

Rittberg v Levy

2022 NY Slip Op 31124(U)

April 8, 2022

Supreme Court, New York County

Docket Number: Index No. 151957/2020

Judge: Judy H. Kim

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

-----X

ELLEN RITTBERG,

Plaintiff,

- v -

DANIEL LEVY, ADRIENNE M. WARD, WBH EAST
HAMPTON LLC, THE CITY OF NEW YORK

Defendants.

-----X

INDEX NO. 151957/2020

MOTION DATE 7/7/21

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 63, 65, 70, 71, 72, 73, 74

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 66, 67, 68, 69

were read on this motion for SUMMARY JUDGMENT.

Plaintiff Ellen Rittberg commenced this action on February 24, 2020, alleging that on September 1, 2019, she sustained injuries after tripping on a raised sidewalk flag adjacent to 114 and 116 East 10th Street, New York, NY and asserting negligence claims against: (1) the owners of 116 East 10th Street (the "Building"), Daniel Levy and Adrienne M. Ward (collectively, the "Individual Defendants"); (2) the owner of 114 East 10th Street, WBH East Hampton, LLC; and (3) the City of New York (the "City") based upon their alleged failure to maintain and repair the sidewalk flag over which plaintiff tripped (NYSCEF Doc. No. 1 [Compl., ¶¶16, 20, 31, 43-44, 51]).

On June 22, 2020, the City and WBH East Hampton LLC interposed answers asserting, as relevant here, cross-claims against the Individual Defendants for indemnity and contribution.

(NYSCEF Doc. Nos. 4 [WBH East Hampton LLC Answer at ¶¶10-12] and 5 [City Answer at ¶11]).

In motion sequence 001, the Individual Defendants move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing this action as against them. Plaintiff and the City oppose the Individual Defendants' motion. In motion sequence 002, plaintiff cross-moves, conditionally, for summary judgment against the City if the Court grants the Individual Defendants' motion for summary judgment. Motion sequence 001 and 002 are hereby consolidated for disposition.

DISCUSSION

“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” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). The Individual Defendants have satisfied this burden by establishing that they are exempt from liability pursuant to Administrative Code of the City of New York §7-210. That provision states, as relevant here, that:

Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This 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.

(Administrative Code §7-210[b] [emphasis added]).

In support of their motion, the Individual Defendants submit a Certificate of Occupancy for the Building dated July 13, 1964 stating that the Building is a two-family residence (NYSCEF

Doc. No. 30 [Certificate of Occupancy]) as well as affidavits attesting to their full-time residence in the Building since 1997 and 1998, respectively, as well as the fact that the only other apartment in the Building was occupied by another family before, during, and after the date of plaintiff's accident (NYSCEF Doc. Nos 27 [Levy Aff. at ¶7, 10-11] and 28 [Ward Aff. at ¶7, 10-11]). The Individual Defendants' affidavits further state that neither they nor anyone on their behalf ever performed any maintenance or repairs to the sidewalk area where plaintiff claims she fell prior to the alleged date of accident, nor did they ever hire anyone to do such work on their behalf prior to the accident (NYSCEF Doc. Nos. 27 [Levy Aff. at ¶21] and 28 [Ward Aff. at ¶21]).

In addition, the Individual Defendants submit copies of Levy's email communications with representatives of the New York City Parks Department about the sidewalk flag at issue. Specifically, on October 24, 2018, Levy emailed the Parks Department stating that

On September 20, I received the welcome news via your notice that work on my sidewalk had been approved and would commence "within a few days." A month later, I have not seen any work done on my block or on Stuyvesant Street, where one of my neighbors received a similar notice. Would you let me know what the status of this repair is, please?

Levy received a response on November 2, 2018 from Amanda of the Parks Department Trees & Sidewalks Program, stating that

Our contractor is still coming to make repairs but they only have a few sites open in Manhattan at a time. We are looking to repair as much of Manhattan as possible before Thanksgiving. After Thanksgiving we will not be opening up any new sites until the beginning of 2019. In other words, if repairs do not begin by Thanksgiving they will not begin through the holiday season. I cannot say when the contractor will be at your property but that is the status of Manhattan right now.

Levy replied on April 8, 2019, that:

Our sidewalk is now even more dangerous after that freak storm during the winter that destroyed so many trees on our block and in the neighborhood. Our big tree must have been slightly uprooted and is now angling more into the street...that means its roots are pushing up the sidewalk, very noticeably higher than before the

winter. I am really concerned about this and hope that, now that the weather is better, the contractor can expedite dealing with the tree. I would hate for the tree to have to be removed but seeing its increased incline has me worried about it.

On April 8, 2019, Levy received a response from Andres, a Trees & Sidewalk Forester from the Parks Department, stating that

Repairs in Manhattan are scheduled to resume on April 15. Your property is on the list for repairs and it should be done before the end of May. The conditions of the tree will be evaluated when the repair is going to be done.

(NYSCEF Doc. No. 32).

Taken together, the foregoing establishes that the Individual Defendants are exempt from liability pursuant to Administrative Code §7-210(b) (See e.g., Hernandez v Ortiz, 165 AD3d 559 [1st Dept 2018]; see also Castro v Rodriguez, 176 AD3d 1031, 1032 [2d Dept 2019]).

In opposition, the plaintiff submits Property Tax Bill Quarterly Statements for the Building (“Quarterly Statements”) for 2009 through 2012 and note that these Quarterly Statements list Levy’s mailing address as 230 East 9th Street, New York, New York (NYSCEF Doc. No. 49). They argue that these documents contradict the Individual Defendants’ claim that they have lived at the Building continuously since 1997 and 1998 and therefore call the entirety of the Individual Defendants’ affidavits into question, making summary judgment inappropriate since the Individual Defendants have not been deposed as to the issue of their residence. The Individual Defendants submit reply affidavits disputing the accuracy of the mailing information listed on the Quarterly Statements submitted by plaintiff and reiterating that they resided at the Building continuously and regularly since 1997 and 1998. The Individual Defendants also submit Quarterly Statements for the Building from 2018 and 2019 indicating their mailing address as 116 East 10th Street.

Plaintiff and the City have failed to raise a triable issue of material fact. The Quarterly Statements submitted by plaintiff create, at most, a question of fact as to whether the Individual

Defendants lived at the Building from 2009 to 2012. However, where the Individual Defendants lived during that period is not material to the Individual Defendants' defense at the center of their motion for summary judgment, i.e., that they owned and occupied the Building at the time of plaintiff's accident in 2019. Neither does the Court credit plaintiff's argument that the discrepancy in the mailing address in the 2009-2012 Quarterly Statements calls into question the entirety of the Individual Defendants' affidavits, including their statements about where they lived in 2019. Even assuming, arguendo, that it did create such a question, the Individual Defendants have resolved any such question through their submission of Quarterly Statements from 2018 and 2019¹ which corroborate their sworn statements that they occupied the Building during this period.

In light of the foregoing, the Individual Defendants' motion for summary judgment dismissing this action and all cross-claims against them is granted, and the Court now turns to plaintiff's cross-motion for summary judgment against the City.

To obtain a grant of summary judgment in this negligence action against the City, plaintiff bears the burden to establish that: (1) defendant owed a legal duty to plaintiff; (2) defendant breached this breach duty and (3) plaintiff suffered injuries as a proximate cause of said breach (See e.g. P.W.B. Enterprises, Inc. v Moklam Enterprises, Inc., 221 AD2d 184, 185 [1st Dept 1995]).

¹ While this material was submitted on reply, it directly responds to issues raised in the opposition to the Individual Defendants' motion and therefore is appropriate to consider on this motion (See e.g., Perez v Beach Concerts, Inc., 154 AD3d 602, 602 [1st Dept 2017]). In addition, the Quarterly Statements at issue are public records available on the Automated City Register Information System ("ACRIS") website of the Office of the City Register, New York City Department of Finance of which the Court may take judicial notice (See 141 Sunnyside LLC v M. Zoarez, Inc., 41 Misc 3d 1224(A) [Sup Ct, Kings County 2013] citing, *inter alia*, LaSonde v Seabrook, 89 AD3d 132, 137 [1st Dept 2011]) and, as such, their consideration does not present any prejudice to plaintiff or the City. The Court further notes that neither plaintiff nor the City ever sought to submit a sur-reply in response to the Individual Defendants' submissions on reply (See Hereford Ins. Co. v Vazquez, 158 AD3d 470, 471 [1st Dept 2018]).

Plaintiff has established that the City owed her a legal duty to maintain the subject sidewalk abutting 116 East 10th Street. Both plaintiff and the City agree that the subject sidewalk flag abutted 116 East 10th Street. As the City's counsel notes, "[p]laintiff's allegations, her testimony at her hearing held pursuant to § 50-h of the Administrative Code of the City of New York ... and the photographs from her 50-h hearing consistently identify the sidewalk abutting 116 E. 10th Street, as the situs of the alleged incident ... [and are] sufficient to establish that the alleged incident occurred on the sidewalk abutting 116 E. 10th Street" (NYSCEF Doc. No. 67 [Bower Affirm. in Opp. at ¶13] [emphasis added]). While Administrative Code §7-210 generally "absolve[s] the City from tort liability for failure to maintain public sidewalks ... and ... shift[s] liability to abutting property owners" (Puello v City of New York, 35 AD3d 294, 294 [1st Dept 2006]; see also Xiang Fu He v Troon Mgt., Inc., 34 NY3d 167, 170 [2019]), in this case the owners of 116 East 10th Street are, as discussed above, exempted from tort liability by Administrative Code §7-210(c) and any liability for plaintiff's injuries therefore rests with the City.

Plaintiff has also established a breach of the City's duty through her GML §50-h testimony and photographs and the undisputed affidavit of her expert, Professional Engineer Himad Beg (NYSCEF Doc. No. 48 [Beg Aff., ¶¶4-5, 12]), stating that the subject sidewalk flag was raised one to three inches in contravention of Administrative Code §7-210 (See Tropper v Henry St. Settlement, 190 AD3d 623 [1st Dept 2021] [plaintiff's motion for summary judgment granted based on plaintiff's 50-h testimony, photos from hearing, and evidence of City's notice to defendant of defective sidewalk sufficient to establish plaintiff's prima facie case for summary judgment]).

Finally, plaintiff has established that the City's liability is not barred by Administrative Code §7-201(c). That provision states that

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any ... sidewalk ... being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice ..., or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe

(Administrative Code §7-201[c][2] [emphasis added]).

The City does not dispute that the necessary written acknowledgement is established by Levy's emails with the New York City Parks Department regarding the subject sidewalk flag – the authenticity of which are undisputed – which were submitted in connection with the Individual Defendants' motion (See Bruni v City of New York, 2 NY3d 319, 325 [2004] [“a written statement showing that the city agency responsible for repairing a condition had first-hand knowledge both of the existence and the dangerous nature of the condition is an ‘acknowledgement’ sufficient to satisfy the Pothole Law”]).

The only argument raised by City in opposition to plaintiff's motion is that the Quarterly Statements submitted in opposition to the Individual Defendants' motion for summary judgment create an issue of fact as to whether the Individual Defendants occupied 116 East 10th Street at the time of plaintiff's accident, calling into question their exemption from liability under Administrative Code §7-210(c) which precludes a grant of summary judgment for plaintiff here. This argument has already been rejected, supra. Accordingly, “[s]ince the City had notice of a defect and failed to cure it, despite having an opportunity to do so, plaintiff's motion for partial summary judgment on the issue of liability [must be] granted” (Sacco v City of New York, 92 AD3d 529, 529-30 [1st Dept 2012]).

In light of the foregoing, it is

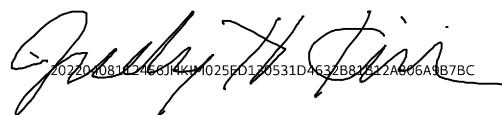
ORDERED that the motion by defendants Daniel Levy and Adrienne M. Ward for summary judgment dismissing this action and all cross-claims against them is granted and they are hereby dismissed; and it is further

ORDERED that plaintiff's cross-motion for summary judgment against the City as to liability is granted, and the issues of apportionment and damages shall be determined at the trial of the matter; and it is further,

ORDERED that within ten days of entry, plaintiff 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 accordingly.

This constitutes the decision and order of the Court.



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JUDY H. KIM, J.S.C.

4/8/2022
DATE

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: