Ramos v Maxi Realty, LLC
2024 NY Slip Op 35118(U)
November 21, 2024
Supreme Court, Westchester County
Docket Number: Index No. 68054/2022
Judge: 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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MARIA RAMOS,

Plaintiff,

-against-

DECISION & ORDER
Index No. 68054/2022
Mot. Seq. No.3

MAXI REALTY, LLC, P AND B YONKERS LLC, et. al.,

Defendants.
----------x
QUINN KOBA, J.

By notice of motion (the "Motion"), defendant, P AND B YONKERS LLC ("P and B"), seeks an order: (1) pursuant to CPLR 3212, granting summary judgment dismissing the complaint against it, and for such other and further legal and equitable relief as may be just, necessary, and proper. Plaintiff opposes the Motion.

The following papers were considered on the Motion:

PAPER	NYSCEF Doc. No.
Notice of Motion, Affirmation in support, Exhibits A – J, Statement of material facts, Affidavit of Mark Dobbin, Memorandum of law in support	42-56
Affirmation in opposition, Statement of disputed material facts, Affidavit	58-60
Memorandum of law in reply	62

Upon consideration of the foregoing, the Motion is determined as follows:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of injuries Ramos allegedly sustained on November 11, 2019 when she tripped and fell over a piece of protruding metal as she was walking on the sidewalk abutting the premises located at 37 Post Road in Yonkers (the "Premises"). This action was discontinued as to defendants, MAXI REALTY, LLC and BLINDTEK DESIGNER SYSTEMS, INC., pursuant to the parties' stipulation of discontinuance, dated June 14, 2023.

In support of the Motion, P and B submitted, *inter alia*, copies of the transcripts from the depositions of Ramos and Mark Dobbin ("Dobbin"), photographs of the accident site, and Dobbins' affidavit.

The following is a summary of plaintiff's deposition testimony. On the date of the accident, she was walking on Post Road in Yonkers when she tripped and fell over a piece of metal (the "Metal Piece") protruding from a grassy patch on the sidewalk abutting the Premises. She first observed the Metal Piece after the accident while she was being helped up off the ground. There was minimal lighting. When shown a Google Maps' photograph of the accident site from August 2019, plaintiff identified a "No Parking Sign" (the "Sign") on the sidewalk in front of the Premises. According to plaintiff, the Sign was not there at the time of her accident.

The following is a summary of Dobbin's deposition testimony. Dobbin and his wife own P and B, the owner of the Premises, which is an infrequently used storage unit for Dobbin's construction company. Dobbin has visited the Premises 3 to 4 times since purchasing it. He did not recall seeing either the Sign or the Metal Piece. Dobbin did not perform any inspections of the sidewalk abutting the Premises before the date of the accident. Neither Dobbin nor P and B installed, or performed any remedial, repair, or replacement work on the subject sidewalk. P and B did not install or remove the Sign; nor did Dobbin ever request the City of Yonkers to do so. P and B never received any notice to take corrective action with respect to any condition of the subject sidewalk or any violation pertaining thereto. There is no managing agent for the Premises. P and B did not maintain the area where the sidewalk where the subject accident occurred. There were, and are, no tenants at the Premises. Dobbin has never tripped or fallen at the accident site.

The following is a summary of Dobbin's affidavit, sworn to on June 4, 2024 (the "Dobbin Affidavit"). Therein, Dobbin attests that he never observed the condition of the sidewalk abutting the

Premises prior to the date of the accident, that he did not send any of his employees from P and B, or his other company, to the Premises prior to the date of the accident, that the Premises never had a building superintendent, that he never received, or heard of, any reports concerning the condition of the subject sidewalk prior to the date of the accident, and that he had no notice of the alleged condition of the subject sidewalk or what caused it prior to the date of the accident.

In opposition, Ramos submitted the affirmation of her attorney. In reply, P and B submitted a memorandum of law.

As a preliminary matter, the court observes that the affidavit of Mark Dobbin does 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 this omission will be overlooked in this instance, counsel is advised that compliance with this rule is expected for all future motions.

ANALYSIS

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

Once a prima facie showing has been made, however, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution or tender an acceptable excuse for the failure to do so; mere expressions of hope are insufficient to raise a genuine issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

"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]). Summary judgment is not warranted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Karel v Pizzorusso*, 215 AD3d 738 [2d Dept 2023]).

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions [on] public sidewalks is placed on the municipality and not the abutting landowner (internal quotation marks and citation omitted). An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty (internal quotation marks and citations omitted)" *La Fleur v Janowitz*, 228 AD3d 636, 636 [2d Dept 2024]; *see also Morales v Village of Ossining*, 218 AD3d 460[2d Dept 2023]).

The special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use (*Loiaconi v Village of Tarrytown*, 36 AD3d 864, 865 [internal quotation marks omitted]). The special use exception is a use different from the normal intended use of the public way (*id.* [alterations and internal quotation marks omitted])" (*Morales v Village of Ossining*, 218 AD3d 460,[2d Dept 2023][internal quotation marks omitted]).

"In order for a statute or ordinance to impose liability upon an abutting owner for injuries caused by a sidewalk defect, the language thereof must not only charge the landowner with a duty, it must also specifically state that a breach of that duty will result in the landowners' liability to those who are injured (internal citations omitted)" (*Lagawo v Myers*, 149 AD3d 1056, 1057 [2d Dept 2017]).

As is relevant in this case, Yonkers City Code § 103-1 requires landowners to maintain sidewalks abutting their property in a safe condition. Similarly, pursuant to Yonkers City Code § 91-34(A), "Every owner . . . of a . . . premises shall keep . . . the sidewalk . . . abutting said . . . premises free from obstruction and nuisances of every kind and shall keep said sidewalks . . . free from . . . other offensive material."

Here, P and B tendered sufficient evidence establishing its *prima* facie entitlement to judgment as a matter of law dismissing the complaint against it. The admissible evidence submitted by P and B demonstrates that the subject accident occurred on a public sidewalk, that P and B did not either create the allegedly dangerous, defective, or unsafe condition of the subject sidewalk or have actual or constructive knowledge of the condition thereof, that P and B did not make special use of the subject sidewalk or violate any statutes or ordinances both charging it with a duty to maintain the subject sidewalk and making it liable for injuries caused by that breach. Although Yonkers City Code §§ 91-34(A) and 103-1 require landowners to maintain sidewalks abutting their property in a safe condition and free from, as is relevant here, offensive materials, neither section expressly imposes tort liability upon P and B for injuries caused by a violation of the duty imposed thereunder (*see Lagawo v Myers, supra; Donaghy v Liddy*, 195 AD3d 680 [2d Dept 2011]).

In opposition to P and B's *prima facie* showing, Ramos submitted the affirmation of counsel. The said affirmation is not based upon personal knowledge and, therefore, lacks probative value sufficient to raise any triable issues of material fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

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

Accordingly, it is hereby

ORDERED that defendant, P and B Yonkers LLC's motion, pursuant to CPLR 3212, for summary judgment dismissing the Complaint against it is GRANTED and the complaint is DISMISSED.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 21, 2024

ENTER:

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

To All Counsel Via NYSCEF