

Holmes v City of New York

2022 NY Slip Op 34084(U)

December 2, 2022

Supreme Court, New York County

Docket Number: Index No. 159147/2019

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

-----X

DIJON HOLMES,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, THE GOSPEL
SPREADING CHURCH

Defendant.

-----X

INDEX NO. 159147/2019

MOTION DATE 08/05/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for

JUDGMENT - SUMMARY

Defendants the City of New York and the City of New York Department of Transportation (together, the City) seek an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing the complaint and all cross-claims against them under the Administrative Code of the City of New York § 7-210. In this action, plaintiff Dijon Holmes (plaintiff) alleges that he tripped and fell due to a hole in the sidewalk adjacent to 210-220 West 145th Street, New York, NY on May 23, 2019.

The City argues that it is not liable for plaintiff's injuries, because it is not the record owner of the subject property, and that the owner of the property is not exempt from the liability shifting provision of Administrative Code § 7-210. Furthermore, the City maintains that it did not cause or create the alleged defective condition that caused plaintiff's incident. Neither plaintiffs nor defendant, the Gospel Spreading Church, submit opposition.

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). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman*, 3 NY2d at 404. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d at 521.

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.*

The City establishes through admissible evidence that the sidewalk adjacent to 210-220 West 145th Street was not owned by the City on the date of the incident. Regarding ownership of said property, the City submits the affirmation of David Atik, an attorney for the New York City Department of Finance (DOF). *See Exhibit K*, NYSCEF doc. no. 38. Mr. Atik attests that he conducted a search of the Property Tax System database which revealed that the City did not own 210-220 West 145th Street at the time of the incident. *Id.* Mr. Atik also affirms that on the date of the alleged incident 210-220 West 145th Street was classified as a “Building Class V1 (vacant land).” *Id.* Mr. Atik’s search revealed that 210-220 West

145th Street was not classified as a one-, two- or three-family solely residential property at the time of the alleged incident. Additionally, the City provided the affidavit of New York City Law Department Senior Title Examiner David Schloss, who conducted a search for the record owner of the subject location which revealed that the record owner was Gospel Spreading Association. *See* Exhibit L, NYSCEF doc. no. 39.

Therefore, the City demonstrates *prima facie* entitlement to summary judgment by establishing: (1) the non-City ownership of the real property that abuts the sidewalk where the alleged incident occurred, and (2) the non-exempt building classification of the abutting property, pursuant to Administrative Code § 7-210.

While the City has no burden to establish its *prima facie* entitlement to summary judgment in order to prove its freedom from liability due to affirmative negligence or special use, the City has tendered evidence proving that it did not cause or create the subject sidewalk condition or make special use of the sidewalk. The City annexes to its motion the affidavit of New York City Department of Transportation (DOT) paralegal Henry Williams, who conducted a search for the two-year period prior to and including the date of plaintiff's trip and fall on May 23, 2019. *See* Exhibit J, NYSCEF doc. no. 37. Mr. Williams attests that he found no evidence that the City caused or created the subject defect. *Id.*

As they submit no opposition to the instant motion, plaintiff and defendant the Gospel Spreading Church fail to raise a triable issue of fact. Therefore, the City's motion for summary judgment must be granted.

Accordingly, it is hereby

ORDERED that the motion of co-defendants the City of New York and the New York City Department of Transportation seeking summary judgment to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said

defendants as taxed by the Clerk of the Court, 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 this action, including any pending motions, is transferred to a general IAS Part, as corporation counsel no longer represents any parties to this action; and it is further


ORDERED that counsel for the moving parties 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/suptctmanh).

This constitutes the decision and order of the Court.

12/2/2022

DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: