

Elliott v 69 W. 9 Owners Corp.
2022 NY Slip Op 32499(U)
July 27, 2022
Supreme Court, New York County
Docket Number: Index No. 158684/2019
Judge: J. Machelles 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

TRACY ELLIOTT, EDWARD KILKELLY,

Plaintiffs,

- v -

69 WEST 9 OWNERS CORP., CITY OF NEW YORK, NEW
YORK CITY DEPARTMENT OF PARKS AND
RECREATION, GREENWICH VILLAGE FISH CO., INC.
d/b/a CITARELLA ("Citarella"),

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for

JUDGMENT - SUMMARY

In the underlying action, plaintiff Tracy Elliot alleges that on October 26, 2018, she tripped and fell due to a raised uneven sidewalk in front of the premises located at 69 West 9th Street, New York, New York.¹

Pending before the court is a motion in which defendant The City of New York (the "City") seeks an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, granting summary judgment to the City and dismissing plaintiffs' complaint and all cross-claims against the City.

¹ Plaintiff Edward Kilkelly is the lawful spouse of plaintiff Tracy Elliott, and plaintiff Kilkelly alleges that as a result of the alleged accident, he was deprived of the services, society, companionship, consortium, aid, and support of his spouse.

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]).

Arguments Made by the Parties

In its motion, the City argues that it is not liable for plaintiff’s injuries as it is not the record owner of the property located at 69 West 9th Street, and that the owner of the premises is not exempt from the liability shifting provision of Section 7-210 of the Administrative Code of the City of New York. Furthermore, the City argues, it did not cause or create the alleged defective condition that caused plaintiff’s incident.

In support of its argument, the City submits the sworn affidavit of Henry Williams (NYSCEF Document #41) wherein Mr. Williams states, *inter alia*, that he is a paralegal who conducts record searches for the Department of Transportation for the City of New York (the “DOT”) and that he personally conducted a search of the electronic databases for 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 West 9th Street between Sixth Avenue (a/k/a Avenue of the Americas) and Fifth Avenue (side of 69 West 9th Street) (to include Bend, Christopher Street, and East 9th Street) in the County, City, and State of New York. This search encompassed a period of two years prior to and including October 26, 2018, the date upon which the plaintiff claimed to have been injured.

The City also submitted the affirmation of David C. Atik (NYSCEF Document #42) wherein Mr. Atik states, *inter alia*, that he is employed by the New York City Department of Finance ("Finance"), and that he personally conducted a search of the Finance database for records relating to 69 West 9th Street, New York, New York, specifically the individual condominium units located at Block 573, Lots 1005 through 1006 for the County of New York. He stated that the search of the records revealed that, on October 26, 2018, the City of New York was not the owner of the property, and that the property was classified as a condominium with multiple units including commercial units, and not as a one, two or three family solely residential property.

Finally, the City submitted the sworn affidavit of Sharon Lai (NYSCEF Document #44) wherein Ms. Lai stated, *inter alia*, that she was employed as an Assistant Records Officer by the Department of Parks & Recreation of the City of New York in the Office of the General Counsel and she personally conducted a search for complaints, service requests, inspections, work orders, Commissioner and Borough Commissioner Correspondence, handwritten inspections, inspection forms, Daily Work Sheets, Borough Forestry contract records, Tree Failure Incident Data Collection Forms, permit applications and permits, for the location at 69 West 9th street (Tree Point ID 580335), County, City and State of New York, for two years prior to and including October 26, 2018.

The City argues that the results of all these searches show that the City was not the record owner of the property located at 69 West 9th Street; that the owners of those premises are not exempt from the liability shifting provision of Section 7-210; and that the City did not cause or create the alleged defective condition that caused plaintiff's incident.

Opposition papers were filed by plaintiffs, and by defendant GREENWICH VILLAGE FISH CO., INC. d/b/a CITARELLA (“Citarella”). Plaintiffs argue that their own investigation, made via Google Maps, shows that “a prior repair was made to the accident location” and is “evidenced by the roped off area surrounding filler concrete in the Google progression photos of August, 2017, some 14 months prior to plaintiffs fall (NYSCEF Document #52, Exhibit 1). Plaintiffs also argue that the City’s motion is premature, “as depositions are necessary to flesh out the issue of who made the repair and who roped off the area.”

Citarella argues that even though the City is not the record owner of the accident location, the City is nonetheless liable because the accident location was part of a public bus stop, and the City continues to be responsible for maintaining any part of the sidewalk that is “within a designated bus stop location.” In support, Citarella submits photos that were previously sent by plaintiff’s counsel to all other counsel (NYSCEF Document #50) and photos that were offered into evidence during plaintiff’s 50-h hearing (NYSCEF Document #39).

In Reply (NYSCEF Document #56), the City argues that “Plaintiff’s incident is located on a sidewalk flag completely devoid of any signage” and “the at-issue condition is located on a sidewalk flag that is neither a bus stop nor a sidewalk flag with a bus sign.”

Conclusions of Law

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 it is not the record owner of the property located at 69 West 9th Street, and that the owner of the premises is not exempt from the liability shifting provision of Section 7-210 of the Administrative Code of the City of New York.

Importantly, however, the photos submitted by Citarella appear to show, on their face, that the alleged defect is located only a few feet from a public bus pole, and the City does not dispute Citarella’s argument that the City is responsible for maintaining public bus stops. Given this, the court finds that Citarella has raised an issue of fact that precludes the granting of summary judgment in the City’s favor.

Conclusion

For all of the aforementioned reasons, it is hereby

ORDERED that the City’s motion for summary judgment is DENIED.

<u>7/27/2022</u>			
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

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