

Acosta v Moca Deli Grocery, Inc.

2022 NY Slip Op 30277(U)

January 26, 2022

Supreme Court, New York County

Docket Number: Index No. 162031/2018

Judge: J. Machelle Sweeting

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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. J. MACHELLE SWEETING PART 62

Justice

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PEDRO ACOSTA,

Plaintiff,

- v -

MOCA DELI GROCERY, INC., 4181 BROADWAY L.L.C.,
MEL MANAGEMENT CORP D/B/A STELLAR
MANAGEMENT, NEW AMERICAN CONSTRUCTION INC
AND, THE CITY OF NEW YORK

Defendants.

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INDEX NO. 162031/2018
MOTION DATE 12/09/2021
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff PEDRO ACOSTA, who claims that on February 20, 2018, at approximately 5:00 p.m., he tripped and fell on a hole in the sidewalk in front of the storefront located at 4183 Broadway in the County, City and State of New York.

Now pending before the court is a motion filed by defendant THE CITY OF NEW YORK (the "City") seeking an order, pursuant to CPLR 3212, granting summary judgment in favor of the City. Upon the foregoing documents, this motion is GRANTED.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

City’s prima facie case

In its motion, the City argues that it is not liable for plaintiff’s injuries because the City does not own the abutting property, and the property is not exempt from the liability shifting provision of Section 7-210 of the Administrative Code of the City of New York.

In support of its motion, the City attached the Affirmation of New York City Department of Finance (“DOF”) employee, Mr. David Atik (NYSCEF Document #53), in which Mr. Atik stated that he had performed a search of the City’s Property Tax System (“PTS”) database, which contains information about property located within the City of New York, and “includes property ownership information and building classification information.” Mr. Atik averred that this database is used and maintained by DOF in the regular course of business, and that he conducted a search for records relating to 4183 Broadway, New York, New York, designated as Block 2176, Lot 74 in the County of New York. According to Mr. Atik, the search of the PTS database revealed that the City of New York was not the owner of the property abutting the location of plaintiff’s alleged accident on February 20, 2018. Furthermore, Mr. Atik, averred that the search revealed that the property was classified as “Building Class D7 (elevator apartment; semi-fireproof with stores).” Based on this, the City argues that the subject property was neither a one-, two-, nor

three- family solely residential property. Since the property does not fall within any of the exemptions set forth in § 7-210, the subject property owner is not exempt from the liability shifting provisions of § 7-210.

The City also argues that it did not cause and create the condition that allegedly caused plaintiff's accident. In support of this argument, the City attached the Affidavit of Christopher Menjivar (NYSCEF Document #52), a paralegal at the Department of Transportation of the City of New York ("DOT"), which stated that he had performed a search in the pertinent electronic databases and identified and requested a search for corresponding paper records of permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the sidewalk located at Broadway between West 177th Street and West 178th Street (side of 4183 Broadway), in the County, City, and State of New York. Per Mr. Menjivar, this search encompassed a period of two years prior to and including February 20, 2018, the date upon which plaintiff claims to have been injured. The City argues that based on the records revealed in this search, none of the evidence establishes or intimates that the City caused or created the alleged sidewalk defect.

Section 7-210 of the Administrative Code of the City of New York, states that “the owner of real property abutting any sidewalk, including, but not limited to; the intersection quadrant for corner property shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” *N.Y. Admin. Code, N.Y.C., N.Y.* §7-210 (2003).

The section further indicates that “[t]his subdivision shall not apply to one, two, or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.” *Id.* Also, “[n]otwithstanding any other provision of law, the

city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.” *Id.*

This court finds, based on the totality of the above information presented by the City, that the City satisfied its *prima facie* burden for summary judgment. The burden now shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact.

Opposition

The plaintiff filed responsive papers in which he stated that, “Plaintiff defers to the Court to determine if the movant's initial burden of establishing no triable issue of fact has been met by movant Defendant for the instant matter based upon all papers and submissions before this Court.” Plaintiff did not dispute any of the arguments made by the City.

Defendants 4181 Broadway, LLC and Mel Management Corp. d/b/a Stellar Management (collectively, the “Owner”) also filed responsive papers. In their papers, the Owner argues the City’s motion is “entirely premature as significant and necessary discovery proceedings remain outstanding and information to oppose is potentially in the possession of [the City].” Specifically, the Owner argues that the Note of Issue had not been filed and that the City has not yet been deposed.

The court finds this argument to be unavailing. First, documentary evidence has already been exchanged, pursuant to the discovery orders, and plaintiff fails to proffer any evidence in contravention of this evidence. Second, the City searched for, and produced, all records relating

to the City's lack of ownership of the property. Third, plaintiff's 50-h hearing has already been held. Finally, despite claiming that the City's motion is premature, plaintiff fails to identify any key fact or offer any evidentiary basis to suggest that discovery may lead to relevant evidence, or that any fact essential to opposing the motion was exclusively within the knowledge and control of the movant. See DaSilva v. Haks Engineers, Architects & Land Surveyors, P.C., 125 A.D.3d 480 (Sup. Ct. App. Div. 1st Dept. 2015) ("Contrary to plaintiff's contention, defendants' motions were not premature although discovery was incomplete. A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.) and A & W Egg Co. v. Tufo's Wholesale Dairy, Inc., 169 A.D.3d 616 (Sup. Ct. App. Div. 1st Dept. 2019) ("Since defendant could have opposed the motion based on its own documents, and pointed to no facts essential to its opposition that are in plaintiff's control, the motion was not prematurely decided before discovery").

In conclusion, given the totality of the circumstances, it is hereby:

ORDERED that the City's motion is GRANTED; and it is further

ORDERED that the complaint and any cross-claims against the City are dismissed, with prejudice; and it is further

ORDERED that the caption is amended as to remove the City of New York as a named defendant in this action; and it is further

ORDERED that this action is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

1/26/2022
DATE


J. MACHETA SWEETING, J.S.C.

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