

Rivera v Nicotra Group LLC
2024 NY Slip Op 35512(U)
August 20, 2024
Supreme Court, Richmond County
Docket Number: Index No. 152280/2019
Judge: Orlando Marrazzo, Jr.
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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. 003

The papers e-filed as documents numbered “103” through “126” were marked fully submitted on the 22nd day of May, 2024.

Upon the foregoing papers, the motion of defendants The Nicotra Group LLC; Nicotra 1000, LLC; and Nicotra 1200, LLC (hereinafter, “Nicotra”), for summary judgment dismissing the complaint and all cross claims against it is denied.

BACKGROUND

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. The City of New York owns the public sidewalk at the location of the accident; the Nicotra defendants are the owners of the abutting commercial premises.

The City filed a motion on June 22, 2022, for summary judgment dismissing the complaint and cross claims asserted against them. The affidavit of its record-searcher, an employee of the NYC Department of Transportation, was legally insufficient to establish, *prima facie*, that the City

lacked prior written notice of the dangerous sidewalk condition, or that an exception to the prior written notice requirement does not apply in this case (*see Ocello v. City of New York*, 194 AD3d 828, 829 [2d Dept 2021]; *Budoff v. City of New York*, 164 AD3d 737, 739 [2d Dept 2019]). The Court held that triable issues of fact as to the municipality's negligence in causing or affirmatively creating the defect precludes summary judgment in its favor (*see Cooper v. First in Queens, Inc.*, __ AD3d __, 2024 WL 3588105). The City's motion for summary judgment dismissing the complaint as against it was denied in a Decision and Order dated September 6, 2023.

The City filed a Notice of Appeal on October 6, 2023, in the Supreme Court, Appellate Division Second Judicial Department.

The Nicotra defendants presently move for summary judgment dismissing the complaint and all cross claims against them.

DISCUSSION

"Liability for injuries sustained as a result of negligent maintenance of, or the existence of dangerous [or] defective conditions to public sidewalks is [generally] placed on the municipality and not the abutting landowner" (*Taveras v. Incorporated Village of Freeport*, 225 AD3d 822, 823-824 [2d Dept 2024]). However, "an abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the property 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" (*Taveras v. Incorporated Village of Freeport*, 225 AD3d 822, 823-824 [2d Dept 2024] [internal citations omitted]).

Nicotra maintains that it neither created the condition nor caused the defect because of a special use of the sidewalk; and that the City is liable to plaintiff for improperly planting and

maintaining the curbside tree and neglecting to repair or replace the raised sidewalk flag. Nicotra also contends that liability for plaintiff's injuries is attributed to the municipality because it derived a special use of the public sidewalk by granting easements to permit the installation of underground utilities at the location in question.

In support of its motion for summary judgment, the Nicotra defendants submit the affidavit of its expert, Rudi Sherbansky, a licensed professional engineer with experience in the field of construction engineering and building compliance with New York City codes and regulations. Mr. Sherbansky's findings and opinions lack evidentiary and probative value because they are based on his inspection of the sidewalk on December 2, 2020, two years post-accident. Movants' expert fails to demonstrate that the alleged hazardous condition as depicted in photographs contained in his report, was substantially the same on October 25, 2018, the date of the accident. Moreover, Mr. Sherbansky relies on tax maps, deeds and other records that are unauthenticated or, otherwise, lack a proper foundation. Furthermore, his opinions regarding the purported improper planting of the tree, the construction of the tree well, and noncompliance with New York City Department of Parks tree planting standards and specifications is not within the scope of his alleged experience in construction engineering and building compliance. The insufficient and unreliable opinions of Nicotra's expert is fatal to its summary judgment motion.

Furthermore, movants fail to convince the Court that the complaint and cross claims against them should be dismissed notwithstanding section 7-210(b) 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 commercial property owner. Subsection (b) provides, in pertinent part, "the [non-exempt] owner of commercial 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”; and subsection (c) expressly provides that the City “shall not be liable.”

The failure to maintain a sidewalk in a reasonably safe condition “shall include, but not be limited to the negligent failure to install, construct, reconstruct, repave, repair defective sidewalk flags...” (Administrative Code § 7-210 [b]). The statute makes no exception for defective sidewalk conditions, as in this case, caused by overgrown tree roots (*see Konstantinos v. 3-21 33 Road, LLC*, 198 AD3d 730, 731 [2d Dept 2021]). The Appellate Court in the *Konstantinos* matter, clarifies that although Administrative Code § 18-129 prohibits an individual or entity from cutting or removing trees, it provides that abutting property owners are permitted to “repair or reconstruct sidewalks, which may include the cutting and removal of tree roots after obtaining appropriate permission from the City” (*Konstantinos v. 3-21 33 Road, LLC*, 198 AD3d at 732; Administrative Code §§ 18-129[a]; 19-103; 19-141). As such, “insofar as the Administrative Code allows abutting property owners to obtain permission to repair and reconstruct the sidewalk flag...it does not absolve [them] from their duty of care and potential liability under Administrative Code § 7-210” (*Konstantinos v. 3-21 33 Road, LLC*, 198 AD3d at 732). Nicotra fails to cite authority contrary to the principles established in *Konstantinos v. 3-21 33 Road, LLC* (198 AD3d 730) whereby an abutting non-exempt landowner is required to remedy defective sidewalk conditions caused by overgrown tree roots.

However, it is well-recognized that Administrative Code § 7-210 does not impose “strict liability” upon the abutting property owner. Thus, to prevail in this summary judgment motion, the Nicotra defendants must demonstrate, *prima facie*, they did not create the defective condition of the sidewalk or have actual or constructive notice of the alleged tripping hazard (*see Cooper v.*

The Court finds First in Queens, Inc. __ AD3d __, 2024 WL 3588105). The Court finds that movants' have failed to meet their burden in the following manner.

Nicotra has not eliminated triable issues of fact regarding whether or not the defective condition was caused or created by its failure to maintain the sidewalk in a reasonably safe condition (Administrative Code § 7-210), specifically with regard to the repair or reconstruction of the raised sidewalk flag, which involves cutting and removal of tree roots after obtaining appropriate permission from the City (*see Konstantinos v .3-21 33 Road, LLC*, 198 AD3d at 732; Administrative Code §§ 18-129[a]; 19-103; 19-141).

Furthermore, Nicotra's reliance on the deposition testimony of its Director of Property Management is unavailing to demonstrate its lack of actual or constructive notice of the uneven and raised sidewalk flag abutting the property. The witness was unable to identify an individual who was responsible for maintenance of the sidewalk. Furthermore, he lacked personal knowledge as to whether the sidewalk was inspected; and whether violations were issued and/or complaints were made to Nicotra. Thus, questions of fact regarding the abutting property owners' actual or constructive notice of the defect preclude summary judgment.

Under these circumstances, the non-exempt Nicotra property owners have failed to establish, *prima facie*, freedom from liability for the breach of their duty to maintain the sidewalk in a reasonably safe condition.

In view of the Court's determination, movants' remaining arguments need not be considered. Nicotra's motion for summary judgment dismissing the complaint as against them is denied without regard to the sufficiency of the opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, it is

ORDERED, the motion of defendants The Nicotra Group LLC; Nicotra 1000, LLC; and Nicotra 1200, LLC for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further,

ORDERED, the Clerk shall mark his or her records accordingly.

E N T E R,

Dated:

8/20/2024



Hon. Orlando Marrazzo, Jr.

Hon. Orlando Marrazzo, Jr.
Supreme Court Justice