Cohen v City of Yonkers

2024 NY Slip Op 35060(U)

December 13, 2024

Supreme Court, Westchester County

Docket Number: Index No. 68145/2022

Judge: Nancy Quinn Koba

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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MARK COHEN,

Plaintiff,

-against-

DECISION & ORDER
Index No. 68145/2022
Mot. Seq. Nos. 1,2

THE CITY OF YONKERS and NEW YONKERS PROPERTY DEVELOPMENT, LLC,

Defendants.
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NEW YONKERS PROPERTY DEVELOPMENT LLC, i/s/h/a NEW YONKERS PROPERTY DEVELOPMENT,LLC,

Third-Party Plaintiff,

-against-

TU CAFÉ LATINO INC.,

Third-Party Defendant.
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QUINN KOBA, J.

By notice of motion (motion sequence no. 1), defendant, City of Yonkers (the "City"), seeks an order granting the City summary judgment, pursuant to CPLR 3212, dismissing the complaint, together with such other and further relief as this Court may deem just and proper (the "City Motion"). Plaintiff opposes the Motion.

By notice of motion (motion sequence no. 2), defendant, New Yonkers Property Development LLC ("New Yonkers"), seeks an order: (1) pursuant to CPLR 3212, granting summary judgment to New Yonkers and dismissing all cross-claims asserted against it; and (2) for such other and further relief as this court deems just and proper (the "New Yonkers Motion"). The New Yonkers Motion is unopposed.

As a preliminary matter, the Court observes that the New Yonkers Motion is untimely. All motions for summary judgment are to be filed within sixty (60) days following the filing of the note of issue (*see* Westchester County Supreme Court Civil Case Management Rules [the "CCM"] and the Trial Readiness Order, dated March 28, 2024 [NYSCEF Doc. No. 23]). The Note of Issue in this action was filed on May 23, 2024;

therefore, under the CCM and the said Trial Readiness Order, all summary judgment motions were to be filed on or before July 22, 2024. The New Yonkers Motion was filed on July 31, 2024. The CCM provides that, "The failure of a party to serve and file a motion . . . within the 60-day time period pursuant to these Rules and the Trial Readiness Order shall result in the denial of the untimely motion . . . ." (CCM IV[F]. Further, New Yonkers did not offer any explanation for its failure to timely file its motion. Thus, in the absence of a showing of good cause, the Court cannot accept the New Yonkers' untimely motion (*see Dojce v 1302 Realty Co. LLC* 199 AD3d 647 [2d Dept 2021]). Accordingly, the New Yonkers Motion is summarily denied as untimely.

Moreover, it appears that Cohen did not submit a counter-statement of facts as required by 22 NYCRR 202.8-g. The City did not raise any objections thereto. Thus, counsel is also advised that compliance with this Rule is expected for all future motions.

Further, the affirmation and affidavit submitted in opposition to the City Motion do not contain a certificate of compliance regarding length and word count as required by the Rules for New York State Trial Courts that went into effect on February 1, 2021 (*see* 22 NYCRR § 202.8-b). Although these omissions will be overlooked in this instance, counsel is advised that compliance with this rule is expected for all future motions.

The Court has considered the following on the City Motion:

PAPER	NYSCEF DOC.NO.
Notice of Motion, Statement of material facts, Affirmation in support, Memorandum of law in support, Supporting papers to Motion, Exhibits A – M	36-53
Affirmation in opposition, Exhibits A-E	67-72
Affirmation in reply, Exhibit A, Supporting papers to motion	75-77

"On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing

papers [internal quotations and citations omitted])" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d at 505 [internal citation omitted]). "[I]n deciding a motion for summary judgment, issue-finding, rather than issue-determination, is the key to the procedure" (*id.* [internal quotation marks and citation omitted]).

"A municipality that has adopted a prior written notice law [as is the case here] cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies (internal quotation marks and citations omitted). To be entitled to summary judgment, the municipality must first establish that it lacked prior written notice of the alleged defect (internal citation omitted). Once that showing is made, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality (internal quotation marks and citations omitted)" (*Douglas v City of Mount Vernon, N.Y.*, 226 AD3d 973 [2d Dept 2024]). "The affirmative negligence exception is limited to work done by a municipality that immediately results in the existence of a dangerous condition (internal quotation marks and citations omitted)" (*Goodman v City of New York*, 230 AD3d 1115, 117 [2d Dept 2024]).

The City's prior written notice law, in relevant part, provides as follows:

> No civil action shall be maintained against the city . . . for . . . injury to person . . . in consequence of any . . . sidewalk . . . or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the Commissioner of the Department of Public Works or any person or department authorized by the Commissioner to receive such notice by certified or registered mail, or where there was previous existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to the Commissioner by certified or registered mail, or there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe (Charter of City of Yonkers, Article XXIV, §24-11[1]).

Further, tree stumps and tree roots inside a tree well on a municipality's sidewalk, as is the case here, fall within the purview of a municipality's prior written notice law (*see generally, Holmes v Town of Oyster Bay*, 82 AD3d 1047 [2d Dept 2011]).

Here, the City established, *prima facie*, that it did not have prior written notice of the alleged defect of the Accident Site. In support of the City Motion, the City submitted copies of the transcripts from Cohen's 50-H hearing and deposition. Both indicate the following: on March 24, 2022, Cohen was walking on the sidewalk in front of the premises located at 771 Yonkers Ave when he tripped and fell over a raised tree root and/or tree stump in a tree well (the "Accident Site"); it was dark and raining when the accident occurred; Cohen did not observe the said tree root or tree stump prior to the accident; and Cohen did not give the City written notice, in writing or otherwise, of the condition of the Accident Site at any time.

The City also submitted a copy of the transcript from the deposition of Jamal Ibrahim ("Ibrahim"), an employee of the City's Department of Public Works (the "DPW") who is responsible for maintaining the DPW's prior written notice records. Ibrahim conducted a search of the DPW's records and did not find any complaints or prior written notices of any defective condition concerning the Accident Site prior to the date of the accident or approximately twenty years prior thereto.

The City also submitted a copy of the transcript from the deposition of Ralph Padilla ("Padilla"), the City arborist who manages the tree division of the City's Parks Department. According to Padilla, the Accident Site is owned by the City. The tree department is responsible for maintaining the City's tree wells, including the Accident Site. In or around 2021, at the City's request, Padilla gave a recommendation regarding the existing tree wells that would be affected by the upcoming "Yonkers Avenue Streetscape Project" (the "Streetscape Project"), which included the Accident Site. Padilla advised the City's engineering department to remove the existing trees covered thereunder and to replace them with new trees. The City hired an outside contractor for the Streetscape Project, which included the aforesaid tree removal and replacement services. Padilla was unaware of any type of complaint having been made about the condition of the Accident Site prior to the date of the accident.

In opposition to the City's *prima facie* showing, Cohen submitted, *inter alia*, a copy of the agreement between the City and Paladino Concrete Creations Corp., dated July 13, 2021, concerning the Streetscape Project (the Streetscape Project Agreement"), an excerpt from Padilla's deposition testimony, a Google Maps photograph of the Accident Site as it appeared in September 2021, and the expert witness affidavit of Gary Boyd, sworn to on September 11, 2024 (the "Boyd Affidavit"). Although the Boyd Affidavit is speculative, conclusory, and unsubstantiated due to his failure to provide any scientific basis or accepted industry standards for his conclusions, (*see generally, Brown v City of Yonkers*, 119 AD3d 881 [2d Dept 2014]), Cohen's remaining submissions raise triable issues of material facts as to the applicability of the affirmative negligence exception to the City's prior written notice law, whether the City, through its contractor, affirmatively created the dangerous condition that allegedly caused Cohen to trip and fall, and whether the work done by the City through its contractor immediately resulted in the

existence of a dangerous condition (*See Reynolds v City of Poughkeepsie*, 230 AD3d 1260 [2d Dept 2024]).

All other arguments raised by the parties on the City Motion and evidence submitted in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that the motion by defendant, City of Yonkers, to dismiss the complaint against it, pursuant to CPLR 3212, is DENIED; and it is further

ORDERED that the motion by defendant, New Yonkers Property Development LLC, for summary judgment and dismissal of all cross-claims asserted against it is DENIED as untimely; and it is further

ORDERD that the parties shall appear, **in person, for a Settlement Conference before the Hon. Nancy Quinn Koba in Courtroom 1602, on January 9, 2025 at 9:30 a.m., and shall timely submit the Settlement Conference Form (NYSCEF Doc. No. 82-1).**

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 13, 2024

ENTER:

HON. NANCY QUINN KOBA, J.S.C.

To All Counsel Via NYSCEF