

Stevens v City of Albany
2025 NY Slip Op 35474(U)
March 14, 2025
Supreme Court, Albany County
Docket Number: Index No. 904119-24
Judge: Peter A. Lynch
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ANTOINETTE STEVENS,

Plaintiff,

v.

CITY OF ALBANY, AND JASPER MCCOY,

Defendants.

DECISION

And ORDER

Index No.: 904119-24

(Hon. Lynch, J.)

Motion Seq. No. 3

INTRODUCTION

Plaintiff claims she tripped on the remaining stub of street sign protruding from a public sidewalk, was injured, and seeks damages from both the municipality and the abutting private property owner.

By Decision and Order dated December 10, 2024, incorporated herein by reference, this Court denied Plaintiff's motion for a default judgment against defendant McCoy, and extended Plaintiff's time to effect personal jurisdiction over said defendant.¹

On February 19, 2025, Plaintiff filed a second motion for a default judgment against defendant McCoy due to his nonappearance in this action.²

On February 26, 2025, Defendant McCoy filed an Answer to the Complaint.³ On February 28, Defendant moved to dismiss the Complaint, claiming no duty of care with respect to maintenance of the public sidewalk adjoining his property.⁴

¹ NYSCEF Doc. No. 19.

² NYSCEF Doc. No. 19.

³ NYSCEF Doc. No. 33.

⁴ NYSCEF Doc. No. 34.

By Decision and Order dated March 13, 2025, incorporated herein by reference, this Court denied Plaintiff's second motion for a default judgment against defendant McCoy, extended Defendant's time to Answer to February 26, 2025, and determined the Answer was timely.⁵

Defendant's motion to dismiss constitutes a motion for summary judgment.⁶

FACTS

Plaintiff alleged defendant Jasper McCoy is the owner of the premises located at 555 Washington Avenue, Albany, New York (the premises).⁷ Plaintiff also alleged that defendant Jasper McCoy resides at 123 Mulberry Street, Springfield, MA.⁸

Plaintiff alleged that a prior street sign had been improperly removed from the sidewalk in the area along the Ontario Street side of the premises, leaving a metal stump protruding from the sidewalk, an area also being maintained by the City of Albany.⁹ Plaintiff alleges that on December 29, 2023, she was lawfully walking along the sidewalk, was caused to trip and fall on the metal protrusion, and sustained injuries.¹⁰

In the Complaint, the Plaintiff described the premises as follows:

"7. That at all times hereinafter mentioned, Defendant, CITY OF ALBANY, owned the premises and/or sidewalk located on the Ontario Street side of 555 Washington Avenue, Albany, New York 12206 where a "one-way" sign previously had been, but was improperly only partially removed, leaving a stump of metal in the sidewalk (hereinafter "subject premises").¹¹

⁵ NYSCEF Doc. No. 42.

⁶ Defendant erroneously titled his motion as one under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Since issue was joined upon filing the Answer, the Court will treat the motion as one under CPLR R 3212.

⁷ NYSCEF Doc. No. 1 – Verified Complaint ¶ 7 and 12.

⁸ NYSCEF Doc. No. 1 – Summons and Verified Complaint ¶ 3.

⁹ NYSCEF Doc. No. 1 – Verified Complaint ¶ 7 and 8.

¹⁰ NYSCEF Doc. No. 1 – Verified Complaint ¶ 18; NYSCEF Doc. No.12- Stevens affidavit ¶ 4.

¹¹ NYSCEF Doc. No. 1 – Verified Complaint ¶ 7.

In fine, Plaintiff identified the premises as both the property located at 555 Washington Avenue and the adjoining sidewalk. Plaintiff further alleged:

12. That at all times hereinafter mentioned, Defendant, JASPER MCCOY, owned the subject premises.

13. That at all times hereinafter mentioned, Defendant, JASPER MCCOY, operated, managed, supervised, and controlled the subject premises.

14. That at all times hereinafter mentioned, Defendant, JASPER MCCOY, maintained, and inspected the subject premises.

15. That at all times hereinafter mentioned, Defendant, JASPER MCCOY, his agents, servants and/or employees were under a **duty** to keep the subject premises in a safe and proper condition, so that they were not dangerous to those who lawfully used them.

16. That at all times hereinafter mentioned, Defendant, JASPER MCCOY, his agents, servants and/or employees caused, **created**, permitted and allowed dangerous conditions to exist and remain in the subject premises.

17. That at all times hereinafter mentioned, Defendant, JASPER MCCOY, his agents, servants and/or employees made **special use** of the subject premises.¹² (Emphasis added)

In the unverified Answer, Defendant denied he had any duty to maintain the sidewalk, as follows:

“Lack of Ownership or Control: Defendant McCoy states that the location where the Plaintiff allegedly sustained injuries, namely the sidewalk on the Ontario Street side of 555 Washington Ave, Albany, NY12206 (the "subject premises"), is a public sidewalk under the ownership, maintenance, and exclusive jurisdiction of the City of Albany. Defendant McCoy **neither owns, possesses, supervises, maintains, repairs, nor has any control over the subject premises, nor did he have any duty to perform such functions.**”¹³ (emphasis added)

At issue is the question of whether a special duty exists herein, and/or whether the motion is premature necessitating discovery in accord with CPLR 3212 (f).

¹² NYSCEF Doc. No. 1 – Verified Complaint ¶¶ 12-17.

¹³ NYSCEF Doc. No. 33 – Answer ¶ 2.

MOTION TO DISMISS

As aforementioned, Defendant McCoy moved to dismiss the complaint.¹⁴ The motion is dated and filed February 28, 2025, and is returnable on March 5, 2025. The motion fails to comply with the 8-day notice requirement (CPLR R 2214 (b)). Since Plaintiff has fully responded to the motion, the Court will consider the defective notice an irregularity that shall be disregarded (CPLR 2001). The motion, however, is otherwise defective since it is unsigned, unverified, and not supported by an affidavit (CPLR R 3212 (b)). This is not a mere irregularity and shall not be disregarded. Nevertheless, the Court will review the applicable standard of law.

STATEMENT OF LAW

In Zuckerman v. New York, 49 N.Y.2d 557, 562 [1980], where the Court held,

To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b]). Normally if the opponent is to succeed in defeating a summary judgment motion, he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form. (Internal quotations and citations omitted).

Recognizing that summary judgment is a **“drastic remedy”** the **“facts must be viewed in the light most favorable to the non-moving party** (see Vega v Restani Constr. Corp., 18 N.Y.3d 499, 503 [2012]) (emphasis added). The Court’s function is **“not to determine credibility**, but whether there exists a factual issue, or if arguably there is a genuine issue of fact.” (see S. J.

¹⁴ NYSCEF Doc. No. 34.

Capelin Associates, Inc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 341 [1974]); see also Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] where the Court held, “**issue-finding, rather than issue-determination, is the key to the procedure**” (emphasis added). The evidence must be viewed in the light most favorable to the Plaintiff (see Watts v. Gines, 199 A.D.3d 1274 [3d Dept. 2021]).

DUTY OF CARE

In Pena v. Pep-Boys, Manny, Moe, & Jack of Del, Inc. 2023 App. Div. LEXIS 2516, p. 2 [2d Dept. 2023] the Court recognized a property owner’s duty to maintain its property in a reasonably safe condition, holding,

“A party in possession or control of real property has a **duty** to maintain the property in a **reasonably safe condition**. When such a party **moves for summary judgment** in a premises liability case, it has “**the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence.**” (Emphasis added; internal citations omitted)

Generally, the duty does not extend to adjoining property (See e.g. Dubois v. Beaver, 25 N.Y. 123 at 126-127 [1862]).

Here, the defective condition allegedly exists within the public sidewalk. In Bruno v. City of New York, 36 A.D.3d 640, 640-641 [2d Dept. 2007], the Court recognized the limited circumstances when a private property owner can be held liable for a defective condition in an adjacent public sidewalk, holding,

“Generally, liability for injuries sustained as a result of dangerous and **defective conditions** on public sidewalks is placed on the municipality and not the abutting landowner. However, an abutting **landowner may be held liable to a pedestrian injured by a defect in a public sidewalk where, inter alia, the landowner negligently constructed or repaired the sidewalk or otherwise**

created the defective condition, or caused the defect to occur by some special use of the sidewalk.”

In the ordinary course, Defendant bears the following burden of proof:

“... a prima facie showing of their entitlement to judgment as a matter of law by submitting **evidentiary proof** demonstrating that they performed **no repair work** in the street abutting their premises and **did not make a special use of the street.**” (See Farrell v City of New York, 67 A.D.3d 859, 861 [2d Dept. 2009])

Considering the foregoing standard, focus on the claimed defective condition is warranted

Plaintiff described the defective condition as follows:

“a “one-way” sign previously had been, but was improperly only partially removed, leaving a stump of metal in the sidewalk.”¹⁵

Plaintiff further claims she was injured when,

“...she was caused to trip and fall on a metal protrusion from the concrete sidewalk, formerly a street sign.”¹⁶

Plaintiff relies on Capretto v City of Buffalo, 124 A.D. 3d 1304 [4th Dept. 2015] to support her claim that defendant is responsible for the defective street sign condition. Such reliance is misplaced.

In Capretto, plaintiff was injured when she “tripped and fell as a result of broken concrete located in the driveway portion of a sidewalk.” (Id. at 1305) The court held,

“Liability to abutting landowners will generally be imposed where the **sidewalk was constructed in a special manner for the benefit of the abutting owner . . .**, where the abutting owner affirmatively **caused the defect . . .**, where the abutting landowner **negligently constructed or repaired the sidewalk . . .** and where a **local ordinance** or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and

¹⁵ NYSCEF Doc. No. 1 – Verified Complaint ¶ 7.

¹⁶ NYSCEF Doc. No. 1 – Verified Complaint ¶ 18.

imposes liability for injuries resulting from the breach of that duty". (Id at 1306) (Emphasis added)

Certainly, when a sidewalk is constructed with a driveway servicing the abutting property, that could constitute a special use. Here, as distinguished, the Court sees no plausible basis to claim that placement of a one-way street sign in the sidewalk would indicate the sidewalk was constructed in a manner for the benefit of the abutting property owner. (See Poirier v. City of Schenectady, 201 A.D.2d 845 [3d Dept. 1994], where the Court held,

“...because **signs** controlling vehicular traffic and parking are an integral part of providing safe streets and thus not specifically installed for the benefit of a particular party, **sign posts and anchors cannot be considered a special use.**” (Emphasis added)

That does not, however, end the inquiry.

At this juncture, the record is silent with respect to any local laws or ordinances which regulate sidewalks within the City of Albany. With that said, imposition of a duty upon the property owner to maintain a street sign is a stretch (See e.g., Vucetovic v. Epsom Downs, Inc. 10 N.Y.3d 517, 521 [2008], where Court denied imposing “civil liability on property owners for injuries that occur in city-owned tree wells.”)

Distinct from the foregoing, the record is incomplete as to how the street sign was removed, leaving a stub sticking out of the sidewalk. Thus, if the abutting owner caused the defect or was negligent in trying to repair the sign, that could serve as the basis for liability. Such facts have not yet been developed, one way, or the other.

CPLR R 3212 (f) provides:

“(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that **facts essential** to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit

affidavits to be obtained or **disclosure** to be had and may make such other order as may be just.”

Hence, the motion is premature, and discovery should ensue.

CONCLUSION

For the reasons more fully stated above, Defendant McCoy’s motion to dismiss the Complaint is denied, without prejudice to renew, and it is further,

ORDERED, that all discovery demands shall be filed and served on or before April 14, 2025; and it further,

ORDERED, that all responses to discovery demands shall be filed and served on or before May 14, 2025; and it further,

ORDERED, all depositions, party and non-party, shall take place on or before July 31, 2025; and it is further,

ORDERED, that Plaintiff shall submit to an independent medical exam (IME), if any, on or before August 29, 2025; and it is further,

ORDERED, that Plaintiff shall file a trial note of issue on or before September 29, 2025, and it is further,

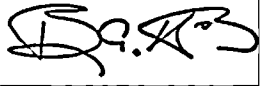
ORDERED, the parties shall appear, via TEAMS, for a compliance conference on September 30, 2025 @ 10:00 a.m.

This memorandum constitutes the decision and order of the Court.¹⁷

Dated: Albany, New York
March 14, 2025

PAPERS CONSIDERED:

¹⁷ Compliance with CPLR R 2220 is required.


PETER A. LYNCH, J.S.C.

03/14/2025

All e-filed pleadings, with exhibits.
NYSCEF Doc. Nos. 1- 42.

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