

Clarke v City of New York
2021 NY Slip Op 31726(U)
March 31, 2021
Supreme Court, Kings County
Docket Number: 513259/2017
Judge: Devin P. Cohen
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**Supreme Court of the State of New York
County of Kings**

Part 91

LILIA CLARKE,

Plaintiff,

against

THE CITY OF NEW YORK, NYC BIKE SHARE, LLC, 486-
496 FULTON STREET CONDOMINIUM, JP MORGAN
CHASE BANK, N.A. D/B/A CHASE BANK AND 562
COURT, LLC,

Defendants.

Index Number 513259/2017

SEQ #005, 006 & 007

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	<u>1-2</u>
Order to Show Cause and Affidavits Annexed...	<u>2-3</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>3</u>
Other	<u>3</u>

2021 MAY 17 PM 2:00

KINGS COUNTY CLERK
FILED

Upon the foregoing papers¹, defendant NYC Bike Share, LLC's motion for summary judgment (Seq. 005), plaintiff's cross-motion for an order holding defendant's motion in abeyance pending discovery and to amend her pleadings (Seq 008), defendant 562 Court LLC's motion for summary judgment (Seq. 006), and defendant JP Morgan Chase Bank, N.A. d/b/a Chase Bank's ("Chase") motion for summary judgment (Seq. 007) are decided as follows:

Factual Background

Plaintiff commenced this action against defendants for damages she claims she sustained when she tripped on "the sidewalk between the Chase Bank located at 490 Fulton Street and the CitiBikes station on that corner" (second amended complaint at 13). Plaintiff alleges that, as she fell she "was spun around and sent airborne, after which she landed, with force, into an empty space within the CitiBikes location (*id.* at 14).

At a Rule 50(h) hearing, plaintiff identified on a photograph the area that contained the

¹ This court will not consider plaintiff's reply papers in further support of her cross-motion, as such papers are not authorized by CPLR 2214.

dangerous condition over which she claimed she tripped (plaintiff's hearing transcript at 14-15).

Plaintiff did so by circling the area where the defect was located (*id.* at 15). This photograph was marked as an exhibit, and NYC Bike Share provides a copy of the exhibit with its motion. The photograph shows a building with an adjacent sidewalk and curb. Next to the curb is a street, along which are several bicycle docking stations. There appears to be a crack in the curb and/or sidewalk, in some proximity to one of the docking stations, and the crack is circled.

Brian Geraghty was the Director of System Expansion for NYC Bike Share at the time of the accident. He states in his affidavit that, on the day of the accident, NYC Bike Share operated a CitiBike bike share station at the site of plaintiff's accident (Geraghty Affidavit at 3-4). He further states the following: "NYC Bike Share, LLC does not presently [or at any time on or before the accident] possess, own, lease, control, maintain and/or repair any real property and/or concrete curbs at or near the footprint of at [sic] the bike share station identified in [plaintiff's] complaint" (*id.* at 5-6). Mr. Geraghty contends that the bike share station's footprint does not include the concrete curb over which plaintiff claims she tripped, and that the NYC Bike Share's authority does not extend past this footprint (*id.* at 8-9).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

562 Court LLC's Motion for Summary Judgment (Seq. 006)

The parties advise that plaintiff has settled her claims against 562 Court LLC.

Accordingly, this motion is denied as moot.

Chase's Motion for Summary Judgment (Seq. 007)

By letter, dated October 14, 2020 (Docket No. 151), counsel for Chase withdrew this motion.

NYC Bike Share's Motion for Summary Judgment
and Plaintiff's Cross-Motion to Amend Her Pleadings

NYC Bike Share was brought into this action relatively recently by plaintiff's second amended complaint, filed on March 31, 2019. In the second amended complaint, plaintiff asserts that NYC Bike Share, along with all defendants, owed a duty to maintain the sidewalk in accordance with Administrative Code of the City of New York ("AC") § 7-210. NYC Bike Share filed its answer to the second amended complaint on May 2, 2019.

Section 7-210 imposes a duty upon property owners to maintain the sidewalk adjacent to their property in a reasonably safe condition (*Kabir v Budhu*, 143 AD3d 772, 773 [2d Dept 2016]). NYC Bike Share has established that it is not the owner of the property adjacent to the sidewalk. Likewise, the City of New York is responsible for maintaining curbs in a safe condition (*Buonviaggio v Parkside Assoc., L.P.*, 120 AD3d 460, 461 [2d Dept 2014], citing AC § 19-101[d]). Plaintiff does not appear to dispute these points, but rather argues that NYC Bike Share's liability is founded in its contract with the City of New York. Section 4.10 of NYC Bike Share's contract with the City of New York states:

NYCBS shall place or install all Equipment in such a manner to prevent any damage to any sidewalk or distinctive pavement. To the extent any such damage occurs and upon notification by DOT, NYCBS shall repair any such damage no later than 72 hours after occurrence. If for some reason work cannot be completed within this time period, NYCBS will submit an acceptable work plan and schedule to the DOT.

