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| Tavares v City of New York |
| 2021 NY Slip Op 31408(U) |
| April 26, 2021 |
| Supreme Court, New York County |
| Docket Number: 150491/2016 |
| Judge: J. Machelle Sweeting |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION PART 62

Justice

-----X

LIDIA TAVARES,

Plaintiff,

- v -

THE CITY OF NEW YORK, 500 WEST 174 HOUSING DEVELOPMENT FUND CORPORATION, XYZ CORP,

Defendant.

-----X

500 WEST 174 HOUSING DEVELOPMENT FUND CORPORATION

Plaintiff,

-against-

CUENCA LOPEZ CORP, ROSA LOPEZ

Defendant.

-----X

INDEX NO. 150491/2016
MOTION DATE 11/02/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595462/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73 were read on this motion to/for JUDGMENT - SUMMARY.

Pending before the court is a motion filed by defendant THE CITY OF NEW YORK (the "City") seeking an order, pursuant to CPLR 3212, granting summary judgment in favor of the City.

In the underlying action, plaintiff seeks to recover damages for personal injuries she allegedly sustained on August 17, 2015, at approximately 6:00 p.m., when she tripped and fell as the result of an alleged defect in front of the property abutting 500 West 174th Street in the County, City and State of New York.

The City argues that it is not liable for plaintiff's injuries because it does not own the abutting property and the property is not exempt from the liability shifting provision of section 7-210 of the Administrative Code of the City of New York. Further, they argue that the City did not cause or create the condition that allegedly caused the plaintiff's accident as evidenced by its DOT records.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Where the Defect is Located

At issue is whether plaintiff fell due to a defect on the *sidewalk*, a defect on the *roadway*, or a defect on the *curb* that spanned both the sidewalk and roadway.

In her Notice of Claim, Summons and Complaint, and Bill of Particulars, plaintiff argues that her accident was caused by a defect in the “curb and sidewalk.” In opposition, the City contends that the defect at issue was only on the sidewalk and that it did not encompass the curb. Specifically, the City points to plaintiff’s EBT wherein plaintiff described the defect by saying it was located on “the floor that’s in front of the building;” “in front of the building; in the pavement there in front where one would walk;” “it was in the front of the building, but not where the cars go.” Importantly, the City points out that plaintiff also identified the specific defective condition that caused her to trip and fall by marking the same with two circles on a photograph [NYCEF document #55]. Furthermore, plaintiff testified at her EBT in relevant part that she had marked the circles “Not where I was walking, but where I tripped when I fell.”

In response, plaintiff’s counsel contends that the markings made by plaintiff at her deposition are not reliable and should not be considered because plaintiff expressed difficulty seeing at the time of her deposition and when marking photographs. Plaintiff’s counsel also argues that, “Ms. Tavares expressed clear confusion throughout the whole process and once again, counsel for City failed to peruse what she was indicating.”

Contrary to the argument made by plaintiff’s counsel, that plaintiff was “confused” as to where the defect was located, during her EBT, plaintiff was given several opportunities to clarify where the defect was, located, and plaintiff marked on the photo, with two concentric circles, in the area on the sidewalk that appears to be two feet away from the curb ([NYCEF Document #55]. Importantly, plaintiff’s counsel fails to submit an affidavit from the plaintiff indicating that due to vision problems or other issues on the day of the EBT, she had incorrectly marked the photo, or that the defect was actually in a location different than that which was circled. As has been held, where a plaintiff provides testimony that they are unable to identify the defect that caused their injury, the defendant is entitled to summary judgment as a matter of law. *See Siegel v. City of New York*, 86 A.D.3d. 452 (1st Dep’t 2011) (“It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury [...] In this case, the decedent's deposition testimony indicated that he circled the defect in the photograph based on his recognition of the approximate location where he fell—not his recognition of the defect itself. This basis for identification of the defect amounts to the type of “rank speculation” that generally warrants summary judgment dismissal [...]).

City's Prima Facie Case

The City described in detail in its papers the results of various record searches the City had performed to support its conclusion that the City did not own the sidewalk at issue; that the abutting property is not a one-, two-, or three-family solely residential property; and that there was no affirmative negligence on the part of the City to cause or create the subject defect.

Section 7-210 of the Administrative Code of the City of New York, states that “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.” *N.Y. Admin. Code, N.Y.C., N.Y. §7-210 (2003)*. The section further indicates that “[t]his 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.” *Id.* Also, “[n]otwithstanding 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.” *Id.*

Here, it is undisputed that the City did not own the property abutting the sidewalk where plaintiff's accident allegedly occurred. It is also undisputed that the abutting property is not a one-, two-, or three-family solely residential property. Hence, the only way the City may be liable for plaintiff's injuries is if the City caused and/or created the alleged defect that caused plaintiff's accident.

With respect to any allegation that the City may have caused the defect, the City argues that the conclusion of the searches listed above was that none of the Department of Transportation records refer to or relate to any work performed by City contractors or agencies on the subject sidewalk.

The exception was the DDC Safe Routes to Schools Contract HWCSCH3B2 (the “Contract”) issued to Triumph Construction Corp. for the location of West 174th Street from Amsterdam Avenue to Audubon Avenue, Manhattan, New York. Accordingly, at the request of the City’s counsel (i.e., Corporation Counsel or the Law Department), Emmanuel Louijeune, who is employed by the City of New York Department of Design and Construction as an Engineer-in-Charge, performed a search for the time period from May 26, 2015 through September 30, 2015. Per the City, these dates correspond to the permits related to the Contract. Mr. Louijeune provided a sworn affidavit [NYCEF document # 59] in which he stated that his search revealed that the Contract did not involve construction, repairs, or inspections to the sidewalk at the subject location of plaintiff’s incident, and that no actual work was performed on the subject sidewalk during this time period.

This court finds, based on the totality of the above information presented by the City, that the City satisfied its prima facie burden for summary judgment. The burden now shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact.

Plaintiff's Opposition

Plaintiff makes several arguments in opposition to the motion.


First, plaintiff argues that the defect included the curb; that the City's searches should have included the adjacent roadway; and that by omitting roadway searches, the City failed to set forth a prima facie case supporting summary judgment. Plaintiff also argues that "[these permits sponsored by the City], together with other documents submitted by the City establish the City's actual notice of the defects involved in this case."

In light of the above findings as to where the defect was located, plaintiff's first claim is without merit. Plaintiff's second claim is also without merit since this is not a case wherein the City is claiming it lacked prior written notice. Lastly, with respect to any remaining contentions, including plaintiff's claim that the City caused and created the defect, plaintiff has produced only unsubstantiated, speculative claims, but no credible proof to refute the sworn statements of Mr. Louijeune that no work took place on the subject sidewalk.

Conclusion

For all of the aforementioned reasons, the City's motion for summary judgment is GRANTED.

This case was settled and discontinued with respect to the remaining defendants [NYCEF Document #29]. Accordingly, this action is now CLOSED.

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| <u>4/26/2021</u> DATE | |  HON. J. MACHEILLE SWEETING, J.S.C. |
| CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |