Wilkerson v City of New York
2018 NY Slip Op 31320(U)
April 2, 2018
Supreme Court, Queens County
Docket Number: 1222/17
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

QS

FILED
APR 19 2018
COUNTY CLERK
QUEENS COUNTY

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

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Michael Wilkerson,

Plaintiff,

- against -

The City of New York, Mezbha U. Kazi and Nazmoon S. Nahar,

Defendants.

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Index Number: 1222/17

Motion Date: 3/20/18

Motion Cal. Number: 178

Motion Seq. No.: 1

The following papers numbered 1 to 8 read on this motion by defendants, Mezbha U. Kazi and Nazmoon S. Nahar, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affidavit in Opposition-Exhibits	5-6
Reply	7-8

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

Motion by Kazi and Nazmoon for summary judgment dismissing the complaint and all cross-claims against them is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon 32-32 53rd Place in Queens County on April 30, 2016. The unrebutted averments of Kazi and Nazmoon in their affidavits in support of the motion are that they are, and were on the date of plaintiff's alleged accident, the owners of said abutting property, a one-family house in which they reside. They also averred that they never made or hired anyone to make any repairs or do any work to the sidewalk up to and including the date of the accident and did not create the condition of the sidewalk by any special use of the sidewalk.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or

caused it through some special use, or unless a statute charges the homeowner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The only statutory provision imposing liability upon property owners in the City of New York for failing to repair and maintain the public sidewalks abutting their property is section 7-210 of the New York City Administrative Code, and that section specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]). Movants have proffered unrebutted evidence that the subject abutting home is a one-family exclusively residential premises occupied by them. Therefore, no statutory liability may be imposed upon them for failing to maintain the sidewalk.

In the absence of any statute imposing liability upon them for failing to repair and maintain the sidewalk abutting their home, the only grounds for liability against them would be if they actually created the defective condition or caused it through a special use. As noted, the unrebutted averment of movants is that they never made any repairs or did any work to the sidewalk up to and including the date of plaintiff's alleged accident. Moreover, although movants also aver that they did not create the raised sidewalk condition by any special use of the sidewalk, it was not their affirmative burden on summary judgment to demonstrate that they did not make a special use of the sidewalk where the subject area of sidewalk did not traverse their driveway. Annexed to the moving papers are photocopies of photographs of the subject area of sidewalk marked as exhibits at plaintiff's 50-h hearing, on one of which plaintiff marked the exact spot where he purportedly tripped and fell. They do not depict this area of sidewalk as being in a special use area.

Plaintiff's counsel annexes to his opposition several photographs of what appear to be the same sidewalk but, unlike the photographs that were marked as exhibits at plaintiff's 50-h hearing, they also depict an area of broken cement slabs next to a tree stump in a curbside tree well, with sawdust strewn about the tree well and its contents, indicating that the curbside tree had been removed at some point. No foundation has been laid for the admission of these photographs. They are not authenticated as being fair and accurate depictions of the area where plaintiff allegedly fell as it appeared at the time of the accident and, indeed, do not show the area as being in the same condition as it appears in the photographs authenticated by plaintiff at his 50-h hearing. They are, therefore, inadmissible. In any event, however, even were they

admissible, they are of no probative value because they do not show that the sidewalk area in question was in a special use area.

Plaintiff did not testify that the condition upon which he tripped and fell was located on that portion of the sidewalk that traverses a driveway or any special use area, and plaintiff does not allege either in his complaint or bill of particulars that the condition was located on that portion of the sidewalk used by movants as a special use area and does not assert a cause of action based upon special use.

Since there has been no allegation in the complaint or bill of particulars that the condition was located in front of movants' driveway or any other special use area and that it was caused by a special use of the sidewalk, it was not movants' initial burden to show evidence that the condition was not caused by a special use. It was plaintiff's burden to show evidence that they were responsible for the condition because they 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 offer any evidence that the condition was caused by a special use of the sidewalk.

Finally, although movants aver that they never received any notices of violation from the City to repair the sidewalk or any complaints concerning the sidewalk, and plaintiff's counsel argues that there are issues of fact as to whether movants had actual or constructive notice of the raised sidewalk condition, the question of notice is irrelevant in the absence of statutory liability or special use.

Accordingly, the complaint and all cross-claims are dismissed against movants. The Court notes that the City has not appeared to oppose the motion.

The caption of this action is hereby amended to read as follows:

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Michael Wilkerson,

Plaintiff,

- against -

The City of New York,

Defendant.

----------X

Index Number: 1222/17

Dated: April 2, 2018

KEVIN J. KERRIGAN, J.S.C.

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