

<b>M.G. v Greater N.Y. Corp. of Seventh Day Adventists</b>
2020 NY Slip Op 34279(U)
December 23, 2020
Supreme Court, Kings County
Docket Number: 503576/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF KINGS: PART 17

-----X  
 M.G., JR., infant by his father and natural  
 guardian, MICHAEL GADDY and MICHAEL  
 GADDY, Individually,

Index No.: 503576/2018  
 Motion Date: 12/16/2020  
 Motion Seq.: 01, 02

Plaintiffs,

– against –

**DECISION AND ORDER**

GREATER NEW YORK CORP. OF  
 SEVENTH DAY ADVENTISTS,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 01) 9-25, 30-33, and (Motion 02) 40-45 were read on these motions for summary judgment and to stay discovery.

In this action to recover damages for personal injuries, the defendant, Greater New York Corp. of Seventh Day Adventists (hereinafter GNYC) moves for an order (Motion 01) pursuant to CPLR § 3212(b) seeking summary judgment dismissing the complaint and CPLR § 8303-a for costs and sanctions. The defendant also moves for an order (Motion 02) staying discovery upon determination of the motion for summary judgment. For the reasons set forth below, the defendant's motions are denied.

This action arises out of the infant plaintiff's trip and fall on a public sidewalk adjacent to 9502 Seaview Avenue in Brooklyn, New York which occurred on July 19, 2016. In support of the motion, the defendant submits *inter alia* copies of deeds, photographs of the sidewalk on which the accident allegedly took place, affidavits, and transcripts of deposition testimony of the plaintiffs. GNYC argues that it is entitled to summary judgment because it did not own, occupy, or make special use of the property where the plaintiff allegedly tripped and fell. GNYC asserts that the property abutting the sidewalk on which plaintiff fell is owned by the Federation of Jewish Philanthropies of New York (hereinafter FOJP) and occupied by the Hebrew Educational Society (hereinafter HES). Notably, the plaintiffs initially commenced a prior action solely against FOJP and HES pursuant to Index No. 505576/2017, which is still pending. Although the complaint alleges that the accident occurred at 9502 Seaview Avenue, GNYC argues that it does not own 9502 Seaview, but instead owns and occupies **9520** Seaview Avenue. The two properties border each other with a driveway in between.

GNYC asserts that it is entitled to summary judgment because: (a) deposition testimony from the prior action and the exhibits marked at those depositions, including photographs, show that the infant plaintiff fell on the sidewalk abutting the HES property; (b) documents from the City Register (ACRIS) show that GNYC has no connection to the HES property which has been

owned by Jewish charitable organizations since 1964 (*See* Exhibits J and K, NYSCEF Doc. Nos. 21 and 22); and (c) the accompanying affidavit of head deacon for GNYC maintenance, Calvin McDonald, establishes that GNYC did not occupy or make special use of the HES property where the infant plaintiff allegedly tripped and fell. GNYC further argues that the affidavit of Steven Lebowitz, director of the summer program at HES, established that the driveway belonged to HES and that the property on the other side of the driveway belonged to someone else. Finally, GNYC contends that Mr. McDonald's affidavit stating that the defendant did not make special use of the property demonstrates that the defendant did not cause or create the condition that allegedly caused the plaintiff to fall.

GNYC also argues that it is entitled to an award of costs and attorney's fees because there is a prior action pending in this court against a different entity for the same alleged injuries: *M.G., Jr. v The Federation of Jewish Philanthropies of New York, et al.*, Index No. 505576/2017, and plaintiffs' counsel has refused to dismiss this subsequent action, which defendant asserts is frivolous.

In opposition, the plaintiff argues that the defendant did not sufficiently establish that it does not own the property that abuts the subject defect. Plaintiff states that, typically, making such a showing requires the retention of an expert surveyor to examine the location of the accident, citing to *Sangaray v West River Associates, LLC*, 26 NY3d 793 (2016) (the movant provided the affidavit of a land surveyor to establish the boundaries of the subject property and that the alleged accident occurred on a co-defendant's property). Plaintiff further argues that defendant did not demonstrate that it did not cause or create the subject defective condition.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez*, at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez*, at 324; *Zuckerman*, at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. *Zuckerman*, at 562.

Pursuant to New York City Administrative Code § 7-210(a), it is the duty of the owner of real property abutting a sidewalk to maintain such sidewalk in a reasonably safe condition. Furthermore, pursuant to subsection (b): "the owner of real property abutting any sidewalk... 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." These provisions, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner. *Pevzner v*

*1397 E. 2nd, LLC*, 96 AD3d 921 (2d Dept 2012); *see also Martinez v New York Metro District of United Pentecostal Church International, Inc.*, 188 AD3d 662 (2d Dept 2020).

Here, the defendant has failed to establish its *prima facie* entitlement to summary judgment as a matter of law. This is an accident that happened at or near the property line on a sidewalk that abuts two properties. Triable issues of fact exist as to whether the defect that caused the infant plaintiff's fall was located on the sidewalk abutting the defendant's property. Contrary to the defendant's contentions, the conclusory affidavit of the head deacon and the testimony of the HES summer program director are not sufficient to eliminate all triable issues of fact with regard to whether the alleged defective condition was within its property. Furthermore, the two photographs annexed to the motion (NYSCEF Doc. Nos. 12 and 13) appear to depict two different locations where the accident took place. NYSCEF Doc. No. 13 is the photograph where the infant plaintiff, during his deposition, drew a circle around the alleged accident site, and defendant argues that this photograph depicts the line on the sidewalk between the HES property and the GNYC property. Mr. McDonald testified that GNYC owns the property to the right of the line, that HES owns the property to the left of the line, and that the crack or defect is on HES property. However, NYSCEF Doc. No. 12 is the photograph where the infant plaintiff's father, during his deposition, drew a circle around the alleged accident site, which depicts a completely different location. The defendant focused on the location of the actual defect and its argument that the defect was on another landowner's property. However, the defendant failed to offer sufficient proof demonstrating that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of the plaintiff's injuries. *See Sangaray* at 799.

Furthermore, CPLR § 8303–a authorizes a court to award costs and reasonable attorney's fees for frivolous claims or defenses “in an action to recover damages for personal injury.” A frivolous action is one that is “commenced and continued this action in bad faith,” or “was without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.” *Zysk v Kaufman, Borgeest & Ryan, LLP*, 53 AD3d 482, 483 (2d Dept 2008). However, this Court does not find that the plaintiffs' action was without any reasonable basis in law or fact, nor does this Court find that this action was brought with the primary purpose to harass the defendant. *See Doscher v Meyer*, 177 AD3d 697, 699 (2d Dept 2019); *see also Baxter v Javier*, 109 AD3d 493 (2d Dept 2013) (an award of costs and attorney's fees is warranted when a claim is asserted solely to harass the defendants). As such, the prong of the motion seeking costs and reasonable attorneys' fees is denied.

Additionally, in light of the court's decision on the defendant's motion for summary judgment (Motion 01), the defendant's motion seeking a stay of all discovery pending a hearing and determination on the motion for summary judgment (Motion 02) is denied as moot.

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED** that defendant's motions for summary judgment (Motion 01) and to stay discovery (Motion 02) are DENIED.

This constitutes the decision and order of the Court.

DATED: December 23, 2020

A handwritten signature in black ink that reads "Lillian Wan". The signature is written in a cursive style and is positioned above a horizontal line.

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.