

DelVillar v City of New York

2021 NY Slip Op 34126(U)

May 27, 2021

Supreme Court, Bronx County

Docket Number: Index No. 25267-2018E

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 03

-----X
DELVILLAR, EMILIO G.

Index No. 0025267/2018

-against-

Hon. MITCHELL J. DANZIGER,

CITY OF NEW YORK
-----X

Justice Supreme Court

C
#003

The following papers numbered 1 to _____ Read on this motion, (Seq. No. 3) for
DISMISSAL, noticed on **June 26 2020**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

see annexed

Upon the foregoing papers, it is ordered that this motion is

Motion is Respectfully Referred to Justice:
Dated: _____

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

Dated: 5/27/21

Hon. *MJD*
MITCHELL J. DANZIGER, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
EMILIO G. DELVILLAR and MARIA G.
DELVILLAR,

Plaintiffs,

-against-

CITY OF NEW YORK, et. al.,

Defendants.
-----X

Index No.: 25267-2018E
DECISION/ORDER

Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion to Dismiss

Papers Numbered

Notice of Motion,	
Affirmation in Support and Exhibits	<u>1</u>
Affirmation in Opposition to motion-City.....	<u>2</u>
Affirmation in Reply to City.....	<u>3</u>
Affirmation in Support- DelVillars.....	<u>4</u>
Affirmation in Opposition- Guante.....	<u>5</u>
Affirmation in Reply.....	<u>6</u>

Motion by plaintiffs, Emilio G. DelVillar and Maria G. DelVillar (“DelVillars”), for an order pursuant to CPLR §3211(a)(5), on the grounds of res judicata and law of the case, based upon the decision of the Appellate Division, First Department in the related case of *Guante v. City of New York*, 182 A.D.3d 456 (1st Dept. 2020), is resolved as follows:

The Guante matter and the DelVillar matter were consolidated on June 20, 2019 by order of this Court. For the purposes of this decision, the Guante matter will be referred to as “action 1” and the DelVillar matter will be referred to as “action 2.” These matters arise from a trip and fall sustained by plaintiff, Alfredo Guante. Mr. Guante allegedly tripped and fell on the sidewalk on Sedgwick Avenue in front of the DelVillars “two-level” home. Mr. Guante commenced an action against the City of New York (“City”), the New York City Department of Parks and Recreation (“Parks”), and the DelVillars. The DelVillars commenced the within action against the City and Metropolitan Transit Authority (“MTA”), New York City Transit Authority (“NYCTA”), and Manhattan and Bronx Surface Transit Authority (“MABSTOA”), (collectively “Transit

defendants”), alleging that it was the City and/or Transit’s responsibility to fix, repair, and abate the alleged public nuisance (a portion of raised sidewalk) in front of their property.

On March 28, 2019, the DelVillars moved for summary judgment as defendants in action 1 (Guante). The City and Mr. Guante opposed the motion and it was denied as premature on June 20, 2019. The DelVillars appealed this Court’s order dated June 20, 2019.

On March 28, 2019, the DelVillars moved for partial summary judgment as to liability in action 2. Thereafter, the City and the Transit defendants moved for summary judgment in action 2, arguing that the DelVillar property was not an exempt property pursuant to New York City Administrative Code §7-210. By order dated June 20, 2019, this Court granted the Transit defendants’ motion, but denied the DelVillars’ and the City’s motion as premature with leave to renew after discovery. No appeal was taken with regard to this order.

On April 9, 2020, the Appellate Division, First Department affirmed this Court’s June 20, 2019 order in action 1 (Guante) holding that the DelVillars failed to establish prima facie entitlement to summary judgment as a matter of law. The Appellate Court held, “Although the City is responsible for maintaining the area that is designated a bus stop location (see Bednark v. City of New York, 162 A.D.3d 565 [1st Dept 2018]), the motion court properly denied defendant’s [sic] motion as premature, since discovery had not been completed. On the record presented, there is no way to determine whether plaintiff fell within a designated bus stop (see, McCormick v. City of New York, 165 AD3d 565 [1st Dept 2018]; Munasca v. Morrison Mgt. LLC, 111 AD3d 564, 565 [1st Dept 2013]).” The DelVillars moved to reargue this decision and on August 6, 2020, the First Department denied reargument.

Now, the DelVillars move to use the language contained in the decision by the First Department dated April 9, 2020, as res judicata and law of the case and ask this Court to find that the City of New York is responsible for maintaining the sidewalk area that is designated as a bus stop and an order directing the City to repair the alleged sidewalk defect in the area designated as a bus stop. It is undisputed that the municipality has an obligation to maintain sidewalks, unless such obligation is shifted to the property owner pursuant to NYC Admin. Code §7-210. This Court does not read the Appellate Division’s decision as creating a basis of res judicata for action #2. Issues are still present as to where the plaintiff fell. As such, summary relief is not warranted.

Plaintiff has failed to satisfy their burden and is not entitled to judgment as a matter of law.

Accordingly, the DelVillars' motion is denied in its entirety.

The City is directed to serve a copy of this order, with notice of entry, upon all parties within 30 days of the entry date.

This constitutes the decision and order of the Court.

Dated: 5/27/21
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.