Asitimbay-Toalongo v Oberman
2024 NY Slip Op 31809(U)
May 20, 2024
Supreme Court, Kings County
Docket Number: Index No. 522807/2018
Judge: Ingrid Joseph

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of May, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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BLANCA ASITIMBAY-TOALONGO,

Plaintiff,

-against-

Index No.: 522807/2018

DECISION AND ORDER

THEODORE G. OBERMAN, RACHEL OBERMAN, CITY OF NEW YORK, THE HALLEN CONSTRUCTION CO., and THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY,

Defendants.

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THEODORE G. OBERMAN and RACHEL OBERMAN,

Third-Party Plaintiffs,

-against-

THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Mot. Seq. No. 6	
Notice of Motion/Affirmation/Memorandum/Exhibits.....	132 – 157
Affirmation of No Opposition.....	194
Affirmation in Opposition/Exhibits.....	228 – 231
Reply Affirmation	233
Mot. Seq. No. 7	
Notice of Motion/Affirmation/Exhibits.....	161 – 189
Affirmations in Opposition/Exhibits.....	196 – 204; 206 – 226
Affirmations in Reply/Exhibits.....	234 – 236; 238 – 240

1

Upon the foregoing papers, Defendants/Third-Party Plaintiffs Theodore G. Oberman and Rachel Oberman (collectively, the "Obermans") move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing Plaintiff Blanca Asitimbay-Toalongo's ("Plaintiff") complaint and all claims and cross-claims against them (Mot. Seq. No. 6). Defendants/Third-Party Defendant City of New York (the "City"), the Hallen Construction Co. ("Hallen"), and the Brooklyn Union Gas Company d/b/a National Grid NY ("National Grid") (collectively, the "Co-Defendants") also move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing Plaintiff's claims, the Obermans' crossclaims, and the third-party action (Mot. Seq. No. 7). Plaintiff only opposes the Co-Defendants' motion.

In her complaint, Plaintiff seeks to recover damages for her personal injuries resulting from an incident that occurred on January 24, 2018. Plaintiff alleges that she was walking on the sidewalk in front of a two-family residence located at 192 State Street in Brooklyn, New York[1] when she tripped due to a broken, uneven, raised, cracked, slanted, deteriorated and dangerous sidewalk. Specifically, at her deposition, Plaintiff, a home health aide, claimed that she was pushing a woman in a wheelchair when the wheelchair became caught in the sidewalk and when Plaintiff attempted to pull it back, she twisted her back and right knee. The subject area of the sidewalk is in front of the portion of the Obermans' residence that they use as a front yard, which provides access to the occupied ground unit and a place to store trash cans.

The Obermans now move to dismiss the complaint and cross-claims on the basis that there is no evidence that they breached a duty to Plaintiff, they caused or created the condition, or that the area where the incident happened was put to special use by them. Moreover, the Obermans argue that the City is responsible for the sidewalk outside of their residence because they are exempt from liability pursuant to New York City Administrative Code § 7-210.[2]

In opposition, the Co-Defendants contend that the Obermans' motion must be denied because there are triable issues of fact as to whether the Obermans derived a special use from the sidewalk abutting their property. Co-Defendants claim that there was special use because the Obermans used the area as an entranceway to their front yard where they stored garbage cans and

[1] The Obermans have owned the two-family residence located at 192 State Street since 1996.
[2] Under Administrative Code § 7-210, owners of property abutting a sidewalk are liable for injuries caused by their failure to maintain the sidewalk in a reasonably safe condition (NYC Administrative Code 7-210 [b]). However, liability does not extend to one-, two- or three-family residential properties that are (a) solely or partly owner-occupied and (b) used exclusively for residential purposes (*id.*).

other items and as an entranceway for their ground floor tenant. Co-Defendants argue that not only did the Obermans' use of the specific area of the sidewalk where Plaintiff's incident occurred constitute "special use," but they also had actual notice of the defect since defendant Rachel Oberman testified that she was aware of the crack. In addition, Co-Defendants assert that there are issues of fact as to whether the special use of the sidewalk was the proximate cause of Plaintiff's accident and injuries. Co-Defendants claim that the Obermans' use of their private yard "certainly could have caused or contributed" to the defect.

In their reply, the Obermans argue that their front yard is not part of the public sidewalk where Plaintiff's accident occurred; instead, the front yard area is within the Obermans' property line. Thus, the Obermans contend that the actual area of Plaintiff's accident did not confer a private benefit to them since it merely permitted access to their property. The Obermans assert that even if there was special use of the sidewalk, there is no evidence that the storage of garbage cans or the presence of the entrance door caused the condition. Finally, the Obermans argue that whether they had notice of the condition is irrelevant absent a duty of care owed to Plaintiff.

Co-Defendants also move to dismiss Plaintiff's complaint and the Obermans' cross-claims and third-party action on various grounds. First, the City argues that it is entitled to summary judgment because it did not receive prior written notice of the alleged defective condition. Since the City neither created the defect nor was the defect created by the City's special use, the notice requirement had to be met. Second, Hallen and National Grid contend that the defect that allegedly caused the accident existed prior to any work performed by them. In support of this contention, Co-Defendants cite to Google Map photographs and Rachel Oberman's deposition testimony in which she testified that the crack existed since she purchased the home in 1996. Even if it was not preexisting, Hallen argues that it did not perform work in the area until September 2018, eight months after the accident. In support, Co-Defendants cite to the deposition transcripts of Walter Stone, National Grid's consultant who performed a database search, and Clayton Daly, Hallen's foreman. Though National Grid concedes that Hallen began work on State Street in 2017, it maintains that no work was performed on the sidewalk in front of the Obermans' residence until *after* the accident. In addition, National Grid asserts that even if Hallen performed work around the time of Plaintiff's accident, it cannot be liable for its independent contractor's negligence.

In her opposition to Co-Defendants' motion, Plaintiff does not dispute that National Grid's final repair work was performed in September 2018; however, Plaintiff alleges that the subject

sidewalk was broken up and temporary asphalt was placed by National Grid or its contractor in 2017. Plaintiff argues that paving orders confirm that work was performed in 2017 on the curbs and sidewalks near 192 State Street. According to Plaintiff, Mr. Stone's testimony that he did not find work records prior to September 2018 is not proof that there was no work performed prior to the accident, but merely creates an issue of fact. Plaintiff further asserts that Co-Defendants overlook Defendant Rachel Oberman's testimony that the existing cracks became worse after the work performed by National Grid. Plaintiff also claims that due to the improper repair of the sidewalk by National Grid prior to the accident, Co-Defendants caused and created the condition that caused her injuries. The Obermans also oppose Co-Defendants' motion, arguing that there is evidence that work was performed by them in the fall of 2017 and the temporary asphalt placed by them existed on the date of the accident.

In their reply, Co-Defendants note that Plaintiff and the Obermans did not address the City's argument concerning notice and National Grid's argument that it is not liable for its independent contractor Hallen's negligence. In addition, Co-Defendants assert that Plaintiff's and the Obermans' oppositions attempt to raise feigned issues of fact and Plaintiff has not shown that work performed by National Grid or Hallen caused the accident. Even if photographs prior to the accident show purported temporary asphalt, Co-Defendants argue that this does not mean that work was performed by National Grid or Hallen. Further, there is no evidence, such as measurements or an expert's report, submitted that the crack became worse after Hallen's alleged work. This theory is solely based on Rachel Oberman's testimony. In fact, Co-Defendants argue that Plaintiff did not allege a worsening or exacerbation of an existing crack in her complaint or bill of particulars.

On a motion for summary judgment, the burden rests with the movant to demonstrate, through admissible evidence, that there are no triable issues of fact and that it is entitled to judgment as a matter of law (*see GTF Mktg., Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]; *Englington Med., P.C. v Motor Vehicle Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011]; CPLR 3212 [b]). Once the movant has met its initial burden, summary judgment will only be granted if the opposition fails to establish the existence of questions of fact (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal citation omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are

insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In a personal injury action alleging a dangerous or defective property condition, liability for such condition is predicated upon "evidence of ownership, occupancy, control, or special use of the property *upon which the defect* is situated" (*Ruggiero v City Sch. Dist. of New Rochelle*, 109 AD3d 894, 895 [2d Dept 2013] [emphasis added]). As a general rule, "liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality and not the abutting landowner" (*Llanos v Stark*, 151 AD3d 836, 838 [2d Dept 2017] [internal quotation marks and citations omitted]).

Under Administrative Code § 7-210, owners of property abutting a sidewalk are liable for injuries caused by their failure to maintain the sidewalk in a reasonably safe condition (NYC Administrative Code 7-210 [b]). However, liability does not extend to one-, two- or three-family residential properties that are (a) solely or partly owner-occupied and (b) used exclusively for residential purposes (*id.*). Nonetheless, an abutting landowner may be liable if he or she creates the defect, causes the defect to occur by some special use of the sidewalk or breached a specific ordinance or statute requiring him or her to maintain the sidewalk (*Staruch v 1328 Broadway Owners, LLC*, 111 AD3d 698, 698 [2d Dept 2013]).

Where the responsibility for the sidewalk lies with the city, the city will not be liable unless it received prior written notice of the defective, unsafe, dangerous or obstructed condition (NYC Administrative Code 7-210 [c] [2]). The exceptions to the written notice requirement concern instances where the city "created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the [city]" (*Puzhayeva v City of NY*, 151 AD3d 988, 990 [2d Dept 2017]).

"Special use occurs where a landowner whose property abuts a public street or sidewalk derives a special benefit unrelated to the public use" (*O'Brien v Babylon*, 196 AD3d 494, 495 [2d Dept 2021]; *see Nguyen v Brentwood Sch. Dist.*, 239 AD2d 406, 407 [2d Dept 1997] [driveway cutting across a public sidewalk may constitute a special use]; *Wendy-Geslin v Oil Doctors*, ___AD3d___, 2024 NY Slip Op 01835, *2 [2024] [special use where hose ran through sidewalk to clean grease trap]; *Giannelis v Borgwarner Morse Tec Inc.*, 167 AD3d 1185, 1186 [3d Dept 2018] [variance of the sidewalk to allow for ingress and egress]). Thus, special use cases typically

involve "an installation exclusively for the accommodation of the owner of the premises" (*Minott v City of NY*, 230 AD2d 719, 720 [2d Dept 1996] [internal quotation marks and citations omitted]).

The Court first addresses the Obermans' motion. In this case, Plaintiff marked an exhibit at her deposition indicating the location where her accident occurred. Plaintiff's "X" is clearly on the portion of the sidewalk in front of the Obermans' front yard accessible to the public (*see Cordova v Vinueza*, 20 AD3d 445, 446 [2d Dept 2005] [evidence established that plaintiff fell more than a foot away from fenced-in area of defendants' premises]; *Arev v Feigenbaum*, 2011 NY Slip Op 31069[U], *5 [Sup Ct, Queens County 2011] [finding that special use doctrine does not apply where plaintiff concedes that area where accident occurred was available to the general public]). Co-Defendants have not established that any portion of the Obermans' front yard is built on or in the sidewalk and the fact that the front yard allows access to a unit is insufficient since "those using it would merely walk across the sidewalk, a use not unrelated to the public use" (*Hernandez v Ortiz*, 165 AD3d 559, 560 [1st Dept 2018] [internal quotation marks and citations omitted]). Therefore, the Court finds that Co-Defendants' contention that the Obermans' use of their front yard constitutes special use of the sidewalk is without merit.

Assuming arguendo that there was special use, Co-Defendants have made no showing that ingress to and egress from the ground unit or that the storage or movement of garbage cans caused the condition. Co-Defendants' speculative belief is insufficient to raise an issue of fact (*see Ioffe v Hampshire House Apt. Corp.*, 21 AD3d 930, 931 [2d Dept 2005] [no evidence abutting landowner created defect in sidewalk by dragging trash receptacles across it]; *Ivanyushkina v City of NY*, 300 AD2d 544, 544-545 [2d Dept 2002] [affirming granting of summary judgment where evidence did not support allegation that special use of sidewalk as driveway caused or contributed to defective condition]). As a result, the Obermans have established prima facie entitlement to summary judgment as a matter of law and Co-Defendants failed to raise an issue of fact.

The Court next addresses the portion of Co-Defendants' motion seeking dismissal as against the City. Neither Plaintiff nor the Obermans argued that the City created the defective condition or derived special use of the sidewalk. Thus, the Court's only inquiry is whether the City had prior notice. Here, through the search of its records, the City established that there were no prior complaints about the subject sidewalk (*Lahens v Town of Hempstead*, 132 AD3d 954, 955 [2d Dept 2015]; *Puzhayeva*, 151 AD3d at 991). Plaintiff and the Obermans do not offer a rebuttal.

Thus, the Court determines that Plaintiff's complaint and any cross-claims against the City is dismissed.

The Court now turns to the issue of whether National Grid and Hallen established prima facie entitlement to summary judgment. In this case, Plaintiff testified that the wheelchair got caught on the sidewalk and marked the exact location—the crack, and not any temporary asphalt patch. It is undisputed that the crack existed prior to the date of the accident, long before any work was performed by National Grid and Hallen. Even if the start date of Hallen's work is disputed, there is no evidence in the record that Hallen caused the defective condition (*Simo v NY City Tr. Auth.*, 13 AD3d 609, 611 [2d Dept 2004] [plaintiff must establish a defendant's negligence was proximate cause of injuries]). Rachel Oberman's unsupported testimony that the crack became worse after work was performed is wholly insufficient to raise an issue of fact. On these grounds, the complaint and any cross-claims as against National Grid and Hallen would be dismissed. Additionally, whether or not Hallen was negligent, the claims against National Grid cannot survive (*Kleeman v Rheingold*, 81 NY2d 270, 273 [1993] [a party is generally not liable for its independent contractor's negligence]; *Hussain v City of NY*, 179 AD3d 1046, 1047 [2d Dept 2020]). National Grid's individual theory of freedom from liability was neither addressed by Plaintiff nor the Obermans.

Accordingly, it is hereby

ORDERED, that Defendants/Third-Party Plaintiffs Theodore G. Oberman and Rachel Oberman's motion (Mot. Seq. No. 6) is granted; and it is further

ORDERED, that Defendants City of New York, the Hallen Construction Co., and the Brooklyn Union Gas Company d/b/a National Grid NY's motion (Mot. Seq. No. 7) is granted; and it is further

ORDERED, that Plaintiff's complaint is dismissed.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice