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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
**Justice**

DONNA ROSE,

Plaintiff,

-against-

POWER CONCRETE CO., INC., et al.,

Defendants.

Index Number 6316/10

Motion Date June 15, 2016

Motion Seq. Nos. 10, 11, 12

Motion Cal. Nos. 138, 139, 140

The following papers numbered 1 to 24 read on these separate motions by defendant Power Concrete Co., Inc. (Power) pursuant to CPLR 2221 and 3212 for summary judgment in its favor dismissing all claims and cross claims against it and pursuant to 22 NYCRR § 202.21(e) to strike the Note of Issue and to remove this matter from the trial calendar, or, in the alternative, pursuant to CPLR 3124 to compel plaintiff to appear for a further deposition and medical examinations, and by defendants Bayside West Realty LLC (Bayside West Realty) and Bayside West Condominium (Bayside West Condo) for summary judgment in their favor.

| | Papers Numbered |
|---|---|
| Notices of Motion - Affidavits - Exhibits ..... | 1-12 |
| Answering Affidavits - Exhibits ..... | 13-20 |
| Reply Affidavits ..... | 21-24 |

Upon the foregoing papers it is ordered that the motions are consolidated and determined as follows:

Plaintiff commenced this action against defendants Bayside West Condo, Bayside

West Realty, The City of New York (City) and Power seeking damages for personal injuries allegedly sustained on April 17, 2009, at approximately 10:30 P.M., when she fell along a public sidewalk adjacent to a building located at 189-42 37th Avenue, Flushing, New York, owned by defendants Bayside West Condo and Bayside West Realty.

Plaintiff testified that while walking her dog along the sidewalk, she stepped with her left foot, and it dipped in a space along the curb, causing her to fall into a car parked at the curb and then to the ground. Plaintiff also testified that there was a sewer or catch basin at the curb where she fell. According to plaintiff, her accident was on the south side of 37th Avenue within one car length of its intersection with 190th Street, and in front of 189-42 37th Avenue, Flushing, New York.

Jerry Papafloratos, the manager of the premises at 189-42 37th Avenue, testified on behalf of defendants Bayside West Condo and Bayside West Realty, that said defendants never did any work to the adjacent sidewalk, or to the subject curb or catch basin.

Eric Sattler of defendant City's Department of Design and Construction (DDC) testified on behalf of defendant City. At his examination before trial, Sattler identified a standard bid contract between defendant City and contractor, defendant Power, with Project ID: HWS2005Q1, for the installation of sidewalks, curbs, pedestrian ramps and hydrant cuts in Queens. Two permits were issued to defendant Power, one on October 24, 2005, and the other on March 21, 2006, related to that contract HWS2005Q1, to open the roadway and/or sidewalk at 37th Avenue from 190th Street to Utopia Parkway for purposes of defendant City. According to Sattler contractors pull full block face permits rather than permits for individual locations, and that the location identified in the subject March 21, 2006 permit issued to defendant Power referencing Project ID: HWS2005Q1 did not necessarily mean that work was done in that location. Another of defendant City's witnesses, Dmitriy Surkov, testified that a permit issued for work between two cross streets only indicates the maximum work area and not the actual work area.

Sattler testified that the exact location of where work was to be done would be given in a Task Order, and that defendant Power would not be authorized to do any work under the contract until it received such Task Order. Sattler also testified that any Task Orders issued for Project HWS2005Q1 would reference residential one-family through three-family or City-owned property and would be block and lot specific giving the Department of Transportation (DOT) sidewalk violation. In addition, Sattler testified that based upon a search of DDC records, including Task Orders and Sidewalk Assessments, while work was done by defendant Power under the subject contract, HWS2005Q1, there was no work done at the subject location of 189-42 37th Avenue. Sattler further testified

that the contract HWS2005Q1 was purely for DOT sidewalk violations; that the contract did not in any way involve work on catch basins; and that the catch basin at issue inset into the curb with no curb box or curb piece in the gap was an acceptable City standard. Brendan Quigley, a witness from defendant City's Department of Environmental Protection (DEP) also testified that the subject recessed-type catch basin is common in the City.

Defendant Power's witness, Nigel Singh, its project manager, testified that defendant Power is in the heavy construction business, performing sidewalk repairs and reconstruction. Singh also testified that defendant Power does not install catch basins or catch basin connections, which work is usually done by a catch basin or sewer contractors. In addition, Singh testified that its contract, HWS2005Q1, with defendant City was for sidewalk repairs, and not reconstruction, and that the resident engineer would give defendant Power a Task Order noting the locations where its work was to be performed. According to Singh, defendant Power pulled two permits for the subject contract because the first expired before any work was done. Singh identified a document entitled "List of Locations Completed" and testified that all the locations on that list originated from a Task Order and that only two were located at 37th Avenue, neither of which was the subject location of 189-42 37th Avenue. Singh also testified that work on any given block would be grouped on one Task Order and not separate Task Orders. Singh further stated that any photographs taken by defendant Power pre or post work would be given to defendant City.

Defendant Power moves for summary judgment in its favor dismissing plaintiff's complaint and all cross claims against it. In a separate motion, defendant Power seeks other relief of striking the Note of Issue or compelling plaintiff to appear for a further deposition and medical examinations. Defendants Bayside West Condo and Bayside West Realty separately move for summary judgment in their favor dismissing plaintiff's complaint and all cross claims against them.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), or credibility assessment (*see Ferrante v American Lung Association*, 90 NY2d 623 [1997]). Once this showing has been made,

however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

It is well-settled that a property owner is not liable for repairing and maintaining abutting public property unless the owner actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges the abutting owner with the responsibility to repair and maintain the public property and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (*see Solarte v DiPalmero*, 262 AD2d 477 [1999].)

There is no ordinance or statute involved in this case that would impose either a duty or liability upon defendants Bayside West Condo and Bayside West Realty regarding the maintenance and repair of the curb. The New York City Administrative Code §§19-152 and 7-210 place the duty to repair public sidewalks upon the abutting property owners, and §7-210 specifically imposes liability upon abutting property owners for any injuries resulting from their breach of that duty. In this case, however, the defective area upon which plaintiff allegedly tripped and fell was not the sidewalk, but the curb. Section 7-201 (c) of the Administrative Code states, in relevant part, "The term 'street' shall include the curbstone." "Sidewalk" is defined in §19-101 as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." Thus, neither §19-152 nor §7-210 imposes upon a property owner a duty to repair and maintain curbs (*see Irizarry v The Rose Bloch 107 University Place Partnership*, 12 Misc 3d 733 [2006]).

Defendants Bayside West Condo and Bayside West Realty have met their initial burden of establishing their prima facie entitlement to judgment as a matter of law by demonstrating that there is no statute imposing a duty upon them to maintain the subject curb and/or the adjacent catch basin, and that they did not create the alleged defective condition or cause it through some special use. Thus, the burden shifts to those parties opposing the motion to present competent evidence raising a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Plaintiff, in opposition, failed to meet this burden. No issue has been raised concerning whether defendants Bayside West Condo and Bayside West Realty created the alleged defect or made some special use of the subject curb/catch basin area. While plaintiff contends that defendants Bayside West Condo and Bayside West Realty failed to adequately light, mark, or warn of the subject curb/catch basin area, plaintiff failed to establish that defendants Bayside West Condo and Bayside West Realty had any duty to do same. Plaintiff further contends that a triable issue of fact exists concerning whether

defendants Bayside West Condo and Bayside West Realty had notice of the alleged defective condition. This contention is also without merit since even if defendants Bayside West Condo and Bayside West Realty had any such notice, as noted, they did not have any duty to maintain the subject curb and catch basin.

Defendants City and Power did not submit any opposition to the motion of defendants Bayside West Condo and Bayside West Realty.

Accordingly, the motion of defendants Bayside West Condo and Bayside West Realty for summary judgment in their favor is granted and plaintiff's complaint and all cross claims against them are dismissed.

Defendant Power, a contractor hired by defendant City, also seeks summary judgment.

It is well established that a contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk (*see Brown v Welsbach Corp.*, 301 NY 202 [1950]; *see also Walton v City of New York*, 105 AD3d 732 [2013]; *Sand v City of New York*, 83 AD3d 923 [2011]).

Here, defendant Power submitted evidence, including the parties' examinations before trial testimony, sufficient to establish, prima facie, that it did not perform any work on the subject curb/catch basin area where plaintiff's accident occurred and, therefore, that it did not create the allegedly defective condition which caused plaintiff to fall (*see Sand v City of New York*, *supra*; *see also Cohen v Schachter*, 51 AD3d 847 [2008]; *Rubina v City of New York*, 51 AD3d 761 [2008]). Thus, the burden shifts to those parties opposing the motion to present competent evidence to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Plaintiff has failed to meet this burden. Plaintiff's contention that a triable issue of fact exists concerning whether defendant Power created the alleged defective condition is unsupported and without merit (*see Zhilkina v City of New York*, 121 AD3d 847 [2014]; *see also Cendales v City of New York*, 25 AD3d 579 [2006]; *Maloney v Consolidated Edison Co. of New York*, 290 AD2d 540 [2002]). The mere fact that permits had been issued to defendant Power to open up the roadway and/or sidewalk at 37th Avenue from 190th Street to Utopia Parkway is insufficient to raise a triable issue of fact as to whether defendant Power performed work on the subject curb and catch basin where the accident occurred and created the alleged defect (*see Cruz v Keyspan*, 120 AD3d 1290 [2014]; *see also Garcia v City of New York*, 53 AD3d 644 [2008]; *Rubina v City of New York*, *supra*).

Plaintiff also contends that defendant Power's motion is premature. A party may not oppose summary judgment with an argument that further discovery is necessary where, as here, the incomplete discovery is due to the party's own inaction in moving to compel discovery in a timely manner (*see Meath v Mishrick*, 68 NY2d 992 [1986]; *see also Titan Communications, Inc. v Diamond Phone Card, Inc.*, 94 AD3d 740 [2012]; *Matuszak v B.R.K. Brands, Inc.*, 23 AD3d 628 [2005]). Moreover, a determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*see Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535 [2010]; *see also Williams v D & J School Bus, Inc.*, 69 AD3d 617 [2010]; *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614 [1999]). Plaintiff asserts that further discovery is needed from defendant City's DDC in the form of site photographs and the identity of the resident engineer of the project HWS2005Q1. Such discovery would not lead to relevant evidence since prior testimony indicates that photographs would only be taken of areas where defendant Power was tasked to perform its work and there is testimony from both defendants City and Power that Power did not receive a Task Order for the location of the subject accident. Furthermore, based on the List of Completed Locations provided to the DDC by the resident engineer, no work was performed by defendant Power in the subject accident location. Plaintiff's mere expression of hope that further discovery would reveal something helpful to defeat the motion provides no basis for denying defendant Power's motion for summary judgment (*see Jorbel v Kopko*, 31 AD3d 612 [2006]; *see also Manney v GE Medical Systems*, 7 AD3d 763 [2004]; *Mazzaferro v Barterama* Corp., 218 AD2d 643 [1995]).

Defendants City, Bayside West Condo and Bayside West Realty did not submit any opposition to defendant Power's motion for summary judgment.

Accordingly, defendant Power's motion for summary judgment in its favor is granted and plaintiff's complaint and all cross claims against it are dismissed.

In light of the foregoing determination, defendant Power's motion to strike the note of issue or to compel further discovery is denied as academic.

Dated: September 27, 2016

**Howard G. Lane, J.S.C.**

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