

<b>Rivera v Nicotra Group LLC</b>
2023 NY Slip Op 35073(U)
September 6, 2023
Supreme Court, Richmond County
Docket Number: Index No. 152280/2019
Judge: Jr., Orlando Marrazzo
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
MILAGROS RIVERA,

*Plaintiff,*

- against -

THE NICOTRA GROUP LLC, NOCOTRA 1000, LLC,  
NICOTRA 1200, LLC, and THE CITY OF NEW YORK,

Defendants.  
-----X

PART C2

Present:  
Hon. Orlando Marrazzo, Jr.

DECISION and ORDER

Index No. 152280/2019  
Motion Nos. 002

The papers e-filed as documents numbered "60" through "98" were marked fully submitted on the 26<sup>th</sup> day of July, 2023.

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Upon the foregoing papers, the motion of defendant The City of New York for summary judgment dismissing the complaint and all cross claims against is denied.

Plaintiff Milagros Rivera commenced this action to recover damages for personal injuries she sustained on October 25, 2018, when she tripped and fell on an uneven and raised sidewalk flag in front of commercial property located at 1200 South Avenue, Staten Island, New York. Plaintiff alleges that defendant The City of New York (the "City") was negligent in failing to properly maintain and repair the sidewalk, including the removal of tree roots.

The City moves for summary judgment dismissing the complaint and all cross claims against it based on section 7-210 of the Administrative Code of the City of New York which shifts liability for the negligent failure to maintain sidewalks from the municipality to the non-exempt abutting landowners. Subsection (b) provides, in pertinent part, "the owner of real property abutting any sidewalk...shall be liable for any injury to property, or personal injury...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 replace defective sidewalk flags” (§7-210 [b]). The statutory mandate does not apply to “one, two, or three-family residential real property that is (i) in hole, or in part, owner occupied, and (ii) used exclusively for residential purposes” (§7-210[b]). The City maintains that §7-210 applies in this case, thereby shifting the municipality’s liability for plaintiff’s injuries to the owner of the commercial property located at 1200 South Avenue.

Movant submits the affirmation of David Atik, an attorney employed by the New York City Department of Finance (“DOF”). Mr. Atik’s duties include responding to Freedom of Information Law requests, subpoenas, and demands concerning the City’s property records. He affirms that DOF maintains and operates a Property Tax System (“PTS”) database to comply with such demands. The information contained in the database includes property ownership and building classification information.

Mr. Atik performed a search of the database relating to 1200 South Avenue. He affirms that the attachments to his affirmation are true and correct copies of the DOF’s original computer printouts which indicate that the property abutting the alleged defective sidewalk is not owned by the City; it is classified as an “Office Building”. Thus, movant argues it is entitled to summary judgment dismissing the complaint as against it because the commercial property abutting the defective sidewalk is not exempt under §7-210(b) and (c) of the Administrative Code.

Notwithstanding the merits of the City’s argument that dismissal of the complaint as against it is warranted on the foregoing basis, the Court finds issues of fact exist regarding the City’s contention that its motion should be granted the action should be dismissed preclude granting its motion for summary judgment. Movant argues that the action should be dismissed as

against it because the record is devoid of evidence that establishes the municipality caused or created the defective sidewalk condition. The affidavit of Sharabanti Aich, a record searcher employed by the Department of Transportation Litigation Support Unit (“DOT”) is submitted in support of the City’s position. Ms. Aich attests that she performed a search of the electronic databases corresponding to relevant papers records of permits, OCMC files, CARs, NOVs, NICAs, inspections, maintenance and repair orders, sidewalk violations, complaints, and Big Apple Maps. She further attests that her search revealed the following records concerning the location at issue: 9 permits; 9 hardcopy permits; 9 applications; 1 OCMC file; 5 inspections; 2 complaints; 1 sidewalk violation; 3 sidewalk inspections; no sidewalk re-inspections; and 3 Big Apple Maps.

The Court finds the affiant’s bare assertion that she located such records, is insufficient to demonstrate she has personal knowledge of the contents and relevancy of those documents with respect to the City’s contention that it did not cause or affirmatively create the sidewalk defect. As such, a proper foundation for the admissibility of DOT’s records is lacking.

Furthermore, 127 pages of the results of Ms. Aich’s record search are also submitted, the majority of which are unintelligible and incomprehensible. It is not within the purview of the Court to interpret movant’s purported evidence of the absence of a “cause and create” ground for dismissal of the complaint. Notably, the planting, cultivation and care of curbside trees is normally under the exclusive jurisdiction of the City’s Department of Parks and Recreation. Apparently, a search for Parks Department records pertinent to the City’s potential liability, or lack thereof, for the overgrowth of tree roots adjacent to the raised sidewalk flag was not performed.

Movant’s remaining contentions are unavailing.

The City failed to meet its initial burden of tendering evidence in admissible form, demonstrating the absence of a triable issue of fact. Its motion for summary judgment dismissing the complaint must be denied without regard to the sufficiency of plaintiff's opposing papers.

Accordingly, it is

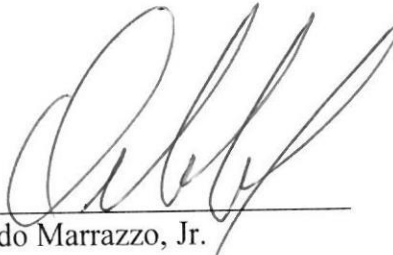
ORDERED, the motion of defendant The City of New York for summary judgment dismissing the complaint is denied; and it further

ORDERED, the Clerk shall mark his records accordingly.

ENTER,

Dated:

9/6/23

  
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Hon. Orlando Marrazzo, Jr.