Martinez v City of New York
2016 NY Slip Op 31842(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 151669/2014
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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YRAIDA MARTINEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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DECISION AND ORDER
Index No. 151669/2014
Mot. Seq. No. 001

Hon. James E. d'Auguste

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1, 2 (Exs. A-I)
AFFIRMATION IN OPPOSITION	3 (Exs. A-C)
REPLY AFFIRMATION	4 (Exs. A-D)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action for personal injuries allegedly sustained by plaintiff Yraida Martinez, defendant The City of New York ("the City") moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor, dismissing the complaint and any cross-claims. For the reasons stated herein, the City's motion for summary judgment is denied.

Factual and Procedural History

In this action, plaintiff seeks to recover damages for personal injuries allegedly sustained on June 19, 2013 when she was caused to trip and fall due to a dangerous and hazardous condition on the sidewalk on Houston Street, approximately thirty feet from the southeast corner at the intersection of Houston Street and Broadway in the County, City and State of New York. Plaintiff specifically alleges that, while walking on the sidewalk on Houston Street, she tripped and fell as a result of broken pieces of the sidewalk and sustained severe and permanent injuries.

On or about July 3, 2013, plaintiff served a notice of claim upon the City. On December 6, 2013, plaintiff testified to the above facts at a hearing pursuant to General Municipal Law ("GML") Section 50-h. She further testified that she fell when she was walking next to the "Hollister" store due to broken pieces of the sidewalk. Davidoff Aff. Ex. E, Tr. 20:7-15. On February 25, 2014, plaintiff commenced this action by filing a summons and verified complaint that alleged negligence in the ownership, operation, management, maintenance and control of the sidewalk at the abovementioned location. On or about March 12, 2014, the City joined issue by serving an answer.[1]

In response to the Case Scheduling Order (Nervo, J.) dated December 4, 2014, the New York City Department of Transportation ("DOT") conducted a search for records pertaining to the segment of East Houston Street between Broadway and Crosby Street for a period of two-years prior to and including the date of plaintiff's accident for "permits, applications for permits, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps." *Id.* ¶ 7, Ex. H, ¶ 3 (Affidavit of Omar Codling, DOT Employee). The search uncovered the following results for the above identified sidewalk location: one permit, one hardcopy permit, one OCMC (Office of Construction and Mitigation Coordination) file, no corrective action requests, one notice of violation, no notifications for immediate corrective action, three inspections, one complaint, and one Big Apple Map. *Id.* ¶ 8, Exs. G, H.

As related to ownership of real property at the subject location, the New York City Department of Finance conducted a search of the Real Property Assessment Division database for

[1] The Court notes that the answer served by the City is not verified, which is a procedural defect in light of the fact that plaintiff filed and served a verified complaint. CPLR 3020(a). However, this issue was not raised by plaintiff, which waives the defect. *Cherubin Antiques, Inc. v. Matlash*, 106 A.D.3d 861, 862 (2d Dep't 2013).

any records relating to 600 Broadway, Block 511, Lot 16 in New York, New York, which is the tax lot location of the property in question. *Id.* ¶ 9, Ex. I (Affidavit of David Schloss, Senior Title Examiner of the New York City Law Department).

On March 11, 2016, the City moved for summary judgment. The City contends that summary judgment is appropriate because the alleged accident did not occur on the sidewalk abutting City-owned property and, due to the building classification, the duty to maintain the sidewalk abutting subject property did not shift to the City, thus the City is not liable pursuant to Section 7-210 of the Administrative Code of the City of New York ("Section 7-210"). Additionally, if Section 7-210 did not apply, the City contends that there was no prior written notice of the alleged defect, as required by Section 7-201(c)(2) of the Administrative Code of the City of New York ("Section 7-201(c)(2)") and no exception to the prior written notice law is applicable because the City did not cause or create the alleged dangerous and hazardous condition on the sidewalk at the subject location.

Discussion

Pursuant to CPLR 3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The Court of Appeals has held that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Additionally, the "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez*, 68 N.Y.2d at 324.

In the instant case, the City contends that summary judgment is appropriate as the City asserts (1) that the alleged accident did not occur on City-owned property, and (2) that the City did not have prior written notice of the alleged defect. The applicable provision pertaining to liability for the maintenance of the sidewalk at issue is Section 7-210. According to Section 7-210(b), "the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . proximately cause by the failure of such owner to maintain such sidewalk in a reasonably safe condition." If the City is not the property owner, the City cannot be held liable for the type of personal injury at issue unless the sidewalk abuts a "one-, two- or three-family residential property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes." *Id.* § 7-210(c).

Here, the City assumes that the alleged accident took place on the sidewalk in front of 600 Broadway, Block 511, Lot 16—property owned not by the City, but by 600 Broadway Partners LLC. Davidoff Aff. Ex. I, ¶ 3. However, plaintiff's notice of claim, complaint, and GML Section 50-h testimony all state that the alleged accident occurred on "*Houston Street*, approximately 30 feet from the southeast corner of Houston and Broadway." Davidoff Aff., ¶ 6 (emphasis added); *see id.* Exs. A, B, E. Accordingly, from the outset of this case, plaintiff alleged that she tripped and fell on the sidewalk abutting Houston Street, not Broadway, and thus the City's assumption that the alleged accident occurred on the sidewalk in front of 600 Broadway is misguided.

Plaintiff's GML Section 50-h testimony indicates that the location where she allegedly tripped and fell is on the sidewalk abutting 19 East Houston Street, Block 511, Lot 16 in New York, New York because, after she fell, she grabbed onto a green pole and noticed that she fell in front of a fruit stand. Davidoff Aff., Ex. E, Tr. 19:5-10. While not dispositive, the location of the fruit stand as identified by plaintiff is relevant to determine where plaintiff allegedly fell. The

photographs of the location where the accident allegedly occurred, annexed to the City's moving papers as Exhibit F, depict a subway station that is located in front of 19 East Houston Street, on the Houston Street side of the Hollister Building (Ragues Aff. Ex. C). If, as assumed by the City, the alleged accident occurred on the sidewalk abutting 600 Broadway, the City would have no reason to perform a two-year DOT record search for the segment of *East Houston Street* between Broadway and Crosby Street. *See* Davidoff Aff., Ex. G (Codling Affidavit). However, due to the parameters of the above search, the City did not ignore the possibility that when plaintiff fell, she was facing Broadway and the side of the Hollister Building was on her left side. This is significant because the side of the Hollister Building abuts the sidewalk on Houston Street, whereas the storefront abuts the sidewalk on Broadway. Thus, the detail provided by plaintiff in her pleadings and GML Section 50-h testimony was sufficient to enable the City, and Mr. Codling, to locate the correct location of the alleged defect and conduct a meaningful investigation. While the City does not contend that the location of the alleged accident is at issue, the City's moving papers and exhibits annexed in support show that the alleged accident did not occur in front of 600 Broadway.[2] Accordingly, the City has not made a prima facie showing of entitlement to summary judgment as a matter of law.

With respect to the issue of prior written notice, Section 7-201(c)(2) states the following:

> No civil action shall be maintained against the city for . . . injury to person . . . sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a

[2] Since the real property search of the location of the alleged accident was only performed for 600 Broadway, the building classification of the edifice abutting the sidewalk where plaintiff allegedly fell is currently unknown, which creates a genuine issue of material fact with respect to the City's liability, as discussed *infra*.

> result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

As relevant here, the City cannot be subjected to liability for personal injuries sustained due to a dangerous condition on a sidewalk unless it had prior written notice of the dangerous condition or one of two exceptions to the prior written notice rule applies. *See Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008); *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 473-74 (1999). The Court of Appeals has recognized two exceptions to the prior written notice rule: (1) where the locality created the defect or hazard through an affirmative act of negligence; or (2) where a "special use" confers a special benefit on the locality. *Yarborough*, 10 N.Y.3d at 728 (citing *Amabile*, 93 N.Y.2d at 474).

Here, the City argues that it was not provided with any prior written notice of the alleged dangerous condition of the sidewalk pursuant to Section 7-201(c)(2) and no exception to the prior written notice law is applicable because the City did not cause or create a dangerous and hazardous condition on the sidewalk where the alleged accident occurred. As the City assumes that the alleged accident occurred on the sidewalk abutting 600 Broadway, yet conducted a DOT records search for the segment of sidewalk located on East Houston Street between Broadway and Crosby Street, this search would not reveal any records or any evidence relating to the sidewalk abutting 600 Broadway. As a result, the City cannot assert that it had no prior written notice of the alleged dangerous condition of the sidewalk where the City assumes plaintiff's alleged accident occurred nor can it assert that it did not cause or create said dangerous condition. Furthermore, according to the City's own DOT sidewalk records search, the City was served with a Big Apple Map by the Big Apple Pothole and Sidewalk Protection Corporation on October 23, 2003 that noted a defect

in the sidewalk in front of 19 East Houston Street. Davidoff Aff., Ex. G, ¶ 4. For these additional reasons, the City has not established a prima facie showing of entitlement to summary judgment as a matter of law.

Even assuming arguendo, that the City established its prima facie burden, plaintiff submitted sufficient evidence and points to other evidence already in the record to raise a material issue of fact with respect to the exact location of her alleged accident and whether the building was City-owned.

In opposition, plaintiff asserts that the accident occurred on 19 East Houston Street, Block 511, Lot 19. Davidoff Aff., Ex. E, Tr. 19:5-10. Plaintiff points to the GML Section 50-h hearing in the record, where she testified that she fell in front of a fruit stand on the "inside of the sidewalk." *Id.* To show that the fruit stand was located on 19 East Houston Street, plaintiff submitted a document from the Office of the Manhattan Borough President, dated June 30, 2014, which mentions that a fruit stand was located on 19 East Houston Street. Ragues Aff., Ex. A n.2. Plaintiff also provides photographs indicating that the fruit stand is located in front of 19 East Houston Street. Ragues Aff., Ex. C. Based on the foregoing, plaintiff created a genuine issue of material fact as to where she allegedly fell. Plaintiff also creates a genuine issue of material fact as to whether the building located at 19 East Houston Street was City-owned at the date of her alleged accident, June 19, 2013, by citing to the above document from the Office of the Manhattan Borough President and a final decree of this Court (Parness, J.), dated April 3, 1989, relating to the City's acquisition (via the New York City Transit Authority ("NYCTA")) of the land for purposes of building the subway station at said location, showing that the City acquired 19 East Houston Street in 1989. Ragues Aff., Ex. A, ¶ 2; *id.*, Ex. B, ¶ 1. As asserted by plaintiff, both

documents indicate that the City owned 19 East Houston Street at the time of the alleged accident and create a genuine issue of material fact, requiring denial of the City's motion.

In reply, the City argues that plaintiff is attempting to change the location of her alleged accident to 19 East Houston Street. The City further argues that the notice of claim and bill of particulars did not sufficiently state the place of plaintiff's alleged accident, but this defect is cured by plaintiff's GML Section 50-h testimony, which shows that the alleged accident occurred on the sidewalk abutting 600 Broadway. The City also reiterates that plaintiff testified during the GML Section 50-h hearing that the "Hollister building, and the stairs when you come out of the subway" were to her left after she allegedly fell, and this is not indicative of the location of plaintiff's alleged accident. Davidoff Aff., Ex. E, Tr. 16:3-9, Tr. 19:5-10. Similarly, as discussed *supra*, the City's arguments in reply lack merit.

A notice of claim is sufficiently particular when the defendant is able "to locate the alleged defect and to conduct a proper investigation of the site and otherwise assess the merits of plaintiff's claim." *Caselli v. City of New York*, 105 A.D.2d 251, 253 (2d Dep't 1984). So long as the lack of specificity in the notice of claim is "inadvertent and not calculated to mislead or confuse, the court may, in its discretion, deem the notice sufficient if it is later clarified in such a manner so as to avoid prejudice." *Miles v. City of New York*, 173 A.D.2d 298, 299 (1st Dep't 1991). As discussed at length above, plaintiff's GML Section 50-h testimony sufficiently identified the location of the alleged action, allowing the City to conduct a meaningful investigation of the alleged defect.

However, the city also argues in the alternative that if plaintiff allegedly fell on the sidewalk abutting 19 East Houston Street, the City is still entitled to summary judgment pursuant to Section 7-210; an argument only advanced in reply. In support of this argument, the City requested that the DOF employee conduct a search of the Real Property Assessment Division database for records

relating to 19 East Houston Street, in the County, City and State of New York. Davidoff Reply, Ex. C (Atik Affidavit). The City also requested Mr. Schloss to conduct a title search for 19 East Houston Street. *Id.*, Ex. D (Schloss Affidavit). While a deficiency of proof in moving papers "cannot be cured by submitting evidentiary material in reply" and cannot be used "to introduce new arguments in support of, or new grounds for the motion" (*Henry v. Peguero*, 72 A.D.3d 600, 602 (1st Dep't 2010)), the City attempts to do so by arguing in the alternative, that if the alleged accident did occur on the sidewalk abutting 19 East Houston Street, summary judgment is still appropriate because 19 East Houston Street is owned by NYCTA, not the City, and the subject property is not a one-, two, or three-family residential property. While it is true that the City is responding to plaintiff's argument in opposition that the alleged accident occurred on the sidewalk abutting 19 East Houston Street, the location of the City's original DOT search indicates that, with due diligence, it could have performed the DOT record search and the title search discussed in its reply. Accordingly, the results of the additional records searches annexed to the City's reply are not properly before the Court, and thus cannot be considered in resolving the instant motion.

Conclusion

As the City failed to demonstrate a prima facie showing of entitlement to judgment as a matter of law, the City's motion for summary judgment is denied. This constitutes the decision and order of this Court.

Dated: September 30, 2016

Hon. James E. d'Auguste, A.J.S.C.