

Sarracco v NYC Bike Share, LLC
2022 NY Slip Op 32649(U)
August 2, 2022
Supreme Court, New York County
Docket Number: Index No. 154028/2019
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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MICHELE SARRACCO,

Plaintiff,

- v -

NYC BIKE SHARE, LLC, ELK MAS 229 EAST 53RD
LLC,BIG B RESTAURANT ENTERPRISES, INC.,CITY OF
NEW YORK

Defendants.

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INDEX NO. 154028/2019

MOTION DATE 05/16/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125

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

Pending before the court is a motion by defendant the CITY OF NEW YORK (the "City") seeking an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, granting summary judgment in favor of the City and dismissing the complaint, and all cross-claims against the City. This court had previously issued a decision in this case on Motion #002 (NYSCEF Document #74).

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

The City argues that it is not liable for plaintiff’s injuries because it does not own the abutting property, and the property is not exempt from the liability shifting provision of Section 7-210 of the New York City Administrative Code. The City also argues that it did not have prior written notice of the alleged defect (the protruding bolt), and it did not cause or create the alleged defect.

In support of their argument, the City e attached the sworn Affidavit of David Atik, (NYSCEF Document #99), which stated that he conducted a search of the New York City Department of Finance Property Tax System database for records relating to 229 East 53rd Street, New York, New York. The search revealed that on December 15, 2018, the City of New York was not the owner of this property, and search results also show that the property was classified as Building Class C7 (walk-ups, over six families with stores), and not as one-, two-, or three-family solely residential property.

The City also attached the sworn Affidavit of Alison Boles, (NYSCEF Document #98), who is employed by the Department of Transportation of the City of New York ("DOT"). Ms. Boles stated 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, sidewalk violations, contracts, complaints, and Big Apple Maps for the sidewalk located at East 53rd Street between Second Avenue and Third Avenue (on the side of 229 East 53rd Street) in the County,

City, and State of New York, and that this search encompassed a period of two years prior to and including December 15, 2018, the date upon which the plaintiff claims to have been injured. The City argues that the results of this search show that the City did not receive prior written notice of the allegedly defective condition that caused plaintiff's incident, and that the City did not cause or create a defect at the subject location.

Opposition papers were filed by defendant Big B, defendant NYC Bike Share ("NYCBS") and plaintiff. None of the opposing parties disputed the City's arguments that the City does not own the abutting property, and that the property is not exempt from the liability shifting provision of 7-210. However, all of the opposing parties argue that the City's motion is premature, and that the City did not sufficiently demonstrate that it did not cause or create the alleged defect.

Specifically, NYCBS argues that the affidavit of Ms. Boles is not dispositive evidence that the City did not cause or create the defective sidewalk condition, and that her affidavit fails to establish whether notice of the defective condition may have been provided to the City by other methods not captured by its electronic database. NYCBS argues that further discovery is warranted to ascertain any acts and/or omissions by the City that may have caused or contributed to plaintiff's fall.

Plaintiff argues that a series of Google maps images (NYSCEF Documents #119, 121, 122, 123) show that a bike rack was installed at the subject location as recently as 2016, but that by 2017, the bike rack had been removed, leaving only the subject bolt protruding from the sidewalk. Plaintiff argues, in part:

7. All parties have denied ownership of the subject rack and bolt.

[...]

10. No defendants have been deposed. In the CITY's CSO response it states that the DOT's Street Furniture Unit has no record of installing the bike rack in the previous two years prior to the accident. The google photos show that the rack was installed earlier than 2009, thus a search is required, at least from the Street Furniture Unit and for work orders and permits for a period of time prior to May 2009 to see if the abutting building or CITY installed and controlled the bike rack.

Big B argued that the affidavits submitted by the City are wholly insufficient in addressing whether the City caused or created the condition. It argues, in part:

15. The self-serving affidavit of Alison Boles (*see* NYSCEF Doc. 98), an employee of the Department of Transportation of the City of New York, is not dispositive. Her affidavit does not state that she reviewed any records or even conducted a search of any paper records or electronic databases for installation or removal of any equipment, including bicycle racks on the sidewalk of New York City streets. The self-serving affidavit of Ms. Boles also does not state anywhere in the document that the co-defendant the CITY OF NEW YORK did not cause or create the alleged defective condition. Ms. Boles makes no statements regarding whether the CITY OF NEW YORK installed and/or removed the subject bicycle rack.

16. The affidavit of Ms. Boles also states she only conducted a search of the "pertinent electronic databases" for a period of two years prior to and including December 15, 2018, the date upon which the plaintiff claims to have been injured. Interestingly, Ms. Boles did not search any records to determine whether the CITY OF NEW YORK installed or removed the subject bicycle rack but only reviewed records related to permits, OCMC files, corrective action requests, notice of violations, inspections, contracts, maintenance and repair orders, sidewalk violations, resurfacing/milling records and Big Apple maps. Importantly, Ms. Boles did not even search any records prior to December 15, 2016 to determine whether the CITY OF NEW YORK installed or removed the subject bicycle rack. Ms. Boles also does not review any other databases to determine if the CITY OF NEW YORK had prior written notice of the allege defect. There is no mention of any search of 3-1-1 records. This is fatal to the CITY OF NEW YORK's summary judgment argument.

Conclusions of Law

The New York Court of Appeals held in Yarborough v City of New York, 10 NY3d 726 (2008), that “[w]here the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the rule - that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality.”

Here, as noted above, there is no dispute that the City does not own the abutting property, and that the property is not exempt from the liability shifting provision of 7-210. However, the City may still be liable if it affirmatively created the defect through an act of negligence.

In this case, plaintiff alleges that the defect that caused her to trip and fall was a protruding bolt on the sidewalk, and that said bolt originated from a bicycle rack that had been removed (see plaintiff’s EBT photos at NYSCEF Document #96). None of the defendants have been deposed as of yet, and none have admitted responsibility for the bolt in question.

Further, as the opposing parties argue, the affidavits submitted by the City address the issue of ownership and notice, but do not sufficiently address the issue of whether the City caused or created the alleged defect. Neither the affidavit of Ms. Boles nor the affidavit of Mr. Atik addresses the issue of whether the respective witnesses reviewed any records for installation or removal of any equipment, including bicycle racks, on the sidewalk. This court finds that the opposing parties must be afforded the opportunity to question the City witnesses as to the scope of their searches as they pertain to the installation or removal of any equipment, including bicycle racks, at the subject location. Accordingly, this motion is denied as premature.

Conclusion

It is hereby:

ORDERED that the City’s motion is denied as premature; and it is further

ORDERED that the City is given leave to refile this motion, at its election, after relevant discovery has been conducted.

8/2/2022
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