

Murphy v City of New York

2022 NY Slip Op 33135(U)

September 14, 2022

Supreme Court, New York County

Docket Number: Index No. 159044/2019

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

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LINDA MURPHY,

Plaintiff,

INDEX NO. 159044/2019

MOTION DATE 01/21/2022

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NYC ONE
HOLDING LLC, 308 REALTY HOLDING LLC

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 62, 66, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80 were read on this motion to/for JUDGMENT - SUMMARY

Defendants the City of New York and New York City Department of Transportation (together, the City) moves this Court for an order granting summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against them. The instant action seeks to recover for personal injuries allegedly sustained on February 23, 2019, when plaintiff Linda Murphy (plaintiff) tripped on the sidewalk adjacent to 306 West 40th Street and 308 West 40th Street, New York, NY. The City contends that it is not liable for plaintiff's injuries pursuant to Administrative Code of the City of New York § 7-210. For the reasons set forth below, this Court grants the City's motion for summary judgment in its entirety and dismisses the complaint and all cross-claims against it.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, 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. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the opposing party to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so].” *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

Administrative Code § 7-210, provides in pertinent part that “the owner of real property abutting any sidewalk...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.” Further, “[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. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.” *Id.*

In support of its motion, the City submits, *inter alia*, the notice of claim identifying the accident location (Exhibit A); plaintiff’s 50-h hearing testimony and exhibits (Exhibit F and G); and affidavits by David Atik, an employee of New York City’s Department of Finance (Exhibit J and K). The notice of claim and plaintiff’s 50-h hearing testimony establish that plaintiff’s accident occurred on the sidewalk adjacent to 306 West 40th Street and 308 West 40th Street, New York, NY.

As explained in his affidavit, Mr. Atik attests that the City is not the owner of the property of either 306 West 40th Street or 308 West 40th Street. (*See* Exhibit J and K). According to Mr.

Atick, 306 West 40th Street is classified as Building Class K4 (retail), and 308 West 40th Street is classified as Building Class V1 (vacant land) – neither building is classified as a solely one, two, or three, family residential property. (*Id.*). As the City it is not the owner of the real property abutting the sidewalk where the accident transpired, and the building is non-exempt from the liability shifting provision of Administrative Code § 7-210, the City is not responsible for the maintenance of sidewalk at issue.

In opposition to the City's motion, both plaintiff and co-defendant NYC One Holding LLC (NYC One) argue that the City's motion is premature pursuant to CPLR 3212 (f).¹ Specifically, plaintiff argues that no depositions have yet been held and only limited discovery has been provided by the defendants. Plaintiff and NYC One argue that the non-City defendants have very recently filed answers, highlighting the prematurity of the City's motion. However, neither plaintiff nor NYC One identifies any key fact that is essential to opposing the motion. *See DaSilva v Haks Engineers, Architects & Land Surveyors, P.C.*, 125 AD3d 480 (1st Dept 2015); *A & W Egg Co. v Tufo's Wholesale Dairy, Inc.*, 169 AD3d 616 (1st Dept 2019). Further, plaintiff and NYC One fail to address or rebut that Administrative Code § 7-210 applies to the location in question. Neither opposing party has submitted any admissible evidence to raise a triable issue of fact. The Court has reviewed the remainder of the arguments in opposition to the motion and find them unavailing.

Accordingly, it is

ORDERED that the motion of defendants, the City of New York and New York City Department of Transportation, for summary judgment to dismiss the complaint and all cross-

¹ Pursuant to CPLR 3212 (f), “[s]hould it appear from affidavits submitted in opposition to the motion [for summary judgment] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had...”

claims herein against them is granted, and the complaint and any and all cross-claims are dismissed in their entirety as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

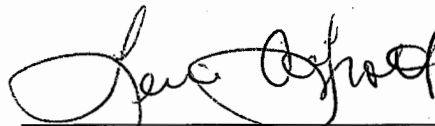
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this action, including any pending motions, is transferred to a general IAS Part, as Corporation Counsel no longer represents any parties to this action.

This constitutes the decision and order of the Court.

9/14/2022

DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT