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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 116044/2007
BIGMAN, MARLENE
vs
CITY OF NEW YORK
Sequence Number : 003
SUMMARY JUDGMENT

PART 5

INDEX NO. 116044/07
MOTION DATE 11/15/11
MOTION SEQ. NO. 003

CAL. # 18

The following papers, numbered 1 to 3, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1
Answering Affidavits — Exhibits ____ No(s). 2
Replying Affidavits ____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

FEB 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/14/12
FEB 14 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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ALLISON BIGMAN, as Executor of the Estate of MARLENE BIGMAN, Deceased,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

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Index No. 116044/07

Argued: 11/15/11
Motion Seq. No.: 003
Motion Cal. No.: 18

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Mitchell D. Frankel, Esq.
Sussman & Frankel, LLP
805 Third Avenue, 12th Floor
New York, NY 10022
212-688-8895

For City:
Zacharie Harden, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0650

By notice of motion dated September 1, 2011, plaintiff moves pursuant to CPLR 3212 for an order granting her summary judgment on the issue of liability. Defendants oppose.

I. BACKGROUND

On June 25, 2007, decedent tripped and fell on an uneven portion of sidewalk adjacent to the JHS 47 School, which is located at 225 East 23rd Street in Manhattan. (Affirmation of Mitchell D. Frankel, Esq., dated Sept. 1, 2011 [Frankel Aff.], Exh. C).

On September 24, 2007, decedent was examined pursuant to General Municipal Law (GML) § 50-h, testifying that her left foot caught on a raised portion of sidewalk running parallel to the direction in which she was walking. (*Id.*, Exh. E). According to her, she could not see the defect before tripping on it, although nothing covered it, and the defect was approximately one to one-and-a-quarter inches higher than the adjacent portion of sidewalk. (*Id.*).

On or about November 26, 2007, decedent commenced the instant action with the filing of a summons and verified complaint, asserting negligence claims against defendants based on their control and maintenance of the sidewalk. (*Id.*, Exh. B). Sometime thereafter, defendants joined issue with service of their answer. (*Id.*).

On April 1, 2008, decedent served defendants with a verified bill of particulars reflecting that the defect on which she tripped is located "approximately 45-50 feet west of the curb at the [n]orthwest corner of 23rd Street and [Second] Avenue, and approximately in the middle of the sidewalk." (*Id.*, Exh. C).

Subsequently, decedent, through a Freedom of Information Law request, obtained three notices of claim previously served on defendants. (*Id.*, Exh. D). The first, served on March 21, 1996, specified that the claimant had tripped on "an uneven sidewalk which resulted in a raised crack at or about a location of approximately 65 feet west of the entrance" to 225 East 23rd Street. (*Id.*). The second, dated December 4, 1998, reflects that the claimant tripped on a "very uneven" portion of sidewalk in front of the bus stop that is adjacent to the subject premises. (*Id.*). According to the third, served on May 26, 1999, the claimant tripped on "a raised portion of the sidewalk area [ ] about 1-2 inches high and 2 feet in length" adjacent to the subject premises, "about 10 feet west of [the] door entrance . . . and about 6 feet from [the] curb line." (*Id.*).

Sometime before July 6, 2009, decedent passed away, and Allison Bigman, her daughter and executor of her estate, successfully moved to be substituted as plaintiff. (*Id.*, Exh. D).

By affidavit dated May 19, 2009, plaintiff states, in pertinent part, that she witnessed decedent's accident and that decedent tripped "on and/or against the raised edge of [a] sidewalk flag[]." (*Id.*, Exh. F).

By affidavit of the same date, Scott Silberman, a professional engineer, states that the defect on which decedent tripped, a "raised sidewalk edge created by two misleveled or misaligned sidewalk flags which created a vertical grade differential of one (1) inch," constituted a tripping hazard. (*Id.*, Exh. G). In coming to this conclusion, he relied on a site visit, decedent's GML § 50-h hearing transcript, plaintiff's affidavit, relevant sections of the New York City Administrative Code, other sidewalk safety publications, and good and accepted engineering practices. (*Id.*). Also, according to him, the defect was:

> caused and created by the owner of the sidewalk when approximately six (six) sidewalk flags were replaced sometime prior to [decedent's] accident. When the sidewalk flags were replaced[,] they were improperly and negligently placed causing the [ ] one (1) inch vertical grade differential. It is also apparent that the subject sidewalk was never properly maintained or repaired after this installation . . . . thereby creating the subject defect/hazard . . . . If this sidewalk was maintained properly, a safe means of egress would have been provided.

(*Id.*).

On June 28, 2010, defendants responded pursuant to a March 29, 2010 discovery order, providing, *inter alia*, an April 28, 2004 notice of violation (NOV) reflecting that a New York City Department of Transportation (DOT) inspection of the subject sidewalk uncovered the following "defects": "broken, trip hazard, patchwork, [and] structural integrity." (*Id.*, Exh. H). On the NOV, the DOT requires the replacement of 1,175 square feet of sidewalk. (*Id.*).

At an examination before trial held on January 21, 2011, DOT records searcher Roy Commer testified that an inquiry corresponding to the April 28 NOV reflects that defendant New York City Board of Education owns the subject premises and that the defects were never repaired. (*Id.*, Exh. J).

II. CONTENTIONS

Plaintiff claims that defendants were negligent in failing to maintain the sidewalk

pursuant to New York City Administrative Code § 7-210, as the defect on which she tripped constituted a tripping hazard, and the NOV and 1996, 1998, and 1999 notices of claim provided defendants with prior written notice of same. (*Id.*). In any event, she asserts that Silberman's affidavit establishes that defendants created the defect. (*Id.*).

In opposition, defendants maintain that plaintiff has failed to establish *prima facie* entitlement to summary judgment, as a violation of the New York City Administrative Code merely constitutes some evidence of negligence, and no evidence was offered demonstrating that the defects identified in the NOV and the notices of claim correspond to the defect on which decedent tripped. (Affirmation of Zacharie Harden, ACC, in Opposition, dated Sept. 23, 2011). They also assert that Silberman's speculation as to the cause of the defect fails to address whether the installation of the flags immediately caused it, and plaintiff addresses neither causation nor decedent's comparative negligence. (*Id.*).

In reply, plaintiff contends that the NOV is specific to the subject sidewalk, as it includes a map on which the defects were identified, thereby constituting prior written notice. (Affirmation of Mitchell D. Frankel, Esq., in Reply, dated Sept. 28, 2011). In any event, she denies that Silberman's opinion is speculative as to the cause of the defect insofar as he identifies good and accepted engineering practice in concluding that the defect resulted from defendants' installation of the sidewalk flags, and claims that his affidavit reflects that this installation immediately resulted in the defect. (*Id.*).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets

this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. Negligence and comparative negligence

To establish a *prima facie* case of negligence, a plaintiff must show duty, breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). Pursuant to New York City Administrative Code § 7-210, and subject to certain exceptions not pertinent here, the owner of real property abutting a sidewalk has the duty to "maintain such sidewalk in a reasonably safe condition" and is liable for injuries arising from its failure to do so. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

In order to demonstrate entitlement to summary judgment on the issue of liability, a plaintiff must not only establish a *prima facie* claim of negligence but also must demonstrate that there exist no triable factual issues as to whether she was comparatively negligent. (*Thoma v Ronai*, 82 NY2d 736 [1993]; *Calcano v Rodriguez*, __ AD3d __, 2012 NY Slip Op 110 [1st Dept, Jan. 12, 2012]).

Here, having failed to address decedent's comparative negligence, or offer any evidence reflecting her freedom from same, plaintiff has failed to demonstrate entitlement to summary judgment.

B. Prior written notice

Pursuant to New York City Administrative Code § 7-201(c)(2), no civil action may be maintained against City arising from a dangerous or defective condition on a sidewalk unless

plaintiff demonstrates that City received prior written notice of the condition. A plaintiff must demonstrate that City received such notice regardless of whether City owns the property abutting the sidewalk where her accident occurred. (*Sondervan v City of New York*, 84 AD3d 625 [1st Dept 2011]).

Here, although the NOV reflects that the subject sidewalk was broken and contained or constituted a trip hazard, and although plaintiff asserts that it was accompanied by a map illustrating the location of these defects, no such map has been provided, and the NOV itself does not indicate where on the sidewalk the defects were located. Moreover, although the notices of claim reflect that portions of the sidewalk were uneven, they contain different descriptions of the defects' locations, and plaintiff offers no evidence demonstrating that they refer to the defect on which she tripped. Therefore, she has failed to demonstrate that no triable factual issues exist as to whether defendants obtained prior written notice. (*See Ortsman v Town of Oyster Bay*, 178 AD2d 588 [2d Dept 1991] [previously served notice of claim that failed to specify exact location of defect did not constitute prior written notice, as "[t]here is absolutely no indication from the prior notice of claim that the defective condition in that case, which could have been anywhere on the basketball court, was the same defective condition involved in this case"]; *see also Sondervan*, 84 AD3d 625 [where City admitted that Big Apple Map showed defect within vicinity of accident site, "[d]isputes as to whether the location and nature of the defect are sufficiently portrayed so as to bring the condition to the municipality's attention involve factual questions appropriately resolved at trial"]).

C. Cause or create

Where City has not received prior written notice of a defect, it may still be held liable if plaintiff demonstrates that the defect immediately resulted from City's performance of repairs or

that City put the sidewalk to a special use. (*Yarborough v City of New York,* 10 NY3d 726 [2008]; *Amabile v City of Buffalo,* 93 NY2d 471 [1999]; *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]).

Here, although Silberman opines that the defect was caused or created when the sidewalk flags were installed, his opinion is wholly conclusory absent evidence as to City's installation of same or any indication as to the basis for his opinion. Moreover, as he claims that the defect also resulted from the sidewalk owner's failure to maintain the sidewalk, his affidavit does not demonstrate that the defect immediately resulted from City's installation of the sidewalk flags. Thus, absent any allegation that City put the sidewalk to a special use, even if plaintiff had demonstrated that she was not comparatively negligent, she would still not be entitled to summary judgment.

In light of this determination, the parties' contentions as to whether a violation of the New York City Administrative Code constitutes negligence and whether plaintiff established causation need not be considered.

IV. CONCLUSION

FILED

FEB 16 2012

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied.

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: February 14, 2012
New York, New York

FEB 14 2012