Evans v YBBME LLC

2019 NY Slip Op 30410(U)

February 19, 2019

Supreme Court, Kings County

Docket Number: 501785/2018

Judge: Reginald A. Boddie

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INDEX NO. 501785/2018
NYSCEF DOC. NO. 46 RECEIVED NYSCEF: 02/21/2019

At I.A.S. Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 19th day February of 2019.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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ANGELA EVANS,

Plaintiff,

-against-

YBBME LLC,

Defendant.

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Index No. 501785/2018
Cal. No. 16
Mot Seq. 2
DECISION AND ORDER

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
Df. Notice of Motion & Annexed Affirmation/Affidavits	1-2
Pl. Affirmation in Opposition	3
Df. Reply	4

Upon the foregoing cited papers, and after oral argument, the decision and order on defendants' motion for summary judgment, pursuant to CPLR 3212, is as follows:

In this personal injury action, plaintiff alleges she tripped and fell on the sidewalk at the corner property, known as 16 Bartlett Street, on the Harrison Avenue side, approximately 25 feet from the Bartlett Street corner, and was injured. Defendant City of New York moved for summary judgment alleging the subject property is non-exempt under the Administrative Code of the City of New York §7-210. Plaintiff opposed, alleging the City sidewalk map produced was illegible and the City can not establish absence of fault since it has water monitoring wells at the

subject location.

Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of material issues of fact (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]). "The proponent of a motion for summary judgment 'must make a prima facie showing of entitlement to judgment as a matter of law . . . Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers'" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

The proponent of a motion for summary judgment must establish its defense or cause of action sufficiently to warrant a court directing judgment in its favor as a matter of law; thus the defendant bears the burden to dispel any question of fact that would preclude summary judgment (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], citing *Friends of Animals*, 46 NY2d at 1067-1068; *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551 [1st Dept 2012]). Only after the movant meets its burden, does the burden shift to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman*, 49 NY2d at 562 [citations omitted]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013], citing *Kosson v Algaze*, 84 NY2d 1019 [1995]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975], citing *Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 63 [1959]; *Bank for Sav. v Rellim Constr. Co.*, 285 NY 708, 709 [1941]). Plaintiff must establish the existence of material facts to create a triable

issue of fact (CPLR 3212 [b]; *Shaw*, 38 NY2d at 207 [citations omitted]).

Section 7-210 of the Administrative Code of the City of New York imposes liability for sidewalk accidents on the abutting property owner. The statute, effective September 14, 2003, provides, in relevant part, that "[i]t shall be the duty of the owner of real property abutting any sidewalk, . . . to maintain such sidewalk in a reasonably safe condition" (Administrative Code § 7-210 [a]). This includes liability for personal injury "caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition" (Administrative Code § 7-210 [b]).

However, there is a statutory exception to this rule. The statute exempts "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (Administrative Code § 7-210 [c]). Where a property falls within the statutory exemption, prior written notice of the defective condition must be given before liability may be imposed on the City (*Fernandez v City of New York*, 19 Misc3d 1135(A) [Sup Ct, New York County; citing *see* Administrative Code §§7-210 [d], 7-201[c] [2]; *Farrell v City of New York*, 49 AD3d 806, 807 [2d Dept 2008]; *Vertsberger v City of New York*, 34 AD3d 453, 455 [2d Dept 2006]).

Here, the City produced acceptable proof that the subject property is not a one-, two- or three-family dwelling used for residential purposes. Rather, it is a six story building consisting of ten apartments. Therefore, the property is not exempt from liability imposed by § 7-210 of the Administrative Code, and the prior written notice law is inapplicable. It therefore follows that the Big Apple map produced by the City has no relevance since notice to the City is not at issue.

Previous courts have however recognized two exceptions to §7-210 for conferring liability on the City; where the City causes and creates a dangerous condition or when a special

use conferred a special benefit upon the City (see *Yarborough v City of New York*, 10 NY3d 726, 728 [2008], citing *see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). For the cause and create exception to apply, the injury must have resulted from an affirmative act of negligence by the City "that immediately results in the existence of a dangerous condition" (*Yarborough*, 10 NY3d at 728, citing *Oberler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis omitted], quoting *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]).

The special use doctrine "authorizes the imposition of liability against any entity that installs an object onto the sidewalk or roadway, for injuries arising out of circumstances where the entity has been permitted to interfere with a street solely for private use and convenience which is in no way connected with the public use" (*Posner v New York City Tr. Auth.*, 27 AD3d 542, 543 [2d Dept 2006], citing *Kaufman v Silver*, 90 NY2d 204, 207 [1997]; *Ausderan v City of New York*, 219 AD2d 562, 563 [1st Dept 1995]).

Here, plaintiff avers the City has made special use of the subject sidewalk and caused and created a condition which led to plaintiff's accident and injury. Plaintiff produced a photo of the accident location, attached as Exhibit B to its opposition papers, which represents a square cut out of the middle of the sidewalk with a circle in the middle. Plaintiff contends that this could be related to the City's well monitors.

Although the City included a drawing in its moving papers which evidence monitors in the area, it did not address the issue in those papers. Instead, the City indicated in its reply that there were no well monitors in the area of plaintiff's accident. In its efforts to explain the omission, the City contends that the well monitors are limited to the Bartlett Street side of the property and the accident occurred on the Harrison Avenue side of the property.

INDEX NO. 501785/2018
RECEIVED NYSCEF: 02/21/2019

However, the documentary evidence shows otherwise. Exhibit G, annexed to the motion, includes a map which clearly shows a well monitor on Harrison Avenue near the corner of Bartlett Street, proximate to the location of the accident. Thus, questions of fact exist as to whether the City caused and created the accident and whether its special use of the sidewalk contributed to plaintiff's accident. Accordingly, the City's motion for summary judgment is denied.

E N T E R:

Hon. Reginald A. Boddie
Justice, Supreme Court