

Cheng v City of New York
2022 NY Slip Op 33087(U)
September 14, 2022
Supreme Court, New York County
Docket Number: Index No. 156588/2019
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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DAVID CHENG and LIZHEN BAO,

Plaintiffs,

INDEX NO. 156588/2019

MOTION DATE 7/19/2022

MOTION SEQ. NO. 004

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF BUILDINGS, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF WATER AND SEWER OPERATIONS and 277
PARK AVENUE, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to

DISMISS

On July 3, 2019, plaintiffs commenced this action against the City of New York, the New York City Department of Buildings, the New York City Department of Transportation, the New York City Department of Environmental Protection, and the New York City Department of Environmental Protection Bureau of Water and Sewer Operations (collectively, the "City") and 277 Park Avenue, LLC, asserting claims for negligence and loss of consortium stemming from David Cheng's alleged slip and fall on June 28, 2018 (NYSCEF Doc. No. 1 [Compl. at ¶¶13, 49-51]).

On December 3, 2018, Cheng testified at a General Municipal Law ("GML") §50-h hearing that it was heavily raining on the date of his fall (NYSCEF Doc. No. 70 [GML §50-h Tr. at p. 15]).

On that date, Cheng was walking along a segment of Park Avenue where, due to construction on the sidewalk in front of 277 Park Avenue, pedestrian traffic was diverted into a walkway on the road (Id. at p. 14). At the time, a large portion of this walkway in the road was “blocked” by a puddle left by the rain (Id. at ¶22). As the pedestrian walkway in the road was not wide enough to accommodate the flow of rush hour pedestrians in both directions, Cheng testified, and he, like “most of the people coming from north to south ... went onto the sidewalk” while “most of the people going south to north” remained on the walkway on the road (Id. at p. 23). Cheng testified that he slipped and fell on the wet metallic edge of the sidewalk (Id. at pp. 22, 24).

The City now moves, pursuant to CPLR §3211(a)(1) and (a)(7), for an order dismissing the complaint and all cross-claims against it, arguing that “[a]ny allegation the City caused, permitted, or allowed the walkway to be in a dangerous condition must fail, as, based on Plaintiff’s own testimony, his slip and fall was not caused by a dangerous or defective condition within the curb, but rather due to the curb being wet from the ongoing rain. The same is true as to any alleged repairs or failure to make repairs—as, based on Plaintiff’s testimony, there was no defective prior repairs, nor a need for repairs as there was no defect” (NYSCEF Doc. No. 64 [Igoe Affirm at ¶13]),

Plaintiffs and co-defendant 277 Park Avenue, LLC, oppose the motion, arguing that they have sufficiently alleged that the City’s negligence led to defects in the walkway forcing pedestrians on to the sidewalk and that defects in the sidewalk led to Cheng’s fall. They further argue that the motion is premature as further discovery is needed.

DISCUSSION

As a preliminary matter, the Court observes that the City “conflates the burdens of proof imposed by CPLR § 3211(a)(1) and (7) and CPLR §3212; utilizing CPLR §3211(a) (1) and (7) as the basis for dismissal while nevertheless making arguments and submitting proof more

appropriate to a motion for summary judgment pursuant to CPLR § 3212” (Preston v The City of New York, 2017 NY Slip Op 30539[U], 2-3 [Sup Ct, Bronx County 2017]). On this motion to dismiss pursuant to CPLR §3211, however, “the pleading is to be afforded a liberal construction” with the facts alleged in the complaint accepted as true and the plaintiffs accorded the benefit of “every possible favorable inference” (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [internal citations omitted]).

That branch of the City’s motion to dismiss pursuant to CPLR §3211(a)(7) is denied, as the complaint’s allegations state a claim for negligence (See e.g., Alba v The City of New York, 2008 NY Slip Op 32111[U] [Sup Ct, NY County 2008] [negligence action in which plaintiff alleged she was forced to detour into roadway where her foot was stuck between steel plates dismissed as to City pursuant to Administrative Code §7-201]). That branch of the City’s motion pursuant to CPLR §3211(a)(1) is also denied.

Under CPLR §3211(a)(1), “[d]ismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 [1st Dept 2014] [internal citations and quotations omitted]). “To be considered documentary” such evidence “must be unambiguous and of undisputed authenticity” (Toribio v 575 Broadway LLC, 61 Misc 3d 1224(A) [Sup Ct, NY County 2018] [internal citations and quotations omitted]). Significantly, “[j]udicial records, mortgages, deeds and contracts constitute documentary evidence, but affidavits and deposition testimony are not considered documentary evidence” (Id. [internal citations omitted]).

In support of its motion, the City relies solely on plaintiff’s GML §50-h testimony which, it argues, definitively establishes that the sidewalk was slippery solely due to the recent rain. While

it is undisputed that “the mere wet nature of a surface from rain does not impose liability on a party” (NYSCEF Doc. No. T64K [Igoe Affirm. at ¶10]), the testimony submitted here is insufficient, at this juncture, to establish that this principle applies here such that dismissal is warranted.

As an initial matter, a party’s testimony is generally not considered documentary evidence for purposes of a CPLR §3211(a)(1) motion (See e.g., Correa v Orient-Express Hotels, Inc., 84 AD3d 651 [1st Dept 2011]). Even assuming, for the sake of argument, that the City may use plaintiff’s GML §50-h testimony in support of the instant motion (See Stein v Nat. Gen. Ins. Co., 2020 NY Slip Op 31814[U], 3 [Sup Ct, New York County 2020] [“on a motion to dismiss pursuant to CPLR §3211(a)(1), documentary evidence may be supplemented by affidavits or deposition testimony that are not disputed”] citing Rosenbaum, Rosenfeld & Sonnenblick, LLP v Excalibur Grp. NA, LLC, 146 AD3d 489 [1st Dept 2017]), Cheng’s testimony at that hearing—that he believed he slipped on the metallic edge of the sidewalk because it was wet—does not constitute objective evidence conclusively establishing the City’s defense that Cheng’s fall was due solely to the rain rather than a defect of the sidewalk.


Accordingly, it is

ORDERED that motion by the City of New York to dismiss this action is denied; and it is further

ORDERED that within twenty days of the date of this decision and order, plaintiffs shall serve a copy of this decision and order with notice of its entry upon all parties, the Clerk of the Court (60 Centre St., Room 141B), and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119) 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 this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

<u>9/14/2022</u> DATE					 HON. JUDY H. KIM, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	