Alshami v AK Holding Group LLC

2025 NY Slip Op 35342(U)

February 27, 2025

Supreme Court, Queens County

Docket Number: Index No. 719771/2020

Judge: Robert I. Caloras

SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: **HON. ROBERT I. CALORAS** **PART 36 MOTIONS**

Justice

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INDEX NO. **719771/2020**

BOBICA ALSHAMI,

Plaintiff,

MOTION SEQ. NO. **003**

- v -

AK HOLDING GROUP LLC,AK RESTAURANT GROUP LLC D/B/A BLEND ASTORIA, PECORARO REALTY CORP., and GET ME TO THE GREEK, LLC.,

DECISION + ORDER ON MOTION

Defendants.

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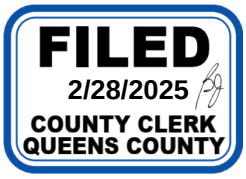

The following e-filed documents, listed by NYSCEF under the motion as: 105-119, 137-146 were read on the motion by Plaintiff for an order granting Plaintiff summary judgment pursuant to CPLR 3212 against Defendants on the issue of liability.

Upon the foregoing documents, it is ordered that the motion by Plaintiff is granted for the following reasons:

According to the Amended Complaint and the submitted papers, on October 2, 2020 Plaintiff tripped and fell on the sidewalk abutting the properties located at 37-15 and 37-17 30th Avenue, Queens County. Defendant Pecoraro owned the premises located at 37-15 30th Avenue (hereinafter "37-15") and Defendant Greek was Pecoraro's tenant and operated a restaurant at 37-15. Defendant AK HOLDING GROUP LLC owned the premises located at 37-17 30th Avenue (hereinafter "37-17"), and Defendant AK RESTAURANT GROUP LLC d/b/a BLEND ASTORIA (hereinafter "Blend") operated a restaurant at 36-17.

Plaintiff now moves for summary judgment against Defendants on the issue of liability. Plaintiff submitted the following: Plaintiff's deposition transcript; photographs; Daniel Lake's (hereinafter "Lake") deposition transcript; Antonio Perez's (hereinafter "Perez" deposition transcript; Anthony Casabianca's (hereinafter "Casabianca") deposition transcript; lease agreement for Blend; ;ease agreement for Pecoraro and Greek; and an affidavit from Joel Schacter, PE (hereinafter "Schacter").

Plaintiff testified that she was walking in front of Defendants' premises, when the front right tip of her foot snagged on an uneven and "raised" portion of the sidewalk causing her to fall to the ground. At her deposition, Plaintiff identified the area where she fell in the photograph marked Defendant's Exhibit "A" and "C" (hereinafter "photograph"). Lake testified that he is employed as the manager for Defendant Blend. Lake was not aware of any construction or physical work done to

the sidewalk area in front of Blend, and denied receiving any complaints about the sidewalk prior to Plaintiff's accident. Lake also testified that prior to the accident, he had passed by the sidewalk several times and never noticed the "crack" depicted in the photograph. Perez testified that he is the President of Defendant Greek. Prior to the accident, Perez visited the restaurant daily, and never noticed anything wrong with the sidewalk in front of the restaurant including any misleveling on the sidewalk. Perez never complained to Pecoraro (the Greek's landlord) of any issues with the subject sidewalk. Perez also did not observe any misleveling on the sidewalk in the photograph. Casabianca testified that he is the owner of Pecoraro. Prior to the accident, Casabianca visited the premises once a month, and never noticed anything wrong with the sidewalk. Casabianca also testified that prior to the accident, Pecoraro never received any claim or lawsuit concerning the sidewalk.

Schacter visited the accident site on October 2, 2020 and measured the height differential between the sidewalk flags to be 1 1/8 inches. Schacter also observed that the sidewalk flags had been patched numerous times, including asphalt (to fill missing concrete) and rubber-like sealant attempting to fill the gaps between the flags. Schacter opined that "[s]ince the patching was installed when the sidewalk flag already exhibited a significant vertical grade differential, it is established that the Defendants had actual knowledge of the dangerous condition prior to the accident". Schacter opined that the raised sidewalk flag constituted a substantial defect. Schacter further opined that Defendants failure to repair this substantial defect violated sections 7-210 and 19-152(a)(4) of the Administrative Code of the City of New York and that this was a substantial factor in causing the Plaintiff's accident.

In opposition, Defendant Blend argues that Plaintiff failed to identify the existence of an actionable sidewalk defect, and that Schacter's report and the photos Plaintiff submitted are inadmissible. Defendant Blend further argues that Plaintiff is not permitted to rely upon sections 7-210 and 19-152(a)(4) because Plaintiff did not allege Defendants violated these sections in the Complaint or the Bill of Particulars, nor has Plaintiff moved to amend her Bill of Particulars.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

"Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property, unless the landowner or lessee has either affirmatively created the dangerous condition, voluntarily but negligently made repairs, caused the condition to occur through a special use, or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street" (Gibbs v Hussain, 184 AD3d 809, 810 [2d Dept. 2020]). However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (Cabezas v Ramos, 173 AD3d 1131 [2d Dept. 2019]). Section 7-210 of the Administrative Code of the City of New York, which became effective

September 14, 2003, shifted tort liability from the City to the commercial property owner for personal injuries proximately caused by the owner's failure to maintain the sidewalk abutting its premises in a reasonably safe condition (Martinez v New York Metro District of United Pentocostal Church International, Inc., 188 AD3d 662 [2d Dept. 2020]; Harakidas v City of New York, 86 AD3d 624 [2d Dept. 2011], lv denied 20 NY3d 1000 [2013]). The language in section 7-210 mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code sections 19-152 and 16-123" (Gallis v 23-21 33 Road, LLC, 198 AD3d 730 [2d Dept. 2021]; Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 521 [2008] [internal quotation marks omitted]). However, Section 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable (see Martinez v Khaimov, 74 AD3d 1031 [2d Dept. 2010]). NYC Administrative Code 7-210(b) provides in pertinent part:

> . . . [T]he owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.

NYC Administrative Code 19-152(a)(4) provides that:

> The owner of any real property, at his or her own cost and expense, shall (1) install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property, including but not limited to the intersection quadrant for corner property . . . a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth.

Here, the Court finds that Plaintiff's submissions established her prima facie entitlement to summary judgment against Defendants on the issue of liability. The Court finds that Plaintiff's submissions sufficiently identified an actionable condition that caused the accident, and that the alleged defect was not trivial. Notably, Plaintiff's testimony sufficiently identified an uneven and "raised" two inch portion of the sidewalk, which she alleges caused her to fall to the ground. The Court also finds that the photographs Plaintiff submitted are admissible. The photograph Plaintiff submitted as Exhibit "9" was marked Plaintiff's Exhibit "5" at Perez's (President of Defendant Greek) deposition, the photograph Plaintiff submitted as Exhibit "8" were marked as Defendants' Exhibit "A" at Plaintiff's deposition, and the photographs Plaintiff submitted as Exhibit "10" were identified by Lake (Blend's manager) at his deposition. Also, even though Plaintiff did not allege that Defendants violated NYC Administrative Code 7-210(b) and 19-152(a)(4) in the Complaint or the Bill of Particulars, the Court finds that Defendants were on notice from the commencement of this action that their alleged liability was predicated upon Plaintiff tripping and falling on an uneven and raised portion of the sidewalk abutting Defendants' property, and as such, Defendants were

aware that these code violations would likely be asserted by Plaintiff as a basis for liability prior to the instant motion being filed (Noller v Peralta, 94 AD3d 833 [2d Dept. 2012] ["The plaintiffs failed to allege in their complaint the violation of that duty and did not specify it in their bill of particulars. Nevertheless, the [Defendants] were on notice from the commencement of the action that their liability was predicated on the allegedly dangerous condition caused by their hedges in visually obstructing the intersection, and they were aware no later than January 2010, eight months before they made their motion for summary judgment, that the ordinance would likely be asserted as a basis for liability"]). Further, the Court finds that contrary to Defendant Blend's claims, the report Plaintiff submitted from Schacter is admissible since the Preliminary Conference Order did not provide a timeframe within which Plaintiff had to disclose her expert. Rather, the Preliminary Conference Order directed the parties to exchange expert information in compliance with CPLR 3101(d)(i), which does not provide a specific deadline for expert witness disclosure. Further, pursuant to CPLR 3212(b), "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit". The Court also finds that Defendant Blend failed to raise any triable issues of fact. Accordingly, Plaintiff's motion is granted.

DATED: February 27, 2025

ROBERT I. CALORAS, J.S.C.