Plaintiff seeks amendment of "the pleadings", pursuant to CPLR 3025(c), to assert this

claim. Plaintiff also asks this court to deny summary judgment so that it can depose NYC Bike Share and obtain discovery on its new theory of liability. "Leave to conform a pleading or the bill of particulars to the proof pursuant to CPLR 3025(c) should be freely granted absent prejudice or surprise resulting from the delay" (*NY Fuel Distributors, LLC v Eljamal*, 162 AD3d 892, 894 [2d Dept 2018], quoting *Hine v Jafa Transp., Inc.*, 97 AD3d 794, 795 [2d Dept 2012]). The court must balance various the circumstances involved in each case, such as the procedural history of the case, the merits of proposed amendment, and the relative prejudice to the defendants (*Ford v Martino*, 281 AD2d 587, 588 [2d Dept 2001]). Here, the plaintiff commenced this action in 2017 and has already amended the complaint twice. However, NYC Bike Share was not brought into the case until May 2019 and, as explained below, discovery of information in NYC Bike Share's possession has not been completed.

A duty of care to a non-contracting party arises in three potential circumstances: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Nachamie v County of Nassau*, 147 AD3d 770, 774 [2d Dept 2017], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Plaintiff argues that the contract imposes a duty upon NYC Bike Share to remedy any defects caused by the installation of its equipment. Arguably, if the installation caused a defect, then it could be that NYC Bike Share launched an instrument of harm.

In accordance with CPLR 3212(f), a party is entitled to a reasonable opportunity for disclosure prior to a motion for summary judgment (*TD Bank, N.A. v 126 Spruce St., LLC*, 117 AD3d 716, 716-17 [2d Dept 2014]). It appears that no one from NYC Bike Share has been

deposed.² On October 8, 2020, NYC Bike Share served plaintiff with a letter requesting a withdrawal of the portion of plaintiff's motion seeking to compel depositions, as the issue had already been decided. As NYC Bike Share explains, it and plaintiff agreed that its deposition would be postponed until after these motions were decided.

NYC Bike Share argues that plaintiff's most recent bill of particulars does not assert any claims against it. However, this may be addressed by the amendment plaintiff seeks. NYC Bike Share also argues that plaintiff claims the defect pre-existed the installation of the docking stations in 2015. NYC Bike Share refers to survey maps from October 2003 that plaintiff attached to her original complaint, which allegedly show a defect at the accident location. Even assuming these maps show a defect at the at the accident location, there remains the possibility that the defect over which plaintiff tripped is a different one, or that the docking station exacerbated the existing defect.

NYC Bike Share argues that plaintiff has not proven that NYC Bike Share had notice of any defect. To the extent NYC Bike Share makes this argument in support of its own motion, it is improperly asserted for the first time on reply (*Emigrant Funding Corp. v Kensington Realty Group Corp.*, 178 AD3d 1020, 1023 [2d Dept 2019]). Additionally, plaintiff is not required to prove NYC Bike Share's notice of the defect in order to amend her pleadings.

NYC Bike Share argues that its duty to remedy any defect is triggered by notification by the Department of Transportation. Jules Flynn, who was the Executive Vice President of Motivate International Inc, an affiliate of NYC Bike Share, states in his affidavit that he is now the VP, Head of Operations for Lyft, Inc 's Bikes and Scooters division (Flynn affidavit at 1). He

² While plaintiff states that he seeks such testimony, she does not specifically move for such relief, and no such relief is granted here.

states that NYC Bike Share never received such notice from the Department of Transportation. Mr. Flynn's affidavit is self-serving, and whether such notification occurred will be a subject for discovery.

NYC Bike Share also claims that it could not have caused any damaged to the area. Mr. Flynn states that he has personal knowledge of the method of installation of the docking stations (*id.* at 4). He further states that "[a]t no time did the installation involve excavation, digging, drilling or construction" (*id.*) Mr. Flynn does not state how the stations were installed, and how it is not possible for the installation to have created or exacerbated a defect in the curb or sidewalk. NYC Bike Share also argues that the damage must occur upon installation, but the contract does not require that the damage occur simultaneously with the installation, only that the installation caused the damage.

Conclusion

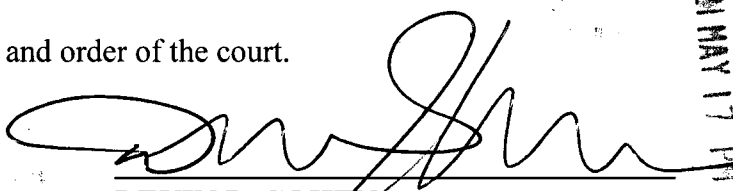
For the foregoing reasons, defendant NYC Bike Share, LLC's motion for summary judgment (Seq. 005) is denied without prejudice, plaintiff's cross-motion to amend her pleadings (Seq 008) is granted, defendant 562 Court LLC's motion for summary judgment (Seq. 006) is denied as moot, and defendant Chase's motion for summary judgment (Seq. 007) is withdrawn.

Plaintiff shall serve an amended complaint within twenty days from notice of entry of this order.

This constitutes the decision and order of the court.

March 31, 2021

DATE


DEVIN P. COHEN

Justice of the Supreme Court

KINGS COUNTY CLERK
FILED
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