Magdaleno v Avenue D Props. LLC
2022 NY Slip Op 34131(U)
December 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 514715/2017
Judge: Carl J. Landicino
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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 1st day of December, 2022.

PRESENT:
CARL J. LANDICINO, J.S.C.

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JERMAINE MAGDALENO,

Plaintiff,

-against-

AVENUE D PROPERTIES LLC and THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID,

Defendants,

---x

THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID,

Third-Party Plaintiff

- against –

NEW YORK PAVING, INC.

Third-Party Defendant.

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Index No. 514715/2017

DECISION AND ORDER

Motion Sequence #3

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	52-65,
Opposing Affidavits (Affirmations)	69,
Reply Affidavits (Affirmations)	71

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

The instant action results from a trip and fall incident that allegedly occurred on May 30, 2017. Plaintiff allegedly injured herself when she purportedly tripped on the sidewalk abutting the premises known as 2714 Avenue D, Brooklyn, New York (hereinafter the "Premises"). The

Premises are apparently owned by Defendant Avenue D Properties LLC (hereinafter the "Defendant Avenue D").

Defendant Avenue D now moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint against it. Defendant Avenue D contends that it did not create the defective condition alleged by the Plaintiff as the alleged defective condition was a temporary asphalt patch as a result of gas main work that was being performed by Defendant the Brooklyn Union Gas Company d/b/a National Grid (the "Defendant National Grid") and Third-Party Defendant, New York Paving, Inc. (the "New York Paving"). Defendant Avenue D also argues that it did not have a special use of the sidewalk.

The Plaintiff opposes the motion. The Plaintiff contends that Defendant Avenue D has failed to meet its *prima facie* burden. Specifically, the Plaintiff argues that Defendant Avenue D failed to provide evidence relating to the last inspection prior to the accident and the condition of the sidewalk at that time of the accident, in relation to the issue of constructive notice.

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, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [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, 538 N.Y.S.2d 837 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 610 N.Y.S.2d 50 [2d 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.
>
> 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.

Here, there is no indication that the Defendant is exempt from the Sidewalk Law, which provides that Defendant Avenue D is, *inter alia*, responsible to maintain its sidewalk in a safe condition. Generally, "liability may be imposed on the abutting landowner where the landowner affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk" *Smirnova v. City of New York*, 64 AD3d 641, 882 N.Y.S.2d 513 [2d Dept 2009] [internal citations and quotations omitted]. Additionally, generally in a premises liability action, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 AD3d 498, 499, 818 N.Y.S.2d 578 [2d Dept 2006] *Curtis v. Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was last cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.,* 75 AD3d 629, 630, 906 N.Y.S.2d 299 [2d Dept 2010]; *Williams v. SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2d Dept 2010]; *Rios v. New York City Hous. Auth.*, 48 AD3d 661, 662 [2d Dept 2008].

"Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]. Such facts and circumstances include "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the

injury." *Trincere v. Cty. of Suffolk*, 90 NY2d 976, 978, 688 N.E.2d 489, 490 [1997], *quoting Caldwell v. Vill. of Island Park*, 304 NY 268, 107 N.E.2d 441 [1952]. "Indeed, before the burden can shift to the plaintiff, defendants 'must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant *and* that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses.'" *Suarez v. Emerald 115 Mosholu LLC*, 164 AD3d 1130, 1131, 82 N.Y.S.3d 22, 24 [2d Dept 2018], *quoting Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79, 41 N.E.3d 766, 774 [2015] [emphasis added in *Suarez*].

Turning to the merits of the instant motion (motion sequence #3), the Defendant Avenue D contends that it is not responsible for the alleged dangerous condition. In support of its position, Defendant Avenue D relies primarily on the depositions of the Plaintiff, Shaye Silverstein, and Walter Stone. Defendant Avenue D also relies on a photograph of the alleged defect and a Job Control Report and Paving History.

As part of Plaintiff's deposition testimony, when asked how many times she had walked on the subject sidewalk, she stated that in the six months prior to the accident, "[o]nce every week and a half." (See Defendant's Motion, Exhibit "F", Page 24). When asked to explain how the accident occurred, she stated "I twisted my ankle on an elevated part of the sidewalk -- my foot, not my ankle." (Id. Page 28). When asked to confirm what part of her left foot came into contact with the alleged defect, she stated, "[t]he elevated part of the sidewalk." (Id. 29). When asked to confirm the height of the "elevated part of the sidewalk," she stated that it was "[p]robably an inch. I'm not certain of the height." (Id. 30). When asked to confirm whether she had seen the elevated portion of the sidewalk previously she said, "[n]o." (Id.) When asked to confirm the first time she observed that part of the sidewalk having a raised patch of asphalt on it, the Plaintiff stated, "[t]hat day." (Id. 66).

During Shaye Silverstein's deposition, he stated that he is employed by Defendant "Avenue D Properties" as the "[p]roperty manager" "[s]ince May of 2019." (See Defendant's Motion, Exhibit H, Page 9). Mr. Silverstein confirmed that he reviewed "[a]ll the records of, of what National Grid did about the building" and documents relating to the work being performed on the sidewalk adjacent to Defendant Avenue D. (Id. Page 16). When asked to describe the condition of the sidewalk as it appeared on May 30th, 2017, he stated "based on the pictures" "it was unprofessionally and not, and not, and not repaired the way it should be. It was covered temporarily." (Id. Page 30). When asked to confirm if anyone complained about the condition of the sidewalk prior to and including May 30, 2017, he stated "[n]o." (Id. 47).

During Walter Stone's deposition, he stated that, "I presently work as a self-employed contractor. I work as a consultant for National Grid USA Service Company, Inc.", "[s]ince I retired from National Grid in 2011." (See Defendant's Motion, Exhibit J, Page 7). Mr. Stone confirmed that he conducted a search "for New York City street opening permits, job control reports, and paving orders." (Id. Page 9). He further confirmed that there was a work order in May of 2017 for "installing a gas main on Avenue D, a retirement of a gas main, and tying in the gas service to 2714 Avenue D." (Id. Page 10). He confirmed that a New York City street opening permit was issued by "[t]he Department of Transportation of New York City" and that "[t]his request came from Brooklyn Union Gas." (Id. Page 12). He further confirmed that the work was to be performed at "Avenue D between Rogers Avenue and East 28th Street." (Id. Page 13). Mr. Stone stated that Brooklyn Union Gas' job control report showed "that the gas main had to be replaced due to age." (Id. Page 23-25). Mr. Stone further confirmed that Brooklyn Union Gas hired New York Paving as a paving contractor in relation to the gas installation project. (Id. Pages 37-38). When asked to describe the sidewalk at the time of the accident he stated, "as I can tell from my search, it would

have been temporary inside the sidewalk where they did the excavation, so you would see the asphalt." (Id. Page 70). He further confirmed that the change from a temporary condition to a permanent condition of the sidewalk "was not before the date of the accident" and that there was no indication of when the paving work was completed. (Id.).

In opposition, the Plaintiff argues that Defendant Avenue D has failed to meet its *prima facie* burden of demonstrating entitlement to summary judgment. Plaintiff further argues that, as the owner of the Premises, Defendant Avenue D had a non-delegable duty to maintain the sidewalk in a reasonably safe condition, free from dangerous conditions or tripping hazards, such as a raised and uneven sidewalk caused by temporary paving work performed for the purpose of providing gas service to the building.

Defendant Avenue D "has established, *prima facie*, that, under the circumstances," it was National Grid's duty to maintain the sidewalk. "National Grid had an "statutory obligation," pursuant to "Administrative Code of the City of New York § 19-147 and the Rules of the City of New York Department of Transportation (34 RCNY) 2-11(e)(16), to repair and restore the subject sidewalk (*see* Administrative Code of City of NY § 19-147 [a][]). Moreover, as a permittee performing work to the public sidewalk, National Grid was liable for any 'damage . . . to persons, animals or property by reason of negligence in any manner connected with the work' (Administrative Code of City of NY § 19-110)." *Maldonado v. 527 Lincoln Place, LLC*, 173 AD3d 730, 731, 103 N.Y.S.3d 581 [2d Dept 2019]. Defendant Avenue D also established that it did not create the alleged dangerous condition or cause it to occur through a special use. *Maldonado v. 527 Lincoln Place, LLC*, 173 AD3d 730. Accordingly, Defendant Avenue D's motion is granted.

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

Defendant Avenue D's motion for summary judgment (motion sequence #3) is granted, and the complaint as against Defendant Avenue D is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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