Haggerty v Fiore
2021 NY Slip Op 31966(U)
April 20, 2021
Supreme Court, Richmond County
Docket Number: 151815/2018
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2
---X HON. THOMAS P. ALIOTTA
MARY ANNE HAGGERTY,

Plaintiff, **DECISION & ORDER**

- against –

Index No. 151815/2018
Motion Seq. 002

MARILYN FIORE, DARREN FIORE, AS TRUSTEE OF THE MARILYN FIORE IRREVOCABLE TRUST, THE CITY OF NEW YORK, AND THE BROOKLYN UNION GAS COMPANY d.b.a. NATIONAL GRID NEW YORK

Defendants.
---X

Recitation of the following papers numbered "1" through "5" in accordance with CPLR 2219(a) were marked fully submitted on the 10th day of March 2021.

Papers Numbered

Notice of Motion, Affirmation in Support and Supporting Papers by Defendants Marilyn Fiore and Darren Fiore as Trustee of the Marilyn Fiore Irrevocable Trust for Summary Judgment Dismissing the Complaint and all Cross Claims (dated January 25, 2021)....................1, 2

Plaintiff's Affirmation in Opposition, with Supporting Papers (dated February 2, 2021) 3

Affirmation in Opposition by Defendant The Brooklyn Union Gas Company d/b/a National Grid NY, with Supporting Papers (dated March 3, 2021) 4

Reply Affirmation (dated February 25, 2021) 5

Upon the foregoing papers, the motion of defendants Marilyn Fiore and Darren Fiore as Trustee of the Irrevocable Trust of Marilyn Fiore for summary judgment dismissing the complaint and all cross-claims as against them pursuant to CPLR § 3212 is granted.

In this action, plaintiff seeks to recover damages for personal injuries she sustained on July 18, 2017 when she tripped and fell on a public sidewalk abutting a one-family residence located at 456 Oakland Avenue, Staten Island, New York. Ms. Fiore has a life estate in the subject premises. Her son, defendant Darren Fiore, is the fiduciary and owner of the property as Trustee of the Marilyn Fiore Irrevocable Trust. Plaintiff claims the sidewalk at issue was dangerous and had an elevation differential of 1.75 inches or more, 10 inches wide, and a "drop-off" of 3.5 inches.

Presently before the Court is the Fiore defendants' motion for summary judgment dismissing the complaint and all cross-claims against them. In support of the motion, movants argue that pursuant to New York City Administrative Code § 7-210, they are exempt from a duty to maintain the public sidewalk and, therefore, they are not liable for plaintiff's injuries. Defendants argue there is no evidence in the record to suggest they caused or created the hazardous condition or that it resulted from a special use of the area in question. Furthermore, they maintain summary judgment is warranted in this case because plaintiff was unable to identify the nature of the defect without engaging in pure speculation and conjecture.

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) the existence of a duty on the part of a defendant to the plaintiff, (2) breach of that duty, and (3) injury suffered as a result of the breach (*see Solomon v. City of New York*, 66 NY2d 1026, 1027 [1985]). Unless there is a duty of care owed to the person injured, a party cannot be held liable in negligence (*id.*). "Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not the owner or lessee of the abutting property unless the landowner has either affirmatively created the dangerous condition, voluntarily but negligently made repairs, caused the condition to occur through a special use, or

violated a statute or ordinance expressly imposing liability on the landowner or lessee for failure to maintain the abutting [sidewalk]" (*Gibbs v. Husain*, 184 AD3d 809, 810 [2d Dept 2020]).

In 2003 the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalk conditions from the City of New York to abutting property owners (*see Rodriguez v. City of New York*, 180 AD3d 1096, 1097 [2d Dept 2020]). The statute provides that the owner of real property abutting the sidewalk shall be liable for any injury proximately caused by the failure of the owner to maintain the sidewalk in a reasonably safe condition (*see* Administrative Code of the City of NY § 7-210[b]). "However, this liability-shifting provision does not apply to one, two or three-family residential real property that is (i.) in whole, or part, owner occupied, and (ii.) used exclusively for residential purposes" (*Rodriguez v. City of New York*, 180 AD3d at 1097; *see Brown v. City of New York*, 162 AD3d 733, 734 [2d Dept 2018]; Administrative Code of the City of NY § 7-210[b]).

In the matter at bar, it is undisputed that the Fiore defendants are owners within the purview of the Administrative Code of the City of New York § 7-210. Pursuant to the Trust Agreement, Ms. Fiore has a life estate in the subject premises. It specifically provides that she possesses "the right to live at her personal residence for her lifetime until her death." Defendant testified at her deposition that she resides at 456 Oakland Avenue since prior to the accident in 2017. She identified the deed to the property wherein title was conveyed to her son, defendant Darren Fiore, as Trustee of the Marilyn Fiore Irrevocable Trust. Nevertheless, as a life tenant, Ms. Fiore retains a possessory interest in the subject premises.

At her deposition, Ms. Fiore identified a series of photographs that were marked into evidence at plaintiff's deposition. Ms. Fiore testified that one of the photographs depicted the

front of her property as it appeared after defendant Brooklyn Union Gas Company "tore up the pavement and left it unfixed" when new pipelines were installed on Oakland Avenue. She testified the condition existed for approximately one year prior to plaintiff's accident despite the numerous phone calls she made to the Brooklyn Union Gas Company. Ms. Fiore further testified she did not take any steps on her part to repair or replace the sidewalk. Moreover, there is no evidence in the record that movants created the defective condition or made a special use of that area of the public sidewalk.

In view of the foregoing, the Fiore defendants sustained their initial burden of establishing, by their submissions, that the subject property abutting the public sidewalk was a one-family, owner-occupied residence. As such, they are entitled to the exemption from liability for owner-occupied residential property set forth in Administrative Code § 7-210(b) (*see Frazier v. Hunte*, 188 AD3d 1162, 1164 [2d Dept 2020]; *Osipova v. London*, 186 AD3d at 1529; *Castro v. Rodriguez,* 176 AD3d 1031, 1032 [2d Dept 2019]). Defendants have sustained their prima facie burden of proof that they had no statutory duty to maintain the subject sidewalk (*see Castro v. Rodriguez,* 176 AD3d at 1032; *Stubenhaus v. City of New York,* 170 AD3d 1064, 1065 [2d Dept 2019]; *Brown v. City of New York*, 162 AD3d 735).

Similarly, movants have also established that they did not create the defective condition that allegedly caused plaintiff to fall or made a special use of that area of the sidewalk. Therefore, they cannot be held liable for plaintiff's alleged injuries under common-law principles. "Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use" (*Meyer v. City of New York*, 114 AD3d 734, 735 [2d Dept 2014]; [2d Dept 2020]; *see Frazier v. Hunte*, 188 AD3d

at 1164; *Osipova v. London*, 186 AD3d 1528, 1529 [2d Dept 2020]; *Castro v. Rodriguez,* 176 AD3d at 1032-1033; *Stubenhaus v. City of New York,* 170 AD3d at 1066).

Neither plaintiff nor defendant Brooklyn Union Gas Company have disputed that the Fiore defendants are exempt from liability as the owners of the subject premises within the meaning of Administrative Code § 7-210(b). In opposition, plaintiff misapprehended the statute and overlooked the explicit exemption of owner-occupied one-, two- or three-family residential property. She erroneously cites case law that is inapplicable to the relevant homeowner exemption provision. Furthermore, the opposition by both plaintiff and Brooklyn Union Gas Company have failed to raise a triable issue of fact as to the Fiore defendants' liability under common-law principles (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Contrary to plaintiff's contention, the motion is not premature. She has not identified what discovery is outstanding and that it might lead to relevant evidence. Nor has she demonstrated that the facts essential to justify opposition to the motion are exclusively within the knowledge or control of the moving defendants (*see Osipova v. London*, 186 AD3d at 1529; CPLR § 3212[f]). "The mere hope or speculation that evidence sufficient to defeat summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Rodriguez v. City of New York*, 180 AD3d at 1097 [citation omitted]; *see Castro v. Rodriguez,* 176 AD3d at 1033; *Stubenhaus v. City of New York,* 170 AD3d at 106).

Accordingly, it is

ORDERED, the motion of defendants Marilyn Fiore and Darren Fiore, as Trustee of the Marilyn Fiore Irrevocable Trust for summary judgment dismissing the complaint and all cross claims as against them is granted; and it is further

ORDERED, the complaint and all cross-claims as against defendants Marilyn Fiore and Darren Fiore, as Trustee of the Marilyn Fiore Irrevocable Trust, are hereby severed and dismissed; and it is further

ORDERED, that the remaining parties shall appear for a post-note of issue settlement conference on June 2, 2021 at a time to be determined via Microsoft Teams in Part C-2.

ORDERED, the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

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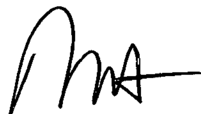

Dated: April 20 2021

Hon. Thomas P. Aliotta, J.S.C