

Lozach v City of New York

2022 NY Slip Op 34183(U)

December 9, 2022

Supreme Court, New York County

Docket Number: Index No. 151346/2018

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

IRENE LOZACH,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 151346/2018

MOTION DATE 05/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing papers, the motion by defendant the City of New York (the "City") is granted for the reasons set forth below.

On February 13, 2018, plaintiff commenced this action alleging that she sustained injuries on March 5, 2017, when she tripped and fell on a raised sidewalk flag abutting 212 West 22nd Street, New York, New York (the "Premises") (NYSCEF Doc. No. 1 [Compl. at ¶10]). Plaintiff alleges that defendant was negligent in: (1) allowing this sidewalk flag to be raised by the roots of an adjacent tree; (2) failing to properly inspect and maintain this area; and (3) either failing to repair this sidewalk defect or improperly repairing the sidewalk flag (Id. at ¶11).

The City now moves, pursuant to CPLR §3212, for summary judgment dismissing the complaint, on the grounds that it is exempt from liability under Administrative Code §7-210. In support of this contention, the City submits: (1) the affirmation of David Atik, an employee of the New York City Department of Finance ("DOF"), attesting that his review of the DOF's Property Tax System database reveals that the Premises is classified as a Building Class D7 rather than a

one-, two-, or three-family residential property (NYSCEF Doc. No. 24 [Atik Aff. at ¶¶4-6]); and (2) the affidavit of David Schloss, Senior Title Examiner for the New York City Law Department, attesting that his title search revealed that 212 W. 22 Realty, LLC held title to the Premises on the date of plaintiff's fall (NYSCEF Doc. No. 23 [Schloss Aff. at ¶¶1-3]).

The City also argues that it did not cause or create the subject sidewalk condition. In connection with this contention, it submits the: (1) affidavit of Sharabanti Aich, an employee of the New York City Department of Transportation ("DOT"), detailing the results of a record search performed for the south side sidewalk of West 22nd Street, between Seventh and Eighth Avenue for the two-year period prior to and including the date of the subject incident (NYSCEF Doc. No. 25 [Aich Aff. at ¶3]); (2) the records produced by this search (NYSCEF Doc. No. 22 [CSO Response at pp. 4-861]); (3) the affidavit of Yelena Bogdanova, an employee of the New York City Department of Parks and Recreation ("Parks"), attesting that a search of records pertaining to street tree planting and sidewalk repairs performed at the Premises for the two-year period prior to and including the date of plaintiff's incident yielded no results (NYSCEF Doc. No. 25 [Bogdanova Aff. at ¶¶4-5]); (4) the affidavit of Sharon Lai, a Parks employee, attesting to a search of Parks records for the Premises for the two-year period up to and including the date of plaintiff's fall (NYSCEF Doc. No. 27 [Lai Aff. at ¶¶1-4]); and (5) the records produced by Lai's search¹ (NYSCEF Doc. No. 22 [CSO Response at pp. 865-871]).

In opposition, plaintiff argues that summary judgment is inappropriate because: (1) a question of fact exists as to whether the City received prior written notice of the sidewalk defect; and (2) omissions in the records produced by the City raise an issue of fact as to whether the City

¹ Plaintiff asserts, incorrectly, that the City has not annexed the records referenced in Lai's affidavit to the instant motion.

caused or created the subject sidewalk defect. Plaintiff also argues that summary judgment is premature because City witnesses have yet to be deposed.

DISCUSSION

“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. 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]).

The City has established that it is exempt from liability under Administrative Code §7-210. That statute shifts tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two- or three-family residential properties that are owner-occupied and used exclusively for residential purposes (See Santos v City of New York, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018]; see also Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 520 [2008]). Here, the Atik affirmation and the Schloss affidavit establish that the City did not own the Premises at the time of plaintiff’s trip and fall and that the Premises was not a one-, two-, or three-family residential property. Therefore, the City bears no statutory liability for the raised sidewalk flag at issue (See e.g., Gallis v 23-21 33 Rd., LLC, 198 AD3d 730, 732 [2nd Dept 2021] [“[w]here a sidewalk may have been damaged by growing tree roots, abutting property owners are responsible for remedying the condition and are liable for damages that may occur because of the defect”]).

The City has also established that it did not cause or create the defective sidewalk condition through an affirmative act of negligence through the affidavits of Aich, Bogdanova, and Lai and the records referenced therein (See Mejia v Sobro Dev. Corp., 2017 NY Slip Op 30440[U], *3 [Sup Ct, NY County 2017]; see also Rizzo v City of New York, 178 AD3d 503, 503-04 [1st Dept 2019]). Plaintiff's arguments to the contrary are unavailing.

Plaintiff makes much of the fact that the records produced by the City include permits issued to others for work in the vicinity of plaintiff's fall, yet do not include records documenting a subsequent inspection of such work by the City. This argument is entirely speculative—the issuance of a permit, by itself, does not prove that any work was actually performed (See Bermudez v City of New York, 21 AD3d 258, 258 [1st Dept 2005]) let alone that the City inspected such work². In addition, plaintiff's observation that the City's CSO Response does not include any contracts for sidewalk repairs is similarly speculative (See e.g., Ragolia v City of New York, 143 AD3d 596, 597 [1st Dept 2016] ["plaintiff's expert's assumption that the City must have created the roadway defect because no permits had been issued is speculative"]).

Plaintiff's argument that the City has not demonstrated that it lacked prior written notice of the defect is also unavailing. Where, as here, the City does not have a duty under Administrative Code §7-210, "it cannot be liable even if it had prior written notice of the defective condition" (Khywad v Persaud, 2015 NY Slip Op 50830[U], *2 [Sup Ct, Queens County 2015] citing Adamson v City of New York, 104 AD3d 533 [2d Dept 2013]; see also Barricelli v City of New York, 2020 NY Slip Op 33315[U], *2 [Sup Ct, NY County 2020] ["Plaintiff's citation to numerous

² Plaintiff fails to identify anything in the record that would suggest that these permits were for work to be performed by a third party as an agent of the City (See e.g., Adams v City of New York, 2019 WL 4806242 [Sup Ct, NY County 2019]; Collins v City of New York, 2017 WL 944000 [Sup Ct, NY County 2017]).

cases regarding actual and constructive notice are unavailing, as notice becomes an issue only as to the owner of a property at issue, which--as discussed above--the City is not”).

Plaintiff’s contention that summary judgment is premature is also without merit. None of plaintiff’s three central arguments in this regard are sufficient to “[show] that discovery might lead to relevant evidence or that the facts essential to justify their opposition to the motion were exclusively within defendants’ knowledge and control” (Bacchus v Bronx Lebanon Hosp. Ctr., 192 AD3d 553, 554 [1st Dept 2021] [internal citations omitted]). First, plaintiff argues that the motion is premature because she has yet to receive a response to her Freedom of Information Law requests for the production of any written notice of the sidewalk defect that the City received prior to her accident. However, as discussed above, even if such prior written notice existed the City would nevertheless be exempted from liability by Administrative Code §7-210.

Second, plaintiff notes that photographs exist of the subject sidewalk flag (i.e., those that were submitted together with plaintiff’s notice of claim and later used at plaintiff’s GML §50-h hearing) that would “apprise the Court of the nature and extent of the defective condition” as well as any prior repairs (NYSCEF Doc. No. 31 [Singer Affirm. at ¶¶5, 8]). Notably, plaintiff failed to submit any of these photographs in opposition to the motion. This is particularly glaring since at least some of these photographs—i.e., those that plaintiff served on the City with her notice of claim—are necessarily within plaintiff’s possession and control. As to the photographs used at plaintiff’s GML §50-h hearing, plaintiff objects to the City’s submission of these photographs in its reply papers (the City asserts that these photos were inadvertently omitted from its initial motion papers). It is puzzling that plaintiff suggests that these photographs from the GML §50-h hearing may create a question of fact yet objects to their review by the Court. Notwithstanding the

foregoing, after reviewing the photographs submitted by the City, and over plaintiff’s objection, this Court finds nothing to suggest that any prior repairs were performed.

Finally, plaintiff argues that the motion is premature because she has yet to depose the City’s witnesses. This does not present a bar to summary judgment in light of the City’s exhaustive documentary production and plaintiff’s failure to suggest any facts essential to oppose the instant motion that might be revealed by such depositions (See Medina-Diaz v 540 W. 145 LLC, 190 AD3d 646, 647 [1st Dept 2021]).

In light of the foregoing, it is

ORDERED that the motion for summary judgment by defendant the City of New York, is granted and the complaint is dismissed in its entirety; and it is further

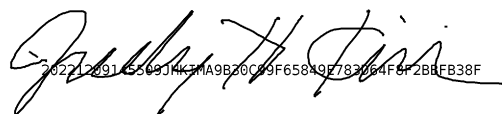
ORDERED that within thirty days from entry of this order, counsel for the City of New York shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; 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 this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

12/9/2022

DATE



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

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER