Kaalund v City of New York
2020 NY Slip Op 33381(U)
October 14, 2020
Supreme Court, New York County
Docket Number: 154001/2016
Judge: Dakota D. Ramseur

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART 5**

Justice

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EMIL KAALUND,

Plaintiff,

- v -

THE CITY OF NEW YORK, COLUMBUS TOWNHOUSE ASSOCIATES, KB COMPANIES, INC.,CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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INDEX NO. 154001/2016

MOTION DATE 10/13/20

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on Defendants Columbus Townhouse Associates and KB Companies Inc.'s motion for summary judgment (sequence 002): 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 92, 96, 98, 100, 103, 104,

The following e-filed documents, listed by NYSCEF document number, were considered on Defendant City of New York's motion for summary judgment (sequence 003): 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 97, 101, 102, 105

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Emil Kaalund commenced this action against Defendants City of New York (the "City"), Consolidated Edison Company of New York, Inc. ("Con Ed"), and Columbus Townhouse Associates and KB Companies, Inc. (the "Columbus Defendants") to recover for injuries allegedly sustained in a January 16, 2016 trip-and-fall on a "defective, upraised steel bar protruding from a metal" sidewalk grate with a broken hinge abutting 600 Columbus Avenue, New York, New York, at or near the intersection of Columbus Avenue and 89th Street. The Columbus Defendants and the City now move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint (sequences 002 and 003, respectively). Con Ed and Plaintiff oppose the Columbus Defendants' motion.[1] The City's motion is unopposed. For the reasons below, after oral argument, both motions are granted.

DISCUSSION

Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v*

[1] Plaintiff's opposition (*NYSCEF 101*) is listed under sequence 003 (the City's motion), but in fact opposes Con Ed's motion (sequence 002).

Prospect Hosp., 68 NY2d 320 [1986]). The movant's initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

I. Columbus Defendants' motion for summary judgment (002)

In any negligence action, a plaintiff must prove: (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof (*Akins v Glens Falls City Sch. Dist.*, 53 NY2d 325, 333 [1981]). As to the first element, liability for a dangerous condition on real property must be predicated upon a defendant's ownership, occupancy, control, or special use of the subject property (*Valmon v 4 M & M Corp.*, 291 AD2d 343, 344 [1st Dept 2002], citing *Hilliard v Roc-Newark Assoc.*, 287 AD2d 691 [2d Dept 2001]). Here, according to Plaintiff's Bill of Particulars and deposition testimony, Plaintiff tripped on a six-inch metal rod protruding from the sidewalk grate near the corner of Columbus Avenue and 89th Street, abutting a 7-Eleven (*NYSCEF 62* [Bill of Particulars]/*NYSCEF 63* [Pl EBT] 10:6-24, 19:5-20). The owners of sidewalk grates are responsible for their maintenance (*Cruz v New York City Tr. Auth*, 19 AD3d 130 [1st Dept 2005]; 34 RCNY § 2-07[b][1] ["The owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad, if such pad is installed."]).

In support of their motion, the Columbus Defendants attach Con Ed's responses to two notices to admit acknowledging Con Ed's ownership of a utility fault numbered 9365 under the sidewalk abutting 600 Columbus Avenue (*NYSCEF 64-67*). The Columbus Defendants also attach Con Ed's October 4, 2019 discovery response, which included the exchange of a report of Con Ed's inspection of vault 9365 on August 17, 2015, five months before Plaintiff's fall (*NYSCEF 69*). The Columbus Defendants also attach the deposition transcript of Con Ed Field technical specialist Daniel Dunbar, which confirmed Con Ed's inspection of the vault and grate (*NYSCEF 70* 14:19, *et seq.; NYSCEF 71*). Thus, the Columbus Defendants meet their burden by demonstrating Con Ed's ownership of the grate, which Con Ed essentially concedes.

In further support, the Columbus Defendants attach the deposition transcript and affidavit of Jorge Vasquez, the District Manager at Grenadier Realty, which managed 600 Columbus Avenue, which both contain denials that the Columbus Defendants owned, repaired, maintained, controlled or otherwise made special use of the subject vault cover or grate (*NYSCEF 72, 73*). In opposition, Con Ed argues that Vasquez's testimony acknowledged the Columbus Defendants' sweeping and shoveling the subject grate, and thus "it is entirely plausible that the alleged damage to the subject grate was caused and created by [the Columbus Defendants] during snow removal efforts" (*NYSCEF 100* [Con Ed Opp] ¶ 6).

While the Columbus Defendants concede, in reply, that their "sidewalk clearing operations necessitated employees to have some contact with Con Edison's sidewalk grate," (*NYSCEF 103* [Columbus Reply] ¶ 6), a movant "need not specifically disprove every remotely possible state of facts on which its opponent might win the case" (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]), "particularly when the opponent's theorizing is farfetched" (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160 [2016]). While the possibility of snowfall between August 17, 2015, the date of Con Ed's last inspection, and January 16, 2016, the date of Plaintiff's fall, is certainly plausible, Con Ed does not point to any evidence in the record actually evidencing a snowfall, and the Columbus Defendants' cleanup, during that time period (*id.* at 168 ["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment"]). Accordingly, summary judgment dismissing the Complaint against the Columbus Defendants is appropriate.

II. City motion for summary judgment (003)

The City also moves for summary judgment, arguing that the City is liable for neither the sidewalk abutting the subject property nor the subject grate, and that the City did not cause or create the subject defect. The City's motion is unopposed.

N.Y.C. Administrative Code § 7-210(b) provides:

> Notwithstanding any other provision of law, 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This 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.

N.Y.C. Administrative Code § 7-210(c) provides, in relevant part:

> Notwithstanding 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.

In support of its motion, the City attaches the affidavit of David Atik, an employee of the New York City Department of Finance, which maintains the Property Tax System ("PTS") database (*NYSCEF 89* ["Atik Aff"] ¶¶ 1-3). Atik avers that his PTS database search for 600 Columbus Avenue, located at Block 1220 and Lot 29 in New York County, revealed that on the date of Plaintiff's fall, the City did not own the property, designated as Building Class D6, which is not a one-, two-, or three-family solely residential property (*Atik Aff* ¶¶ 4-6). Accordingly, the City is not liable for maintenance of the area under N.Y.C. Admin. Code § 7-210.

Similarly, in the absence of any opposition, the Court also agrees with the City that it is not liable for any injuries caused by defects related to the subject grate. For the reasons discussed above, the City is correct that Con Ed, not the City, is responsible for the grate. Thus, analysis shifts to whether the City created the subject condition or caused it to occur through a special use.

With respect to that point, the City incorrectly reverses the burden to the non-movant to demonstrate a triable issue of fact. The City analogizes the situation here to one where a municipality has demonstrated a lack of prior written notice, thereby shifting the burden to a non-movant to demonstrate an exception to the prior written notice law, such as a municipality's creation of a defective condition (*City Affirm* ¶ 28, *et seq.*). In that context, however, a municipality's creation of a defective condition is an explicit exception to N.Y.C. Admin. Code § 7-201(c)'s prior written notice requirement.

However, a municipality's creation of a defective condition is an explicit exception to N.Y.C. Admin. Code § 7-201(c)'s prior written notice requirement. Here, no such rule exists, and therefore no exception and burden-shifting exist; rather, it is the City's affirmative obligation to demonstrate that it did not cause or create the subject condition. Phrased another way, it is not, in this context, a plaintiff's initial obligation to prove that the City *did* create the condition, but the City's obligation to prove that it did *not* (*see Gomez v NYC*, 175 AD3d 1502, 1503 [2d Dept 2019] ["Administrative Code § 7-210 does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence…the City met its prima facie burden for summary judgment…by establishing that the premises did not fall within the exception for one-, two-, or three-family owner occupied residential properties, *and that it did not affirmatively cause or create the alleged defect in the sidewalk.*"] [emphasis added]; *Gjeloshaj v 2979 LLC*, 83 AD3d 583, 584 [1st Dept 2011] [reversing and denying summary judgment where defendant failed to satisfy its initial burden to establish, as a matter of law, that it did not cause or create the alleged defect]; *Serano v NY City Hous. Auth.*, 66 AD3d 867, 868 [2d Dept 2009] [NYCHA failed to establish its prima facie entitlement to judgment as a matter of law *by demonstrating that it neither created the allegedly defective condition nor caused it to occur through a special use of the sidewalk*] [emphasis added]).

Nevertheless, the City has satisfied its burden through its supporting exhibits. The City attaches the affidavit of Department of Transportation paralegal Michael Abdulmalik, who personally conducted a 2-year record search based on the information provided by Plaintiff (*NYSCEF 85-86*). Abdulmalik's search produced 3 hardcopy permits, 3 permits, 1 complaint, and 2 sidewalk inspections, none of which evidenced work by the City. In the absence of opposition, this is sufficient to satisfy the City's burden, and summary judgment is appropriate.

CONCLUSION/ORDER

For the reasons above, it is

ORDERED that the motion of Defendants Columbus Townhouse Associates and KB Companies, Inc. for summary judgment (sequence 002) is **GRANTED**, and the complaint is dismissed against those parties with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the motion of Defendant City of New York for summary judgment (sequence 003) is **GRANTED**, and the complaint is dismissed against the City with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the Defendants Columbus Townhouse Associates and KB Companies, Inc. and the City of New York shall, within 30 days of receipt of this order, e-file and serve upon all parties a copy of this order with notice of entry; and it is further

ORDERED that based on the City's dismissal, the Clerk of Court shall transfer this action to a Justice of a non-City part.

This constitutes the decision and order of the Court.

10/14/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE