

Gibson v City of New York
2022 NY Slip Op 32340(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 150116/2020
Judge: J. Machelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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ANNA GIBSON,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, NEW
YORK CITY DEPARTMENT OF TRANSPORTATION, 780
RIVERSIDE OWNER LLC, YMY MANAGEMENT CORP

Defendants.

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INDEX NO. 150116/2020

MOTION DATE 05/03/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

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

In a Decision and Order on Motion #002, dated November 10, 2021 (NYSCEF Document #40) this court denied, as premature, plaintiff’s motion for partial summary judgment against the Owner.

Pending now before the court is a motion in which The City Of New York, New York City Department Of Parks And Recreation, and the New York City Department Of Transportation (collectively, the “City”) seek an order pursuant to Civil Practice Law and Rules (“CPLR”) Section 3212, granting summary judgment to the City, on the grounds that, pursuant to Section 7-210 of the Administrative Code of the City of New York, the City had no responsibility to maintain the subject sidewalk and the City did not cause or create the alleged condition.

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]).

The City’s prima facie case

The City argues that they are not liable for plaintiff’s injuries, as they are not the record owner of the properties located at 780 Riverside Drive, and that the owners of those premises is not exempt from the liability shifting provision of Section 7-210. Furthermore, the City argues that they did not cause or create the alleged defective condition that caused plaintiff’s incident.

In support of their argument, the City attached the sworn Affidavit of David Atik, (NYSCEF Document #58), which states that he conducted a search of the New York City Department of Finance Property Tax System database for records relating to 780 Riverside Drive, New York, New York, located at Block 2134, Lot 22 in the County of New York. The search revealed that on March 7, 2019 the City of New York was not the owner of this property, and that the subject property was classified as Building Class D1 (elevator apartments), with 71 living units, and not as a one-, two-, or three-family solely residential property.

The City also argues that they did not cause or create the condition that allegedly caused the plaintiff’s accident. In support of their argument, the City attached the sworn Affidavit of Sherri Reid, (NYSCEF Document #57), which states that she personally conducted 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, contracts, complaints, and Big Apple Maps for the sidewalk located at Riverside Drive between West 155th Street and West 156th Street (the side which includes 780 Riverside Drive) in the County, City, and State of New York. Her search encompassed a period of two years prior to and including March 7, 2019, the date upon which plaintiff claims to have been injured.

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 that the City satisfied their *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.

Arguments in Opposition

In opposition, 780 Riverside Owner LLC and YMY Management Corp. (collectively, the “Owner entities”)¹ jointly argue that plaintiff’s 50-h testimony should not be considered and that the instant motion, like plaintiff’s prior motion, is premature. Plaintiff and the Owner entities both argue that the City should not have limited their records search to only a two year period and, that by doing so, the City failed to meet their burden in showing that they did not cause or create the subject defect.

Conclusions of Law

With respect to the argument that the City improperly limited their search, this argument is unavailing, as the Case Scheduling Order (NYSCEF Document #42) expressly limits the records search to the two-year period immediately preceding the accident. Further, as the City properly argues, the First Department has consistently held that a search of two years prior to and including the date of 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

¹ In Motion #002, plaintiff filed the motion only against defendant 780 Riverside Owner LLC, and such party was referred to as the “Owner.” In this motion (Motion #003), opposition papers were jointly filed by defendants 80 Riverside Owner LLC and YMY Management Corp., and such parties are referred to collectively as the “Owner entities.”

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 co-defendant 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 establish, *prima facie*, that the tree well border did not constitute an inherently dangerous condition") [emphasis added].

With respect to the transcript of plaintiff's 50-h hearing, plaintiff and the Owner entities argue that the City cannot use the transcript to bolster their motion because this court had previously determined that the transcript could not be used against the Owner entities. In Reply, the City argues that it can use the transcript against the Owner entities because the Owner entities did not assert cross-claims against the City and will not, therefore, be prejudiced if the transcript is considered by the court. The City's argument however, is misplaced.

As noted above, it is undisputed that the Owner entities were not present and did not participate at the 50-h hearing of plaintiff, and that the Owner entities were neither invited to, nor notified of, plaintiff’s hearing before it occurred. While the City had the opportunity to question plaintiff, the Owner entities did not have the same opportunity. Had the Owner entities been able to question plaintiff, they may have been able to produce evidentiary proof in admissible form sufficient to defeat the City’s *prima facie* case for summary judgment. Given this, the court finds that it would be prejudicial to the Owner entities to grant summary judgment to the City.

Conclusion

Accordingly, it is hereby:

ORDERED that this motion is denied as premature.

7/15/2022
DATE


J. MACHELLE SWEETING, J.S.C.

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