

Archer v 3626 Kings Hwy. Owners Corp.

2017 NY Slip Op 32616(U)

November 21, 2017

Supreme Court, Kings County

Docket Number: 511768/14

Judge: Larry D. Martin

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 21st day of November, 2017.

P R E S E N T:

Hon. LARRY D. MARTIN, J.S.C.

KISHONA ARCHER,
Plaintiff,
-vs-

Motion Sequence #1
INDEX No. 511768/14

3626 KINGS HIGHWAY OWNERS CORP.,
FIRSTSERVICE RESIDENTIAL NEW YORK, INC.,
and CHELMSFORD CONTRACTING CORP.,
Defendants.

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion	
and Affidavits (Affirmations) Annexed _____	<u>1-2</u> _____
Answering Affidavit (Affirmation) _____	<u>3</u> _____
Reply Affidavit (Affirmation) _____	<u>4</u> _____

Upon the foregoing papers, defendants 3626 Kings Highway Owners Corp. ("3626 Kings") and FirstService Residential New York, Inc. ("FirstService"; collectively, "defendants") move for an order, pursuant to CPLR 3212, granting them partial summary judgment on the issue of liability and dismissing plaintiff Kishona Archer's ("plaintiff") complaint and all cross-claims asserted against them.

Plaintiff commenced the instant action to recover compensatory damages for personal injuries she allegedly sustained on January 15, 2014 when she tripped and fell (the "subject accident") in front of the residential premises located at 3626 Kings Highway, in Brooklyn, New York (the "subject premises"). The subject premises is owned by 3626 Kings and operated by FirstService, a residential property management company. In the complaint, plaintiff alleges, inter alia, that

defendants were negligent in their ownership, operation, management, maintenance, control, repair

(or failure thereof) of the sidewalk adjacent to the subject property (Complaint, ¶ 39).

In their motion for summary judgment, defendants contend that the subject accident was the result of a missing curbstone in front of the subject premises rather than a defect in the adjoining sidewalk. According to defendants, curbstones are not considered a part of the sidewalk under the New York City Administrative Code (“Administrative Code”), and, as such, they do not have a duty to keep the curbs in a reasonably safe condition. Upon a review of the record submitted by the parties and the applicable law, the Court finds that defendants have satisfied their initial prima facie burden of demonstrating their entitlement to judgment as a matter of law. Pursuant to Administrative Code § 7-210 (a), “[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition” (New York City Administrative Code § 7-210 [a]). However, § 19-101(d) of the Administrative Code “excludes the term ‘curb’ from the definition of a ‘sidewalk,’ [and, as such,] section 7-210 does not shift liability to abutting property owners from the City of New York with respect to a defective condition existing on a curb” (*Alleyne v. City of New York*, 89 AD3d 970, 971 [2d Dept 2011], citing *Ascencio v. New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010]; *Garris v. City of New York*, 65 AD3d 953, 953 [1st Dept 2009]; see also New York City Administrative Code § 19-101[d]).

In support of their motion for summary judgment, defendants proffer, among other things, transcripts of deposition testimony from plaintiff and the superintendent of the subject premises, Hector Garcia (“Mr. Garcia”); an affidavit from the property manager for the subject premises,

Nicholas Dubovici ("Mr. Dubovici"); and photos of the subject premises that were used for identification during plaintiff's deposition.

At her deposition, plaintiff testified that the subject accident occurred as she was stepping onto the sidewalk in front of the subject premises (Deposition of plaintiff, 36: 11-12, 38: 7-9; 47: 21-22). Plaintiff explained that when she stepped onto the sidewalk, she "felt that the sidewalk was missing" and that she "didn't have the support of [any]thing to stand on" (*id.* at 47: 23-24; 54: 16-17; 73: 10). During the deposition, plaintiff was asked to describe the alleged defect in the sidewalk, specifically, whether it was broken, cracked or crushed, and she merely reiterated that it was missing (*id.* at 74: 20-21). Plaintiff was later shown photos of the accident location and asked to identify where she fell, and she placed an "X" symbol on an area of the photograph depicting the edge of the sidewalk (Notice of Motion, exhibit E: Archer C). There is a missing curbstone in between the sidewalk and street in the area marked by plaintiff (*id.*). However, when asked whether a missing curb is what caused her fall, plaintiff responded "no" and stated that it was the edging of the sidewalk that she stepped on and "didn't feel anything," which caused her to "start going down" (*id.* at 83: 11-13). Notwithstanding, plaintiff subsequently confirmed that the area she fell from did not have a curb (*id.* at 83: 22-24). The Court notes that the photos proffered by defendants do not depict any missing sidewalk slabs in front of the subject premises.

Moreover, the Court notes the respective testimonies of both Mr. Garcia and Mr. Dubovici that at the time of the subject accident there were missing curbstones in the area where plaintiff fell (Garcia Deposition, 17: 13-18; 18: 2-3; Dubovici Affidavit, ¶¶ 7-8). The Court also notes Mr. Dubovici's assertion that any defects in the sidewalk slabs abutting the front of the subject premises had been corrected prior to the subject accident and that he was unaware of any defect in the area

where plaintiff fell (Dubovici Affidavit, ¶¶ 5, 6, 12). In his affidavit, Mr. Dubovici also avers that neither he nor anyone on behalf of 3626 Kings “made any special use or use of any kind of curbstones located adjacent to the [subject premises]” (*id.* at ¶ 14).

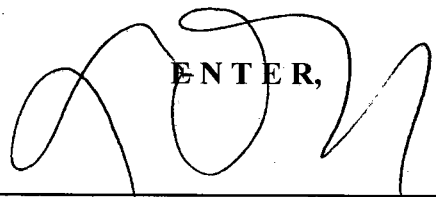
Based upon the foregoing, the Court finds that defendants have satisfied their initial prima facie burden of demonstrating that plaintiff’s injury was caused by a defective curb condition rather than a sidewalk defect, and that they “neither created the defect nor caused the defect to occur because of a special use of the sidewalk” (*Pareres v Cho*, 149 AD3d 1095, 1096 [2d Dept 2017]; *see Ascencio*, 77 AD3d at 593). In opposition, plaintiff merely submits her own deposition transcript and copies of the same photographs previously submitted by defendants. As previously noted, the photos of the subject accident location depict a missing curb in the area of plaintiff’s fall (Notice of Motion, exhibit E: Archer B, Archer C; Plaintiff’s Aff in Opp, exhibit C). The photos further demonstrate that the surrounding sidewalk slabs were devoid of any defects (*id.*). In this regard, the Court finds that plaintiff has failed to submit sufficient evidence in admissible form to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Accordingly, defendants’ motion for summary judgment dismissing the complaint herein is granted. The foregoing constitutes the decision and order of the Court.

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ENTER,


HON. LARRY D. MARTIN
J.S.C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT