

Paulino v Abner Props. Co.

2023 NY Slip Op 30103(U)

January 12, 2023

Supreme Court, New York County

Docket Number: Index No. 155555/2018

Judge: Leslie A. Stroth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

-----X

ANNA PAULINO,

Plaintiff,

- v -

ABNER PROPERTIES COMPANY, THE CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 15555/2018

MOTION DATE 10/13/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for

JUDGMENT - SUMMARY

The instant motion arises out of an action to recover for personal injuries sustained by plaintiff Anna Paulino (plaintiff) on November 27, 2017 when she allegedly tripped and fell on the sidewalk in front of 154 and/or 158 West 14th Street in New York, NY (the subject property). Defendant City of New York (the City) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor, dismissing plaintiff's complaint and any cross-claims against it. Co-defendant Abner Properties Company (Abner) and plaintiff submit opposition to the motion. The City submits a reply.

The City argues that, pursuant to the Administrative Code of the City of New York § 7-210, it is not liable for plaintiff's alleged injuries. 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,

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. *Id.*

I. The City's Motion for Summary Judgment

The City argues that a photograph of the incident location as well as plaintiff's pleadings and testimony demonstrate that plaintiff tripped and fell on the sidewalk in front of the subject property and that the City does not own said property. *See* NYSCEF doc. nos. 25, 26, and 29 - 32. The City also maintains that the subject premises is not a one, two, or three-family solely residential property and is, therefore, not exempt from the liability shifting provisions of Administrative Code § 7-210. Furthermore, the City maintains that it did not cause and/or create the alleged defect that caused plaintiff's incident, nor did it make special use of the subject sidewalk.

In support of its motion, the City relies on a record search conducted by a New York City Department of Transportation (DOT) employee, Omar Codling. *See* NYSCEF doc. no. 34. Mr. Codling attests that he conducted a search for the sidewalk located at West 14th Street between Sixth and Seventh Avenues for the two-year period prior to and including the date of plaintiff's accident on November 27, 2017. *See id.* at ¶ 3. He also conducted a supplemental search for the subject location for the six days leading up to and including the date of plaintiff's accident. *See* NYSCEF doc. no. 35. Additionally, the City relies on a search conducted by a New York City Department of Finance (DOF) employee, David Atik. *See* NYSCEF doc. no. 36. Mr. Atik affirms that he conducted a search of the Property Tax System database used and maintained by DOF in the regular course of its governmental business for 154-158 West 14th Street, New York, NY. *See id.* at ¶ 4. Mr. Atik affirms that, on the date of plaintiff's accident, the City was not the owner of

the subject property. *See id.* at ¶ 5. Further, Mr. Atik affirms that the subject property is classified as a “Building Class O6 (office building)” and not as a one, two, or three-family solely residential property. *Id.* at ¶ 6.

The City argues that, because the subject property is not owned by the City and does not fall within the exempt classifications set forth in Administrative Code § 7-210, it is not liable for plaintiff’s alleged injuries and that all claims by plaintiff against the City should be dismissed. Additionally, while the City has no burden to establish its *prima facie* entitlement to summary judgment to prove its freedom from liability due to affirmative negligence or special use, it asserts that there is no evidence that the City caused or created the alleged condition or made special use of the subject sidewalk. The Court of Appeals has held that the City may still be held liable if it caused and/or created the subject defect and/or made special use of the subject sidewalk. *See Yarborough v City of New York*, 10 NY3d 726 (2008). The City asserts that the DOT search reveals no evidence that the City caused and/or created a defect at the subject location. *See* NYSCEF doc. no. 33. Therefore, the City argues that it cannot be held liable for plaintiff’s alleged injuries.

II. Abner’s Opposition

In opposition, Abner argues that the City has failed to establish its *prima facie* entitlement to summary judgment. It asserts that the City has not proved that it is not liable for plaintiff’s injuries, as a question of fact exists as to whether plaintiff fell entirely on the sidewalk or on the curb, or both. Abner maintains that plaintiff’s 50-h testimony does not provide a clear location of the accident on either the sidewalk or the curb, but rather that plaintiff circled an area in the gap between the sidewalk and the curb as the location of her accident. *See* NYSCEF doc. nos. 30 at 12-13; 31. Further, Abner asserts that during plaintiff’s examination before trial (EBT), she testified that she was caused to trip while stepping onto the sidewalk when her left foot was caught

in the space between the sidewalk and the curb. *See* NYSCEF doc. no. 32 at 35, 49. Therefore, Abner argues that a question of fact exists as to the City's liability because the City is responsible for the maintenance and repair of the curb and it is not certain whether plaintiff fell due to a defect on the sidewalk or the curb.

Additionally, Abner argues that questions of fact exist as to whether the City caused and/or created the alleged defect. It asserts that the City did not show that it did not cause the gap between the curb and the sidewalk through its two record searches. In support of this argument, Abner provides an affidavit of engineering expert James M. Bermudez, who attests that his inspection of the subject location revealed that the entire 63-inch section of the curb has deteriorated and settled over time, creating horizontal openings and vertical grade differentials between the curb and the sidewalk, while the sidewalk is in satisfactory condition and does not present a substantial or otherwise latent defect. *See* NYSCEF doc. no. 41 at ¶¶ 4, 11. Therefore, Mr. Bermudez opines that the proximate cause of plaintiff's alleged trip and fall is the defective granite curb, which is the City's responsibility to maintain. *See id.* at ¶ 12. Abner relies on this affidavit to argue that the City's motion must be denied because plaintiff's accident was caused by the curb, for which the City is responsible.

III. Plaintiff's opposition

Plaintiff also opposes the City's motion, arguing that the City has failed to meet its *prima facie* burden demonstrating that it did not have prior written notice of the subject defect, as required by Administrative Code § 7-201 (c) (2). First, plaintiff argues that the Big Apple Maps (BAM) submitted by the City are "illegible and extremely blurry" and, therefore, the City should not be permitted to use them in support of its motion. Secondly, plaintiff asserts that the City did not address the issue of prior written notice in its motion, failing to meet its *prima facie* burden. Even

if the City had addressed this issue, plaintiff maintains that it would not be able to demonstrate a lack of prior written notice because the BAMs submitted are illegible and blurry. *See* NYSCEF doc. no. 48. However, plaintiff asserts that the BAMs do demonstrate numerous defects in the vicinity of plaintiff's accident location, raising a triable issue of fact as to whether the defect was depicted. *See Sanchez v City of New York*, 176 AD3d 490 (1st Dept 2019) (holding that factual issues as to whether a defect is designated on the BAM should be resolved by a jury).

Additionally, plaintiff argues that the City's motion is premature because Court-ordered depositions were still outstanding at the time it was filed. She asserts that the City filed its summary judgment motion before either of defendants' depositions were held, in violation of the Case Scheduling Order (CSO) issued on March 7, 2019. *See* NYSCEF doc. no. 50. Plaintiff maintains that these depositions are vital and necessary for the prosecution of her case and, therefore, the Court must deny the City's summary judgment motion as premature.

Plaintiff also opposes Abner's contention in its opposition that plaintiff fell due to a defect in the curb, asserting that the evidence demonstrates that the cause of plaintiff's accident was a defect in the sidewalk. *See* NYSCEF doc. nos. 30 and 32. Plaintiff argues that her testimony clearly establishes that she fell on the sidewalk adjacent to the property owned by Abner and that she circled an area of the sidewalk that was raised, cracked, and fractured, rather than the curb, in the photograph. *See id.* Further, plaintiff asserts that Mr. Bermudez's affidavit contains speculative and conclusory claims, as it does not annex any photographs depicting his findings.

In support of her arguments, plaintiff submits the affidavit of professional engineer, Nicholas Bellizzi, with annexed photographs of his inspection. *See* NYSCEF doc. no. 47. Mr. Bellizzi attests that the subject sidewalk contained substantial defects which caused plaintiff's accident. *See id.* at ¶¶ 8-10. Administrative Code § 19-152 (a) (4) provides that a substantial defect

constituting a tripping hazard on a public sidewalk exists where there is a vertical grade differential of half an inch or more, or where there is a horizontal defect measuring an inch or more. Mr. Bellizzi attests that there was vertical height differential of more than half an inch and a horizontal gap between the curb and sidewalk of over one inch, commonly referred to as a “toe trap.” *Id.* at ¶¶ 10, 11. Mr. Bellizzi also attests that he found substantial fractures and broken-off pieces of concrete in the subject sidewalk, which corroborates plaintiff’s testimony, and asserts that Mr. Bermudez fails to provide a scientific basis for his opinion that the curb sunk/settled. *See id.* at ¶ 18. Additionally, plaintiff argues that the Court should not consider Mr. Bermudez’s affidavit because it is defective, asserting that the “Inspection & Condition Report” and exhibits which he relies on were not annexed to his affidavit.

IV. The City’s Reply

In further support of its motion, the City submits a reply to both plaintiff’s and Abner’s opposition papers. The City argues that both plaintiff’s pleadings and opposition support the City’s contention that the location of the accident was on the sidewalk rather than the curb, in contrast to Abner’s assertions. Further, the City maintains that a gap between the curb and sidewalk is not part of the curbstone and, therefore, the City is not liable as it is only responsible for maintenance of the curb. The City also argues that the prior written notice requirement of Administrative Code § 7-201 is not an exception to § 7-210 and is, therefore, irrelevant to the City’s *prima facie* showing of entitlement to summary judgment. Additionally, the City notes that neither plaintiff nor Abner challenge the building’s non-City ownership or non-exempt classification.

Further, the City argues that both Mr. Bermudez’s and Mr. Bellizzi’s expert affidavits should be disregarded as speculative and self-serving, and that Mr. Bermudez’s affidavit in particular is insufficient because he does not have personal knowledge of the accident and did not

inspect the condition until over four years after the date of plaintiff's alleged accident. Even so, the City maintains that it can only be held liable for affirmative negligence when work by the City *immediately* results in a dangerous condition, and that Mr. Bermudez attests that the curb deteriorated and settled *over time*. Additionally, the City notes that Mr. Bellizzi attests the defect was on the sidewalk, not the curb, in support of its motion for summary judgment.

Lastly, the City argues that the motion is not premature because all relevant discovery has been exchanged. It asserts that it exchanged the two-year search for the subject sidewalk segment via secure file transfer on September 9, 2021 (*see* NYSCEF doc. no. 55), and that no deposition testimony could alter the City's liability in this action, as it does not own the subject property and said property does not fall within a non-exempt classification, pursuant to Administrative Code § 7-210.

V. Analysis

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.

Although the City demonstrates that it does not own the property adjacent to the subject sidewalk and that said property does not fall under an exempt building classification pursuant to Administrative Code § 7-210, questions of fact exist regarding whether plaintiff's injury was caused by a defect in the sidewalk or the curb. The parties seem to agree that plaintiff tripped due to a gap between the sidewalk and the curb at the subject location, but the expert affidavits submitted by plaintiff and Abner raise a question of fact as to whether the gap was caused by the deterioration/settling of the curb or by a defect in the sidewalk, or both. Affording the parties opposing summary judgment all favorable inferences, the Court finds that the City fails to tender sufficient evidence to show the absence of any material question of fact and the right to entitlement to judgment as a matter of law.

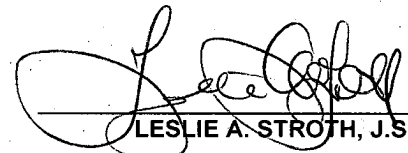
Accordingly, it is hereby

ORDERED that defendant, City of New York's motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

The foregoing constitutes the decision and order of the Court.

1/12/2023
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE