Martinez v Manhattan Land Trust
2022 NY Slip Op 31834(U)
June 8, 2022
Supreme Court, New York County
Docket Number: Index No. 155308/2018
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** ***Justice*** **PART** **62**

---X

Nancy Martinez as Administrator for the personal Injuries sustained on July 18th, 2017 by MILDRED MALDONADO, deceased,

Plaintiff,

- v -

THE MANHATTAN LAND TRUST, CITY OF NEW YORK,

Defendants.

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INDEX NO. 155308/2018

MOTION DATE 07/24/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

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

The complaint in the underlying action alleges that on July 18, 2017, Mildred Maldonado tripped and fell due to a defect on the sidewalk in front of the park known as "Parque De Tranqulidad," located at 314-318 East 4th Street, between Avenue C and Avenue, D, in the County, City, and State of New York.

On or around August 28, 2020, plaintiff's counsel reported that Mildred Maldonado ("Maldonado") had died on July 20, 2019, and that counsel was in the process of having an Administrator appointed for her estate. Subsequently, this action was stayed by order of the undersigned dated October 28, 2020 and May 6, 2021.

On October 29, 2021, the stay expired and no application was made to extend the stay. In a letter to the court dated November 1, 2021 plaintiff's counsel reported that Nancy Martinez had been appointed Administrator of the Estate of Mildred Maldonado, and that an Amended Summons and Amended Complaint had been served and filed.

Now pending before the court is Motion #003, wherein defendant THE CITY OF NEW YORK (the "City") seeks an order, pursuant to CPLR 3212, granting summary judgment in favor of the City, dismissing the complaint, and all cross-claims against the City. This motion was originally filed on July 24, 2020. Opposition papers by co-defendant The Manhattan Land Trust (the "Trust") were filed on August 25, 2020, and plaintiff's opposition papers were filed on August 27, 2021. The City filed a Reply on August 28, 2021.

By order dated November 23, 2021, (NYSCEF Document #93), this court granted leave for each party, at his or her election, to submit, to the court, a letter update and any supplemental filings. Such letters were to have been filed on or before December 15, 2021.

As of December 20, 2021, no such filings had been made. In response to a courtesy email sent by the court, counsel for the plaintiff and counsel for the City each filed a letter (NYSCEF Documents #94 and #95, respectively) indicating that their clients rested on their previous submissions. As of today, counsel for the Trust had not filed any letter to the court. Accordingly, Trust is presumed to be resting on its previous submissions.

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]).

<u>City's *prima facie* case</u>

In support of its motion, the City argues that the pleadings, testimony, and photographs consistently identify the sidewalk located in front of 314-318 East 4th Street, New York, New York, as the location of Maldonado's alleged accident. The City argues that it is not liable for Maldonado's s injuries because the City is neither the record owner of 314-318 East 4th Street, nor is the actual owner of 314-318 East 4th Street exempt from the liability shifting provision of Section 7-210 of the Administrative Code of the City of New York. Furthermore, the City argues, that it did not cause or create the alleged defective condition that caused Maldonado's accident, and the City did not derive a special use from the subject sidewalk.

In support of its argument that the City is not the record owner of the subject property, the City submitted the sworn Affidavit of David C. Atik, which provides, in part:

> 1. I am employed by the City of New York, Department of Finance ("Finance"). My duties and responsibilities include responding to Freedom of Information Law ("FOIL") requests, and complying with and responding to subpoenas and other demands for information concerning Finance's various property records.
>
> 2. In the operation of its statutory mandate, Finance maintains and operates the Property Tax System ("PTS") database. The information contained in the database includes property ownership information and building classification information. The information can be accessed in the database for property located within the City of New York by using either the property's address or the Borough, Block and Lot number.
>
> […]
>
> 4. At the request of the Office of the Corporation Counsel, I conducted a search of the PTS database for records relating to 314-318 East 4th Street, New York, New York. Said address is located at Block 373 and Lots 10,11, and 12 for the County of New York.
>
> 5. The search revealed that, on July 18, 2017, the City of New York was not the owner of this property.
>
> 6. Additionally, the search results show that the property was classified as Building Class V1 (vacant land), and not as a one-, two-, or three-family solely residential property.

In support of the City's argument that it did not cause or create the defect at the subject location, the City submitted the sworn affidavit of Gabriel Herman, a DOT records searcher, (NYSCEF Document #46), who states that he personally conducted a search for permits, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the sidewalk located East 4th Street between Avenue C and Avenue D (including the side of 314-318 East 4th Street, New York) for the time period of two years prior to and including July 18, 2017, the date of plaintiff's incident. 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 sidewalk condition alleged to have caused Maldonado's accident.

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.*

Here, there is no dispute that the City is not the record owner of 314-318 East 4th Street. Based on the above evidence produced by the City, this court finds 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

In opposition, Maldonado argues that the City's motion should be denied as procedurally defective because the City failed to attach their Answer to their motion, and the City's witness, Mr. Herman, did not swear to the truth and accuracy of the information conveyed in his Affidavit.

In opposition, defendant the Trust also argues that the City's motion should be denied, for the reasons stated by Maldonado. The Trust further argues that Mr. Herman's search was improperly limited to the two years prior to and including July 18, 2017, the date of Maldonado's accident. Additionally, the Trust argues that the City's motion should be denied, because the City employed contractors to perform work on the sidewalk, to occupy the sidewalk and to work in the area where the accident occurred. Finally, the Trust argues that this motion is premature because depositions have not been held and discovery has not been provided by the City.

With respect to the argument that the City's motion should be denied as procedurally deficient because the City failed to attach their Answer to their motion, CPLR 3212(b) provides, in relevant part, that "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions."

Here, the City attached an Affidavit of Service of Answer, as well as the Notice of Claim, the Summons and Complaint, the Trust's Answer, the Bill of Particulars, and 50-h Testimony. It is undisputed that the City's Answer in this case had been properly served on the parties, filed with the court, and is part of the record in this case. Importantly, none of the parties, here, argue that they are prejudiced by the City's alleged failure to again attach a copy of the Answer to its motion papers. Accordingly, this court declines to deny the City's motion on this grounds.

With respect to the argument that Mr. Herman did not swear in his Affidavit as to the truth and accuracy of the information conveyed therein, this argument is belied by the record, as the Affidavit prominently states on its face: "GABRIEL HERMAN, being duly sworn, deposes and says [...]."

With respect to the argument that the City employed contractors to perform work on the sidewalk, occupy the sidewalk and work in the exact area "where the accident occurred," this claim too, is belied by the record, which indicates that the only work performed directly by the City or by a City agency was performed under Permit Number M01-2017011-C49 (NYSCEF Document #45, pages 75-77 of 196). This permit was issued to the New York City Department of Environmental Protection for the purpose of conducting repairs "On Street: Avenue D." In contrast, plaintiff has consistently maintained that her accident occurred in front of the park known as "Parque De Tranqulidad," located at 314-318 East 4th Street.

With respect to the argument that Mr. Herman's search was improperly limited to the two years prior to and including July 18, 2017, (the alleged date of Maldonado's accident), such argument is contrary to the record. The Case Scheduling Order in this case, (NYSCEF Document #19), states "This PC order to fully adopt and incorporate all provisions of the Part 62 DCM Case scheduling order, specifically section 7 (d) as it relates to the Department of

Transportation…". The referenced Part 62 DCM Case scheduling order is the Uniform Order used in City cases, which states, in relevant part:

> 7(d) The City of New York and/or other defendants represented by Corporation Counsel, if any, shall provide the following Additional Disclosure to all parties within 90 days from the date of this Order, subject to the date and location specified in the notice of claim:
>
> **Trip and Fall Cases (Department of Transportation):**
> i. Applications for permits and permits for **2 years prior to, and including, the date of occurrence;**
> ii. Cut forms, repair orders and repair records for **2 years prior to, and including, the date of occurrence;**
> iii. Violations issued for **2 years prior to, and including, the date of occurrence**;
> iv. A copy of the title and signature pages, and insurance declaration sheets and/or certificates, for all contracts in effect for **two years prior to, and including, the date of occurrence;**
> v. Contracts and all related contract documents (i.e. progress reports) for **two years prior to, and including, the date of occurrence** will be made available for inspection and copying at either the Office of the Corporation Counsel designated by said Counsel, or the appropriate City agency, upon a mutually convenient appointment, but in no event more than 90 days hereafter or after a subsequent request for same by plaintiff;
> vi. Complaints made for **2 years prior to, and including, the date of occurrence**;
> vii. A copy of the most recent Big Apple Pothole and Sidewalk Protection Corporation map filed for the area in issue and, if the incident at issue occurred six months or less after the filing of the most recent such map, then the City shall also produce the last such map filed before the most recent such map for that location.
> (emphasis added).

Further, as the City properly argues, the First Department has consistently held that a search for two years prior to and including the date of the accident is sufficient to establish a *prima facie* case. *See, e.g.* Elstein v City of New York, 209 AD2d 186 (1st Dept 1994) ("Here, the City came forward with proof that it had not been given any prior written notice of the alleged defective condition and that no work construction or repair had been performed in the nearly *two-year period* preceding the date of the incident […] Under these circumstances, the IAS Court properly granted the City's cross-motion for summary judgment dismissing the complaint"); Hued v City of New York, 170 AD3d 571 (1st Dept 2019) ("The City established that it lacked prior written notice of

the subject condition by submitting affidavits by record searchers employed by the Department of Transportation and nonparty Department of Environmental Protection (DEP) concerning the searches they conducted of the records in their respective agencies' possession, which showed that the City received no written complaints about the subject sunken catch basin in the *two years* preceding the day of plaintiff's accident"); Rizzo v City of New York, 178 AD3d 503 (1st Dept 2019) ("Defendants also made a *prima facie* showing that they did not cause or create the alleged defect by submitting their deposition testimony denying that they attempted to repair the area before the accident and the deposition testimony of codefendant City of New York's witness that the applicable records for two years prior to and including the accident date for the property were searched and no permits for sidewalk repairs were found"); Kovel v Glenwood Mgt. Corp., 200 AD3d 460 (1st Dept 2021) ("In its motion for summary judgment, defendant relied on the following evidence: plaintiff's description of the border as green, smooth and approximately three inches high, plaintiff's deposition testimony […] and a record search by the New York City Department of Transportation finding no violations concerning the tree well or its border in the *two years* preceding the accident. This evidence was sufficient to *prima facie* establish that the tree well border did not constitute an inherently dangerous condition") [emphasis added].

Finally, with respect to the argument that the City's motion is premature, the court finds the arguments made by the Trust that further discovery may lead to relevant evidence, are "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" which, as noted above, are insufficient to defeat a *prima facie* case for summary judgment. *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).

Accordingly, it is hereby:

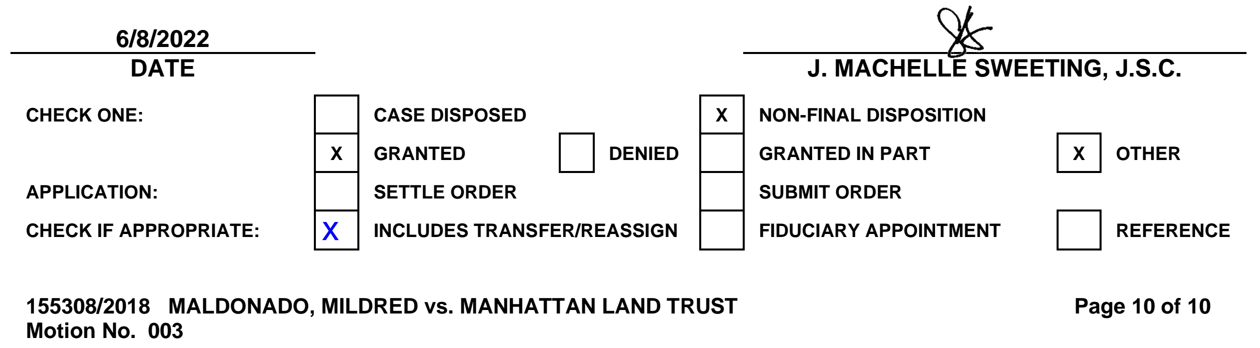
ORDERED that the City's motion for summary judgement dismissing the complaint and all cross-claims against the City, with prejudice, is GRANTED; and it is further

ORDERED that the caption shall be amended 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).



6/8/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[X]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE