

Pickett v SV-B Owners LLC

2023 NY Slip Op 33407(U)

October 3, 2023

Supreme Court, New York County

Docket Number: Index No. 156353/2020

Judge: Frank P. Nervo

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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. FRANK P. NERVO PART 04

Justice

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GLADYS PICKETT,

Plaintiff,

- v -

SV-B OWNERS LLC, SV-B LIHTC LLC, ACACIA SENDERO
VERDE II HOUSING DEVELOPMENT FUND COMPANY,
INC., L&M BUILDER'S GROUP, LLC, L&M DEVELOPMENT
PARTNERS, INC., OLIVIERO CONTRACTING INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff moves for summary judgment on the issue of liability.

Defendants oppose and cross-move for summary judgment, dismissing the action.

The standard by which the Court analyzes the instant motion is well established. On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the

Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Here, the procedural posture of these applications, namely the filing of competing motions for summary judgment, is, at minimum, a strong indicator that obvious issues of fact preclude summary judgment. Plaintiff alleges she was caused to trip and fall due to a broken sidewalk. Defendants allege that any defect is trivial and that, with respect to the contractor defendants, was not caused by them. Resolution of these claims is inappropriate on summary judgment and the instant applications are exactly the type of perfunctory summary judgment motions that this Court admonished against as substantially wasting judicial resources (*see Marrero v. Gotham Plaza*, 2023 NY Slip OP 31995[U] [Nervo, J.] [Sup Ct, NY Cty 2023]; *see also* Andrew Denney, *New York Lawyers' 'Perfunctory' Filing of Summary Judgment Motions Wastes Court Resources, Judge Says*, *New York Law Journal* [June 15, 2023]).

As relevant here, “the question of whether or not a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case and is a question of fact for the jury and liability will result where the condition is found to be hazardous to pedestrians” (*Shechtman v. Lappin*, 161 AD2d 118 [1st Dept 1990]; *see also Trincere v. County of Suffolk*, 90 NY2d 976 [1997]). The size of the alleged defect, whether significant as plaintiff alleges, or trivial as defendants allege, is not a concern for this Court on summary judgment (“Dimensions of a sidewalk defect are not controlling on the question of liability” *Wilson v. Jaybro Realty & Dev. Co.*, 289 NY 410 [1943]).

Finally, the Court notes that issues surrounding the admissibility and/or evidentiary weight of plaintiff's photographs of the alleged condition likewise preclude summary adjudication. As relevant here, defendants demanded metadata and digital copies of the photographs relied upon by plaintiff. However, plaintiff did not substantively respond to the demand. Given that plaintiff averred she could not substantively respond to the demand, the parties entered into a stipulation, which was so-ordered by the Court, providing that plaintiff had no knowledge of who took the photos, when the photos were taken, or how they were taken (*see* May 24, 2022 stipulation; NYSCEF Doc. No. 35 at ¶ 1 "... plaintiff's counsel came into possession of these photographs on November 11, 2019, but do not know who took these photographs, when they were taken or how they were taken"). Now, on this motion, plaintiff provides an investigator's affidavit of authentication averring, *inter alia*, that the investigator took certain photographs 12 days following the accident (NYSCEF Doc. No. 53). It is unclear, from the motion and cross-motion, whether the so-ordered stipulation and investigator's affidavit relate to the same set of photographs – the so-ordered stipulation references page numbers of plaintiff's bill of particulars, however, notably absent from the record is any bill of particulars.¹ All parties having moved for summary judgment, it is sufficient for this Court to find the photographs insufficient for any party to meet their burden on these motions, given the forgoing.

¹ Demands for bills of particulars can be found in the record at Doc. Nos. 13 and 21; however, the responsive bill of particulars is not filed to the record.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied.

THIS CONSTITUTES THE ORDER OF THE COURT

10/3/2023

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

HON. FRANK P. NERVO
J.S.C.