Steen v Ethan Allen Design Ctr.
2021 NY Slip Op 31134(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 150198/2018
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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YHUDES STEEN,

Plaintiff,

- v -

ETHAN ALLEN DESIGN CENTER D/B/A ETHAN ALLEN, EMPIRE STATE REALTY TRUST, INC., ESRT EAST WEST MANHATTAN RETAIL, L.L.C., 166 EAST 61ST STREET CORP., 166 EAST 61ST STREET ASSOCIATES

Defendant.

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INDEX NO. 150198/2018

MOTION DATE 01/21/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 62

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 57, 58, 59, 61

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Yhudes Steen ("Plaintiff") brings this negligence action against Defendants Ethan Allen Design Center,[1] Empire State Realty Trust, Inc., ESRT East West Manhattan Retail, LLC, 166 East 61st Street Corp., and 166 East 61st Street Associates for injuries sustained during an alleged slip and fall.

In motion sequence 002, Defendants Empire State Realty Trust and ESRT East West Manhattan Retail, LLC move for summary judgment, dismissing Plaintiff's amended complaint and all cross-claims asserted against them. In motion sequence 003, Defendants 166 East 61st Street Corp. and 166 East 61st Street Associates also move for summary judgment, dismissing

[1] Pursuant to a stipulation, the action was discontinued as to Defendant Ethan Allen. (NYSCEF Doc No. 60.)

Plaintiff's amended complaint and all cross-claims asserted against them. Both motions have been fully submitted and are consolidated for disposition.

Background

Plaintiff alleges that on November 27, 2016, around 6:30pm, she tripped and fell on the sidewalk near the corner of Third Avenue and 60th Street, adjacent to the premises located at 1010 Third Avenue, New York, New York, which also bears the address of 166 East 61st Street. (NYSCEF Doc Nos. 36, Bill of Particulars, at ¶¶ 2-3; 34 at ¶ 5.) Plaintiff alleges that she was caused to trip and fall due to the failure of the Defendants to maintain the sidewalk in a reasonably safe condition, in violation of New York City Administrative Code § 7-210. (NYSCEF Doc No. 7, Amended Complaint, at ¶ 75.)

Defendant ESRT East West Manhattan Retail, LLC ("ESRT") is the owner of a commercial unit in the building at 1010 Third Avenue. (NYSCEF Doc No. 34 at ¶ 5.) Defendant Empire State Realty Trust, Inc. is a related management company that manages the commercial unit on behalf of ESRT. (NYSCEF Doc No. 39 at 8-9, lns 21-3.) Ethan Allan was the lessee of the commercial unit at the time of Plaintiff's alleged fall. (*Id.* at 17-18, lns 24-2.) Defendant 166 East 61st Street Corporation is the owner of the land, while Defendant 166 East 61st Street Associates is the sponsor and owner of the condominium. (NYSCEF Doc No. 41 at 5-6, lns 23-16.)

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "Failure to make such a prima facie showing requires

denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Prior to the adoption of Admin. Code § 7-210 in 2003,

> property owners in New York City had a statutory duty both to "install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property" (Administrative Code of City of NY § 19-152 [a]) and to "remove the snow or ice, dirt, or other material from the sidewalk" (Administrative Code of City of NY § 16-123 [a]). Failure to comply with these directives resulted in fines or an obligation to reimburse the City for its expenses incurred in performing the necessary work, but not tort liability (*see* Administrative Code of City of NY § 19-152 [e]; § 16-123 [e], [h]).
>
> Under this previous statutory scheme, the City, as the owner of the sidewalks, generally remained liable for injuries to pedestrians caused by defective sidewalk flags, subject to the requirements of the prior written notice law (*see* Administrative Code of City of NY § 7-201 [c] [2]; *see also Yarborough v City of New York*, 10 NY3d 726 [2008]). An abutting landowner could be held liable only if the owner affirmatively created the dangerous sidewalk condition, negligently made repairs or used the sidewalk in a special manner for its own benefit (*see Hausser v Giunta*, 88 NY2d 449, 453 [1996]).

(*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 519–20 [2008].)

However, in 2003, the City Council enacted Admin. Code § 7-210, which "transferred tort liability for defective sidewalks from the City to abutting property owners ... as a cost-saving measure[.]" (*James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 4-7 [1st Dept 2013].) Admin. Code § 7-210 provides that:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

> b. 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 … 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. …

(NYC Admin. Code § 7-210.)

Thus, "owners of real property have a nondelegable duty to maintain the sidewalk in a reasonably safe condition." (*Pichardo v City of New York*, 2020 WL 2302997, at *3 [Sup Ct, NY County 2020], citing *Baghban v City of New York*, 140 AD3d 586, 586 [1st Dept 2016].) However, individual condominium and commercial unit owners are not considered "owners" for the purposes of § 7-210. (*See Araujo v. Mercer Sq. Owners Corp.*, 95 AD3d 624, 624 [1st Dept 2012]; *see also Jerdonek v 41 West 72 LLC,* 143 AD3d 43, 46-48 [1st Dept 2016] ["[T]he unit owners, though they collectively own the common elements, are divested of the powers and responsibilities of ownership with respect to those elements. Those powers and responsibilities are vested in the board of managers, which becomes the proper defendant on any claim, whether common-law or statutory, that lies against the owner of the common elements"].)

Motion sequence 002

In ms002, Defendants Empire State Realty Trust and ESRT East West Manhattan Retail, LLC ("ms002 Defendants") move for summary judgment dismissal of the amended complaint and all cross-claims alleged against them, on the grounds that they are not the owners of the land or the building, and thus had no responsibility to maintain the sidewalk. (NYSCEF Doc No. 34 at ¶ 12.) Rather, the ms002 Defendants cite to the Declaration of the 166 East 61st Street Condominium ("Declaration"), which states that the "sidewalks outside and immediately appurtenant to the Building" are "common elements" which must be maintained, repaired,

replaced, and restored by the building's Board of Managers. (*Id.* at ¶¶ 9-12, citing NYSCEF Doc No. 40 ("Declaration") at §§ 1[a][d][1]; 8.) Further, the Declaration states that the commercial unit (owned by the ms002 Defendants) "shall not include any of the Common Elements[.]" (*Id.* at § 6[b][viii].)

Based on the record before the court, there is no issue as to Defendant 166 East 61st Street Associates' and Defendant 166 East 61st Street Corp.'s ownership of the land adjacent to the sidewalk at issue. Plaintiff has no opposition to that portion of Defendants' Empire and ESRT's motion seeking dismissal against those Defendants only. (NYSCEF Doc No. 57 at ¶ 6.). Defendants had no duty under Admin. Code § 7-210 to maintain the sidewalk in a reasonably safe condition. (*See* NYSCEF Doc No. 40 at § 1[a][d][1].) Accordingly, motion sequence 002 is granted. The amended complaint and all cross-claims alleged therein are dismissed as against Defendants Empire State Realty Trust, Inc. and ESRT East West Manhattan Retail, LLC.

Motion sequence 003

In motion sequence 003, Defendants 166 East 61st Street Corp. and 166 East 61st Street Associates (hereinafter "Defendants") move for summary judgment dismissal of the amended complaint and all cross-claims alleged against them, on the grounds that they had no duty to maintain the specific area of sidewalk where Plaintiff alleges she tripped. Defendants make three main arguments: 1) that 34 RCNY § 2-20[a][2] obviated their duty under Admin. Code § 7-210 to maintain that area of the sidewalk because it was within three feet of a lamp post; 2) that the City had "special use" of that area of the sidewalk because it placed the lamp post there; and 3) that the defect in the sidewalk is actually part of the curb, which is outside of the Defendants' duty under § 7-210. (NYSCEF Doc No. 45, Defs.' Brief, at ¶¶ 4-6.) Defendants' arguments will be addressed in turn.

1. 34 RCNY § 2-20 [a] [2]

Defendants' first argument is premised on 34 Rules and Regulations of the City of New York ("RCNY") § 2-20 [a][2] ["Street Light and Power"], which states that "[o]nly public utilities, public benefit corporations, City agencies or licensed and insured contractors shall be permitted to install, repair, use or work within three (3) feet of any type of City electrical equipment or non-City electrical equipment attached to City Property, including communication circuits." Further, Defendants cite 34 RCNY § 2-01, which defines "city electrical equipment" as "city property to which electrical connections can be made, including but not limited to, electrical devices, wood poles and metal street light/lampposts." Defendants submit excerpts from Plaintiff's deposition testimony and photographs of the site of the alleged accident to indicate that Plaintiff did in fact trip and fall over a section of uneven sidewalk located within three feet of a lamp post. (NYSCEF Doc Nos. 49, 50, 53.) Defendants also submit an affidavit and photographs from Natalie Yurov, a private investigator, who measured the distance between the sidewalk defect and the lamp post as being 14 inches. (NYSCEF Doc No. 52.) Defendants argue that they were "not allowed to do any work pertaining to the area," as the sidewalk defect was within three feet of the lamp post. (Defs.' Brief at ¶ 43.)

In opposition, Plaintiff argues that Defendants misinterpret 34 RCNY § 2-20[a][2] by erroneously suggesting that the provision places maintenance responsibility on another party. (NYSCEF Doc No. 57 at ¶ 7.) Rather, Plaintiff argues that the provision must be read in conjunction with Admin. Code § 7-210, meaning that Defendants' duty to reasonably maintain the sidewalk must be satisfied through hiring a licensed contractor. (*Id.*)

The court finds that 34 RCNY § 2-20[a][2] does not obviate Defendants' non-delegable duty under Admin. Code § 7-210 to maintain the sidewalk adjacent to the premises in a reasonably

safe condition and finds Defendants' argument that the rule prohibited them from doing any work to that area unavailing. In *Doyley v Steiner*, 107 AD3d 517 [1st Dept 2013], property owner defendants made a similar argument under 34 RCNY § 2-20 regarding their obligation to maintain a sidewalk that bore electric shunts, owned by co-defendant Con Ed, that provided emergency electric power to the building. Although the Court in that case ruled that the shunts did not constitute "electric equipment," as they were temporary fixtures and not owned by the City, the Court went further in rejecting the property owners' argument, stating that "even if a shunt [was] 'electrical equipment,' nothing in the rules appears to have prohibited the property owners from taking steps to warn pedestrians about the hazard posed by the shunts in a manner that did not involve working within three feet of them or 'interfering' with them in any respect." (*Doyley*, 107 AD3d at 519.)

This conclusion is supported by the history of 34 RCNY § 2-20. The Statement of Basis and Purpose behind the provision indicates that "section 2-20 [was] added to address the procedures and processes involved in working within a specific distance of or on NYC electrical equipment . . . for the purpose of maintaining public safety. The new rules address the requirements for constructing, testing and maintaining electrical devices, including communication circuits, in the public right-of-way." (City Rec, Sept. 27, 2010 at 2717.) Thus, the rule was intended to regulate work relating to street lights and electrical equipment by ensuring that either city or municipal agents, or "licensed and insured contractors," perform the kind of skilled electrical work that could affect public safety. (*See generally id.*; *Doyley*, 107 AD3d at 5.) Defendants' specious interpretation that the rule obviates their duty under Admin. Code § 7-210 and prohibits them from performing any form of maintenance overlooks the possibility that it could simply hire a licensed

and insured contractor to perform any required maintenance, which would achieve the twin goals of the rules: maintaining public safety with regard to both electrical equipment and sidewalks.

In urging this court to rule that the sidewalk maintenance duty of property owners under Admin. Code § 7-210 ends at a three-foot diameter of every lamp post in New York City, Defendants attempt to analogize 34 RCNY § 2-20[a][2] with 34 RCNY § 2-07 ["Underground Street Access Covers, Transformer Vault Covers and Gratings"], which Defendants assert is a "parallel rule". (Def's Brief at ¶ 50.) First, a reading of the two sections demonstrates that they are not parallel in the slightest. 34 RCNY § 2-07 [b][1] and [2] provide that: "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. . . and shall replace or repair any cover or grating found to be defective[.]" This rule assumes private ownership of sidewalk gratings, which are often owned, for example, by Con Ed (*see Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560 [2d Dept 2009]), and explicitly imposes both monitoring and maintenance requirements. On the other hand, 34 RCNY § 2-20[a][2] merely states that only certain personnel are allowed to work within three feet of City electrical equipment.

