Ortiz v City of New York
2018 NY Slip Op 31348(U)
May 15, 2018
Supreme Court, Bronx County
Docket Number: 7548-2007
Judge: Fernando Tapia

C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

IRIS D. ORTIZ,

Plaintiff, **Index:** 7548-2007

- against -

THE CITY OF NEW YORK AND NEW YORK CITY TRANSIT AUTHORITY, CBS OUTDOOR, INC., and SHELTER EXPRESS CORP.,

Defendants.

DECISION

This action arises from an alleged trip and fall incident that occurred on May 23, 2006 at or near a bus stop in front of 153 East Fordham Road in Bronx County. Defendants seek to move and cross move to dismiss this action. The motions and cross-motions are the following:

(1) Defendant NEW YORK CITY TRANSIT AUTHORITY (NYCTA) moves under CPLR 3211 and CPLR 3212 granting summary judgment and or dismissing the complaint of the plaintiff and the cross-claims of any party, on the grounds that they do not bear any liability;

(2) THE CITY OF NEW YORK (CONY) and SHELTER EXPRESS CORP. (SEC) cross move seeking summary judgment and dismissal of plaintiff's complaint and all cross claims against CONY and SEC on the basis that (i) CONY is free from liability based upon section 7-210(a) of the New York City Administrative Code (section 7-210(a), (ii) SEC had no notice of the alleged defective condition, and (iii) any condition of which SEC was aware was de minimis in nature; and

(3) Defendant CBS OUTDOOR, INC. (CBS) cross move to dismiss on the grounds that (a) they contracted its responsibility to maintain and repair the shelter to co-defendant, SEC, and (b) there is no evidence of a dangerous or defective condition where the incident occurred.

In motion for summary judgment pursuant to CPLR 3212, it is well settled that the non-movant is entitled to the evidence being viewed in the light most favorable and affording them with the benefit of every favorable inference that can be drawn when assessing a summary judgment motion.[1] On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case".[2] Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial.[3]

I. NYCTA's Summary Judgment Motion

NYCTA submits to the court that summary judgment is warranted herein on the grounds that it did not owe any duty to the plaintiff, as it did not own, operate, manage, maintain control, or have any jurisdiction over the subject public sidewalk at the incident location. NYCTA posits that it does not owe any duty for an injury occurring on property it does not own or control. [4] Furthermore, it has long been held that NYCTA does not own, maintain, operate or control the public streets, sidewalks or curbs, nor does it control the location or maintenance of bus stops. [5]

Plaintiff and co-defendants must present triable issues of fact once NYCTA has met their prima facia burden. Plaintiff and co-defendants CONY and SEC assert that NYCTA owed a duty to plaintiff by providing a reasonable care to maintain the approach in a safe condition or to warn

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[1] *See Kesselman v. Lever House Restaurant*, 29 AD3d 302 [1st Dept 2006]; *Goldman v. Metropolitan Life Ins. Co.*, 13 A.D.3d 289 [1st Dept 2004].
[2] *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 852 (1985).
[3] *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 (1986).
[4] *McMahon v. Surface Transportation Corp., of New York*, 272 A.D.202, 69 N.Y.S2d859 (1st Dept. 1947).
[5] *Shaller v. City of New York*, 41 A.D. 3d 697, 839 N.Y.S. 2d 766 (2nd Dept. 2007) ("The City of New York, not the NYCTA, is responsible for the maintenance of bus stops within the City of New York, including the roads, curbs, and sidewalks").

patrons of any unsafe and furthermore, NYCTA motion is premature as it has failed to produce witness that could allow for inquiry at a deposition into area of the accident.

NYCTA motion for summary judgment is granted. Plaintiff testified at her deposition that she allegedly tripped and fell within the bus stop. [6] NYCTA points out that plaintiff did not state that the action was based on a claim that NYCTA did not provide plaintiff with a safe place to alight from the bus. Plaintiff and co-defendants CONY and SEC fail to raise a triable issue of fact as to whether NYCTA own or control the area where plaintiff allegedly tripped and fell. Law is clear that NYCTA has no duty to maintain sidewalks regardless of whether the sidewalk is located at a bus stop. Furthermore, plaintiff and co-defendants CONY and SEC have failed to present any evidence to establish the existence of material issues of fact. Plaintiff and co-defendants merely state that the motion is premature as discovery is outstanding because of some vague issue of whether an NYCTA bus driver might have seen the alleged defect. "Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212 (f) for postponing a determination of a summary judgment motion.". [7]

II. CONY & SEC

CONY and SEC move to dismiss on the grounds that CONY is free from liability based upon section 7-210(a), CONY and SEC had no notice of the alleged defective condition, and any condition of which Shelter Express was aware was de minimis in nature. The plaintiff in opposition asserts that section 7-210(a) is not applicable because case law has consistently held an exception to this section in that CONY is responsible for the maintenance of bus stops within the New York City, including the roads, curbs, and sidewalks attendant hereto. [8] Furthermore,

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[6] Plaintiff's Opposition, Exhibit F, pg. 14, ln 14-15.
[7] Plotkin v. Franklin, 179 AD2d 746 [2d Dept 1992] [internal citations omitted].
[8] *Shaller v. City of New York*, 41 A.D. 3d 697, 839 N.Y.S. 2d 766 (2nd Dept. 2007).

plaintiff argues that CONY and SEC have not established that they were without actual or constructive notice of the claimed defective condition. And finally, the defective condition was not de minimis in nature.

Counsel for SEC and CONY presented work records that indicate on three occasions before the incident, February 6, 2006, February 9, 2006, and February 27, 2006, there is a notation as to the presence of "patches" in the subject bus shelter. [9] Mr. Novoni, a representative from SEC in his EBT, indicated that "patches" show a possible repair that might have occurred from moving the post in the shelter. [10]

There are issues of fact as to whether SEC caused the defect at issue- and or negligently failed to repair the defect. SEC admits that under the contract it was responsible for maintenance and repair of the bus shelter at issue including trenching and conduits. Therefore, based upon the contract, the sworn testimony, and photographs submitted, there are issues of fact as to whether SEC caused the defect at issue- and or negligently failed to repair the defect.

As to the question of whether the alleged defect was de minimus, "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable", and therefore that granting summary judgment to a defendant "based exclusively on the dimension[s] of the ... defect is unacceptable". [11] Plaintiff testified in her EBT that her entire foot went into the hole. [12] Furthermore, the "patches" or repairs that were made indicate a defect that was allegedly repaired. It is not apparent that the alleged defect was

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[9] SEC/CONY Attorney Affirmation, Exhibit D (Novoni EBT).
[10] *Id.*
[11] *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66 (2015) *quoting Trincere v. County of Suffolk*, 90 N.Y.2d 976 (1997).
[12] Plaintiff's Counsel Affirmation, Exhibit A (Plaintiff's EBT), pg. 32.

repaired correctly and was de-minimus, or trivial. It is for a jury to decide whether this alleged defect is actionable.

Finally, CONY is responsible for the maintenance of bus stops within the City of New York, including the roads, curbs, and sidewalks and therefore section 7-210 is not applicable. [13] Even though there is no evidence that CONY or its employees caused or created the defect at issue or had any actual or constructive notice of the defect, it is, well settled that a principal may be held liable for the acts of its agent when the agent is acting in its capacity as agent. "The general rule is that knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it." [14]

III. CBS' Summary Judgment Motion

A moving defendant for summary judgment in a trip and fall action has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of an alleged defect. [15] CBS has not met its prima facie burden of entitlement to summary judgment as a matter of law.

Glen Herskowitz, a manager from CBS who is responsible for the operations of franchise agreements in the City of New York, testified at his deposition that CBS had a contract with the City with regards to maintenance of the bus shelters, which expired at the end of June 2006. [16] During that time, CBS contracted with SEC for the maintenance, operation, servicing and general care of the bus shelter. [17] As with CONY, CBS may be held liable for the acts of its

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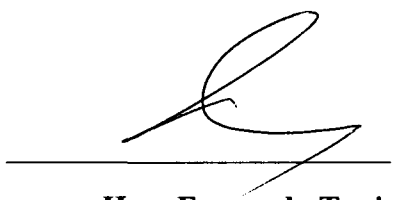
[13] *Shaller v City of New York*, 41 AD3d 697.
[14] *Center v. Hampton Affiliates*, Inc., 66 N.Y.2d 782, 497 N.Y.S.2d 898, (1985), *citing Farr v. Newman*, 14 N.Y.2d 183, 187; Henry v. Allen, 151 N.Y. 1, 9.
[15] *See Smith v. Costco Wholesale Corp.*, 50 AD3d 499 (1st Dept 2008).
[16] Defendant CBS' Counsel Affirmation, Exhibit C - Glen Herskowitz Depo, pg. 10.
[17] *Id* at pg. 11.

agent when the agent is acting in its capacity as agent. SEC had knowledge of a defect condition that they undertook repair with patches. [18] Any knowledge or acts by SEC to repair, maintain, operate, service or provide general care can be held against CBS. Accordingly, it is

ORDERED that the motion of defendant NEW YORK CITY TRANSIT AUTHORITY to dismiss the complaint herein is granted and the complaint and all cross claims are dismissed in their entirety as against said defendant; furthermore, it is

ORDERED that the cross-motions by defendants THE CITY OF NEW YORK, SHELTER EXPRESS CORP., and CBS OUTDOOR, INC. to dismiss the complaint and cross-claims are denied in their entirety;

This constitutes the decision of the court.



Dated: May 15, 2018

Bronx, New York

Hon. Fernando Tapia J.S.C.

[18] *See* n 14, *supra.*