Friedman v Kandel
2022 NY Slip Op 33922(U)
November 5, 2022
Supreme Court, Kings County
Docket Number: Index No. 504149/2021
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of November 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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FRIDA FRIEDMAN,

Plaintiff,

-against-

HERMAN KANDEL and SYLVIA KANDEL,

Defendants.

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Index No.: 504149/2021

DECISION AND ORDER

Motion Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	18-20, 22-28,
Opposing Affidavits (Affirmations)	29-35,
Reply Affidavits (Affirmations)	36,
Memorandum of Law	21,

After a review of the papers and oral argument, the Court finds as follows:

The instant action results from an alleged trip and fall incident that occurred on September 24, 2020. The Plaintiff, Frida Friedman (hereinafter "the Plaintiff") allegedly injured herself after tripping on a purportedly broken, uneven, cracked, sidewalk flag that abutted the property known as 1119 45th Street, Brooklyn, New York (hereinafter "the Premises" or "Property"). The Premises are apparently owned by Defendants Herman Kandel and Sylvia Kandel (hereinafter the "Defendants").

The Defendants now move (motion sequence #2) for an order pursuant to CPLR 3212, granting them summary judgment and dismissing the complaint. The Defendants argue that they are exempt from the Administrative Code of the City of NY § 7-210 (the "Sidewalk Law"). The Defendants contend that

they reside in a two family home at the Property. The Defendants argue that they are not otherwise liable for the condition at issue as they did not cause or create the alleged condition or make special use of the sidewalk as a driveway. Specifically, the Defendants contend that it was not their use of the driveway that caused the sidewalk defect. The Defendants contend that tree roots near the sidewalk flag at issue caused the subject condition.

The Plaintiff opposes the motion. The Plaintiff contends that the Defendants have failed to meet their *prima facie* burden. The Plaintiff contends that Defendant Herman Kandel admits in his deposition to having attempted to repair the sidewalk in the area where the Plaintiff's accident occurred and has therefore raised the issue of whether the Defendants caused or created the condition at issue. The Plaintiff also argues that there are issues of fact as to whether the alleged defect was a product of the Defendants' special use of the sidewalk as a driveway.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires

denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

The Sidewalk Law

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter "the Sidewalk Law"). The Sidewalk Law provides in pertinent part that:

> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to 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.
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> c. Notwithstanding 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.

Turning to the merits of the motion made by the Defendants, they rely on the deposition of the Plaintiff, the deposition of Defendant Herman Kandel and the affidavit of Mark Marpet, P.E.

When asked during her deposition to describe what caused her to trip and fall, the Plaintiff stated that "[t]here was a crack that was broken in the sidewalk, and that is what made me trip." (See Defendants' Motion, Exhibit "D", Page 21) When asked to describe the crack, the Plaintiff stated that it was "[l]ike one to two inches deep." (See Defendants' Motion, Exhibit "D", Page 22). When asked where she was

when she fell, the Plaintiff stated "[i]n front of his driveway." (See Defendants' Motion, Exhibit "D", Page 26).

During his deposition, when asked who is responsible for repairing the sidewalk, Defendant Herman Kandel stated "[m]yself." (See Defendants' Motion, Exhibit "F", Page 11) When asked if he had made repairs to the sidewalk, Mr. Kandel stated "[y]es." (See Defendants' Motion, Exhibit "F", Page 12). When asked where on the sidewalk he made repairs, Mr. Kandel stated "[c]oming from my neighbors, one of the sides, in order to get insurance, I have to grind, grind the spot of the sidewalk." (See Defendants' Motion, Exhibit "F", Page 12). When asked how he became aware of the Plaintiff's accident, he stated "I had just walked out of my house to go to work and I saw Mrs. Frida was on the floor with Mrs. Kessler, the neighbor." (See Defendants' Motion, Exhibit "F", Page 14). When asked to identify a photograph of the purported defect on the sidewalk in the area of the driveway, Mr. Kessler stated "you see in the driveway, it was grinded, because something was a little higher, a little higher than usual." When asked whether he would drive his automobile over that area, he stated "[y]es." (See Defendants' Motion, Exhibit "F", Page 22).

As part of his affidavit, Mark Marpet, Ph.D., P.E., stated that "I utilized the photographs which were provided by Ms. Friedman's counsel, marked at her deposition, and identified by her as depicting the place where her accident occurred." (See Defendants' Motion, Exhibit "G", Paragraph 3) Mr. Marpet also stated that "I examined the curb and sidewalk in front of 1119, at the point where it meets the abutting property at 1117." (See Defendants' Motion, Exhibit "G", Paragraph 4) While Mr. Marpet acknowledges that repairs were conducted in the general area, he states that the "grinding did not extend into the area where Ms. Friedman claimed she tripped." (See Defendants' Motion, Exhibit "G", Paragraph 4). Mr. Marpet opines that "the curb had been displaced here by tree roots growing underneath the sidewalk, from the tree growing in front of 1117." (See Defendants' Motion, Exhibit "G", Paragraph 8). Mr. Marpet also

opined that "the area identified by Ms. Friedman as causal in her fall-located on the far left of the driveway, would not be driven over by a vehicle entering or exiting the driveway in its normal course, as it is at the very edge of the northwestern part of the driveway, and a car turning into the driveway that drove over the area under discussion would **probably** strike the adjacent concrete stub wall and iron fence that borders the property at 1117." (See Defendants' Motion, Exhibit "G", Paragraph 9). (emphasis added).

In opposition, the Plaintiff relies primarily on the affidavit of Scott Silberman, P.E. As part of his affidavit Mr. Silberman states that "[a]ll of my opinions set forth herein are to a reasonable degree of engineering certainty, and are based upon my personal inspection and onsite observations of the subject premises on April 11, 2022, my review of the above noted documents, review of pertinent statutes, building codes, industry guidelines, literature, and general accepted standards and practice for safety for the overall design, maintenance, management, operation and safety of the subject sidewalk/driveway." (See Plaintiff's Affirmation in Opposition, Silberman Affidavit, Paragraph 4). Mr. Silberman stated that "[i]f the slab is raised due to tree roots, the cars driving on top of the raised flag will cause it to crack at different locations similar to what is seen below and will certainly contribute to walking hazards similar to what is seen below." (See Plaintiff's Affirmation in Opposition, Silberman Affidavit, Paragraph 12).

The Court finds that there is a material issue of fact regarding whether the Defendants made special use of the area at issue and whether they caused and created the subject defect. There is evidence that indicates that the Defendants used the area of the sidewalk where the Plaintiff tripped as part of their driveway. See *Breger v. City of New York*, 297 AD2d 770, 771, 747 N.Y.S.2d 577 [2d Dept 2002]. Moreover, "where the defect occurs in a part of the sidewalk, which is used as a driveway, the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did 'nothing to either create the defective condition or cause the condition through' the special use of the property as a driveway." *Katz v. City of New York*, 18 A.D.3d 818, 819, 796 N.Y.S.2d 639, 640 [2d Dept 2005], quoting

Breger v. City of New York, 297 A.D.2d 770, 771, 747 N.Y.S.2d 577, 578 [2d Dept 2002]. "If the weight of traffic on the driveway could have been a concurrent cause of the defect, the motion for summary judgment should be denied." *Adorno v. Carty,* 23 A.D.3d 590, 591, 804 N.Y.S.2d 798, 799 [2d Dept 2005].

Based upon the foregoing, it is hereby ORDERED as follows:

The Defendant's motion for summary judgment (motion sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.