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

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SHARMI BASKERVILLE,

Plaintiff,

-against-

503 WEST 148TH STREET, LLC, ODYSSEY MANAGEMENT, "XYZ CORP.," d/b/a ODYSSEY MANAGEMENT, and HAMILTON HEIGHTS COMMUNITY HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

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Index No.: 160163/2013

DECISION AND ORDER

Motion #003

CAROL R. EDMEAD, J.S.C.:

I. Background

In this negligence/personal injury action, Plaintiff Sharmi Baskerville alleges that she sustained injuries when a plywood board ("the board") caused her to fall on the namesake property of Defendant/property owner 503 West 148th Street, LLC ("503 West") in New York, New York ("Defendants' property"). 503 West and fellow Defendant/management company Odyssey Management/"XYZ Corp." ("Odyssey") move together for summary judgment dismissing the Complaint.[1]

Defendants argue that inasmuch as plaintiff alleges that defendants' sidewalk repair work encumbered the sidewalk with a tripping hazard/plywood board, and discovery and photographs establish that the construction work was, in fact, being performed on the neighboring property (505 West 148th Street), plaintiff was not caused to fall on property owned or maintained by defendants. The debris that plaintiff claims to have tripped over was in front of, and adjacent to,

[1] The Court previously granted default judgment against the remaining defendants. Any reference.to "Defendants" in this opinion refers to the movants.

the neighboring property. Therefore, as plaintiff's accident did not occur in front of defendants' property, the court should dismiss the action, as defendants owed no duty to plaintiff.

In opposition, Plaintiff argues that Defendants failed to satisfy their burden because they do not claim that the plywood board was entirely on the neighboring property, and the records demonstrate that the plywood board "was demonstrably not entirely in front of [the neighboring property]" (*Pl Opp* ¶¶ 2-3, 6). Further, Defendants do not claim that they lacked notice of the plywood board or its danger to Plaintiff (*id.* at ¶ 9). Plaintiff notes that the affidavit of Benjamin Jannarone, Defendants' principal, does not dispute the board's presence on the sidewalk, at or near Defendants' property (503). And, Defendants do not dispute that it was them who placed the board at the location shown in the photographs, and does not change the fact that the board was also in front of defendants' Premises. Plaintiffs also assert that the photos attached to Defendants' motion contradict Defendants' positions and create issues of fact as to the exact position of the board (on Defendants' property versus the neighboring property), as well as who deployed the board. In any event, Plaintiffs' attestation that the portion of the board upon which she tripped was located in front of defendants' Premises, coupled with photographs showing that the Premises was used in connection with the subject repair work, raises issues of fact.

In reply, Defendants reiterate that they had no duty to Plaintiff, and argue, for the first time, that since plaintiff tripped over a plywood board, she did not trip over the "sidewalk" for purposes of New York City Administrative Code 7-210. Further, as Defendants did not create the defect, negligently make repairs to the sidewalk, did not make special use of the sidewalk, or violate any statute, Defendants are not liable, as a matter of law, even if the board were on their

property (*id.* at ¶¶ 6-14).[2] Defendants did not have a duty to maintain the board, as it was placed for the exclusive benefit of the neighboring property, which Defendants did not own.

II. Discussion

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]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

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]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014]

[2] To the extent that Plaintiff introduces arguments in its reply, the Court will consider it because of our courts' stated preference for deciding cases on the merits where possible (*Henneberry v Borstein*, 91 AD3d 493, 497 [1st Dept 2012]).

citing Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v. Genger*, 123 AD3d 445, 447 [1st Dept 2014] lv to appeal denied, 24 NY3d 917 [2015], *citing Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 [1st Dept 1993]). In other words, 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]).

Administrative Code § 7-210 "unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure" *(Sangaray v W. Riv. Assoc., LLC*, 2016 NY Slip Op 01002 (Feb. 11, 2016)). Thus, as the owner of the property abutting the sidewalk on which plaintiff claims she fell, Defendants "were responsible for maintaining the sidewalk in a reasonably safe condition" (*Garcia v. City of New York*, 99 AD3d 491, 492, 952 NYS2d 133 [1st Dept. 2012] *citing* Administrative Code of City of NY § 7-201 [a]).[3] Consequently, on a motion for summary judgment, Defendants bear "the initial burden of demonstrating that [they] neither created the defective condition nor had actual

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[3] Administrative Code § 7-210 ("7-210"), which reads, in relevant part:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including . . . to maintain such sidewalk in a reasonably safe condition.
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> * * * * *
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> b. . . . .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.

or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Garcia v. City of New York, supra citing Khaimova v City of New York*, 95 AD3d 1280, 1282 [2012]).

While the record, at this juncture, supports Defendants' contention that the *construction work* was performed by the neighboring property owner, and that such work allegedly created the tripping hazard, such contention is not dispositive as to Defendants' liability.

Here, Defendants' principal Jannarone attests that the plywood board that caused plaintiff's alleged fall "was on the sidewalk in front of the neighbor's property." Jannarone states that there was no "construction debris on the sidewalk" in front defendants' property, there "was no sidewalk repair work, or any other construction" at defendants' property on the date of plaintiff's accident. The photographs depicting the area where plaintiff fell, according to Jannarone, show a "sidewalk that has been repaved" and "a piece of plywood covering a portion of the sidewalk" and that defendants do not own the building "adjacent to the re-paved sidewalk."

However, in opposition, Plaintiff attest that the plywood board "straddled the front of the [Defendants'] Premises *and* its immediate adjacent property" (¶2, emphasis added). According to plaintiff, the photographs depict that the plywood board "plainly extend to the front of the Premises." Plaintiff also submits additional photographs that show the "wood and the position in which it existed at the time of the accident." According to plaintiff, the plywood board "extended from the front of the Premises to the front of the 505 [neighboring] Premises" and that she "fell upon the portion of the sheet of wood that was directly in front of the entrance to [Defendants'] Premises" and "in front of the wall forming part of the exterior entryway into the

Premises, on top of which sits two flower boxes and structural column." Moreover, as noted by Plaintiff in opposition, the three pictures do not clearly delineate the border between Defendants' property and the neighboring property, or where the board rests in relation to that line.

Given this material factual dispute, and given the Court of Appeals' recent holding in *Sangaray*, the summary judgment in favor of Defendants is inappropriate.

In *Sangaray v W. Riv. Assoc., LLC*, the plaintiff fell due to a height differential between two sidewalk flags of a sidewalk. The lower of the two flags, which allegedly created the depression, was located in front two adjacent property owners: approximately 92% of the lower (or depressed) flag was located in front West River Associates LLC's property; 8% of the flag was located in front of the property owned by defendant Sandy and Rhina Mercado. And, the spot where plaintiff fell was located on the 8% portion of the flag, located in front of the Mercados' property. West River moved for summary dismissal on the ground that the area where plaintiff fell was located entirely in front of the Mercados' property. The Mercados opposed the motion on the ground that the majority of the defective flag was located in front of West River's property. West River's motion was granted, and affirmed by the First Department, on the ground that the record and land surveyor established that West River did not own the property that abutted the defective portion of the sidewalk on which plaintiff fell.

However, the Court of Appeals reversed, disapproving of the First and Second Department's "engraft[ing] onto section 7-210 [of] a 'location requirement', without conducting any inquiry as to whether a neighboring owner's failure to comply with its statutory duties may have also been a proximate cause of the accident (*id.*). Though the location of the defect and the property that it abuts is significant, "that does not, however, foreclose the possibility that a

neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained" (*id.*).

Thus, an issue of fact exists as to whether the sidewalk area upon which plaintiff fell solely abutted the neighboring property, whether the plywood board over which Plaintiff allegedly tripped solely abutted the neighboring property, and more importantly, whether Defendants maintained the portion of its sidewalk over which Plaintiff allegedly fell in a reasonably safe condition. Defendants' contention that the tripping hazard that plaintiff claims to have tripped over was in front of, "and adjacent to," the neighboring property is insufficient to warrant summary judgment in their favor (*id.*, stating that defendant was "required to do more than simply demonstrate that the alleged defect was on another landowner's property" and that although defendant "West River did not have a duty to remedy any defects in front of the [neighboring] Mercado property, section 7-210 (a) imposed a duty on West River to maintain the sidewalk abutting its premises in a reasonably safe condition"]).

And, as noted by Plaintiff in opposition, "Defendants do not claim that they lacked of [sic] notice of the wood sheet. . ." (*Pl Opp* ¶ 6).

Therefore, as issues of fact exist as to whether Defendants owed plaintiff a duty, summary judgment in their favor is unwarranted.

It is also noted that Defendants' contention that the plywood board on which Plaintiff fell was not a sidewalk for purposes of the Administrative Code was raised for the first time in reply. Arguments raised for the first time in reply are not to be considered (*Wal-Mart Stores, Inc. v. U.S. Fidelity and Guar. Co.*, 11 A.D.3d 300, 784 N.Y.S.2d 25 [1st Dept. 2004]; *Alrobaia ex rel.*

Severs v. Park Lane Mosholu Corp., 74 A.D.3d 403, 902 N.Y.S.2d 63 [1st Dept. 2010] ("The argument on which the court relied, however, was raised for the first time in defendants' reply papers, and should not have been considered by the court in formulating its decision")). As the First Department explained in *Dannasch v. Bifulco (*184 A.D.2d 415, 417, 585 N.Y.S.2d 360 [1st Dept. 1992]): "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." And, plaintiffs were not given an opportunity to submit a sur-reply (*Apartment Recycle Co. of Manhattan Inc.*, 10 Misc.3d 1066(A), 814 N.Y.S.2d 559 (Table) [Supreme Court, New York County 2005] *citing, Fiore v. Oakwood Plaza Shopping Center, Inc.*, 164 A.D.2d 737, 739, 565 N.Y.S.2d 799 [1st Dept.], *affd.*, 78 N.Y.2d 572, 578 N.Y.S.2d 115, 585 N.E.2d 364 [1991], cert. denied, 506 U.S. 823, 113 S.Ct. 75, 121 L.Ed.2d 40 [1992] ("The First Department, however, has carved out a narrow exception to the maxim excluding arguments advanced in a movant's reply papers: where the opposing party availed themselves of an opportunity to oppose the claims in their surreply,' the movant's arguments may be considered on their merits")).

In any event, Defendants failed to establish that the Second Department's holding in *Smirnova v. City of New York*, 64 AD3d 641, 882 NYS2d 513 [2d Dept 2009]), that a plywood covering a subway grate which the abutting landowner therein was under no obligation to maintain, applies to the plywood board herein which was allegedly utilized to cover the sidewalk flag over which defendants have an obligation to maintain.

III. Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Defendants 503 West 148th Street, LLC and Odyssey Management/"XYZ Corp." for summary judgment dismissing the Complaint is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 26, 2016

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.