York*, 114 AD3d 734 [2nd Dept. 2014]). Therefore, to succeed on a motion for summary judgment pursuant to CPLR 3212 based upon New York City Administrative Code §7-210, the City must make a prima facie showing that (1) the City did not own the premises abutting the accident location, (2) none of the foregoing statutory exceptions to Administrative Code §7-210 are applicable, (3) the City did not cause or create the allegedly defective condition, and (4) an exception carved out by case law does not apply, i.e., a tree well (*Vucetovic v. Epsom Downs, Inc.,* 10 NY3d 517, 521-522 [2008]) or tree roots (*Missirlakis v. McCarthy,* 145 AD3d 772, 773 [2d Dept. 2016] and *Donadio v. City,* 126 AD3d 851, 852 [2d Dept. 2015]) were the cause of a plaintiff's fall. When it is unclear whether a plaintiff fell on a defective sidewalk, tree well or a combination of the two, summary judgment must be denied (*Fusco v. City of New York,* 71 AD3d 1083, 1084 [2d Dept. 2010]).

The City must also establish that plaintiff has not plead and prove the statutory condition precedent prescribed by Administrative Code §7-201(c)(2) , more commonly known as the "Pothole Law" (*see Katz v. City of New York*, 87 NY2d 241, 243 [1995]; *Bosi v. Louzoun,* 134 AD3d 660, 661 [2d Dept. 2015] and *Donadio v. City,* 126 AD3d 853). This section of the Administrative Code states that the City may not be held liable for any defect in, or obstruction to, a sidewalk unless it has received written notice of the condition at least 15 days prior to an occurrence and failed to remedy the defect (*see Bruni v. City of New York*, 2 NY3d 319 [2004]).

Here, summary judgment is granted to both defendants. Plaintiff cannot demonstrate either prior written notice to the City or a special use of the area of the sidewalk in question by the homeowner. Finally, the post-accident emails dated approximately nine months post-accident are also insufficient to raise a question of fact to defeat summary judgment as to either defendant.

Accordingly, it is hereby

ORDERED, that defendants' respective motions for summary judgment are granted and this action is dismissed in its entirety; and it is further.

ORDERED, that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: July 28 , 2020

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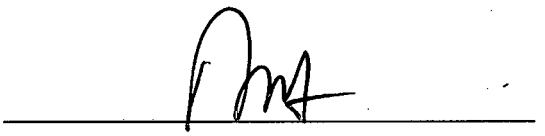

HON. THOMAS P. ALIOTTA, J.S.C.