Second, Defendants' citation to *Vucevic v Epsom Downs, Inc.*, 10 NY3d 517 [2008] in support of the analogy is misplaced. (Defs.' Brief at ¶ 50.) Defendants claim that "[c]ourts have found that there is nothing that would allow 34 RCNY 2-07 to shift the statutory obligation of the city to the abutting property owner in stating 'legislative enactments in derogation of common law, and especially those creating liability where none previously existed must be strictly construed'" and cites to *Vucevic*. However, the facts at issue in *Vucevic* did not involve sidewalk gratings; but actually dealt with a plaintiff who stepped and fell into a tree well. (*Vucevic*, 10 NY3d at 519.)

Defendants' plea to "prevent a shift of the statutory obligation of the city to an abutting property owner" (Defs.' Brief at ¶ 50) merely advocates for a pre-2003 world, before the adoption of Admin. Code § 7-210.

If Defendants' view of the law were accepted, it "would lead to absurd, and unintended, results. If a plaintiff were to fall on one side of a [three-foot diameter of a lamp post], liability would attach to the adjacent property owner. On the other hand, if the plaintiff were to fall on the other side, the City would be liable." (*James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 6-7 [1st Dept 2013].)

2. Special Use

Second, Defendants argue that the City of New York should be charged with "special use" of the sidewalk because the City placed the lamp post on the sidewalk, thus rendering the City liable for Plaintiff's alleged fall. (Defs.' Brief at ¶ 56.) Defendants argue that "liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property." (*Id.*, citing *Franks v G&H Real Estate Holding Corp.*, 16 AD3d 619 [2d Dept 2005].)

This argument likewise fails. First, a street lamp does not constitute a special use. (*Mahler v Incorporated Village of Port Jefferson*, 18 AD3d 450, 450 [2d Dept 2005].)

Second, almost every case relied on by Defendants in support of this argument does not involve a sidewalk or discusses the prior statutory scheme before Admin. Code § 7-210 was adopted. (*See* Defs.' Brief at ¶¶ 56-58, citing *Franks*, 16 AD3d 619 [2d Dept 2005] [involving a fall in a parking lot, which does not implicate Admin. Code § 7-210]; *Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729 [2d Dept 2008] [involving a dock collapse]; *Giaccotto v New York City Tr. Auth.*, 150 Misc 2d 164, [Sup Ct, NY County 1990] [fall occurred in 1982].) Likewise,

the next 10 citations are to cases ranging from the years 1872 to 1992. (*See* Defs.' Brief at ¶¶ 58-59; *see also* Defs.' Brief at ¶¶ 59-60, citing *Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1st Dept 1988]; *Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004] [fall occurred in 2001 and First Department cites to the old statutory scheme]; *LaTorre v New York City Tr. Auth.*, 33 AD3d 970 [2d Dept 2006] [fall occurred in 2000].) Accordingly, Defendants' argument is without merit. The fact that a lamp post was on the sidewalk does not obviate Defendants' duty under Admin. Code § 7-210 to maintain the sidewalk in a reasonably safe condition.

3. Defect "might be" part of the curb

Finally, Defendants make a last-ditch attempt at absolving themselves of potential liability by suggesting that the area in which Plaintiff fell "might be part of the curb or sidewalk ramp." (Defs.' Brief at ¶ 52.) Defendants argue that "[i]f the accident location is considered to be part of the curb" then the City would be liable, as the City is responsible for curb maintenance. (*Id.*) This argument clearly presents a triable issue of material fact and demonstrates that this matter must be submitted to a jury to weigh the evidence and resolve any issues necessary to render a final conclusion.

Defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law and the motion is denied in its entirety. Thus, it is hereby

ORDERED that motion sequence 002 for summary judgment of Defendants Empire State Realty Trust, Inc. and ESRT East West Manhattan Retail, LLC is granted in its entirety and the amended complaint and all cross-claims are dismissed as against them; and it is further

ORDERED that motion sequence 003 for summary judgment of Defendants 166 East 61st Street Corp. and 166 East 61st Street Associates is denied; and it is further

ORDERED that the claims against Defendants 166 East 61st Street Corp and 166 East 61st Street Associates are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This is the decision and order of the court.

04/09/21
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
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