

Hudson v Dyckman Sherman Realty, LLC
2022 NY Slip Op 33347(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 156084/2020
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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TARIK HUDSON,

Plaintiff,

- v -

DYCKMAN SHERMAN REALTY, LLC, CVS PHARMACY
INC., THE CITY OF NEW YORK

Defendants.

-----X

INDEX NO. 156084/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion for

JUDGMENT - SUMMARY

On August 5, 2020, plaintiff commenced this personal injury action alleging that on February 16, 2020, while walking out of a store owned by defendant CVS Pharmacy, Inc. located at 130 Dyckman Street (the “Building”) in Manhattan he was caused to trip and fall due to a defective sidewalk condition (NYSCEF Doc. No. 1 [Compl at ¶32]). At his General Municipal Law (“GML”) §50-h hearing, plaintiff testified that he tripped and fell next to a metal grate in the sidewalk (NYSCEF Doc. No. 36 [GML §50-h Tr. at p. 30]).

Defendant the City of New York (the “City”) now moves for summary judgment dismissing the complaint and all cross-claims against it, contending that it has established that it is exempt from liability under Administrative Code §7-210 and 34 RCNY §2-07 and did not cause or create the condition alleged to have caused plaintiff’s injuries. In support of its motion, the City submits the affirmation of David C. Atik, an employee of the New York City Department of Finance (“DOF”), in which he attests that a review of the DOF’s Property Tax System database

reveals that the Building was not owned by the City on the date of plaintiff's accident and, moreover, that the Building is classified as Class K1 (retail) and not as a one-, two-, or three-family residential property (NYSCEF Doc. No. 40 [Atik Affirm.]

The City also submits the affidavit of Mildred McKnight-Gibson, attesting as follows:

I am employed by the New York City Department of Transportation (DOT) in the Highways Inspection and Quality Assurance Unit (HIQA). I have been employed by DOT and assigned to the HIQA Unit since 2010 ... My current title is Highway and Sewer Inspector. I have worked as a Highway and Sewer Inspector since 2010.

I commenced my employment at DOT by undergoing approximately 6 months of training where I attended presentations in a classroom setting and went out into the field to observe actual street conditions. For field training, I accompanied designated DOT senior inspectors to many locations in the City of New York ("City"). Among other things, I was taught how to determine which entities are responsible for street hardware based on a visual inspection. I was also taught how to differentiate hardware of various entities, including utility companies.

My duties include visiting active work sites on sidewalks and roadways in the City to enforce DOT's rules and regulations regarding work being performed on the sidewalks and roadways, including but not limited to inspecting active work sites for (a) safety of pedestrians and vehicular traffic; (b) appropriate DOT permits authorizing the scope of work being performed; (c) adherence to DOT permit stipulations. My duties also include issuing summonses, Corrective Action Requests (CARs), and Notices of Immediate Corrective Action (NICAs) to those that have violated DOT rules and regulations. I also conduct inspections of different street hardware on the City's sidewalks and roadways.

My duties require me to be able to identify the entities responsible for street hardware by a visual inspection in order to issue summonses, CARs, or NICAs to the appropriate entities so they can remediate unsafe conditions.

At the request of the New York City Law Department, I personally conducted an onsite inspection on April 4, 2021, to identify the hardware located in the sidewalk located at Dyckman Street between Sherman Avenue and Nagle Avenue (at 130 Dyckman Street) in the County, City, and State of New York, and as depicted in the photograph annexed hereto as Exhibit A.

In order to identify the entity responsible for the maintenance of this hardware, I observed the design and physical appearance of the hardware. I also examined the face of the hardware to determine if it contained any unique markings that tend to indicate the entity responsible for its maintenance and repair. In this instance, I observed that the style and appearance of the hardware was similar to ones pointed

out to me during training as typical Consolidated Edison hardware. Additionally, I observed that this grating is similar to ones for which I have issued NOV's, CARs and NICAs to Con Edison in the past, which have been accepted by them.

Based on the forgoing and in conformity with my training and experience, this grating is identified as being the responsibility of the Consolidated Edison.

(NYSCEF Doc. No. 39 [McKnight-Gibson Aff. at ¶¶1-7] [emphasis added]).

Finally, the City submits the affidavit of Henry Williams, a Department of Transportation of the City of New York ("DOT") paralegal, attesting to his search of DOT records for the sidewalk located at Dyckman Street between Nagle Avenue and Sherman Avenue for a period of two years prior to and including the date of plaintiff's fall (NYSCEF Doc. No. 37 [Williams Aff.]). The City also attaches the records produced by Williams's search as a separate exhibit (NYSCEF Doc. No. 38 [DOT Records]).

In opposition, plaintiff argues that City's motion is premature as plaintiff has not had an opportunity to depose a City witness regarding the City's documentary production and therefore cannot properly oppose the instant motion.

DISCUSSION

"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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

Here, the City has demonstrated through the Atik affirmation that it is exempt from liability under Administrative Code §7-210, which shifts tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two- or three-family residential properties that are owner occupied and used exclusively for residential

purposes (Santos v City of New York, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018] citing Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 520 [2008]).

Given the facts alleged here, however, this is not the end of the analysis. Specifically, plaintiff alleges that he fell near a grate in the sidewalk and, under 34 RCNY §2-07, “[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad” and must “replace or repair any cover or grating found to be defective [as well as] . . . any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating” (34 RCNY §2-07[b]). As a grate owner’s liability to make such repairs is not shifted to the owner of an abutting property under Administrative Code §7-210 (See Storper v Kobe Club, et. al., 76 AD3d 426 [1st Dept 2010]), the City must also prove that it was not the owner of the subject grate in order to establish its entitlement to summary judgment. It has not done so.

The City argues that the affidavit of McKnight-Gibson establishes that ConEd is the sole owner of the grating. The Court disagrees. McKnight-Gibson’s affidavit is conclusory, as it fails to set forth the factual basis for McKnight-Gibson’s conclusion that the grating in question is the property of ConEd, let alone establish that the grating was ConEd’s property at the time of plaintiff’s accident (See Vega v The City of New York, 2016 NY Slip Op 32580[U], 3 [Sup Ct, New York County 2016]; see also Concepcion v City of New York, 2019 NY Slip Op 30964[U], 4 [Sup Ct, New York County 2019]; Hawkins v The City of New York, 2019 NY Slip Op 30957[U], 3 [Sup Ct, New York County 2019]; but see Bailey v The City of New York, 2019 WL 1318499 [Sup Ct, NY County 2019]).

Accordingly, a question of fact remains as to whether the City may be liable to plaintiff under 34 RCNY §2-07(b), mandating the denial of the City’s summary judgment motion (See Saez v Sapir Realty Mgt. Corp., 185 AD3d 456, 456-57 [1st Dept 2020] [11 Madison defendants’ motion for summary judgment properly denied where they did not conclusively establish that ConEd was the owner of the sidewalk vault grate on which plaintiff allegedly tripped]).

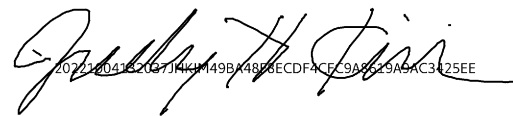
In light of the foregoing, it is

ORDERED that the City’s motion for summary judgment dismissing the complaint and all cross-claims as against it is denied; and it is further

ORDERED that within twenty days of entry, plaintiff shall serve a copy of this order with notice of its entry upon all defendants and upon the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerks 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); and it is further

ORDERED that the Clerk of the Court is directed to set this matter down for a preliminary conference in the DCM Part on the next available date.

This constitutes the decision and order of the Court.



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HON. JUDY H. KIM, J.S.C.

10/4/2022

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: