

Fredrick-Singh v City of New York
2023 NY Slip Op 35163(U)
June 19, 2023
Supreme Court, Queens County
Docket Number: Index No. 700404/2021
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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VIOLET FREDRICK-SINGH,

Index No. 700404/2021

Plaintiff,

Part 6

Motion Date: June 5, 2023

-against-

Calendar No. 41

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, 3617
BEH PARSONS REALTY LLC, KENNEDY
PAVILION RH LLC, QUEENS DIALYSIS AT THE
PAVILION, LLC, AND THE PAVILION AT
QUEENS REHABILITATION & NURSING,

Sequence No. 5



Defendants.

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The following papers numbered 1 to 10 read on this motion by defendants 3617 BEH PARSONS REALTY LLC, KENNEDY PAVILION RH LLC, QUEENS DIALYSIS AT THE PAVILION, LLC and THE PAVILION AT QUEENS REHABILITATION & NURSING for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against them pursuant to CPLR §3212

Papers

Numbered

Notice of Motion, Material Facts, Affirmation, Exhibits.....1-5

Affirmation in Opposition, Exhibits.....6-8

Reply Affirmation.....9-10

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants 3617 Beh Parsons Realty LLC, Kennedy Pavilion RH LLC, Queens Dialysis at the Pavilion, LLC, and The Pavilion at Queens Rehabilitation & Nursing's (hereinafter referred to collectively as the "Kennedy Pavilion defendants") motion for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against them pursuant to CPLR §3212 is granted, as the Kennedy Pavilion defendants eliminated all triable issues of fact with respect to liability.

Plaintiff commenced this action for personal injuries sustained on September 16, 2017 when she cut her leg on a metal spike protruding from a tree well outside of the premises located at 36-17 Parsons Boulevard in Flushing, New York 11354. Plaintiff filed the Summons and Complaint on March 6, 2018, and issue was subsequently joined on March 22, 2019.

The Kennedy Pavilion defendants argue that they are entitled to summary judgment and dismissal of plaintiff's Complaint and all cross-claims against them because tree wells and incidents caused by tree wells are not property owners' responsibility under New York City Administrative Code §7-210, and the Kennedy Pavilion defendants therefore had no duty to maintain the tree well. The Kennedy Pavilion defendants presented the pleadings, plaintiff's Bill of Particulars, photographs, prior Court Orders, affidavits, and the deposition testimony of the parties in support of their motion. Plaintiff testified that she was injured on a metal spike protruding from a tree well and not from a sidewalk defect. Joel Edelstein attested in his affidavit of merit that he is a managing member of the Kennedy Pavilion defendants, and they did not cause or create the allegedly defective condition, did not maintain a special use of the subject tree well, and did not voluntarily but negligently repair the tree well. Defendants further argue that as there is no evidence of their negligence, the cross-claims must be dismissed. Based upon the foregoing, the Kennedy Pavilion defendants argue that they established a prima facie entitlement to summary judgment.

Plaintiff opposes the Kennedy Pavilion defendants' motion and argues that they failed to eliminate all triable issues of fact. Plaintiff presented prior Court Orders, deposition testimony of the parties, and an affidavit of merit from plaintiff in support of her opposition. Plaintiff argues that there are questions of fact as to whether the dangerous condition that caused plaintiff's accident was due to the Kennedy Pavilion defendants' special use of the area for loading and unloading patients and patrons to the facility. Plaintiff further argues that co-defendant City of New York produced two witnesses with no knowledge of the accident locations and were unable to produce any documents that would ascertain who planted the subject tree and surrounding guard. Plaintiff further argues that there are questions of fact as to whether the valet's placement of the vehicle caused plaintiff's accident, because there was no space between the car and the sidewalk for plaintiff to safely exit the vehicle.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2

N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In 2003, Administrative Code §7-210 was enacted to shift tort liability for defective sidewalks from the City of New York to abutting property owners but created an exception for one-to-three family residential properties that are owner occupied. (*Brown v. City of New York*, 162 A.D.3d 733, 734 [2d Dept. 2018].) The exception was created to relieve small property owners with limited resources from the sole burden of liability for sidewalk repairs and defects. (*Id.* at 734-735.) However, it also allowed for liability against residential property owners who negligently perform repairs, created the defective condition, or caused the condition to occur because of a special use of the sidewalk. (*Leitch-Henry v. Doe Fund, Inc.*, 179 A.D.3d 655 [2d Dept. 2020].)

A tree well does not fall within the Administrative Code §7-210 definition of “sidewalk” and therefore does not impose civil liability on property owners for injuries that occur in city-owned tree wells. (*Iskhakbayev v. Casol Realty, LLC*, 183 A.D.3d 706, 707 [2d Dept. 2020].)

The Kennedy Pavilion defendants established a prima facie entitlement to summary judgment through their production of the deposition testimony of the parties, photographs and affidavits. They demonstrated that plaintiff was injured by a metal spike in the tree well, an area for which Administrative Code §7-210 does not hold them liable. The Kennedy Pavilion defendants demonstrated that they owed no duty to maintain the tree well, did not cause or create the defective condition in the tree well that caused plaintiff’s accident, did not maintain a special use of the subject tree well, and did not voluntarily but negligently repair it. As defendants were not negligent, there are no grounds to sustain co-defendant City of New York’s cross-claims. Further, since defendant City of New York failed to oppose the motion, the cross-claims are dismissed.

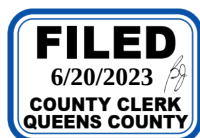
Plaintiff failed to raise a material issue of fact in dispute. Plaintiff’s argument that the Kennedy Pavilion defendants failed to establish who planted or owned the tree well is without merit, as the Kennedy Pavilion defendants met their burden by demonstrating they did not own the subject tree well and therefore did not owe a duty to maintain it. Plaintiff’s argument that the valet picking up and dropping off cars next to the tree well created a special use of the tree well is also without merit, as a special use must be derived specifically from the tree well itself. (*See generally O’Brien v. Babylon*, 196 A.D.3d 494 [2d Dept. 2021].) Plaintiff’s argument that there are questions of fact with respect to whether the valet’s placement of the vehicle caused plaintiff’s accident is also without merit, as she failed to present competent, admissible evidence that the

valet routinely placed cars in front of that tree well as part of defendants' work. The caselaw presented by plaintiff is inapplicable, as it stands for the proposition that there may be liability where the state of the property itself contributes to a dangerous condition. Here, there is no question that the metal fixture protruding out of the tree well caused plaintiff's accident, and plaintiff failed to present competent, admissible evidence that the valet was aware of, or should have known, that a metal spike was in the tree well. Based upon the foregoing, the Kennedy Pavilion defendants established a prima facie entitlement to summary judgment and plaintiff failed to raise a triable issue of fact.

Accordingly, defendants 3617 Beh Parsons Realty LLC, Kennedy Pavilion RH LLC, Queens Dialysis at the Pavilion, LLC, and The Pavilion at Queens Rehabilitation & Nursing's motion for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against them pursuant to CPLR §3212 is granted. Plaintiff's Complaint is dismissed against defendants 3617 Beh Parsons Realty LLC, Kennedy Pavilion RH LLC, Queens Dialysis at the Pavilion, LLC, and The Pavilion at Queens Rehabilitation & Nursing, and all cross-claims against them are dismissed.

This constitutes the decision and Order of the Court.

Dated: June 19, 2023



A handwritten signature in black ink, reading "Tracy Catapano-Fox".

Hon. Tracy Catapano-Fox, J.S.C.