

Shang v 231 W 15 Realty LLC
2022 NY Slip Op 33608(U)
October 19, 2022
Supreme Court, New York County
Docket Number: Index No. 152681/2021
Judge: J. Mabelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

YINGRUI SHANG,

Plaintiff,

- v -

231 W 15 REALTY LLC, 142 W 86TH ST REALTY LLC,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., THE CITY OF NEW YORK

Defendants.

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INDEX NO. 152681/2021

MOTION DATE 06/17/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 54, 55, 56, 59, 60, 61

were read on this motion to/for DISMISS.

In the underlying action, plaintiff claims that on August 29, 2020 between 8:00 and 9:00 p.m., he was riding his electric-powered bicycle when he was involved in an accident on the street/road designated West 86th Street in Manhattan, New York.

Pending before the court is a motion in which defendant 142 W 86th ST REALTY LLC (“142”) seeks summary judgment, pursuant to Civil Practice Law and Rules 3212, dismissing the complaint and all cross-claims against 142 with prejudice, on the grounds that defendant 142 bears no liability and has no responsibility for the plaintiff’s alleged accident; and upon dismissal, awarding costs and reasonable attorney’s fees to 142, including costs associated with the instant motion and sanctions pursuant to 22 NYCRR § 130-1.1.

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

142 argues that plaintiff’s accident occurred in the public city street/roadway on West 86th Street, and did not involve any condition on the premises of 142 West 86th Street or its abutting sidewalk. 142 also argues that there is no evidence that 142 created the alleged condition, used or maintained the area, or put the area to any special use. In support of its argument, 142 submits the sworn Affidavit of Gary Brown, (NYSCEF Document #49), who is a managing member of 142.

The Affidavit states, in part:

1. I am a managing member of 142 W 86th St Realty, LLC which owns the building located at 142 West 86th Street in Manhattan (the “building” or the “property”). The same was true on 8/29/20.

[...]

6. The location where the plaintiff claims he fell is located in the public street and is not a part of 142’s property or its sidewalk. The same was true on 8/29/20.

7. Upon my information and belief the location where the plaintiff claims he fell belongs to the City of New York and that the same was true on 8/29/20.

8. 142 does not own, operate or control the public street/roadway located on West 86th Street, including the location of the plaintiff’s alleged accident. There are no special uses of or easements pertaining to the accident location. The same was true on 8/29/20.

9. At no time did 142 or anyone on its behalf make use of the location where plaintiff claims he fell, or any portion of the public street/roadway located on West 86th Street, for a driveway or any other

purpose. Neither is there any access from the alleged accident location to a driveway, parking lot or garage on 142's property. Neither are there any delivery areas there. The same was true on 8/29/20.

10. Neither I, 142 nor anyone on its behalf ever performed any maintenance, repairs, construction, or snow removal at the location where plaintiff claims he fell, or to any portion of the public street/roadway of West 86th Street, prior to the alleged date of accident, nor did we ever hire anyone to do such work on our behalf. The same was true on 8/29/20. Id.

11. At no time prior to the alleged accident on 8/29/20 did I, 142 or anyone on its behalf replace or repair any portion of the street/roadway on West 86th Street, including the alleged accident location.

12. It is and always was my understanding that maintenance, repair and snow removal at that location, including the location where the plaintiff claims he fell, was the responsibility of the City and its contractors.

13. At no time prior to 8/29/20 did I, 142 or anyone on its behalf advise the City or anyone else that 142 intended to replace or repair any portion of the street of West 86th Street, including the alleged accident location.

14. Prior to 8/29/20, 142 never received any complaints or violations from anyone that the areas adjacent to 142 were in any way dangerous, defective, or in need of attention or repair, or that these areas were slippery, poorly lit, of a slip, trip or fall hazard requiring repair or any measures to be taken by 142.

In opposition, plaintiff makes two primary arguments, both of which are based on four photographs plaintiff had attached to his Notice of Claim (NYSCEF Document #46).

First, plaintiff argues that the barricades depicted in the photos raise a question of fact as to whether 142 made special use of the area of the street where plaintiff fell. Specifically, plaintiff argues:

6. It is clear that the barricades were removed so as to permit motor vehicles to stop directly in front of the defendant's building, so passengers could be discharged as close as possible to the entrance of the movants' building, and to provide parking.

7. One of the barricades may even be observed leaning up against the moving defendant's building in one of the defendant's own exhibits in support. See the Photos as Defendant's Exhibit "L", NYSECF Document #46

8. The defendant therefore knows their motion is meritless, because the barricades were moved for the purpose of their tenant's convenience- There being no other reasonable explanation for their position- as depicted in the defendant's attached photos.

[...]

10. The removal of the barricades is the clear evincing of the moving defendant valuing rent money above public safety- they even used the side of their building to place at least one barricade against it, which should have been in a position to warn of the subject roadway defect.

[...]

12. As such, there is clearly an issue of fact regarding the removal of the barricades that, if not moved, would otherwise have prevented the plaintiff's accident.

13. Furthermore, the removal of the barricades to better serve their tenants was the defendant's special use of the roadway.

[...]

33. Could anyone but the defendant know what the defendant has to do with the state of their property shown in their own photo exhibits, particularly the barricades being removed from the street defect area directly in front of their building? See the Photos as Defendant's Exhibit "L", NYSECF Document #46.

Second, plaintiff argues that the photos show a pipe attached to 142's building that discharges into the street. Specifically, plaintiff argues:

7. Here (below) are some cropped and enlarged segments of the 4th page of plaintiff's exhibit "L", that show not only the pipe descending the defendant's building's wall (note in the first page photo excerpt above shows the pipe crossing the sidewalk), but the lower righthand photo shows the terminal end of the pipe where it discharges into the street.

[...]

15. Does that mean that the defendant does not deny (albeit does not admit either) running pipe from the building to the street, but only denies running pipe to the alleged accident location in the street?

16. Clearly, yes.

17. If it does not mean that, what other meaning could more properly be ascribed to it?

18. The answer is- none other.

19. The reason I raised a point regarding the pipe was to establish a special use by the defendant of the street in front of their building.

20. To establish a special use it is not necessary that the defendant's pipe be inside of the actual defect contacted by the plaintiff's bike that caused the plaintiff to fall from/with his bike.

21. Particularly in this case, because pipes carry liquids (unless it's a natural gas pipe, and I am not claiming that the defendant was discharging natural gas into the street), and that makes the area of discharge an area of special use.

[...]

23. The defendant's affiant's denial of such a pipe to the street (City property) from the defendant's building does not extinguish the fact that the defendant's own photo exhibit shows such a pipe.

In reply, 142 submitted, *inter alia*, an Attorney Affirmation in which counsel explicitly denied that the photos showed any pipe whatsoever, describing the assertion that the photos showed a pipe to be "bizarre." Counsel also argued that even assuming *arguendo* there was a pipe, which there was not, plaintiff's own description as to what caused her to fall was solely a defect on the street, and plaintiff never made mention of any pipe. Plaintiff also submitted a supplemental Affidavit by Mr. Brown, (NYSCEF Document #60), that states, in part:

4. The speculative statement made by the plaintiff's attorney, that 142 moved or rearranged barricades from the street to allow for vehicle drop off or some other benefit, is entirely false. Neither 142, nor anyone on its behalf, moved or rearranged the barricades for any reason whatsoever, including for vehicles to stop in front of the building or for "tenant convenience," as the plaintiff's attorney speculates. The same was true on 8/29/20.

5. Neither 142 nor anyone on its behalf moved barricades either around or near the mailbox or near the building. The same was true on 8/29/20.

6. The barricades are not, and were never, the property of 142. Neither 142, nor anyone on its behalf, placed the barricades there. The same was true 8/29/20.

7. Neither 142 nor anyone on its behalf contracted for any construction or work in the public street, including the area where the plaintiff's alleged accident occurred, prior to and including the date of the alleged accident. The same was true on 8/29/20.

8. In addition, 142 did not cause any pipe to be placed from the building to the alleged accident location in the street. Nor did 142 hire or contract with anyone to do so on its behalf. The same was true on 8/29/20.

9. Upon information and belief, there was never a pipe or other equipment running from the building to the alleged accident location into the street, prior to, or on the alleged date of accident. The same was true on 8/29/20.

Conclusions of Law

It is undisputed that the subject accident occurred on the roadway and not on the sidewalk. Notably, defendant, the City of New York (the “City”), did not oppose this motion or rebut 142’s primary assertion that the street is the responsibility of the City and not of 142.

As noted above, the Court of Appeals has 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, and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions” are insufficient. Here, despite the allegations of plaintiff’s counsel, there is simply no evidence on this record that 142 made any special use of the street area where plaintiff fell.

With respect to the barricades, the photos submitted by plaintiff show barricades that are at most, partially touching the sidewalk. In his affidavit, Mr. Brown firmly asserted that the barricades are not, and were never, the property of 142; that neither 142, nor anyone on its behalf, placed the barricades there; and that no one from 142 moved or rearranged barricades from the street. There is nothing on this record to refute Mr. Brown’s sworn statements. Plaintiff’s allegations that 142 moved the barricades to allow occupants of 142 to park their cars is simply not borne out on this record and amounts to pure speculation. *See Siegel v City of New York*, 86 AD3d 452 (1st Dept 2011) (A plaintiff’s ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ to defeat a defendant’s motion for summary judgment”); *Rodriguez v New York City Hous. Auth.*, 87 NY2d 887 (1995) (An examination of plaintiff’s opposition motion papers reveals no evidentiary proof ‘in admissible form,’ other than ‘[m]ere conclusions, expressions of hope or unsubstantiated allegations or assertions’).

With respect to the alleged “pipe,” this court, upon inspection of the photos, does not see any visible evidence of a pipe depicted in the photos. Further, Mr. Brown’s sworn statement is that there was never a pipe or other equipment running from the building to the alleged accident location, and there is nothing on the record to refute Mr. Brown’s sworn statements.

Sanctions

Finally, with respect to with respect to sanctions under 22 NYCRR § 130-1.1, 142 argues that plaintiff’s counsel acted frivolously in bringing and pursuing this action, as plaintiff’s counsel knew, after plaintiff’s 50h hearing, that 142 did not own and had no duty to maintain or repair the accident location.

The 22 NYCRR 130-1.1 (Costs; sanctions) provides, in relevant part:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part [...]

[...]

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

[...]

In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.


Here, plaintiff had a good faith basis for commencing suit, and there is no indication on this record that plaintiff prevented 142 from seeking summary judgment or dismissal earlier. Accordingly, and in the exercise of this court’s discretion, an order imposing sanctions and costs and fees is not warranted here. See, e.g., Esannason by Bowers v New York City Hous. Auth., 163 AD2d 160 [1st Dept 1990] (denying the imposition of sanctions and counsel fees where plaintiff’s counsel advanced a reasonable theory upon which suit was commenced, despite being presented with evidence that defendant was not the party responsible for plaintiff’s injuries); Watson by Watson v City of New York, 178 AD2d 126 [1st Dept 1991] (finding that the information available to plaintiffs’ counsel was sufficient to justify plaintiff’s reluctance to voluntarily discontinue the action and the imposition of sanctions was unwarranted).

Conclusion

For the reasons detailed above, it is hereby

ORDERED that the branch of 142’s motion seeking summary judgment dismissing plaintiff’s complaint and all cross-claims against 142 with prejudice, pursuant to Civil Practice Law and Rules 3212, is **GRANTED**; and it is further

ORDERED that the branch of 142’s motion seeking costs and reasonable attorney’s fees is **DENIED**.

<u>10/19/2022</u> DATE					 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE

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