

Berch v City of New York

2023 NY Slip Op 33139(U)

August 9, 2023

Supreme Court, New York County

Docket Number: Index No. 161096/2013

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X

SUSAN BERCH,

Plaintiff,

- v -

THE CITY OF NEW YORK, HARDWELL ACQUISITION LLC.,

Defendant.

-----X

HARDWELL ACQUISITION LLC.

Third-Party Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY

Third-Party Defendant.

-----X

INDEX NO. 161096/2013
MOTION SEQ. NO. 005

AMENDED
DECISION + ORDER ON
MOTION

Third-Party
Index No. 595707/2016

The following e-filed documents, listed by NYSCEF document number (Motion 005) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 119, 121, 122, 124, 126, 128, 129, 130, 131, 132, 143, 145, 147, 148, 149, 166, 167, 168, 169, 170, 171, 172, 175

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

For the reasons that follow, the summary judgment motion by Defendant and Third-Party Plaintiff, HARDWELL ACQUISITION LLC (HARDWELL) is denied.

Procedural History

Plaintiff initially commenced this action against the City of New York (the City), The Metropolitan Transit Authority Bus Company (MTA Bus Company) and HARDWELL on November 27, 2013. (NYSCEF Doc. 1). There, the first cause of action was against the City and HARDWELL and concerned a January 8, 2013, incident where Plaintiff alleges twisting her foot on a crack and/or hole in the sidewalk. The second cause of action was against the MTA Bus Company and concerned claims arising out of a separate January 28, 2013, incident where the Plaintiff alleges tripping over a bus ramp.

MTA Bus Company moved to dismiss Plaintiff's initial complaint, asserting that it did not own the bus identified in the complaint (Motion Seq. 1) and identifying NEW YORK CITY TRANSIT AUTHORITY (TRANSIT) as the likely owner of the bus. Plaintiff then filed an amended complaint on April 16, 2014, against the City and HARDWELL only (NYSCEF Doc. 11). In the amended complaint, the claims regarding the January 8, 2013, incident were against the City and HARDWELL. However, the claims arising out of the January 28, 2013, incident were now alleged against only against the City. Plaintiff then entered into a stipulation of discontinuance with MTA Bus Company dated April 28, 2014 (NYSCEF Doc. 12) and a subsequent June 4, 2014, Order directed that the caption be amended (NYSCEF Doc. 22), thereby dismissing MTA Bus Company from the action.

The City then filed its own motion to dismiss and for summary judgment (Motion Seq. 3) alleging that it is not responsible for Plaintiff's injuries due to a sidewalk defect pursuant to New York City Administrative Code §7-210 as the repair and maintenance of the sidewalk was the responsibility of the property owner (HARDWELL), and as the City did not own, operate, control or maintain the bus involved in the January 28, 2013 accident.

While the City's motion was pending, HARDWELL commenced a third-party action against TRANSIT on September 16, 2016. (NYSCEF Doc. 51). The City's unopposed motion was granted by Order dated October 5, 2016 (NYSCEF Doc. 54), dismissing the City from this action. Notably, neither Plaintiff's initial, nor amended complaint asserts any claims against TRANSIT. Thus, Plaintiff's only remaining claims are those asserted against HARDWELL concerning the January 8, 2013 incident upon the sidewalk abutting 346 7th Avenue in New York County.

HARDWELL now moves to dismiss the complaint and for summary judgment asserting that although HARDWELL owned the property adjacent to the subject sidewalk, it did not have duty to maintain the area of the sidewalk where the defect was located.¹ In support, HARDWELL submits the parties' deposition transcripts, photos, and the lease between the City of New York and TRANSIT.² Plaintiff opposes the motion and TRANSIT does not.

¹ HARDWELL timely moved, post-note of issue to dismiss and for summary judgment. HARDWELL's initial motion was denied with leave to refile, or amend the statement of facts within 30 days, by an Order of this Court dated, January 11, 2023, as the movant's statements of material facts was not in compliance with 22 NYCRR 202.8-g (NYSCEF Doc. #145). HARDWELL then amended its, filing the amended statement of material facts. The motion will now be addressed on its merits.

² TRANSIT has its own summary judgment motion pending, Motion Seq. No. 7 which will be decided separately and concurrently with the within motion, Motion Seq. 5.

Heriberto Hernandez (“Hernandez”) an Associate Project Manager Level 2 for TRANSIT testified at a deposition and confirmed that the sidewalk grates near the accident location are part of TRANSIT’s subway system and are used for ventilation (NYSCEF Doc. 103). Hernandez first learned of this incident on December 15, 2020 via an email from his supervisor. Hernandez then conducted an inspection of the subject area, on January 15, 2021. At that time, Hernandez observed that the sidewalk slab adjacent to the grates had been replaced. He did not take any measurements.

HARDWELL’s Summary Judgment Motion

HARDWELL’s motion was noticed as one to dismiss pursuant to CPLR 3211 and as one for summary judgment pursuant to CPLR 3212. Since the motion was filed post-note of issue and Plaintiff opposes it as a summary judgment one, this Court will treat this motion as one seeking summary judgment only (*see* CPLR 3211(c); *Wiesen v. New York Univ.*, 304 AD2d 459 [1st Dept 2003]).

A party seeking summary judgment has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form that dispels any material question of fact for a trial (*see* CPLR 3212 [b]; *Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986], *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Section 7-210 of the New York City Administrative Code unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure (*Sangaray v. W. River Assocs., LLC*. 26 NY3d 793 [2016]). While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7–210. (*Xiang Fu He v. Troon Mgmt., Inc.*, 34 NY3d 167 [2019]). This duty is modified by Title 34 of the Rules & Regulations of the City of New York §2-07(b)(1), which provides that the owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending

twelve inches outward from the edge of the cover, grating, or concrete pad, if such pad is installed (34 RCNY §2-07[b][1]).

Here, it is not disputed that the property abutting the subject sidewalk is owned by Defendant HARDWELL. However, HARDWELL argues that although it may be responsible to maintain the sidewalk abutting its property pursuant to §7-210 of the Administrative Code, it is not responsible for the subject condition because it involved the frame around the subway grate which owners of the grates are responsible for pursuant to 34 RCNY § 2-07(b)(1).

In support HARDWELL relies solely upon the deposition testimony of TRANSIT’s employee, an associate project manager, H. Hernandez regarding the distance between “the subway grate to the divider of [the] cement slab”. Although Hernandez testified that the distance was approximately eight inches, he testified based on reviewing a photograph at his deposition. Significantly, Hernandez did not base such testimony upon conducting any actual measurements. Moreover, Hernandez visually inspected the subject area approximately eight years after this incident occurred and after it was apparently repaired and/or changed from the time of the accident (as per the Plaintiff’s disposition testimony). Thus, at this time, there is insufficient evidence to establish that the crack and or hole on the sidewalk that caused Plaintiff’s alleged accident is within the 12 inch parameter designated by 34 RCNY § 2-07(b)(1). Accordingly, HARDWELL has not met its prima facie burden as a matter of law as there are material questions of fact as to the location of the subject defect as it relates to the subway grate.

Therefore, it is hereby, ORDERED that Defendant-Third-Party, HARDWELL ACQUISITION LLC’s motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

8/9/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

HON. DENISE M. DOMINGUEZ
J.S.C.