Derosa v City of New York
2020 NY Slip Op 32908(U)
July 28, 2020
Supreme Court, Richmond County
Docket Number: 150704/2017
Judge: Thomas P. Aliotta

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

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KATHLEEN DEROSA, KATHLEEN DEROSA AS ADMINISTRATOR OF THE ESTATE OF ALBERT DEROSA,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, MAHMOUD H. ALY, M.H. ALY, M.D., P.C., GRANT CITY MEDICAL LLC,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 150704/2017
Motion No.: 001 and 002

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "10" were fully submitted on the 15th day of July 2020:

	Papers Numbered
(MS_001) City Defendants' Notice of Motion and Affirmation with Exhibits (NYSCEF DOC. 39-51)	1, 2
(MS_001) Plaintiff's Affirmation in Opposition (NYSCEF DOC. 67-68)	3
(MS_001) City Defendants' Affirmation in Reply (NYSCEF DOC. 75-77)	4
(MS_002) Defendants, ALY and GRANT CITY MEDICAL, LLC's, Notice of Motion and Affirmation with Exhibits (NYSCEF DOC. 52-63)	5, 6
(MS_002) Defendants, CITY's, Affirmation in Opposition (NYSCEF DOC. 66)	7
(MS_002) Plaintiff's Affirmation in Opposition (NYSCEF DOC. 69-70)	8
(MS_002) Defendants, ALY and GRANT CITY MEDICAL, LLC's, Affirmation in Reply to CITY (NYSCEF DOC. 71)	9

(MS_002) Defendants, ALY and GRANT CITY MEDICAL, LLC's, Affirmation in Reply to Plaintiff (NYSCEF DOC. 73-74) 10

Upon the foregoing papers, the motions for summary judgment by defendant, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION (MS_001), and defendants, MAHMOUD H. ALY, M.H. ALY, M.D., P.C., GRANT CITY MEDICAL LLC (MS_002), are decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff when she tripped and fell on a broken/depressed curb/grass area adjacent to 1910 Richmond Road, Staten Island, New York (hereinafter "the premises").

Defendants, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION (collectively "the City"), and defendants, MAHMOUD H. ALY, M.H. ALY, M.D., P.C., GRANT CITY MEDICAL LLC (hereinafter "Aly" and "Grant"), have moved for summary judgment.

On the date of accident, plaintiff accompanied her husband to an appointment with Dr. Aly at his office located at the intersection of Richmond Road and Barton Avenue (Ex. G, NYSCEF #47], p.14:21-25, 15:5-7)).[1] Their daughter drove them to the appointment and parked the car on the Barton Avenue side of Dr. Aly's office because the office parking lot was full (15:8-25;, 16:1-21). The accident occurred after the doctor's appointment (16:16-18) while

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[1] As both defendants annexed the statutory hearing and plaintiff's deposition transcript to their motion papers, the Court is referring to Exhibit "D" [NYSCEF #44] and Exhibit "G" [NYSCEF #47], respectively, annexed to the City's papers.

walking towards the car (26:23:25, 27:1-8). Plaintiff was about to open the door of the car when she fell (30:13-20) on a broken sidewalk that was lifted (31:1-3). At the moment plaintiff's accident happened, she was standing on "kind of like the raised sidewalk and the grass (35:18-21). At no time prior to her accident did the plaintiff see her foot on the stones or bricks at the curb as she was looking forward at the car door handle (Id. at pp.73-74). During her pre-action statutory hearing pursuant to General Municipal Law 50-h, plaintiff described the area where she fell as narrow with concrete and grass, not a sidewalk, at the curb line (City, Ex. D [NYSCEF #44], pp.9-10; 13:1-19; 22:11-20). She further described the accident location as "the area of the curb" (14:20-25, 15:1-12), but was unsure whether she stepped on "a brick, a stone or whatever that was" (20:19-25, 21:1-2).

Dr. Aly testified that the premises did not have a sidewalk on the Richmond Avenue or Barton Avenue side of the property when he took ownership. On the Barton Avenue side of the property, the curb line has Belgian block pavers that were at the premises at the time defendants took ownership and they have never repaired same (Aly and Grant Ex. J [NYSCEF #63], p.13).

In support of its motion, the City argues that based upon plaintiff's testimony at her statutory hearing and examination before trial, coupled with the fact that the City has attested to the lack of records, this action and all cross-claims must be dismissed because plaintiff cannot establish prior written notice of the defect at the curb that allegedly caused her fall (Administrative Code § 7-201[c]). Defendants, Aly and Grant, likewise move for summary judgment on the grounds that 1) plaintiff's testimony establishes that any defect which is alleged to have caused plaintiff's fall was not on the sidewalk but the curb, and 2) neither defendant performed work or maintenance on the sidewalk and curb. Therefore, since it is duty of the City

to repair/maintain the curb, Aly and Grant cannot be liable as a matter of law and this action together with all cross-claims must be dismissed (Administrative Code § 7-210).

Dr. Aly has also moved for summary judgment based upon plaintiff's testimony that she fell on the curb and, therefore, Administrative Code § 7-210 places liability upon the City. The City, relying upon Dr. Aly's testimony, also argues that co-defendants' motion for summary judgment must be denied because after purchasing the property, renovations were performed upon it. These renovations included landscaping and the installation of pavers and a pathway on the Barton Avenue side of the property (NYSCEF #63, pp. 6-7; 29-31]). Specifically, when presented with the option of pavers by the company performing the work, Dr. Aly responded, "I asked him what do you think? He said put the pavers, and I said okay" (31:6-14]). Neither Dr. Aly nor anyone on his behalf called the City regarding the area where plaintiff allegedly fell (31:20-25, 32:1-7) and, further, he never received complaints (32:8-15).

Plaintiff submits in opposition that all defendants have failed to sustain their burden of proof. More specifically, defendants posit that plaintiff's statutory hearing transcript and deposition transcript are unsigned and submitted without proof that either was mailed to plaintiff for her review and signature. Therefore, the testimony is inadmissible and absent this proof in admissible form their respective motions must be denied.

With regard to the City's motion, plaintiff argues that the Big Apple Map (City Ex. F, NYSCEF DOC. 46) documents prior written notice of an extended area of broken curb and since the precise location of the defect is in dispute, a jury must decide this question of fact. The parties dispute whether the area where plaintiff fell was a curb since it is undisputed that a cement sidewalk did not exist at this location. This also precludes summary judgment to

defendants Aly and Grant. Moreover, it is a question of fact whether said defendants created the hazardous condition during the renovations performed at their property.

In reply, the City addresses each of plaintiff's four contentions, i.e., the Big Apple Map depicts notice of the defect; a 311 complaint was made to the City; plaintiff did not fall on the curb, but rather the curb/grassy area; and there is no clear curb at the location.

The City posits that the notice depicted in the Big Apple Map and the defect which is the subject of the 311 telephone complaint are both with respect to the Richmond Road side of the premises, not the Barton Avenue side where plaintiff allegedly fell. Next, assuming arguendo that the 311 telephone complaint did relate to the Barton Avenue side, a 311 complaint does not constitute prior written notice. Finally, if plaintiff now contends that she fell on a combination of the sidewalk/curb [which contradicts her prior testimony], the City is still entitled to summary judgment because the sidewalk is the responsibility of the adjacent commercial landowner.

It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320,324 [1986]. Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v. Prospect Hosp.*, *supra*). However, if the movant fails to make such a showing it requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ.Med. Ctr.*, 64 NY2d 851, 853 [1985]). In this regard, bare conclusory assertions, expressions of hope or unsubstantiated allegations or assertions are legally insufficient to raise a triable issue (*Winegrad v. New York Univ.Med. Ctr.*, *supra.* and *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

It is also well-settled that the City may not be held liable for any defect in, or obstruction to, a sidewalk, curb or roadway in the absence of prior written notice of the alleged defective condition, unless the City fails to remedy the defect within 15 days after receiving such notice (see, *Bruni v. City of New York*, 2 NY3d 319, 324-326 [2004]. In addition, prior written notice is a condition precedent which a party is required to plead and prove in order to maintain a tort action against the City (see 7-201[c] of the Administrative Code of the City of New York; *Katz v. City of New York*, 87 NY2d 241, 243 [1995]). The Court of Appeals has recognized two exceptions to the prior written notice rule, *i.e.*, where the City created the defect through an affirmative act of negligence or the doctrine of "special use" applies (*see Amabile v. City of Buffalo*, 93 NY2d 471, 474).

Here, in the opinion of this Court, the City defendants have sustained their burden of proof, while co-defendants, Aly and Grant, did not. Defendants, Aly and Grant, failed to eliminate all triable issues with regard to the exact location and the cause of plaintiff's fall (*see* Sobel v. City of New York, 120 AD3d 485; *see also* Gelstein v. City of New York, 153 AD3d 604). Accordingly, their motion must be denied.

An owner of property has a duty under the common law to maintain his or her premises in a reasonably safe condition (*see Kellman v. 45 Tiemann Assoc.*, 87 NY2d 871, 872; *Basso v. Miller*, 40 NY2d 233, 241). By ordinance, that duty has been extended to the sidewalk abutting commercial property in the City of New York with the enactment of Section 7-210 of the Administrative Code, thereby relieving the City of such responsibility (with some exceptions). Such shifting of responsibility to the abutting commercial property, however, does not include curb (*see* Administrative Code §19-101[d], which defines sidewalk 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). This definition is not dependent on the presence of a cement or slab pathway or walkway. The sidewalk maintenance remains with the abutting commercial property owner, but not the curb (*see Garris v. City of New York*, 65 AD3d 953; *Fernandez v. Highbridge Realty Assoc.*, 49 AD3d 318, 319).

Nevertheless, two important issues remain with respect to defendants, Aly and Grant: (1) the exact location of plaintiff's fall; and (2) whether she fell due to the absence of the curb, or the condition of the area adjacent to the curb, *i.e.*, the grassy/dirt area. It is uncontested that the curb in front of Aly and Grant's property had deteriorated. However, it cannot be said as matter of law that it was the curb or absence thereof which caused plaintiff to fall (*see generally, Stanciu v. Bilello,* 138 AD3d 824). Nor can it be said that it was the condition of the area immediately adjacent to the curb which caused plaintiff to fall (*see Lanhan v. City of New York*, 69 AD3d 678). Plaintiff's credibility as to whether she fell on the curb or the grass is a question of fact for the jury since her testimony at the statutory hearing and then later at her deposition use the words "sidewalk" and "curb" interchangeably. It is also a question of fact whether the abutting landowner replaced the blocks at the curb line while performing renovations and created the condition upon which plaintiff alleges she fell.

Notwithstanding the foregoing, the City has established its entitlement to summary judgment as a matter of law. Neither plaintiff nor co-defendants have raised a question of fact that prior notice written notice was received by the City defendants with respect to the Barton Avenue side of the premises. Although the transcripts may be unsigned, plaintiff's Notice of Claim and Summons and Verified Complaint each allege the location of the accident as the curb/grass area. Therefore, since the City cannot be held liable for damages beyond the curb (Administrative Code § 7-210), the question of fact for the jury with respect to co-defendants,

does not defeat summary judgment as to the City defendants absent prior written notice of the defect (Administrative Code § 7-201).

Accordingly, it is hereby

ORDERED, that defendants, MS_001 CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION's, motion for summary (MS_001) is granted in its entirety; and it is further

ORDERED, that defendants, Aly and Grant's, motion for summary judgment (MS_002) is denied in its entirety; and it is further

ORDERED, that this action, together with all cross-claims, is dismissed as against defendants, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION; and it is further

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

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

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KATHLEEN DEROSA, KATHLEEN DEROSA AS ADMINISTRATOR OF THE ESTATE OF ALBERT DEROSA,

Index No.: 150704/2017

Plaintiff,

-against-

MAHMOUD H. ALY, M.H. ALY, M.D., P.C. and GRANT CITY MEDICAL LLC,

Defendants.

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and it is further

ORDERED, that the Clerk shall enter judgment accordingly and amend their records to reflect the new caption.

This constitutes the decision and order of the Court.

Dated: July 28, 2020

ENTER:

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