

Veksler v City of New York

2022 NY Slip Op 30753(U)

March 31, 2022

Supreme Court, New York County

Docket Number: Index No. 158713/2017

Judge: Judy H. Kim

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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. JUDY H. KIM **PART** **05RCP**

Justice

-----X

IOSIF VEKSLER, LYUBOV VEKSLER,

Plaintiff,

- v -

THE CITY OF NEW YORK, TRIOMPHE RESTAURANT
CORP., TRUMP INTERNATIONAL HOTEL & TOWER NEW
YORK, JEAN-GEORGES MANAGEMENT LLC

Defendant.

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INDEX NO. 158713/2017

MOTION DATE 8/27/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion for DISMISSAL.

Upon the foregoing papers, the motion by defendant the City of New York (the “City”), pursuant to CPLR §§3211(a)(7) and 3212, to dismiss the complaint is granted for the reasons set forth below.

On September 29, 2017, plaintiffs commenced this action asserting negligence claims against all defendants based upon Iosif Veksler’s alleged trip and fall caused by a metal barrier in front of 1 Central Park West (NYSCEF Doc. No. 1 [Compl. at ¶¶80-81]). While the Complaint initially included a derivative claim by Lyubov Veksler, this claim has been withdrawn (NYSCEF Doc. No. 69 [Yaroslavskiy Affirm. in Opp., ¶51]). This action was also discontinued without prejudice as to defendants Triomphe Restaurant Corp. and Jean-Georges Management LLC (NYSCEF Doc. No. 57 [Partial Stipulation of Discontinuance]).

The City now moves to dismiss the complaint as against it, arguing that: (1) the barrier was an open and obvious hazard; and (2) plaintiff’s failure to plead that the City owed a special duty

of care to Iosif Veksler precludes plaintiff's remaining negligence claim as against it. Plaintiff opposes the motion¹. Co-defendant Trump International Hotel & Tower New York also opposes the City's motion except as to that branch seeking dismissal on the grounds that the barricade was open and obvious².

BACKGROUND

At a GML §50-h hearing, Iosif Veksler testified that on December 23, 2016, at approximately 1:00 p.m., he tripped and fell over a leg of a metal police barrier placed on the sidewalk in front of the Trump International Hotel located on Central Park West between 60th Street and 61st Street (NYSCEF Doc. No. 48 [Veksler Transcript at 13:10-14:12; 19:13-15; 19:23-20:18; 65:14-16]). Plaintiff testified that there was heavy pedestrian traffic because it was the holiday season and the sidewalk was full of metal barriers placed "chaotically" (Id. at 14:1-3). He further testified that people were coming toward him and he was weaving through the crowd to avoid them and the metal barriers (Id. at 19:19-20:12). Plaintiff further testified that he was in a rush to get to a swimming pool on 63rd Street and was walking fast and did not see the metal barrier he tripped on because it was behind a garbage can that was in his way (Id. at 13:23-25; 14:5-9).

The City produced police officer Thomas Serino of the New York Police Department ("NYPD") Barrier Section – which is responsible for the placement and removal of barriers within New York City – for an examination before trial (NYSCEF Doc. No. 51 [Serino EBT Tr. at 8:19-

¹ The City notes that plaintiff's opposition to its motion was submitted three days after the date stipulated by the parties (NYSCEF Doc. No. 66). However, this minimal delay has not prejudiced defendants and plaintiff's dilatory filing is therefore excused (CPLR §§2004, 2214[c]).

² Defendant Trump International Hotel & Tower New York argues that the City's motion should be denied due to its failure to comply with Administrative Order 270/21 insofar as each paragraph in the City's Statement of Material Facts do not contain citations to the record. However, these defects were cured by the City's Revised Statement of Material Facts (NYSCEF Doc. No. 64) and the Court will consider the City's motion.

9:6]). Serino testified that barriers were placed around 1 Central Park West by the NYPD for the Women and Allies March (Id. at 26:17-28:18). NYPD records reflect that these barriers were initially intended to be placed at the subject location on December 12, 2016 and removed the next day (NYSCEF Doc. No. 49). Serino testified that due to repeated protests and ongoing demonstrations conducted in front of the Trump International Hotel following the 2016 Presidential election, the barriers were instead left at that location for an extended period in December (Id. at 48:21-49:6). He could not, however, state the specific date when the barriers were first placed or the length of time they remained (Id.). When asked whether records related to the placement of barriers for those protests and demonstrations could be located, Serino testified that due to the fluid nature of the events the metal barriers were placed based upon commands given by field commanders over the phone (Id. at 38:5-22). Serino also testified that barriers were sometimes removed by third parties such as construction workers and forgotten. (Id. at 52:21-53:5; 60:8-23).

DISCUSSION

The question of whether the metal barrier at issue here was an open and obvious hazard presents an issue of fact that cannot be determined at this juncture. A condition is open and obvious when it is “plainly observable and [does] not pose any danger to someone making reasonable use of his or her senses” (Boyd v New York City Hous. Auth., 105 AD3d 542, 543, 964 N.Y.S.2d 10 [1st Dept 2013] [internal quotation marks omitted]; Acosta v Gouverneur Ct. Ltd. P'ship, 133 AD3d 470, 470 [1st Dept 2015]). The question is generally one for the jury (Brown v Garda CL Atl., Inc., 150 AD3d 542, 543 [1st Dept 2017]; Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69 [1st Dept 2004]). Although the issue may be decided by the court where photographs and testimonial evidence clearly resolve the issue (See e.g., Tagle v Jakob, 97 NY2d 165, 169

[2001] [internal citations omitted]), the evidence here does not do so. Although the photographs submitted by plaintiff demonstrate that the base of the barrier was plainly visible from certain angles, “the fact that a condition is visible does not necessarily mean it is open and obvious” particularly where the photographs submitted depict an empty sidewalk rather than the crowded sidewalk described by plaintiff (Cook v Consol. Edison Co. of N.Y., 51 AD3d 447, 448 [1st Dept 2008]). Accordingly, the Court declines to grant the City’s motion for summary judgment on this ground and turns to that branch of the City’s motion seeking dismissal on the grounds that plaintiff is barred from asserting a negligence claim against it based on his failure to allege that the City owed him a special duty.

A party seeking to impose liability on a municipality acting in a “governmental capacity” – i.e., acting “for the protection and safety of the public pursuant to the general police powers” (Applewhite v Accuhealth, Inc., 21 NY3d 420, 425 [2013]) – “must establish the existence of a special duty to plaintiff, which is more than the duty owed to the public generally” (Musano v City of New York, 182 AD3d 491, 491 [1st Dept 2020] citing Applewhite v Accuhealth, Inc., 21 NY3d 420, 425–426 [2013]). However, when “[a] government entity performs a purely proprietary role” – i.e., “when its activities essentially substitute for or supplement traditionally private enterprises” (Connolly v Long Island Power Auth., 30 NY3d 719, 727 [2018], quoting Turturro v City of New York, 28 NY3d 469, 478 [2016]) – then it will be “subject to suit under the ordinary rules of negligence applicable to nongovernmental parties” (Applewhite v Accuhealth, Inc., 21 NY3d 420, 425 [1st Dept 2013]; see also R.K. by Fatmir K. v City of New York, 200 AD3d 584 [1st Dept 2021]).

The dispositive question, then, is whether the NYPD’s placement of metal barriers was an exercise of the City’s governmental function or a proprietary function. As a rule, the NYPD’s

placement of metal barriers in connection with managing pedestrian and vehicular traffic is a governmental function (See Devivo v Adeyemo, 70 AD3d 587 [1st Dept 2010]). Plaintiff argues that the NYPD's failure to immediately remove the metal barriers after the Women and Allies March was a proprietary act. This argument is without merit. The City's exercise of discretion in carrying out a governmental function – the timing of the placement of barricades for traffic control – does not turn a governmental function into a proprietary one, even if that exercise of discretion is negligent (Id. [NYPD "officers' alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of public safety"]; see also Alvarez v Beltran, 121 AD3d 488 [1st Dept 2014] and Shands v Escalona, 44 AD3d 524 [1st Dept 2007]).

A recent decision in New York County Supreme Court, Ross v City of New York, 2021 WL 2030379, *2 (Sup Ct, NY County 2021) presents a compelling application of this principle. The plaintiff in Ross sued the City for injuries allegedly sustained after tripping over a metal barrier and argued that because the NYPD barricades were put in place four days before their intended use – the Thanksgiving Day parade – they were not performing a governmental function at the time of plaintiff's accident. The Ross court disagreed, noting that "[t]he fact that the City placed these barricades for the purposes of traffic/crowd control describes a quintessential government function" and therefore "to analyze whether the barricades were placed prematurely would be an analysis of the discretionary [governmental] function" (Ross v City of New York, 2021 WL 2030379 [Sup Ct, NY County 2021]). The same rationale applies to the City's alleged delay in removing the barriers at issue here.

In light of the foregoing, it is

ORDERED that the City’s motion pursuant to CPLR § 3211(a)(7) and 3212 to dismiss the complaint as against it is granted and the complaint is hereby dismissed in its entirety as to the defendant the City of New York; and it is further

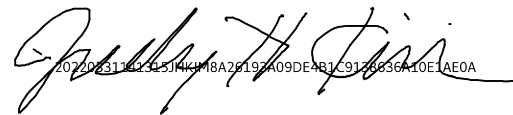
ORDERED that within twenty days of entry, the movant shall serve a copy of this order with notice of its entry upon all parties and upon the Clerk of the Court (60 Centre St., Room 141B) and the Trial Support Office (60 Centre St., Rm. 158M) in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on this court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety as against defendant the City of New York and to amend the court’s records to reflect the change in the caption herein; and it is further

ORDERED that the Clerk of the Court is directed to amend the caption to remove Lyubov Veksler as a plaintiff and Triomphe Restaurant Corp. and Jean-Georges Management LLC as defendants; and it is further

ORDERED that since the City is no longer a party to this action, the Trial Support Office shall reassign this action to the inventory of a non-City Part.

3/31/2022
DATE



JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: