

Beniaminova v City of New York

2021 NY Slip Op 33950(U)

February 3, 2021

Supreme Court, Queens County

Docket Number: Index No. 702269/19

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

FILED

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Liuba Beniaminova,

Index **5/20/2021**
Number: 702269/19 **2:30 PM**

Plaintiff,

- against -

Motion **COUNTY CLERK**
Date: 2/1/21 **QUEENS COUNTY**

The City of New York and Hand's Realty
Corp.,

Motion Seq. No.: 2

Defendants.

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The following papers numbered E20-E47 read on this motion by defendant, Hand's Realty Corp., for summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E20-34
Affirmation in Opposition-Exhibits.....	E35-38
Reply.....	E41-43
Amended Reply-Exhibit.....	E44-46
Letter.....	E47

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Hand's for summary judgment dismissing the complaint and all cross-claims against it is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling on the curb/sidewalk abutting 64-48 108th Street in Queens County on October 1, 2018.

Plaintiff testified in her 50-h hearing that her accident occurred as she stepped out of her parked vehicle on the left side of 65th Avenue. She related, "I put the left foot. And when I was getting up, my left foot wasn't moving in order to help it step with the other foot because it was stuck. Half of my foot was on the sidewalk and the other half was on the curb." She elaborated that it was the back of her foot that was on the curb. Likewise, she testified in her deposition that after she placed her left foot on the ground, "I raised my body - I lifted it up and I got caught on something. There was this crack - I actually saw the crack later, but my foot got caught on something and it would not let me turn around and get out completely. Since I already did this push to exit, so my weight pulled me out and dropped me on the ground.

A photograph was shown to her at her deposition and marked as Defendant's Exhibit B for identification, and plaintiff identified the condition depicted therein which she claims caused her to fall by circling the condition in pen and writing her initials next to it. This photograph is annexed to the moving papers as Exhibit J. The photograph shows a broken section of curb and the circled portion shows a missing chunk of curbstone. The sidewalk abutting this curbstone does not show any defects and is relatively flush with the curb, being neither raised nor depressed from it. Other photographs submitted by plaintiff are higher-resolution images that include close-ups of the broken curb she identified as the cause of her accident.

Plaintiff further confirmed specifically that the gap in the curb that she circled in the Exhibit D photograph is where her foot got caught. When asked, "Would you say your foot was trapped in the broken piece of curb?" she replied, "Right. It wouldn't get out and it wouldn't allow be to move. I mean it wouldn't let me."

Thus, plaintiff's clear testimony is that her foot became wedged in the gap in the curbstone when she stepped into it as she exited her car and put weight on it while trying to stand up.

In her affidavit in support of the motion, Penny Chin, the manager of the abutting commercial property Hand's, avers that neither she nor anyone from or on behalf of Hand's ever made any repairs to the curbstone or made any special use of it, and did not cause or make worse the condition depicted in the photograph.

Hand's also annexes an affidavit of a professional engineer, Joseph Lucchesi, who avers that he conducted an inspection of the curbstone on July 16, 2020 and observed a missing and damaged portion of curbstone approximately 16" wide and the entire depth of the curb to the pavement. He states that the damaged area of curbstone is completely within the poured curb line where the sidewalk ends and that the sidewalk is in excellent condition, with no cracks or displacements, and that all sidewalk surfaces are flush to grade. He avers that the missing area of curbstone where plaintiff alleges her foot was caught was entirely within the curb line, and that there was no involvement of the sidewalk in plaintiff's getting her foot caught or trapped due to the missing portion of curb line.

A property owner is not liable for repairing and maintaining abutting public property unless the owner actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges the abutting owner with the responsibility to repair and maintain the public property and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The New York City Administrative Code §§19-152 and 7-210 place

the duty to repair sidewalks upon the abutting property owners, and §7-210 specifically imposes liability upon abutting property owners for any injuries resulting from their breach of that duty. However, in the instant case, the defective area that plaintiff identifies as the condition that caused her to fall was not the sidewalk but the curb.

Section 7-201 (c) of the Administrative Code states, in relevant portion, "The term 'street' shall include the curbstone." Conversely, "sidewalk" is defined in §19-101 as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." Neither §19-152 nor §7-210 imposes upon a property owner a duty to repair and maintain curbs (see Irizarry v. The Rose Bloch 107 University Place Partnership, 12 Misc 3d 733 [Supreme Court, Kings County 2006]). Curbs are part of the street which the City has the exclusive duty to maintain.

Thus, since the evidence proffered is that the condition that plaintiff alleges caused her injuries was that of the curb and not the sidewalk, and that Hand's did not create the condition or cause it by a special use of the curb, Hand's has established a prima facie entitlement to summary judgment by demonstrating prima facie that it did not owe plaintiff any duty of care, either under statute or at common law.

In opposition, plaintiff's counsel annexes an affidavit of plaintiff in which she avers, for the first time, that "my foot came in contact with a broken curb and stainless steel wire mesh protruding from the sidewalk, which caused me to fall...After I fell, I saw the broken curb and wire mesh."

Plaintiff also annexes an affidavit of a professional engineer, Stanley Fein, in which he avers that his affidavit is based upon his "investigation" of the accident site, his review of the photographs, deposition transcripts and bill of particulars. He avers that "it was reported" to him that plaintiff's foot came in contact with a broken curb and wire mesh protruding from the sidewalk, and that his "investigation" revealed that "a wire mesh approximately six inches in length in a vertical position protruded from the sidewalk." He avers that the wire mesh is a common method of reinforcing poured concrete and is an integral part of the sidewalk construction and therefore a part of the sidewalk, not the curb. He opines that the wire mesh and broken curb caused plaintiff's foot to become caught.

Plaintiff did not testify in either her 50-h hearing or deposition that her foot was caught on a piece of wire mesh protruding from the sidewalk or that she saw any wire mesh, and she does not allege either in her complaint or bill of particulars that the defective condition that caused her injuries included a wire mesh. Plaintiff's affidavit, which clearly contradicts her prior testimony and pleadings was, thus, patently crafted by her counsel

