Schwartz v City of New York
2018 NY Slip Op 30004(U)
January 2, 2018
Supreme Court, New York County
Docket Number: 158614/2014
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32
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RORY SCHWARTZ,

Plaintiff,

Index No. 158614/2014
Motion Seq: 001

-against-

THE CITY OF NEW YORK, VAL-MAC RESTAURANT, INC., SPAIN RESTAURANT & BAR, JULIO DIAZ and JOSEPH BALKHAN, INC.,

Defendants.

DECISION & ORDER
ARLENE P. BLUTH, JSC

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The motion for summary judgment by defendants Val-Mac Restaurant ("Val-Mac"), Spain Restaurant & Bar ("Spain") and Julio Diaz (collectively, the "moving defendants") is granted.

Background

This personal injury action arises out of plaintiff's alleged trip and fall in front of the restaurants operated by Val-Mac and Spain located on West 13th Street, New York, New York. On May 20, 2014, plaintiff was walking on the sidewalk when he claims he tripped due to the height differential between the tree well and the sidewalk. Plaintiff alleges that he was forced to walk near the tree well because ongoing construction work in front of the restaurants redirected his walking path. Plaintiff testified that he followed a girl walking in front of him through a narrow passageway between the construction work on the sidewalk and the curb. Plaintiff contends that he did not see the tree well due to a planter and tripped over it. The tree well had sunk down and was not level with the sidewalk.

Justice Tisch previously granted summary judgment dismissing defendant the City of New York on the ground that the City did not have prior written notice of any defect regarding the tree well (NYSCEF Doc. No. 87).

The moving defendants argue that they are entitled to summary judgment because the City of New York is responsible for the condition of a tree well. The moving defendants also contend that they did not cause the height differential between the sidewalk and the tree well.

In opposition, plaintiff emphasizes that the accident occurred when plaintiff's foot rolled on both the sidewalk and the tree well. Plaintiff also argues that there is an issue of fact arising out of the planter, which allegedly obstructed plaintiff's view of the tree well. Plaintiff observes that defendants had maintained this planter for several years prior to the accident. Plaintiff concludes that the placement of the planter created a trap that proximately caused the accident.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, 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 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the moving defendants met their prima facie burden establishing entitlement to summary judgment on the grounds that they had no duty to plaintiff to fix the defective tree well and that the tree well was the cause of the accident.

The instant motion turns on the proximate cause of plaintiff's accident. Plaintiff testified that the accident occurred as follows:

> "I was walking down West 13th Street towards Sixth Avenue. And as I approached the Spain Restaurant, there were workmen collecting debris and blocking the passage way. . . . I cannot go through. There was a ditch on the property line of the building. There were the men working on the sidewalk, then there was a planter with a tree. And then in the gutter, there was another ditch. And the girl who was ahead of me at that point, I notice walked on the portion of the pavement between the planter and the curb. It was a narrow passageway and seemed to be the only through way. And the girl who I noticed ahead of me walked through that passageway. And I followed her, and she continued. And I stepped onto an unlevel part of the pavement. I fell forward. I realized that it was a tree well that I didn't see prior, because of the planter. *And the tree well was lower than the pavement. And my right foot stepped right where there was the change of elevation, and I fell forward*" (NYSCEF Doc. No. 45 at 17 [emphasis added]).

Plaintiff's account of the accident demonstrates that the proximate cause of plaintiff's accident was the sunken tree well. There is no basis to find, as plaintiff argues in opposition, that the accident occurred through some combination of the sidewalk and the tree well. In fact,

Justice Tisch observed that "Plaintiff is quite specific that his injuries came from a trip and fall related to the tree well" (NYSCEF Doc. No. 87 at 3). The evidence submitted establishes that the accident would not have occurred if the cobblestones in the tree well were even with the sidewalk.

Accordingly, the moving defendants' motion must be granted because "a tree well is not part of the 'sidewalk' for purposes of section 7-210 of the Administrative Code of the City of New York, which imposes tort liability on property owners who fail to maintain city-owned sidewalks in a reasonably safe condition" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 518-19, 860 NYS2d 429 [2008]). The moving defendants "cannot be held liable for plaintiff's injuries unless [they] affirmatively created the dangerous condition, negligently made repairs to the area, or caused the dangerous condition to occur through a special use of the area" (*Fernandez v 707, Inc.*, 85 AD3d 539, 540, 926 NYS2d 408 [1st Dept 2011] [finding that property owner's duty to keep abutting sidewalk in safe condition did not apply to a tree well]).

Here, plaintiff failed to show that the moving defendants created the defective tree well, negligently tried to repair it or caused the sunken tree well due to some special use of it. Further, this is not a case where plaintiff identified a defect with the *sidewalk* that was also a proximate cause of his accident (*cf. Vigil v City of New York*, 110 AD3d 986, 987, 973 NYS2d 750 [2d Dept 2013] [finding an issue of fact whether plaintiff fell due to a defect in the tree well, the sidewalk or a combination of the two]). Photographs reviewed at plaintiff's deposition support the conclusion that there was no defect in the sidewalk and confirm the presence of the sunken tree well (*see* NYSCEF Doc. No. 47). Under these circumstances, the Court finds that the

moving defendants cannot be held liable as a matter of law because they had no duty to repair the defect in the tree well.

Plaintiff's claim that the placement of the planter, the ongoing construction and the tree well created a trap does not change the Court's conclusion. While the construction and the placement of the planter (which plaintiff claims obstructed his view) may have forced plaintiff to walk in a narrow passageway, they were not proximate causes of his trip and fall. If the tree well had simply been maintained properly and kept level with the sidewalk, then plaintiff would not have tripped.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by Val-Mac, Spain and Diaz is granted and plaintiff's claims against these defendants are severed and dismissed.

This is the Decision and Order of the Court.

Dated: ~~December , 2017~~ 1/2/18
New York, New York

ARLENE P. BLUTH, JSC