| **Sotell v City of New York** |
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| 2017 NY Slip Op 32774(U) |
| December 1, 2017 |
| Supreme Court, Queens County |
| Docket Number: 709711/14 |
| Judge: Kevin J. Kerrigan |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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James Sotell,

Plaintiff,

- against -

The City of New York, The NYC Department of Transportation, Partnership 1995 II LP, and Flushing Financial Corporation,

Defendants.

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Index Number: 709711/14

Motion Date: 11/8/17

Motion Cal. No: 166 & 167

Motion Seq. No.: 3&4

The following papers numbered 1 to 14 read on this motion by defendant, Flushing Financial Corporation, and 1-14 read on this motion by defendant, Partnership 1995 II, LLP, for summary judgment.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits (Seq. 3)..... | 1-4 |
| Affirmation in Opposition-Exhibits..... | 5-7 |
| Affirmation in Partial Opposition..... | 8-9 |
| Reply to Plaintiff..... | 10-11 |
| Reply to City-Exhibit..... | 12-14 |

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Motion by Flushing for summary judgment dismissing the complaint and all cross-claims against it (Motion Seq. No. 3) and motion by Partnership for summary judgment dismissing the complaint and all cross-claims against it (Motion Seq. No. 4) are consolidated for disposition.

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motion by Flushing and motion by Partnership for summary judgment dismissing the complaint and all cross-claims against them are granted.

Plaintiff allegedly sustained injuries from a piece of wrought-iron fencing bordering a curbside tree well located in front of 107-11 71st Avenue in Queens County on February 4, 2014. The property is owned by defendant Partnership 1995 II, LLP and is leased to Flushing. Plaintiff alleges that he crossed in the middle of the block on 71st Avenue on his way to former defendant Gotta Get A Bagel (GGB) which leased the adjoining premises at 107-09 owned by former defendant Citibank and, upon crossing the street, stepped onto the curb between the tree well on his left which was bordered by the fencing and a bicycle rack on the right. As he did so, his lower left leg came into contact with a protruding piece of the wrought-iron railing of the tree well, causing a laceration of his leg.

Flushing and Partnership have established a prima facie entitlement to summary judgment as a matter of law by demonstrating that they had no statutory duty to maintain the curbside tree well (see Vellios v Green Apple, 84 AD 3d 1356 [2nd Dept 2011]), that they did not install the wrought-iron fencing in the tree well or create the hazardous protruding iron condition of the fencing of the tree well and, therefore, that they owed plaintiff no duty of care either under statute or under common law principles of negligence.

An abutting property owner is only liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk where either a statute charges the property owner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon it for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]) or where the property owner either created the defective condition or caused it through some special use.

The only statutes that impose upon an abutting property owner the duty to repair and maintain a sidewalk are §19-152 of the Administrative Code and §2904 of the New York City Charter, and the only statute that imposes liability for failure to maintain the sidewalk is §7-210 of the New York City Administrative Code. Those sections, however, only apply to owners, not tenants. Therefore, since Flushing does not own the abutting property but is merely a tenant, it had no statutory duty to maintain and repair the

abutting sidewalk. Moreover, since the defective area was within a curbside tree well, it was not part of the sidewalk and, therefore, no statutory duty under §7-210 attaches to Partnership (see Vucetovic v. Epsom Downs, Inc. (10 NY 3d 517 [2008]). Therefore, neither Flushing nor partnership had a statutory duty to repair and maintain the tree well fencing.

The only other bases for liability against Flushing and partnership would be under common law negligence if they created the defective condition of the tree well fencing or if they made a special use of the tree well and its fencing. In this regard, since they had no statutory duty to maintain the subject tree well and fencing, it was plaintiff's burden to show evidence that they created the defect or caused it through some special use (see Pratt v. Villa Roma Country Club, Inc., 277 AD 2d 298, 299[1st Dept 2000] ("No ordinance or statute is alleged here. Thus, it was incumbent upon the plaintiffs to raise a triable issue of fact that the defendant either created or caused the defective condition, or derived a special benefit from the abutting property unrelated to public use . . . . Since the plaintiffs failed to come forward with any opposing evidence demonstrating that the defendant created or caused the defective condition, or made a special use . . . the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint"). Plaintiff has failed to do so.

No evidence is offered by plaintiff to raise an issue of fact as to whether either Flushing or Partnership caused the piece of metal to protrude from the fence in the tree well. On the contrary, even though it was not their burden on summary judgment to do so, Flushing has proffered unrebutted evidence in the form of the affidavits of Flushing's executive vice president and director of operations of Flushing who averred that Flushing did not install, repair, maintain or ever touch the fencing in question, and its assistant vice president and legal processing manager, Michael Buccino, averring that Flushing never did anything respecting the tree well or the tree within it, and Partnership has proffered the unrebutted affirmation of its managing agent, Steven Maietta, in which he averred that Partnership did not install the fencing in the subject tree well and did not maintain it.

Plaintiff's counsel only speculates that Flushing and Partnership may have created the dangerous condition of the fence and that further discovery is needed to explore this possibility. In this regard, plaintiff's argument that summary judgment must be denied because discovery is not complete fails to raise a triable issue of fact. The mere speculative hope that additional discovery may yield evidence favorable to plaintiff is not a basis for denial of summary judgment.

Plaintiff also argues that notwithstanding that Flushing and Partnership may not have had a statutory duty under §7-210 of the Administrative Code to maintain the tree well and fence, they had a common law duty to do so because they owed plaintiff a duty to maintain the premises, inclusive of the approaches to the premises, in a safe condition. Plaintiff argues that the sidewalk "pathway" between the tree well and fence and the bicycle rack was an approach to the premises and, therefore, that Flushing and Partnership owed a duty of care to warn plaintiff of the piece of metal fence extending into the walkway and to repair it. Plaintiff thus argues, in the alternative, that the defective condition over which Flushing and partnership were responsible was not the fence located in the tree well but the sidewalk over which the piece of fence projected. Plaintiff's argument is without merit.

In the first instance, no condition of the sidewalk itself is alleged to have caused plaintiff's injuries. The short piece of metal projecting from the fence which plaintiff brushed against as he walked by on the sidewalk does not constitute a defect of the sidewalk but of the fence over which Flushing and Partnership have no responsibility, just as limb from a curbside tree belonging to the City which overhangs a sidewalk does not constitute a dangerous condition of the sidewalk that the abutting property owner is responsible to address by lopping off the limb or by refraining from shoveling the snow accumulated on it so as not to "invite" pedestrians to use it as a "path".

Moreover, the "pathway", as plaintiff describes it, based upon the photographs annexed to the moving papers that were shown to plaintiff at his deposition, is merely a portion of the public sidewalk next to the tree well and abutting the curb. It is not part of Flushing's premises and is not a dedicated pathway to it. It merely abuts the curb and tree well and leads to the main portion of the public sidewalk. Plaintiff's argument that this sidewalk was an approach to the premises and therefore Flushing and partnership had the duty to warn of dangers present on it and to take corrective measures is also an argument based upon the special use doctrine. In this regard, no evidence is proffered to demonstrate that Flushing or Parnership benefitted from the sidewalk in question in any manner different from the general public so as to raise a question of fact as to whether they made a special use of the sidewalk (see Simo v. Transit Authority, 13 AD 3d 609 [2nd Dept 2004]). Consequently, plaintiff's further contention that Flushing and Partnership had actual notice of the condition is irrelevant.

Accordingly the motion is granted, and the caption of this action is amended to read as follows:

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James Sotell,

Index Number: 709711/14

Plaintiff,

- against -

The City of New York and The NYC Department of Transportation,

Defendants.

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Dated: December 1, 2017

KEVIN J. KERRIGAN, J.S.C.

FILED
DEC 11 2017
COUNTY CLERK
QUEENS COUNTY