

<b>Bassan v Pelas Realty Corp.</b>
2021 NY Slip Op 30074(U)
January 11, 2021
Supreme Court, New York County
Docket Number: 150311/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART IV

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BETHY BASSAN,

Plaintiff,

-against-

PELAS REALTY CORP.,

Defendant.  
-----X

DECISION AND ORDER

Index Number

150311/2017

FRANK P. NERVO, J.S.C.

Defendant moves for summary judgment in its favor contending that it did not have a duty to maintain the portion of the sidewalk plaintiff alleges was defective and/or snowy/icy, causing her fall. Alternatively, defendant contends that even if it was under a duty to maintain that portion of the sidewalk, it lacked notice of the alleged defect and therefore cannot be held liable. Finally, defendant contends it was not snowy at the time of plaintiff’s alleged injury and therefore dismissal is proper. Plaintiff opposes and cross-moves for summary judgment, contending that defendant had a duty to maintain the sidewalk under the special use doctrine, knew about the defect, and otherwise failed to meet its burden establishing a defense as a matter of law.<sup>1</sup>

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<sup>1</sup> This motion and cross-motion were originally returnable June 16, 2020. The parties adjourned same to August 17, 2020 (NYSCEF Doc. No. 59), October 8, 2020 (NYSCEF Doc. No. 60), October 29, 2020 (NYSCEF Doc. No. 61), and November 30, 2020 (NYSCEF Doc. No. 64). The Court ordered the November 30, 2020 adjournment final, “absent leave of Court” (NYSCEF Doc. No. 64). Thereinafter, the parties purported to adjourn the matter via stipulation to December 7, 2020 (NYSCEF Doc. No 71); leave for this further adjournment was not sought and, therefore, the motion and cross-motion were returnable November 30, 2020. Consequently, the “affirmation in further support of the cross-motion” was late when filed on December 4, 2020 (NYSCEF Doc. No. 72). The disregard of Court imposed deadlines and orders should not be tolerated (*see generally Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C*, 5 NY3d 514, 521 [2005]). As such, the Court declines to consider this late filing. Alternatively, were the Court to consider Doc. No. 72, its decision herein would be unaffected.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a feigned issue of fact will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

### **DUTY TO MAINTAIN SIDEWALK & SPECIAL USE**

The parties agree that the sidewalk defect at issue falls within the twelve-inch perimeter of the sidewalk grating.<sup>2</sup> Defendant contends this requires dismissal of the

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<sup>2</sup> A plain view of the photographs submitted shows the cracking/defect beginning immediately adjacent to the edge/corner of the vent grating.

action, as it is not the owner of the grating and therefore has no duty to maintain the grating pursuant to the Highway Rules. Plaintiff contends that notwithstanding the presence of the grate, the special use doctrine imposes a duty on defendant to maintain the sidewalk, and summary judgment in her favor is warranted. Alternatively, plaintiff argues that the special use doctrine creates an issue of fact precluding dismissal.

Landowners in New York City have a duty to maintain the sidewalk abutting the property in a reasonably safe condition (New York City Administrative Code § 7-210). However, this duty is limited by the Highway Rules, which provide that “the owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware” (34 RCNY § 2-07[b]; *see also Cruz v. New York City Tr. Auth.*, 19 AD3d 130 [1st Dept 2005]). Sidewalks are included in the Highway Rules’ definition of “street” (*id.*).

The special use doctrine provides an exception to the well-established general principle that, absent local regulation, a landowner does not owe a duty to the public to maintain the sidewalk abutting their property<sup>3</sup> (*D’Ambrosio v. City of New York*, 55 NY2d 454 [1982]). The doctrine provides that where an abutting landowner has put part of the public way to some special use for the landowner’s own benefit, the landowner has an obligation to maintain the public way for the public’s benefit (*id.*; *Granville v. City of New York*, 211 AD2d 195 [1st Dept 1995]). “Special use cases usually

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<sup>3</sup> Since September 14, 2003, accidents within New York City are governed by New York City Administrative Code § 7-210, which imposes a duty on landowners to maintain the sidewalk abutting their property, with certain exceptions (*supra* at p. 2).

involve the installation of some object in the sidewalk ... or some variance in the construction thereof.” (*Balsam v. Delma Eng’g Corp.*, 139 AD2d 292 [1st Dept 1988]; see also *Granville v. City of New York*, 211 AD2d at 197).

However, special use does “not supersede pre-existing regulations such as 34 RCNY 2-07(b), which makes owners of covers or gratings on the street responsible for monitoring the condition of such hardware and the area extending 12 inches outward from its perimeter” (Pattern Jury Instructions 2:111 Comments; see also *Torres v. Sander’s Furniture, Inc.*, 134 AD3d 803 [2d Dept 2015]; *Roman v. Bob’s Discount Furniture of NY, LLC*, 16 AD3d 940 [2d Dept 2014]). Consequently, plaintiff’s claims that the defendant’s special use imputes liability for a defect within twelve inches of the perimeter of a sidewalk grate must fail (*id.*). Defendant is not responsible for monitoring the portion of the sidewalk plaintiff has identified as defective, pursuant to the Highway rules.

#### **METEOROLOGICAL CONDITIONS & SIDEWALK SNOW/ICE**

Notwithstanding defendant’s lack of responsibility to monitor the sidewalk grate and pavement within 12 inches of that grate for defects therein, defendant landowner was responsible for keeping the sidewalk free from ice and snow (New York City Administrative Code § 16-123).

Plaintiff testified that snow and ice was present contributing to her fall. Defendant asserts that no snow had fallen for eleven days prior to plaintiff’s accident, and therefore her claim that defendant failed to keep the sidewalk free and clear of snow

is without merit. Defendant submits an affidavit of a meteorologist in support of its position. This affidavit has been redacted in significant part,<sup>4</sup> leaving only one of the expert's conclusions are unredacted. It is beyond cavil that the Court cannot determine whether an expert's opinion is supported by the unredacted evidence in the report when the opinion itself has been redacted.<sup>5</sup> Under these circumstances the Court finds the affidavit without probative value, and disregards it in its entirety (*Chieffet v. New York City Transit Auth.*, 10 AD3d 526 [1st Dept 2004]; see generally *Bender v. Gross*, 33 AD3d 417 [1st Dept 2006]). Plaintiff's testimony that she was caused to fall, in part, by icy conditions on the sidewalk raises an issue of material fact sufficient to defeat summary judgment.

Alternatively, if the Court were to consider the affidavit, it would not find dismissal of plaintiff's claim warranted. Defendant's expert's affidavit, states that "no snow or ice was present" at the time of plaintiff's accident, approximately 7:30am on

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<sup>4</sup> Defendant contends the redaction was inadvertent and a result of scanning a highlighted copy of the report, which caused the highlighted portion to appear redacted (Reply - Exhibit C NYSCEF Doc. No. 68). However, submitting the report on reply is improper. Furthermore, the "corrected" report is entirely different from the redacted affidavit, is at least several pages longer than the redacted affidavit, and bears the expert's signature at a different location (Reply - Exhibit A NYSCEF Doc. No. 67).

<sup>5</sup> The affidavit report's conclusion reads, in pertinent part, "25. In conclusion, the following opinions are given with a reasonable degree of scientific and meteorological certainty and are based on sound, scientific principles and practices accepted in the field of meteorology:

- a. [REDACTED]
- b. A few light snow showers or snow flurries fell, with some occasional lulls, from approximately 5:33am through 6:47am on January 22<sup>nd</sup>, 2015 and a "Trace" of snow (defined as less than 0.1' and too light to measure) fell.
- c. [REDACTED] (for approximately 24 hours and 43 minutes prior to the time of the incident).
- d. At 7:30am on January 23<sup>rd</sup>, 2015 (approximate time and date of the incident), the sky was mostly clear the air temperature was 28 degrees Fahrenheit, [REDACTED]
- e. According to the EBT transcript of Bethy Bassan, Ms. Bassan was asked and answered the following, [REDACTED; REMAINDER INCOMPREHENSIBLE]
- f. [REDACTED; REMAINDER INCOMPREHENSIBLE] The last time there was any snow/ice on exposed untreated and undisturbed surfaces prior to the day of the incident was [REDACTED]"

January 23, 2015, notwithstanding that the air temperature noted on the meteorological report was below freezing for approximately nine and one-half hours before plaintiff's accident and until nearly four hours after her accident. That the air temperature was below freezing for some period before plaintiff's accident, and these freezing conditions existed until some period after her accident, in conjunction with her testimony that ice contributed to her fall, raises a triable question of fact whether ice was present at the time (CPLR § 4528).

Defendant's contention that it did not have notice of defective conditions on the sidewalk and therefore it is entitled to summary judgment, is without merit. Where the administrative code imposes a duty to maintain or inspect the sidewalk area, constructive notice may be imputed (*Robles v. Time Warner Cable, Inc.*, 167 AD3d 477 [1st Dept 2018]; *Singh v. United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272 [1st Dept 2010]).

Finally, to the extent plaintiff seeks summary judgment, defendant's testimony that no snow or ice was present on the sidewalk is likewise sufficient to raise a triable issue of fact precluding summary judgment.

Accordingly, it is

ORDERED defendant's motion seeking summary judgment is partially granted to the extent of dismissing any cause of action premising liability on the defendant's special use of the sidewalk, and is otherwise denied; and it is further

ORDERED that the plaintiff's cross-motion is denied as issues of fact preclude summary judgment.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated: January 11, 2021

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Hon. Frank P. Nervo, J.S.C.