

Perez v City of New York

2021 NY Slip Op 34168(U)

May 21, 2021

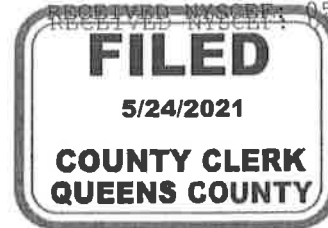
Supreme Court, Queens County

Docket Number: Index No. 707258/2018

Judge: Tracy Catapano-Fox

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
ETEL ESTHER PEREZ,

Plaintiff,

-against-

THE CITY OF NEW YORK and QUEENS
BALLPARK CO., LLC,

Defendants.
-----X

Index No. 707258/2018

Part 6

Motion Date: March 29, 2021

Calendar No. 34

Sequence No. 3

The following papers numbered 1 to 14 read on this motion by defendants for summary judgment and dismissal pursuant to CPLR §3212, and this cross-motion by plaintiff to amend her Bill of Particulars to reflect plaintiff's injuries.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	1-4
Notice of Cross-Motion, Affirmation, Exhibits.....	5-8
Affirmation in Opposition to Cross-Motion.....	9-10
Defendants' Reply Affirmation, Exhibits.....	11-12
Plaintiff's Reply Affirmation.....	13-14

Upon the foregoing papers it is ordered that these motions are determined as follows:

Defendants' motion for summary judgment and dismissal pursuant to CPLR §3212(b) is granted, as there are no issues of fact in dispute to find defendants liable for plaintiff's injuries. Plaintiff's cross-motion to amend her Bill of Particulars is denied as moot.

Plaintiff commenced this action for personal injuries sustained on March 15, 2017, when she slipped and fell on a patch of ice on the outdoor plaza inside the gates of 41 Seaver Way, Flushing, New York, owned and operated by defendants. Plaintiff filed the Summons and Complaint on May 10, 2018, and issue was joined on July 27, 2018. Plaintiff filed the Notice of Issue on November 13, 2019, and defendants now move for summary judgment, and plaintiff cross-moves for discovery.

Pursuant to CPLR 3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 NY3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*) The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824 [2014]; *Brill v City of New York*, 2 NY3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

In a premises liability case, a defendant real property owner, or a party in possession or control of real property who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon Enters., Inc.*, 172 AD3d 678-679 [2nd Dept. 2019].)

Defendants established a prima facie entitlement to summary judgment, as defendant City of New York was an out-of-possession landlord that was not responsible for snow removal on the property. They presented the lease agreement that relieved defendant City of New York as landlord from maintenance of the property, including snow removal. As plaintiff failed to oppose this portion of defendants’ motion, defendants’ motion for summary judgment as to defendant City of New York is granted without opposition.

Defendants also established a prima facie entitlement to summary judgment, by presenting sufficient evidence that defendant Queens Ballpark did not cause or create the dangerous condition alleged by plaintiff. (See *Joseph v. New York City Tr. Auth.*, 66 AD3d 842 [2nd Dept. 2009].) They established that they did not receive any complaints about ice in the plaza prior to plaintiff’s accident. Defendants’ Vice-President of Ballpark Operations Sue Lucchi testified at her deposition as to her responsibilities over maintenance of the ballpark and discussed the general snow removal process and procedures. This testimony, alone, would not be sufficient to establish defendants maintained the property prior to plaintiff’s accident. However, Ms. Lucchi’s testimony regarding snow removal processes was confirmed by plaintiff, who conceded at her deposition that there was a small cleared path in the plaza that did not appear dangerous. (*Compare Parrinello v. Independence Plaza SC, LLC*, 189 AD3d 1441 [2nd Dept. 2020].) Defendants also

presented the weather service information that established it was snowing the night before plaintiff's accident, and the snow stopped during a time defendants' facility was closed, thereby rendering them unable to clear any snow overnight prior to the early morning hours of plaintiff's accident.

Plaintiff failed to raise a triable issue of fact in dispute. (*See Gentles v. New York City Transit Auth.*, 275 AD2d 388 [2nd Dept. 2000].) Plaintiff conceded that defendants removed the snow to create a path, and thereby satisfied their obligation to maintain the property. Her affidavit of merit stating defendants' snow removal was insufficient and caused the dangerous condition is speculative, as plaintiff did not testify at her deposition that she observed any icy or snowy condition prior to her fall. (*See Wise v. Filincieri*, 163 AD3d 609 [2nd Dept. 2018].) Further, plaintiff's photograph to demonstrate poor lighting was not exchanged, not discussed at the deposition, and does not establish the condition of defendants' plaza at the time of plaintiff's accident. Based upon the evidence presented, there are no issues of fact in dispute.

Accordingly, defendants' motion for summary judgment pursuant to CPLR §3212 is granted, and plaintiff's Complaint is dismissed. Defendants' remaining arguments are denied. Plaintiff's cross-motion to amend her Bill of Particulars is denied as moot.

This constitutes the decision and Order of the Court.

Dated: May 21, 2021



Hon. Tracy Catapano-Fox, J.S.C.