

<b>Nardi v City of New York</b>
2022 NY Slip Op 33438(U)
October 11, 2022
Supreme Court, New York County
Docket Number: Index No. 156007/2018
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

-----X

ANGELINA NARDI,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, MOTIVATE BIKES, LLC., NYC BIKE SHARE, LLC, and CITI BIKE

Defendants.

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INDEX NO. 156007/2018
MOTION DATE 01/25/2022, 01/25/2022
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 41, 42, 43, 44, 45, 47, 50

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 46, 48, 49, 51, 52, 53, 54, 55

were read on this motion for DISCOVERY.

On June 28, 2018, plaintiff commenced this action, alleging that on May 20, 2017, she tripped and fell due to a hazardous condition in Sara D. Roosevelt Park in New York County, sustaining injuries, and asserted negligence claims against all defendants (NYSCEF Doc. No. 1 [Complaint]). At her General Municipal Law ("GML") §50-h hearing, plaintiff testified that she fell due to an "uneven surface" or "crack" in a concrete pathway in the park, which crack was located approximately eight to ten feet from a bike share station (NYSCEF Doc. No. 58 [GML §50-h Tr. at pp 31-34]) purportedly owned and operated by defendants Motivate Bikes, LLC., NYC Bike Share, LLC, and Citi Bike (NYSCEF Doc. No. 1 [Compl. at ¶349-370]).

In motion sequence 001, defendants NYC Bike Share, LLC d/b/a Citi Bike, and Motivate Bikes, LLC (collectively, the “Moving Defendants”) move for summary judgment dismissing this action. In motion sequence 002, plaintiff moves, pursuant to CPLR §3124, to compel all defendants to appear for depositions. These motions are consolidated for disposition. For the reasons set forth below the Moving Defendants’ motion for summary judgment is granted and plaintiff’s motion to compel is granted in part.

In support of their motion for summary judgment, the Moving Defendants submit the affidavit of Laura Fox, General Manager of Lyft, Inc., which acquired the Moving Defendants on or about November 30, 2018 (NYSCEF Doc. No. 29 [Fox Aff. at ¶¶1, 3]). Fox attests that:

In my role of as the General Manager for Lyft, Inc. my responsibilities include overseeing the operations of the bike sharing system in the City of New York, which is operated under the NYC Bike Share, LLC entity. I possess firsthand knowledge of the operations through my position. In addition, I possess knowledge of NYC Bike Share, LLC and Motivate Bikes, LLC’s operations prior to the November 30, 2018 acquisition through the corporate documents and records.

...

On May 20, 2017, Motivate Bikes, LLC did not own, operate, control, manage, and/or maintain any bike share station in New York City. Indeed, Motivate Bikes, LLC did not own, operate, manage, and/or maintain any bike share station in New York City.

...

Motivate Bikes, LLC does not use, and has not used at any point in time relevant to this litigation, any real property located in Sara D. Roosevelt Park and/or the accident location identified by Plaintiff.

...

Motivate Bikes, LLC did not enter into any contract with the City of New York, nor with any other entity, which requires it to keep the accident location safe, to maintain the area, to erect barriers, to maintain walkways, or to correct any unsafe condition in any part of Sara D. Roosevelt Park.

NYC Bike Share, LLC does not presently, and did not on May 20, 2017 or at any time prior thereto, specifically own, operate, lease, repair control, manage and/or maintain any real property and/or walkways or grounds at the location identified by Plaintiff, Angelina Nardi, in her complaint and deposition.

NYC Bike Share, LLC does not presently, and did not on May 20, 2017, or at any time prior thereto, enter into any contract with the City of New York, or any other entity, which obligated NYC Bike Share, LLC to keep the accident location safe, to maintain the area, to erect barriers, to maintain walkways, or to correct any unsafe condition in any part of Sara D. Roosevelt Park. Further, NYC Bike Share, LLC did not perform any construction work on the pathways and walkways of Sara D Roosevelt Park at any time on May 20, 2017 or at any time prior thereto.

As the General Manager for Lyft, Inc. I am aware and possess knowledge of how Bike Sharing Stations are installed. The bike share stations are placed on the ground. No construction or modification to the pavement or sidewalk is involved.

(Id. at ¶¶3-14 [emphasis added]).

The Moving Defendants argue that they have established that they owed no duty to plaintiff to maintain the area where she fell and therefore cannot be held liable in this negligence action. In opposition, plaintiff argues that summary judgment is inappropriate because she has not had the opportunity to depose a witness from the Moving Defendants with knowledge of the facts set out in Fox's affidavit. Specifically, plaintiff argues that issues of fact remain as to whether the defect which caused plaintiff's injury was created by the Moving Defendants during the delivery, unloading, and installation of the bike share stations, which information is uniquely within the Moving Defendants' knowledge.

### DISCUSSION

“[T]he 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. 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, 324 [1986] [internal citations omitted]).

“Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property” (Balsam v Delma Eng'g Corp., 139 AD2d 292, 296-97 [1st Dept 1988] [internal citations omitted]). The Moving Defendants have established through the Fox affidavit that they did not own, occupy, or control the site of plaintiff’s fall. Plaintiff does not dispute this. Accordingly, the Moving Defendants may only be liable for harm caused by the subject defect if they created that defect through any special use or affirmative act (See Jeansimon v Lumsden, 92 AD3d 640, 640-41 [2d Dept 2012]).

The Moving Defendants have established that they undertook no special use or affirmative act that created the subject defect based on the Fox affidavit attesting that they performed no work at the site of plaintiff’s fall (See e.g., Camacho v City of New York, 135 AD3d 482, 482-83 [1st Dept 2016] [“By demonstrating that the area where plaintiff fell was outside the area where they and their contractor ... performed work, defendants ... established prima facie that they did not cause or create the defective condition in the sidewalk”]). The alleged proximity of a bike share station owned and operated by NYC Bike Share, LLC to the site of plaintiff’s fall does not, in and of itself, raise a question of fact as to whether Moving Defendants caused or created the subject defect (See Siegel v City of New York, 86 AD3d 452, 455 [1st Dept 2011] [plaintiff’s argument that “proximity of the ECS conduit to the alleged defect raises questions as to whether defendants’ work caused the defect ... is unpersuasive”]).

In opposition, plaintiff contends that the Moving Defendants may have created this defect when their truck delivered the bike share station in question and that discovery is needed to resolve this question of fact. The Court is unpersuaded by this argument. Even assuming that the defective condition was caused by a truck, plaintiff offers nothing beyond her own hopeful speculation that it was created by the Moving Defendants' truck rather than any other truck that could have driven through this location prior to plaintiff's accident (See Kiskiel v Stone Edge Mgt., Inc., 129 AD3d 672, 674 [2d Dept 2015] ["there was no evidence, only speculation, that the defendant created the condition, which could have been caused by anyone with access to the trash pick-up point"]; see also Beirne v Ames' Strand View W. Corp., 2016 NY Slip Op 32879[U], 4 [Sup Ct, Nassau County 2016 ["plaintiff's assertion that the crack may have been caused by the defendants' vehicles driving on the sidewalk is also speculative"], affd., 161 AD3d 1034 [2d Dept 2018]). Accordingly, the Moving Defendants' motion for summary judgment is granted and this action is dismissed as against them.

In light of the foregoing, plaintiff's motion to compel defendants to appear for depositions is denied as to the Moving Defendants as moot. Plaintiff's motion is granted, however, as to the remaining defendants, and the City of New York is directed to produce a witness for a deposition on or before November 30, 2022.

Accordingly, it is

**ORDERED** that the motion by NYC Bike Share, LLC d/b/a Citi Bike, and Motivate Bikes, LLC, for summary judgment is granted and this action is hereby dismissed as against them; and it is further

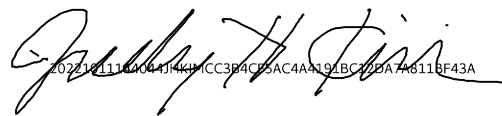
**ORDERED** that Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion to compel is granted to the limited extent that the City is to produce a witness for a deposition on or before November 30, 2022, and is otherwise denied; and it is further

ORDERED that within twenty days of entry, NYC Bike Share, LLC d/b/a Citi Bike, and Motivate Bikes, LLC, 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); and it is further

ORDERED that Clerk of the Court is to set this matter down for a status conference in the DCM Part on the next available date after November 30, 2022.

This constitutes the decision and order of the Court.



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10/11/2022  
DATE

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

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: