

400 E. 77th St. Owners, Inc. v City of New York

2021 NY Slip Op 31758(U)

May 19, 2021

Supreme Court, New York County

Docket Number: 152057/2018

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 5

Justice

-----X

400 EAST 77TH STREET OWNERS, INC.

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 152057/2018

MOTION DATE 01/20/2021,
02/02/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 62, 63, 64, 65, 66, 68

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 67

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

Plaintiff, 400 East 77th Street Owners, Inc., commenced this action seeking damages stemming from a December 11, 2016 underground flood, in which plaintiff alleges the City failed to timely locate and repair a ruptured City water main beneath the building located at First Avenue and East 77th Street, New York, New York (building). Plaintiff, the owner of the building, seeks damages related to the repair of the damage to the building and sidewalk surrounding the building. In motion sequence 002, plaintiff now moves pursuant to CPLR 3212 for summary judgment as to liability, and an inquest for damages against defendant, the City of New York (City). In motion sequence 003, defendant, the City of New York (City), now moves pursuant to 22 NYCRR § 202.21(e) to vacate the note of issue, and for a stay of the City's time to file a dispositive motion. Both motions are opposed. For the following reasons, and after oral argument on May 19, 2021, plaintiff's motion is granted, and the City's motion is denied.

FACTUAL BACKGROUND

On the morning of December 11, 2016, at 6:54 a.m., plaintiff's board president called 311 to report water coming up from underground on to the sidewalk adjacent to the building (NYSCEF # 21). An hour later, at 8:04 a.m., the building's managing agent called 311 to report that there was a leak in the basement of the building and that the basement was flooded with approximately twelve to eighteen inches of water (NYSCEF # 35). The building's superintendent, Kola Djeljevic (Djeljevic), testified that he observed multiple fountains of water emerging from the concrete in front of the building and water emerging from cracks within the sidewalk.

At approximately 8:30 a.m., work crews from the Department of Environmental Protection (DEP) arrived at the building and began to work on determining the source of the leak. The DEP ultimately determined that the rupture flooding the sidewalks and the building was in the “domestic line,” as opposed to a “service line,” and issued the building “3 day notice” directing plaintiff to repair the ruptured line. To that end, plaintiff hired Alex Figliola Water & Sewer LLC (Figliola) on an emergency basis. Figliola arrived at the building at approximately 6:30 p.m. and began excavating at 9:00 p.m. As part of their work, Figliola and Djeljevic, shut off the domestic water line valve from the street side, however, the leak continued unabated. On December 12, 2016, Figliola notified the DEP to notify that the domestic line was not the cause of the leak. The DEP sent a work crew to the building, and upon inspection determined that service line, and not the domestic line was ruptured.

The DEP work crew began to excavate the asphalt where the ruptured water main was located, resulting in a hole that was five feet by five feet by seven feet. DEP Supervisor, John Caccavale, testified that the “[r]epair crew broke out – they broke out the asphalt – they broke out in the area where John LoBello marked out the ground” (NYSCEF # 38 at 51:7-10). Caccavale further testified that:

“when they were breaking out the concrete and the asphalt. they got to an area where there was very little soil there at that point. A lot of the – a lot of the soil has been washed away from the water”

(*id.* at 51:25-53:5).

After the hole in the water main was fixed:

“Whatever water was in the hole, they pumped it out, they filled with clean fill, they tamped and they had to return to shop for more fill and they dumped the wet debris, they loaded dump truck in the shop with the clean fill, they locked up and back to location. Two dump trucks full. Tamped, blacktopped, tamped and they cleaned up area safe, installed shoring box, excavation was, looks like 6 feet by 5 feet by 7 feet”

(*id.* at 106:13-23)

Caccavale explained the DEP’s excavation protocol where undermine, otherwise known as voids beneath a roadway or sidewalk, are detected:

“Usually if there’s an undermining underneath the roadway due to a water main break or a water leak that we respond to, we try to break out the area as much as we can in the area that we believe is undermined because of the break. And once the repairs are made, that area that we visually have seen as being undermined would usually be filled with, you know, clean fill or something like that and then tamped and brought to grade”

(*id.* at 54:20-55:5).

On December 12, 2016, the DEP completed the repair. About a month after the incident, a three-by-three inch hole opened in the sidewalk at the location of the excavation, and Djeljevic filled it with two 35 to 50 pound bags of blacktop. Approximately two years later, another hole appeared on the curb, in the vicinity of the first hole. The City repaired the second hole.

Prior to the flood, the plaintiff retained Howard L. Zimmerman Architects, PC (HLZA) to investigate and report on the condition of the building. HLZA Senior Project Manager John Favazzo opined that, based on his pre-rupture physical inspection on October 14, 2016, “the sidewalks . . . were observed to be in good condition” (NYSCEF # 40 at ¶ 14). On February 16, 2017, HLZA returned to the building to perform an assessment of the flood damage and recommend remedial measures. At HLZA’s recommendation, the plaintiff retained Ground Penetrating Radar Systems, Inc. (GPRS) to conduct tests to determine whether there were “voids underneath the sidewalk that will cause differential settling and cracking of the concrete sidewalks” (NYSCEF # 41). According to the report produced by GRPS “[a]t least 50% or more of the subgrade has voids” at the sidewalk area surrounding the building (*id.*).

Plaintiff thereafter hired HLZA Senior Structural Engineer. Ilya Shtulberg (Shtulberg), an expert on sidewalks and vaults to provide an expert opinion as to the cause of cracks, holes and warping in the sidewalks bordering the Building; the likelihood of ongoing damage to the sidewalks; and remedial measures. Shtulberg concluded, to a reasonable degree of engineering certainty, that the flood caused the voids, finding that:

“It is likely that the voids were caused by the water main break, which forced water up to the sidewalk surface through the joints and into the basement through the foundation walls for a period of two days”

(*id.*).

Shtulberg further determined that:

“[t]he City’s failure to locate the burst City water main during their emergency site visit on December 11, 2016, which caused water to erupt at high pressure from the burst pipe for approximately 24 hours until the City returned and repaired it on December 12, 2016, washed soil from beneath the sidewalk and created substantial voids beneath the sidewalk”

(*id.*).

In support of its motion, the City argues that: 1) the DEP performed some repairs, and the extent of the repairs is up to a jury to decide; 2) that the alleged defective condition developed over time; 3) that the sidewalk condition does not pose a hazard; and 4) that the alleged defective condition was caused as a result of normal deterioration.

DISCUSSION

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

The owner of a water main has a duty of maintaining and repairing its water main so as to avoid injury to abutting property owners and the public generally (*De Witt Props. v City of New York*, 44 NY2d 417, 423-24 [1978]). Evidence of a break and the flooding of abutting property is insufficient, in and of itself, to establish liability (*id.*). The plaintiff must establish that the injury was caused by defendant's negligence in the installation or maintenance of the system (*De Witt Props. v City of New York*, 44 NY2d 417, 424 [1978]). Under this standard, the defendant will be held liable in negligence if the evidence demonstrates that, upon receiving notice of the water main break, it failed to "make reasonable efforts to inspect and repair the defect" (*Guidarelli v. City of Schenectady*, 167 AD3d 1402, 1405 [3d Dept 2018], quoting *De Witt Props.*, 44 NY2d at 424).

Here, plaintiff demonstrates that the City was negligent in failing to identify and locate the source of the leak on December 11, 2016, resulting in water to flow from the City's water main unabated for over twenty-four hours. The City's opposition concedes as much. Further the City fails to produce any evidence disputing the expert reports submitted by plaintiff revealing that the rupture of the water main caused significant voids underneath the sidewalk. Moreover, there is no evidence DEP attempted to ascertain the extent of the undermine or break up the asphalt and concrete over the undermine, remove the wet debris, or fill the voids with clean fill, tamp, or blacktop, in accordance with DEP protocol. Accordingly, plaintiff's motion for summary judgment on liability is granted.

As plaintiff's motion for summary judgment on the issue of liability, the City's motion to vacate the note of issue and for additional time to file a motion for summary judgment is denied as moot. In any event, as plaintiff argues, the City failed to provide a basis to vacate the note of, in that the City does not argue that "the case is not ready for trial, . . . that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect" (22 NYCRR 202.21[e]).

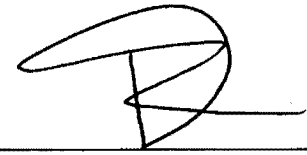
Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted, and the matter is set down for an inquest on the issue of damages on plaintiff's cause of action for negligence; and it is further

ORDERED that the City's motion to vacate the note of issue and for additional time to file a motion for summary judgment is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order, within notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



5/19/2021
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE