

Cruz v Heights Broadway LLC
2022 NY Slip Op 31973(U)
June 23, 2022
Supreme Court, New York County
Docket Number: Index No. 161711/2019
Judge: J. Machel Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

YOLANDA CRUZ,

Plaintiff,

- v -

HEIGHTS BROADWAY LLC, THE CITY OF NEW YORK,
STAPLES THE OFFICE SUPERSTORE EAST, INC., 185TH
OPERATING LLC,

Defendants.

-----X

HEIGHTS BROADWAY LLC

Plaintiff,

-against-

185TH OPERATING, LLC, STAPLES THE OFFICE
SUPERSTORE EAST, INC.

Defendants.

-----X

INDEX NO. 161711/2019

MOTION DATE 09/21/2021,
10/18/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595475/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 144, 145, 146, 147, 148, 156, 157, 162, 167

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 138, 139, 140, 141, 142, 143, 149, 150, 151, 152, 153, 154, 155, 158, 159, 160, 161, 163, 164, 165, 166, 168, 169

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

This is an action to recover monetary damages for personal injuries sustained by plaintiff YOLANDA CRUZ, who alleges that on March 5, 2019, at approximately 6:45 am, she slipped and fell on a patch of ice on the sidewalk abutting 4320 Broadway (the “premises”), in the County, City and State of New York.

Named as defendants in this case are: THE CITY OF NEW YORK (the “City”); HEIGHTS BROADWAY LLC (the “Owner”), which is the owner of the premises; STAPLES THE OFFICE SUPERSTORE EAST, INC. (“Tenant Staples”), which is a tenant at the premises; and 185TH OPERATING LLC (“Tenant Garage”) which is also a tenant at the premises. It is undisputed that at the premises, Tenant Staples operated a retail store and Tenant Garage operated a parking garage.

Pending now before the court are two motions:

The first is Motion #002 filed by Tenant Garage seeking an order, pursuant to CPLR 3212, granting summary judgment to Tenant Garage and dismissing all of plaintiff’s claims and defendant Owner’s cross-claims against Tenant Garage, on the basis that Tenant Garage is not liable to plaintiff or to the Owner as a matter of law.

The second is Motion #003 filed by plaintiff seeking an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment against the defendants, as there are no triable issues of fact regarding liability.

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]).

Tenant Garage's Motion (#002)

In its motion, Tenant Garage argues that responsibility for plaintiff's accident falls on the City, as plaintiff had testified that the cause of her fall was ice that resulted from a leaking fire hydrant on the sidewalk where she fell, near the corner of 184th Street and Broadway. Plaintiff had testified that she observed the hydrant leaking the day before her accident, and photographs taken of the subject fire hydrant on 184th street on March 11, 2019 show the hydrant leaking water onto the sidewalk.

Tenant Garage also argues that as the owner of the premises, Heights Broadway, LLC was responsible by statute for the removal of snow and ice on the sidewalks abutting the premises, and that the lease agreement between the Owner and Tenant Garage does not require Tenant Garage to remove any snow and/or ice from the sidewalks abutting the premises.

Tenant Garage further argues that responsibility for the sidewalk falls on Tenant Staples, as the lease between the Owner and Tenant Staples explicitly provides that it is the responsibility of Tenant Staples to "keep the sidewalks immediately adjacent to the Premises reasonably free of snow, ice, dirt and debris, and repair any damage to same caused by Tenant [Staples]".

In opposition, plaintiff, Owner and Tenant Staples argue that regardless of what the written leases provide, Tenant Garage, which managed and operated a 24-hour/7 days per week parking garage at the premises, had for years voluntarily assumed the actual responsibility of clearing the sidewalk area of snow and ice by routinely cleaning, shoveling and salting the sidewalk. They further argue that because Tenant Garage undertook these affirmative acts, issues of fact exist as to whether Tenant Garage was responsible for plaintiff's accident by failing to properly clear the sidewalk, and issues of fact exist as to whether Tenant Garage's clearing methods actually contributed to or created the condition that caused plaintiff's fall.

In support of their arguments, plaintiff, Owner and Staples attached, *inter alia*, transcripts from the EBTs of Jose D. Barreto, who was a manager at the garage (the “Garage Manager”)(transcript at NYSCEF Document #120); Octavio Zarate, who was an operations manager at the Staples store (the “Staples Manager”) (transcript at NYSCEF Document #121); and Richard Battaglia, who was a regional property manager for Staples (transcript at NYSCEF Document #122). Plaintiff, Owner and Staples argued that the testimony in the transcripts show that prior to the subject accident, Tenant Garage regularly cleared snow and ice in the area where plaintiff fell, whereas Staples did not. They also maintain that that record shows that the Garage Manager had actual notice in the days before the fall that the subject fire hydrant was leaking, as the Garage Manager testified that he noticed the subject hydrant leaking days before the incident. They contend that the record is devoid of any evidence that any Staples employee had any such notice.

In Reply, Tenant Garage argues that to the extent that it cleared the sidewalk, it was only in the area *east* of the tree well on 184th Street, and the area where plaintiff fell was in the area *west* of the tree well.

Plaintiff’s Motion (#003)

In her motion, plaintiff argues that at the time of the incident and prior thereto, there was water leaking from a fire hydrant a few feet away from where she slipped and fell. According to a NYC Department of Environmental Protection report exchanged in discovery, (NYSCEF Document #119), on February 27, 2019 at 9:15 a.m., prior to plaintiff’s accident, a 311 call was made to the New York City Department of Environment Conservation stating that the hydrant on 184th Street near Broadway was leaking. A work order was generated, and two agents of the City

were sent to the site on February 28, 2019 to address the issue. Nevertheless, the issue was not addressed and the hydrant continued to leak.

Plaintiff contends that immediately after she fell, while she was still on the ground, she took a photograph of the leaking fire hydrant (NYSCEF Document #128). Later that evening, plaintiff's daughter returned to the accident location and took a video of the fire hydrant, which was still leaking. Plaintiff also argues that the certified National Oceanic and Atmospheric Administration weather records, (NYSCEF Document #141), show that there were cold temperatures and snow fall in the four days preceding plaintiff's accident, namely on March 1, March 2, March 3, and March 4, 2019. Plaintiff contends that there is no evidence on this record to contradict her testimony that she was caused to slip and fall by the hazardous icy condition, and that the condition was caused by the leaking fire hydrant, that was depicted in her photographs and video.

Specifically, with respect to the City, plaintiff argues that it had notice of the hazardous ice condition, and that it failed to properly close off the fire hydrant after performing maintenance on February 28, 2019. With respect to the Owner, plaintiff argues it had a non-delegable duty, pursuant to Section 7-210 of the New York City Administrative Code, to ensure that the sidewalk was cleared and to place warning signs in appropriate locations to warn pedestrians of any dangerous and hazardous slippery conditions on the sidewalk. With respect to Tenant Staples and Tenant Garage, plaintiff argues that as the lessees/tenants of the subject premises, they, too had a duty to clear the sidewalk area and to place warning signs in the appropriate location surrounding the slippery area. Lastly, with respect to Tenant Garage, plaintiff further argues that it failed to notify co-defendants of the leaking fire hydrant despite noticing the hazardous condition days prior to her accident.

In opposition, Tenant Garage made arguments similar to those it made in opposition to Motion #002, (detailed above), namely, that it had no legal duty to plaintiff and that any liability to plaintiff is attributable to the City, the Owner and Tenant Staples.

In its opposition papers, the City argued that it had notice of a leaking hydrant, but it inspected and repaired the condition the very next day. The City argued that the testimony of the City worker who repaired the hydrant, (transcript at NYSCEF Document #123), proves that the City addressed the issue of the hydrant properly, and that the hydrant may have been subsequently operated by the Fire Department, the Sanitation Department, private construction contractors, and ordinary citizens who have the necessary tools to open NYC fire hydrants. The City also argued that plaintiff's testimony that she slipped on a patch of "ice," raises a question as to whether the leaking hydrant directly caused or contributed to the ice. The City further argued that plaintiff failed to annex an expert affidavit showing that the leaking fire hydrant formed the ice that allegedly caused her accident, and that the patch of ice could have formed from the snow that fell in the days immediately before plaintiff's accident.

The Owner and Tenant Staples argued, first, in opposition to plaintiff's motion, that Tenant Garage had assumed the duty to clear the sidewalk and, second, that that the Administrative Code does not obligate either the Owner or Tenant Staples to clear ice that formed as the result of a leaking hydrant. They also argue that, unlike the City and Tenant Garage, neither the Owner nor Tenant Staples had any notice that a fire hydrant on the sidewalk was leaking.

Conclusions of Law

With respect to Tenant Garage's motion (#002) for summary judgment, this is DENIED. As noted above, summary judgment can only be granted when there is the absence of any material issue of fact. Here, as argued in the opposition papers, the testimony of the Garage Manager shows that Tenant Garage did routinely engaged in the undertaking of snow and ice removal, and salting the sidewalk. Although Tenant Garage argues that it only cleared the sidewalk in the area *east* of the tree well on 184th Street, and not in the area *west* of the tree well, where plaintiff alleged she fell, this argument is contradicted by the testimony of the Staples Manager, who averred that shows that Tenant Staples believed that the area where plaintiff fell was within the area that was regularly cleared by Tenant Garage. There remains on this record, issues of fact as to whose duty it was to maintain the specific area of the sidewalk where plaintiff fell.

Tenant Garage also argues that the Garage Manager is a fact witness, and his testimony cannot be used to establish whether a legal duty exists under these circumstances. The court finds this argument to be unavailing. Even if, *arguendo*, Tenant Garage had not assumed a legal duty to clear the sidewalk, it is undisputed that Tenant Garage did undertake regular cleaning and snow removal of some area of the sidewalk surrounding the premises. Therefore, there remains an open question as to whether any of the prior maintenance performed by Tenant Garage had created, caused or exacerbated any defect in the area where plaintiff fell. For these reasons, Tenant Garage's motion for summary judgment is DENIED.

As to plaintiff's motion (#002) for summary judgment as against all defendants, this motion is also DENIED.

Plaintiff's own weather reports show that there was snowfall in the area in the four days preceding plaintiff's accident. In the absence of an expert report, it is unclear on this record whether the patch of ice on which plaintiff claimed to have fallen was caused by the leaking fire hydrant or by melting snowfall. Further, the testimony from the City worker was that the hydrant was that although his personal memory was unclear, his written records were clear. He testified, "So if we said [in the written report that] we shut it, then we didn't see any water coming from the hydrant at that time, based on the report." The City worker also testified that there were other parties who had access to fire hydrants, including the sanitation department and private construction companies. Given these questions of fact, summary judgment cannot be granted with respect to the City.

With respect to the Owner, Tenant Garage and Tenant Staples, the City is correct that the papers submitted by these co-defendants "demonstrate confusion with respect to who is charged with cleaning snow and ice from the sidewalk at the subject location." Tenant Garage contends that the Owner, was responsible for snow removal operations and that Tenant Staples, pursuant to its lease, expressly agreed to remove snow, ice, dirt and debris from the sidewalk at the subject location. The Owner and Tenant Staples, in turn, argue that Tenant Garage had notice of the leaking fire hydrant and had assumed, over a period of years, a legal duty to remove snow and ice in the area where the fire hydrant was located. Summary judgement is denied, as there remain critical questions of fact as to who is charged with snow cleaning operations at the subject location, and whether snow and ice removal methods, or a lack thereof, could have contributed to the icy condition on the sidewalk where plaintiff's alleged incident occurred.

Conclusion

For all of the aforementioned reasons, it is hereby:

ORDERED that Tenant Garage’s motion (#002) is DENIED; and it is further

ORDERED that plaintiff’s motion (#003) seeking summary judgment is DENIED.

Any relief not expressly granted herein is also denied.

This is the Decision and Order of this court.

6/23/2022

DATE



J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE