

McGovern v City of New York
2022 NY Slip Op 35158(U)
March 8, 2022
Supreme Court, Bronx County
Docket Number: Index No. 28759/2018E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK : Part IA-12

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Catherine McGovern,

Plaintiff,
-against-

The City of New York, JP Morgan Chase Bank,
National Association, 386 Park South LLC,
Defendants.

-----X
Kim Adair Wilson, J.:

DECISION AND ORDER

Index No. 28759/2018E
Motion Seq. #003

HON. KIM ADAIR WILSON
J.S.C.

“NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,” dated and filed November 15, 2021, respectively, by Lindsay Kalick, Esq. (Wilson, Elser, Moskowitz, Edelman & Dicker LLP), counsel for defendant JPMorgan Chase Bank, National Association (s/h/a JP Morgan Chase Bank, National Association), seeks “an Order: (a) pursuant to CPLR 3212, dismissing plaintiff’s complaint and all cross claims asserted against it on the ground that there are no genuine issues of material fact in dispute; and (b) granting such other relief as this Court may deem just and proper.” The remaining parties submit no opposition to defendant’s motion. This Court determines the defendant’s motion as follows:

Plaintiff McGovern commenced this personal injury action against the defendants¹ alleging that on April 28, 2017, the defendants’ negligence caused her to trip on a hole on the sidewalk of East 27th Street between Madison Avenue and Park Avenue South, approximately two to three feet from the entrance of Chase Bank, fall and sustain serious injuries. Plaintiff contends that defendant 386 Park South LLC (“386 Park South”), owner of the building adjacent to the sidewalk where plaintiff allegedly tripped and fell, and defendant JPMorgan Chase Bank, National Association (“JPMC”), its tenant, had a duty to maintain the subject sidewalk.

Here, in the instant action, defendant JPMC moves for CPLR 3212 summary judgment. By affirmation, dated November 15, 2021, defendant’s counsel asserts that plaintiff’s complaint and all cross claims asserted against defendant JPMC should be dismissed on the ground that “there are no genuine issues of material fact in dispute.” Counsel posits that

¹ By “Stipulation Discontinuing Action,” dated November 15, 2018, the respective counsel of plaintiff Catherine McGovern and defendant The City of New York agreed to discontinue the action with prejudice, together with all cross-claims and counterclaims against defendant The City of New York.

defendant JPMC was a commercial tenant of the subject premises and thus, owed no duty to plaintiff regarding the maintenance of the sidewalk because it neither created nor caused the alleged dangerous condition or made special use of the sidewalk. In fact, counsel contends that building owner, defendant 386 Park South, had a nondelegable duty to maintain and repair the sidewalk pursuant to Administrative Code of the City of New York §7-210.

It is well settled that summary judgment is a drastic remedy which can only be granted when it is clear that there are no triable issues of fact (*Middle Village Associates v Pergament Home Centers, Inc.*, 184 Misc2d 552 [2000], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986] or where the issue is even debatable (*Stone v Goodson*, 200 NYS2d 627 [1960])).

The pertinent provision of the NYC Administrative Code § 7-210 is as follows:

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.

In support of its motion, defendant JPMC proffers the pleadings, the deposition transcripts of plaintiff Catherine McGovern (September 3, 2020 and November 13, 2020), Jimmy Ngo (May 17, 2021) on behalf of defendant 386 Park South, and Naira Simonyan (April 20, 2021) on behalf of defendant JPMC; photographs of the alleged defective sidewalk; and the affidavit of Kathleen Pendergraft, Vice President of Casualty Insurance Claims at JPMorgan Chase, including the lease and its subsequent amendments.

Plaintiff McGovern testified that on April 28, 2017, at approximately 4:30PM, she was walking when she tripped on a hole on the sidewalk of East 27th Street between Madison and Park Avenue and fell. She observed no work being performed on the subject sidewalk and did not observe the hole prior to her accident; she saw the hole after she fell and looked down.

Kathleen Pendergraft, by affidavit dated November 1, 2021, authenticates the subject property's lease and its subsequent agreed upon extensions and amendments. The lease in effect during plaintiff's accident, establishing the relationship between the parties, is entitled, "FOURTH AMENDMENT TO LEASE."² Movant's counsel posits that, in accordance

² THIS FOURTH AMENDMENT TO LEASE (this Amendment") made as of the 29th day of December,

with the lease agreement (§4 Repairs – Floor Load), the tenant is responsible for taking “good care of the demised premises” and making “all repairs thereto as and when needed to preserve them in good working order and condition.” He further posits that defendant JPMC performed no work on or made any repairs to the subject sidewalk.

Naira Simonyan, defendant JPMC’s assistant branch manager, was at the subject premises on the day of plaintiff’s accident. She testified that the bank’s employees are not responsible for inspecting the sidewalk. They are only responsible for inspecting the perimeter inside the bank solely for loiterers. Ms. Simonyan possessed no knowledge of complaints regarding the subject sidewalk prior to plaintiff’s accident date.

Jimmy Ngo began working for defendant 386 Park South in September 2017, after plaintiff’s accident. At the time of his deposition, he was the property manager for the subject premises and testified that 386 Park South owned the building on April 28, 2017, the date of plaintiff’s accident. He stated that the manager’s responsibilities include handling the building’s daily operations and to ensure that the building, including its adjacent sidewalk, were safe. Mr. Ngo testified that, if he, as property manager, observed a defect on the adjacent sidewalk, he would “try to fill it in” by placing a “patch cement on top, but if it’s deeper, if it’s deeper, if it’s cracked a lot more then I would ask for a professional to do that.” He further testified that 386 Park South retains no work orders or records of sidewalk repairs.

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing (*Bethlehem Steel Corp v Solow*, 51 NY2d 870 [1980]). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material question of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The NYC Administrative Code § 7-210 effectively shifts liability for injuries arising from a negligent failure to maintain a sidewalk from the municipality to the non-exempt abutting landowners (*Cook v Consolidated Edison Co. of N.Y., Inc.*, 5 AD3d 447 [1st Dept 2008]). Although the Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk, and the owner is required to maintain his or her property in a reasonably safe condition to avoid the

2010, between 386 PARK AVENUE SOUTH PROPERTY INVESTORS I, LLC, a Delaware limited liability company (“Landlord”), having an address c/o Monday Properties, 230 Park Avenue, 5th Floor, New York, New York 10169, and JPMORGAN CHASE BANK, N.A. (successor by merger to Manufacturers Hanover Trust Company), a national banking association (“Tenant”), having an address at 1111 Polaris Parkway, Suite 1E, Mail Code OH1-0241, Columbus, OH 43240, Attn: Lease Administration.

likelihood of injury to others, a tenant may be held liable to the owner for damages resulting from a violation of a lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of the property" (*Wahl v JCNYS, LLC*, 133 AD3d 552 [1st Dept 2015]; *Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]; *O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1996]). Here, defendant JPMC, the tenant of the subject premises, met its burden through its proffered evidence, specifically, the lease between it and defendant owner 386 Park South which establishes that, as the tenant, it possessed no obligation to repair or replace the sidewalk in front of the subject premises. Moreover, defendant 386 Park South submits no opposition papers and thus, produces no evidentiary proof to show the contrary and warrant a trial of material question of fact.

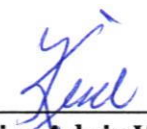
Upon review and the analysis of statutory authority, relevant case law, the papers submitted and the record, this Court determines that defendant JPMC's motion seeking to dismiss plaintiff's complaint and all cross claims asserted against it is granted without opposition.

Accordingly, JP Morgan Chase Bank, National Association's motion is **GRANTED** in its entirety as stated herein.

Defendant/Movant is directed to serve a copy of this Order with Notice of Entry, upon the parties within thirty (30) days of entry of this Order and file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: March 8, 2022
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.