Webb v City of New York
2023 NY Slip Op 35028(U)
December 12, 2023
Supreme Court, Queens County
Docket Number: Index No. 708839/2020
Judge: Chereé A. Buggs
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Amended Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

---X

Index No.:708839/2020

COLLETTE WEBB,

Motion Date: 10/16/2023

Plaintiff,

Motion Cal. No.: 37

-against-

Motion Sequence No.: 1

THE CITY OF NEW YORK, CHARLES PRICE and LENA PRICE,

Defendants.

---X

The following efiled papers numbered 19-23, 25-41 submitted and considered by Defendant Charles Price and Lena Price (hereinafter collectively known as "Price") seeking an Order for summary judgment pursuant to Civil Practice Law and Rules (CPLR) 3212, seeking to dismiss Plaintiff Collette Webb's (hereinafter "Webb") complaint against them together with all cross-claims.

	Papers Numbered
Notice of Motion-Affirmation in Support-Affidavits-Exhibits..	EF 19-23
Affirmation in Opposition-Affidavits-Exhibits......	EF 25-39, 40
Affirmation in Reply-Affidavits-Exhibits..............	EF 41

The undersigned's Order dated December 7, 2023 is hereby amended to reflect the opposition papers submitted by The City of New York.

Relevant Factual and Procedural Background

Webb initiated a negligence action on June 30, 2020, for injuries from a trip and fall on January 5, 2020, caused by a raised sidewalk section in front of Defendants Charles Price and Lena Price's residence at 116-31 195th Street, St. Albans, County of Queens, State of New York (subject

location). Price filed an Answer with cross-claims on August 25, 2020. On the date and time of the incident, Webb was carrying two bags and her cell phone, walking to her son's house located next door to Price's property when the incident occurred. According to Price, they had reported the sidewalk issue several times to New York non-emergency city services by dialing "311" but received no response and the sidewalk at the location was not repaired. According to Price, they had hired contractors multiple times for temporary fixes to the sidewalk since 1968, the last being around 2018.

In support of the motion for summary judgment, Price alleged that the raised sidewalk was due to tree roots under the slab lifting it, which is a natural occurrence and not their responsibility. Price goes on to claim that according to Administrative Code of City of NY § 7–210[b], maintenance of public sidewalks next to single-family homes is the responsibility of the New York City Department of Parks and Recreation. The tree causing the sidewalk issue was also public property under the New York City Department of Parks and Recreation's domain, which as the adjacent homeowners, they could not remove due to legal restrictions and thus, had no responsibility over maintaining the tree or sidewalk, thus they are not liable for the injury. Price further claimed that their voluntary sidewalk repairs, made in response to the city's inaction, were reasonable and did not indicate negligence.

Price also submitted the affidavit of William Hart (hereinafter "Hart"), a professional engineer licensed in the State of New York. Hart conducted an inspection of the location where Webb's accident occurred, and also reviewed various documents including Webb's deposition transcript; complaint; verified bill of particulars; discovery documents; Webb's notice of claim with two photos; The City of New York (hereinafter "City") response to Preliminary Conference Order and Price's Answer. Hart also reviewed Google street view photos of the subject location in November 2019 and November 2020. Hart opined that within a reasonable degree of engineering certainty, Price's repair and maintenance of the subject location was performed properly and resulted in the safest sidewalk conditions possible without removing the tree, and that the recurring lifting of the sidewalk was caused by the tree.

Law and Application

CPLR 3212 provides:

> (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

> (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...
>
> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

"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" (*see Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once a prima facie 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" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]). "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial

of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Based upon the documentary evidence set forth in Price's motion papers, the Court finds that Price has sufficiently established their entitlement to judgment as a matter of law. "In 2003, the New York City Council enacted Administrative Code of the City of New York § 7–210, the Sidewalk Law, to shift tort liability for injuries resulting from a defective sidewalk from the City to abutting property owners" (*see Brown v City of New York*, 162 AD3d 731, 732 [2d Dept 2018]; citing *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]; *Gelstein v City of New York*, 153 AD3d 604, 605 [2d Dept 2017]; *Johnson v Manley*, 150 AD3d 1210, 1211 [2d Dept 2017]). However, this provision does not apply to "one-, two- or three-family residential real property that are (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (Administrative Code of City of NY § 7–210[b]). "The exemption was provided in recognition that it was inappropriate to expose small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair." (*See Brown v City of New York*, 162 AD3d 731, 732 [2d Dept 2018]; *Coogan v City of New York*, 73 AD3d 613, 614 [1st Dept 2010].) Price established, prima facie, that their property abutting the sidewalk was a one, two or three-family, owner-occupied residence, and thus, they are entitled to exemption from liability under section 7–210(b) of the Administrative Code, and they had no duty to maintain the subject sidewalk (*see Martin v Newton*, 206 AD3d 644, 645 [2d Dept 2022]; citing *Castro v Rodriguez*, 176 AD3d 1031, 1032 [2d Dept 2019]; *Brown v City of New York*, 162 AD3d 731, 732 [2d Dept 2018]).

Further, "[a]bsent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use" (see *Missirlakis v McCarthy*, 145 AD3d 772, 773 [2d Dept 2016]; citing *Meyer v City of New York*, 114 AD3d 734, 735 [2d Dept 2014]; *Crawford v City of New York*, 98 AD3d 935 [2d Dept 2012]; *Romano v Leger*, 72 AD3d 1059, 1059 [2d Dept 2010]; *Farrell v City of New York*, 67 AD3d 859, 860 [2d Dept 2009]). Here, based on the records, Price had established with Hart's expert opinion that the repairs they made in the past did not cause the defective condition or cause it to occur by special use. The recurring raising of the slab was caused by the tree root's upward pressure, which is the responsibility of the City of New York.

In opposition, Webb and the City opposed on similar grounds. They first alleged that Price attempted several repairs on the raised sidewalk where the Plaintiff fell since 1968, the last being in 2018, which could make them liable under the "cause and create theory", and hence Price have not met thier burden demonstrating the absence of any material facts (*see Tambaro v City of New York*, 140 AD2d 331 [2d Dept 1988]). Specifically, while municipalities have a duty to maintain public sidewalks, property owners can be liable if they create a hazardous condition through defective repairs or special use. Webb then argued that Price's expert, Mr. Hart, lacked comprehensive information to conclude that the sidewalk repairs were properly done, as he didn't review contractor

agreements, scope of work, or permits and based his opinion on a visual inspection conducted years after the repairs. Webb further contends that Price failed to establish prima facie entitlement to summary judgment, as their argument relies heavily on an expert opinion without substantial evidence regarding the quality and scope of the repairs, and that there still exists factual issues necessitating a trial, especially concerning whether Price caused or created the dangerous sidewalk condition.

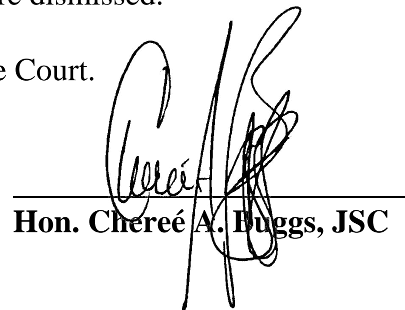
In reply, Price cited *Friedman v. Gearrity*, 33 AD.2d.308 (2nd Dept. 1970), contending that Webb and City failed to present any evidence showing that Price created the defective condition from the repairs made on the property. Price then claims again that the defective condition is due to the tree roots and referenced the Hart's expert opinion. Finally, Price argued that the case at hand is distinguishable from *Tambaro v City of New York*, 140 AD2d 331 (2d Dept 1988), since in *Tambaro,* a hole in the previously repaired sidewalk implied an improper repair, while here, a slab being lifted by a tree root does not imply negligent repair but, rather, a natural consequence of tree growth.

The Court finds that both Webb and City failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]). Although Webb argued that the raising of the slab is not caused by the tree root but rather caused Price's pervious repairs, they offer no evidence establishing that fact. Further, "an abutting landowner is not responsible for damage caused to a sidewalk by the roots of a tree" (*see Missirlakis v McCarthy*, 145 AD3d 772, 773 [2d Dept 2016]; citing *Simmons v Guthrie*, 304 AD2d 819, 820 [2d Dept 2003]; *Romano v Leger*, 72 AD3d 1059, 1059 [2d Dept 2010]; *Jackson v Thomas*, 35 AD3d 666, 667 [2d Dept 2006]; *Gomez v City of New York*, 238 AD2d 472 [2d Dept 1997]).

Therefore, the motion of Charles Price and Lena Price seeking summary judgment is granted. Plaintiff's complaint and any and all cross-claims are dismissed.

This constitute the decision and Order of the Court.

Dated: December 12, 2023



Hon. Chereé A. Buggs, JSC