SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

SHALON BROADDUS,

Plaintiff,

-against-

ASN KEY WEST, LLC,

Defendant.

Index No. 155745/2012

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant ASN Key West, LLC (defendant) moves for an Order, pursuant to CPLR 3212, granting summary judgment, dismissing the Complaint of plaintiff Shalon Broaddus (plaintiff) on the grounds that plaintiff admits that her fall occurred within a New York City-owned tree well, as well as upon the indisputable evidence that defendant did not cause or create the allegedly dangerous condition.

Background

This case involves a trip and fall accident that occurred on July 14, 2010 at approximately 1 p.m. on the sidewalk in front of 750 Columbus Avenue, between 96th Street and 97th Street , (the "Property") and more specifically, according to plaintiff, due to missing stone along the perimeter of a tree well in front of said premises. On said date, Plaintiff tripped and fell after alighting from the MI 1 bus due to the missing stone.

Defendant's Contentions

On November 15, 2013, the examination before trial of the plaintiff was held. During her deposition, Plaintiff testified that she fell as she was stepping inside a City-owned tree well.

As part of her testimony, Plaintiff marked an "X" on a photograph depicting the tree well at issue, which was marked as Exhibit 1 for purposes of the deposition. On January 16, 2014, the examination before trial of defendant, by representative Antje Eichinger (Eichinger), was held. During her deposition, Ms. Eichinger identified Porters who worked at the Building at the time of the incident at issue, including: Bhishom Singh, Anthony Parker, and Rizalito Zapanta (collectively, the "Porters").

According to the affidavit of Bhishom Singh (Singh), he currently work as a Porter at the Property. He was hired in this position on or about May 9, 1994, and he was employed in this position on July 14, 2010, the date of the incident. As a Porter, he performs cleaning and maintenance tasks at the Property, which includes performing certain tasks on the exterior of the Property. He performed such tasks throughout July 2010. At no point during his employment did he remove, adjust, or alter any stone from any tree well adjacent to the Property. To his knowledge, no employee of defendant or contractor removed, adjusted, or altered any stone from any tree well adjacent to the Property on or before July 14, 2010.

Plaintiff's Opposition

Plaintiff exited the Ml bus on Columbus Avenue between 96th Street and 97th Street prior to the accident (Broaddus at pg. 19, 21). Plaintiff stepped off the bus, directly onto the curb where there was a tree encased with a gate around it (Broaddus at pg. 23-24). Plaintiff was shown a photograph of the tree well and placed an "X" where she fell. See, copy of photographs annexed to Defendant ASN's moving papers as Exhibit "E". The "X" marks the spot where her foot first hit when she alighted off of the bus (Broaddus at pg. 26). Plaintiff then fell sideways to her right and slightly forward (Broaddus at pg. 27). Plaintiff testified that she fell where there

was a missing stone/brick surrounding the tree (Broaddus at pg. 31-32). As a result of the fall, Plaintiffs knees hit the other stones and her right shoulder struck the iron casing around the tree (Broaddus at pg. 33). Immediately after falling, Plaintiff looked and saw that some of the stones/bricks were missing (Broaddus at pg. 35). There was grass and dirt in the place where stone/brick is missing (Broaddus at pg. 33). She also noticed that some of the stones/bricks were raised (Broaddus at pg. 35).

On January 16, 2014, Ms. Eichinger appeared for a deposition on behalf of Defendant. Ms. Eichinger is employed by Equity Residential and specifically is the general manager for 730 Columbus Avenue and 750 Columbus Avenue on the upper west side (Eichinger at pg. 8). She has been the general manager since 2007 (Eichinger at pg. 8). She is at 750 Columbus five days a week (Eichinger at pg. 9). ASN is the registered name of 750 Columbus (Eichinger at pg. 14). In 2010, ASN owned 750 Columbus (the "Building") (Eichinger at pg. 15). The porters were responsible for cleaning the sidewalks (Eichinger at pg. 19). The porters and the service team were responsible for snow removal on the sidewalk (Eichinger at pg. 19-20). According to Ms. Eichinger, the building was responsible for maintaining the sidewalk (Eichinger at pg. 21-22). Some of the sidewalk flags were repaired (Eichinger at pg. 21). The regional service team would inspect the sidewalk and then the appropriate repairs would be made (Eichinger at pg. 22).

There is a bus stop in front of 750 Columbus as well as a "tree pit" (Eichinger at pg. 26). Looking at the photograph marked as Plaintiffs Exhibit "3", Ms. Eichinger confirmed that there is a tree pit with a decorative black fence around the tree pit (Eichinger at pg. 27). According to Ms. Eichinger, the building hired a landscaping company to plant seasonal flowers, green

vegetation and mulch in the tree pit for decorative purposes in order to improve the curb appeal of the building (Eichinger at pg. 27-28). Ms. Eichinger was in charge of hiring the landscaping company to perform the work within the tree pit (Eichinger at pg. 29). Ms. Eichinger directed the work that is done within the tree pit (Eichinger at pg. 29). Ms. Eichinger inspected the work after it is done (Eichinger at pg. 29). As of the date of Ms. Eichinger's 2013 deposition, permanent plants were placed in the tree well by the landscaping company (as opposed to the City) (Eichinger at pg. 30). Ms. Eichinger testified that her service team cleaned the snow from the perimeter stones on three sides of the tree well, but is not sure whether they also removed snow from the stones on the side where the street is (Eichinger at pg. 31-32). It is Ms. Eichinger's understanding that the Building was not responsible for maintaining the tree well, but the Building did make special use of it for decorative purposes only (Eichinger at pg. 35). Ms. Eichinger noticed some defective stones after she received a complaint about them (Eichinger at pg. 35). She then had someone from the service team take out some of the stones because there was a possibility that someone could trip so they decided to take the hazard away (Eichinger at pg. 35-36, 49).

Ms. Eichinger also testified that garbage and debris would go into the tree pit on a daily basis (Eichinger at pg. 38-39). The porters would clean up the tree pit because it was bad for curb appeal (Eichinger at pg. 39). Ms. Eichinger was also shown a photograph, marked as Plaintiffs Exhibit "2" that shows an overgrowth of grass. See, copy of photograph marked as Plaintiffs Exhibit "2." Ms. Eichinger was not sure whether the service team would go out and pull the weeds or trims the grass, but indicated the service manager might know (Eichinger at pg. 43). Ms. Eichinger instructed the service team that the tree well/tree pits need to look aesthetically

pleasing for cub appeal purposes (Eichinger at pg. 44) and conceded that the overgrown grass and weeds would detract from curb appeal (Eichinger at pg. 44). Although Ms. Eichinger was not sure whether the service team addressed that condition, she testified that they should (Eichinger at pg. 45). Ms. Eichinger was also shown a photograph marked as Plaintiffs Exhibit "1". See, copy of photograph marked as Plaintiffs Exhibit "1". That photograph depicts stones surrounded by black mulch (Ms. Eichinger at pg. 45). The mulch depicted in the photograph looks like the mulch that the landscaping company (hired by the building) puts down (Eichinger at pg. 45-46). Ms. Eichinger was not sure whether the landscaping company ever removed any of the stones to accomplish their mulching and planting (Eichinger at pg. 46).

The testimony of Ms. Eichinger clearly establishes that defendant derived a special use from the tree well. First, Ms. Eichinger testified that the building hired a landscaping company to plant seasonal flowers, green vegetation and mulch in the tree pit (Eichinger at pg. 27-28). Ms. Eichinger testified that this was done to enhance the curb appeal in front of the building (Eichinger at pg. 28). Ms. Eichinger directed the work that was done within the tree pit (Eichinger at pg. 29). Ms. Eichinger concedes that the building made special use of the tree well area for decorative purposes. (Ms. Eichinger at pg. 35). Since Defendant derived a special use from tree well area, they were required to maintain the area in a reasonably safe condition to avoid injury to others.

It is clear from Ms. Eichinger's testimony that, at the very least, Defendant had constructive notice of the missing stones in the tree well area. Again, constructive notice will be found in situations where a defect is visible and apparent and has been in that condition so long that the defendant is presumed to have seen it, or to have been negligent in failing to see it.

Based upon Ms. Eichinger's own admissions, it is clear that in exercising its duty to maintain the premises, as well as maintain the tree well area in an aesthetically pleasing manner (per Ms. Eichinger), an employee and/or agent of Defendant, whether it be Ms. Eichinger, one of the porters or other member of the service team, should have discovered the missing stones. Their failure to do so constitutes negligence. A jury could reasonably infer that the defect was noticed by the Defendant, but they nevertheless were negligent in failing to timely remedy same.

Even a cursory review of the photographs annexed to Plaintiffs papers, demonstrates that Defendant failed to maintain the tree well area in good repair and in a reasonably safe condition. The missing (and raised) stones are readily apparent in the photographs. Ms. Eichinger concedes that there is overgrown grass in the areas where the missing stones are located. Clearly the defect had to exist for an extended period of time to allow for overgrown grass to develop.

The facts of this case also raise issues of fact as to whether Defendant created the dangerous condition. In the case at bar, the record is irrefutable that Defendant hired a landscaping company to perform work within the tree well area. Ms. Eichinger admitted that she was not sure whether the landscaping company removed any of the stones to accomplish their mulching and planting (Eichinger at pg. 46). Thus, issues of fact exist as to whether Defendant created the dangerous condition, which caused Plaintiff to trip and fall.

Defendant's Reply

Plaintiffs opposition to this motion relies, virtually exclusively upon testimony of building manager, Antje Eichinger regarding post-accident measures taken by the building to prevent a second accident. As Ms. Eichinger clearly stated in her deposition, defendant "never did anything to the tree pits" prior to the date of the accident. See Exhibit F of the original

motion, page 33, lines 22 through 25. Furthermore, she clearly stated that no one from defendant or on defendant's behalf had ever handled the stones alleged to have been missing on the date of the accident. See Exhibit F, page 37, lines 3 through 14, page 46 lines 4 through 16. As stated above, the defendants did, some time after the occurrence of the accident remove some of the misaligned stones within the tree well to avoid a subsequent accident. See Exhibit F, page 36, line 20 through page 37 line 2, 7. Plaintiffs argument that this should be viewed to establish control over the tree well is meritless since the defendant took no such actions pre-accident, and were under no obligation to do so. Plaintiffs argument that the defendant was on notice of the alleged dangerous condition before the accident is likewise meritless. The defendant has no responsibility to take action regarding a hazardous condition occurring on the property owned and maintained by another.

DISCUSSION

Summary Judgment (Defendant is Movant)

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501

NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Special Use

As articulated by the Appellate Division, First Department in *Fernandez v 707, Inc.* 85 A.D.3d 539, 926 N.Y.S.2d 408 [1st Dept 2011]: Although Administrative Code of the City of New York § 7–210 (eff. September 14, 2003) imposes tort liability on property owners who fail to maintain abutting city-owned sidewalks in a reasonably safe condition, [defendant] cannot be held liable for plaintiff's injuries by virtue of its status as an abutting landowner because a property owner's responsibility for a sidewalk does not extend to tree wells (*see Vucetovic v Epsom Downs, Inc.*, 10 N.Y.3d 517, 521, 860 N.Y.S.2d 429, 890 N.E.2d 191 [2008]; *Grier v 35–63 Realty, Inc.*, 70 A.D.3d 772, 895 N.Y.S.2d 149 [2010]).

And, it is well settled that the owner or lessee of land abutting a public sidewalk owes no duty to the public to keep the sidewalk in a safe condition unless the landowner or lessee creates a defective condition in the sidewalk or uses it for a special purpose (*see, D'Ambrosio v City of New York,* 55 N.Y.2d 454, 450 N.Y.S.2d 149, 435 N.E.2d 366; *Roark v Hunting, 24 N.Y.2d 470, 301 N.Y.S.2d 59, 248 N.E.2d 896; Nevins v Great Atlantic and Pacific Tea Co.*, 164 A.D.2d 807, 559 N.Y.S.2d 539). Here the defendant cannot be held liable for the defect alleged in the complaint, because there is nothing in the record to suggest that defendant created the defective condition. And prevailing case law does not support a finding of special use based on the defendant's clearing garbage from the tree well, maintaining decorative flowers in the tree well, by planting mulch in the tree pit, or by using the area for a purpose different from the general populace such to impute liability based upon a theory of "special use" (*Tortora v Pearl Foods*, 200 A.D.2d 471, 472, 606 N.Y.S.2d 235; *Nuesi v City of New York*, 205 A.D.2d 370, 613 N.Y.S.2d 175).

Cause/Create/Repair

Here defendant made a *prima facie* showing that it did not create the missing stone along the perimeter of a tree well which allegedly caused plaintiff's accident, did not cause it to occur because of a special use, and did not violate a statute or ordinance which expressly imposed liability upon it for failing to maintain the subject tree well (*see Holmes v Town of Oyster Bay,* 82 A.D.3d 1047, 1048, 919 N.Y.S.2d 207; *Grier v 35–63 Realty, Inc.*, 70 A.D.3d 772, 773, 895 N.Y.S.2d 149).

And, as to plaintiff's argument that defendant may have created the condition based on the work of defendant's landscaper, Ms. Eichinger states on page 46 of her deposition, the

following:

Q. Do you know if [the landscaper] moves any of the stones in order to accomplish their mulching and planting?

A. No, no. They wouldn't do that because the stones – no. I don't think so..

Q. Okay. You don't think they move any of the stones?

A. I don't think so.

Q. You think they work around the stones?

A. Yes.

And, this witness follows up by explaining that she never instructed the landscaper to do anything or any work whatsoever to the stones in this particular tree pit.

Further, a careful reading of Ms. Eichinger's deposition transcript shows that the post accident repair was to prevent any further accident; this does not establish "special use" prior to the accident.

In opposition, the plaintiff failed to raise a triable issue of fact as to this issue

Based on the deposition testimony of Ms. Eichinger and the affidavit of Bhishom Singh defendant has made its *prima facie* showing of entitlement to summary judgment.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of defendant ASN Key West, LLC for an Order, pursuant to CPLR 3212, granting summary judgment, dismissing the Complaint of plaintiff Shalon Broaddus is granted and said Complaint is hereby dismissed. And it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly. And it is further

ORDERED that counsel for defendant shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for plaintiff.

Dated: September 3, 2015

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD