Narvaez v City of New York
2016 NY Slip Op 31108(U)
May 26, 2016
Supreme Court, Bronx County
Docket Number: 300684/2013
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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LEONICA NARVAEZ,

Index No.: 300684/2013

Plaintiff(s),

-against-

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

CITY OF NEW YORK and VISTA MEDIA GROUP, INC., d/b/a LAMAR DEVELOPMENT COMPANY,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment	Papers Numbered
Notice of Motion, Affirmation, and Affidavits in Support with Exhibits	1
Affirmation in Opposition by VISTA MEDIA GROUP INC., ...	2
Affirmation in Opposition by Plaintiff	3
Reply Affirmations by CITY OF NEW YORK.....	4,5

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendant, CITY OF NEW YORK (hereinafter "City"), moves for summary judgment dismissing the complaint pursuant to CPLR §3212. Plaintiff commenced this action seeking damages for injuries allegedly sustained by her on February 25, 2012 when she allegedly tripped and fell over an uneven and cracked area of the sidewalk located on the westerly side of Edward L. Grant Highway, north of its intersection with West 170th Street in the Bronx.

The City asserts that summary judgment is warranted pursuant to §7-210 of the Administrative Code of the City of New York which shifts liability for injuries arising from defective sidewalk conditions in front of certain properties from the City to abutting property owners. The City further asserts that summary judgment is warranted because plaintiff and defendant, VISTA MEDIA GROUP, INC., (hereinafter "Vista"), failed to raise an issue of fact as to whether the City caused and created the alleged defect in the sidewalk.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law

(*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

Pursuant to section 7-210(b) of the New York City Administrative Code,

> Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. 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. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

The section further provides:

> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe

> condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

The City alleges that plaintiff's accident occurred on the sidewalk adjacent to a property with the address of 79 West 170th Street, located at Tax Block 2520, Lot 12 in the Bronx (hereinafter, the "property"). Vista admitted to owning the property on the date of plaintiff's accident in its response to plaintiff's Notice to Admit dated January 27, 2015. Neither Vista nor the plaintiff dispute these assertions in their opposition to the motion. Further, the City submits a printout from the Department of Finance of the City of New York (hereinafter, "DOF"), Real Property Assessment Division (hereinafter, "RPAD") that classifies the premises as "class V1." Class V1 is listed as, "Zoned Commercial or Manhattan Residential." Neither Vista nor Plaintiff dispute this assertion. Based on the foregoing, the City has established that the premises does not fall within any of the exemptions set forth in §7-210 as it is neither a one-, two, or three- family residential property that is in whole or in part owner occupied and used exclusively for residential purposes, nor was is owned by the City. Therefore, the City is shielded from liability pursuant to §7-210.

Additionally, the City has established that it neither caused nor created the alleged defect in the sidewalk. The City submits affidavits of Min Yi Chan ("Chan") and Talia Stover ("Stover") both employed by the New York City Department of Transit ("DOT"). Chan conducted a search for DOT records of permits, complaint/repair orders, violation and contracts for the sidewalk located at the intersection of Edward L. Grant Highway between West 170th Street and Shakespear Avenue for the two years prior to and including the date of plaintiff's accident. Stover conducted the same search for the sidewalk located at the intersection of Edward L. Grant Highway and West 170th Street, also for the two years prior to and including the date of plaintiff's accident. The records of applications for permits, permits, complaints/repair orders, violations or contracts indicate that the City or its contractors did not perform any work to the sidewalk located at the intersection on the west side of Edward L. Grant High and north of West 170th Street.

Vista contends that summary judgment must be denied for two reasons. First, that in light of the testimony of Danny Garcia, employed by the DOT, an issue of fact exists as to whether the City performed worked at the subject location through a subcontractor, Mana Contracting Group

LTD. Vista also contends that Garcia's testimony creates an issue of fact as to whether work performed by the New York City Fire Department caused or created the defect in the sidewalk. Plaintiff argues that an issue of fact remains as to the City's liability because the accident occurred near a fire hydrant and a gas cap. However, in order to establish a claim that the City caused and created a hazardous condition, plaintiff, and co-defendant here, must show that any work done by the City immediately resulted in the existence of the dangerous condition (*Yarborough v. City of New York*, 10 N.Y.3d 726 [2008]). The court finds that the plaintiff and Vista have failed to make any such showing. Indeed, the showing of immediate hazard cannot be made by conclusory allegations or speculation (*Lawler v. City of Yonkers*, 45 A.D.3d 813 [2d Dep't., 2007]).

Based on the record before the court, both Vista and plaintiff have failed to raise an issue of fact as to whether the City is shielded from liability pursuant to §7-210. Further, Vista and the plaintiff have failed to submit any evidence that the City affirmatively caused or created the defect that allegedly caused plaintiff's injury. Therefore, the motion is granted and the complaint and any cross-claims are hereby dismissed against the City of New York. Further, the clerk of the court is hereby directed to transfer this matter to a non-city part.

This constitutes the decision and judgment of the court.

Dated: 5.26.16
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.