Mack v New York City Hous. Auth.
2025 NY Slip Op 32363(U)
July 2, 2025
Supreme Court, New York County
Docket Number: Index No.154975/2023
Judge: Carol Sharpe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL SHARPE** ***Justice*** **PART** **52M**

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EUGENE MACK,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 154975/2023

MOTION DATE 10/09/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiff moved for partial summary judgment pursuant to CPLR §3212 on the issue of liability against New York City Housing Authority ("NYCHA"), to dismiss defendants' first affirmative defense of comparative fault, and to set the matter for trial on the issue of damages only. Written opposition was filed in which the defendants conceded that they had constructive notice of the defect.

Plaintiff commenced the action by filing the summons and complaint on June 2, 2023, after serving the notice of claim on January 16, 2023. Plaintiff testified at the GML § 50-h hearing. Plaintiff alleges that on December 23, 2022, he fell on a broken sidewalk located at 177/175 Nagle Avenue in New York County, causing him to sustain certain injuries; that NYCHA failed to maintain in reasonably good condition pursuant to NYC Administrative Code § 7-210; and that

NYCHA had constructive notice of the condition. Issue was joined by the filing of the answers. Corporation Counsel now represents both defendants.

In support of his motion, plaintiff submitted, among other things, photographs, an expert affidavit, and the transcript of his GML §50-h hearing. Defendants filed written opposition conceding that it had constructive notice of the defect but opposed the granting of partial summary judgment on liability on the grounds that while notice is one element of a premises liability claim, plaintiff must show that the sidewalk was not kept in a reasonably safe condition, that a dangerous condition existed, that the defect was the proximate cause of the accident, and comparative fault. Plaintiff filed a reply.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman,* 39 A.D.3d 303, 306, 833 N.Y.S.2d 89 (1st Dept. 2007), *citing Winegrad v. New York Univ. Med. Center,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.,* 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). If the proponent makes the required *prima facie* showing, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 733 N.E.2d 203, 711 N.Y.S.2d 131 (2000).

"It is well established that summary judgment may not be granted whenever the pleadings raise clear, well-defined and genuine issues." *Falk v. Goodman*, 7 N.Y.2d 87, 89, 163 N.E.2d 871, 195 N.Y.S.2d 645 (1959). Upon a motion for summary judgment, the role of the court is issue

finding, not issue determination. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240, 942 N.Y.S.2d 13 (2012); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957); *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322 (1st Dept. 1947). The motion should be denied where different conclusions can reasonably be drawn from the evidence. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992). All of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor. *Udoh v. Inwood Gardens, Inc.*, 70 A.D.3d 563, 897 N.Y.S.2d 12 (1st Dept. 2010). Issues of credibility are to be resolved at trial, not by summary judgment. *Castillo v. New York City Tr. Auth.*, 69 A.D.3d 487, 891 N.Y.S.2d 645 (1st Dept. 2010). Here, defendants concede that NYCHA had constructive notice of the defect, thus they are not required to turn over discovery regarding their knowledge of the condition.

Proximate cause is a question for the trier of the facts. "It is well settled that "[e]vidence of negligence is not enough by itself to establish liability," for it also must be proved that the negligence was a proximate, or legal, cause of the event that produced the harm sustained by the plaintiff (*Sheehan v City of New York*, 40 NY2d 496, 501, 528, 354 NE2d 832, 387 NYS2d 92 [1976]). *Hain v. Jamison*, 28 N.Y.3d 524, 46 N.Y.S.3d 502, 68 N.E.3d 1233 (2016). "Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder." *Id.*

Comparative fault is also a question for the jury. "When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries. If so, the comparative fault of each party is then apportioned by the jury. Therefore, the jury is still tasked

with considering the plaintiff's and defendant's culpability together." *Carlos Rodriguez, Appellant, v. City of N.Y., Respondent*., 31 N.Y.3d 312, 324, 76 N.Y.S.3d 898, 101 N.E.3d 366 (2018); *Fortson v. Thompson*, 2025 NY Slip Op 03277 (1st Dept June 3, 2025); *Gama v. 2001 Story Tower A LLC*, 232 A.D.3d 464, 465, 220 N.Y.S.3d 295 (1st Dept. 2024)("Even though plaintiff established defendants' liability on summary judgment, the jury at the damages trial will be tasked with considering the parties' culpability together and therefore must consider the issue of plaintiff's comparative negligence").

While a landowner has a duty to maintain the property in a reasonably safe condition, an open and obvious condition is a question of fact as to plaintiff's comparative fault. "The Supreme Court properly determined that the open and obvious condition of the sidewalk did not absolve the appellants of liability but instead presented an issue of fact as to the plaintiff's comparative fault." *Cupo v. Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40, 53, (2nd Dept. 2003); *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 242, 677 N.Y.S.2d 764, 700 N.E.2d 303 (1998)("Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question"); *Tagle v. Jakob*, 97 N.Y.2d 165, 169, 737 N.Y.S.2d 331, 763 N.E.2d 107 (2001)("the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question"); *Timmons v. Praylow*, 238 A.D.3d 473*4(1st Dept. 2025)(open and obvious '"is generally fact-specific and thus usually a jury question."'). Accordingly, plaintiff's motion for partial summary judgment is granted on the issue of constructive notice only, and the remaining issues for the trial are proximate cause, dangerous condition, reasonably safe condition, comparative fault, injuries, and damages.

It is hereby :

ORDERED, that plaintiff's partial summary judgment motion as to liability is granted on the issue of constructive notice only; it is further

ORDERED, that plaintiff's summary judgment motion to dismiss the defendants' first affirmative defense of comparative fault is denied; it is further

ORDERED, that the issues of proximate cause, dangerous condition, reasonably safe condition, comparative fault, injuries and damages shall be determined at trial; it is further

ORDERED, that plaintiff shall serve a copy of this Decision and Order with Notice of Entry upon all parties and on the Clerk of the Court, within thirty (30) days of the date herein, and file proof of said service within thirty (30) days thereafter; and it is further

ORDERED, that service of this Decision and Order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or if it is an e-file case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-filing" page on the court's website).

This constitutes the Decision and Order of the Court.

ENTER:

July 2, 2025
DATE

HON. CAROL SHARPE, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE