

**Carroll v Port Auth. of N.Y. & N.J.**

2019 NY Slip Op 31117(U)

April 16, 2019

Supreme Court, New York County

Docket Number: 150580/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART 2**

*Justice*

-----X INDEX NO. 150580/2015

JADAH CARROLL,

Plaintiff,

MOTION SEQ. NO. 001

- v -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this personal injury action commenced by plaintiff Jadah Carroll, defendant Port Authority of New York and New Jersey moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. After oral argument, and after a review of the relevant statutes and case law, the motion is denied.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff commenced this action by filing a summons with notice on January 16, 2015. Doc. 1. On February 11, 2015, defendant filed a demand for a complaint. Doc. 5. In the verified complaint, filed May 8, 2015, plaintiff alleged that, on January 31, 2014, she was injured "between West Broadway and Church Street adjacent to the post office and in front of the 9/11 Memorial Museum" in New York County. Doc. 6 at par. 7. Although plaintiff alleged in the complaint that

the alleged incident occurred as a result of defendant's alleged ownership, maintenance and control of the area where she fell, she did not specify precisely how the accident occurred.

Defendant subsequently served an answer denying all substantive allegations of wrongdoing and asserting several defenses. Doc. 8.

In her bill of particulars dated October 22, 2015, plaintiff alleged that she was injured in a "trip and fall" accident which occurred "as a result of failing to repair and/or correcting [sic] a defect in the sidewalk adjacent to the Post Office in front of the 9/11 Memorial Museum" located "between West Broadway and Church Street." Doc. 36.<sup>1</sup>

During her February 2016 deposition, plaintiff testified that, when the accident occurred, she was walking on Vesey Street from Church Street to West Broadway. Doc. 33 at 17. She recalled that, at the "exact instant" she fell:

I was walking on Vesey Street, and all of a sudden, my foot skidded out from underneath me and I became sort of airborne. I flipped, landed, I bounced off my left knee and landed on my right side.

Doc. 33 at 18.

Plaintiff further stated that she did not see what she fell on and that there was no foreign object. Doc. 33 at 19.

The note of issue was filed on February 12, 2018. Doc. 26.

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<sup>1</sup> This was consistent with plaintiff's amended notice of claim, filed with defendant on December 15, 2014, in which she alleged that she was injured "as a result of failure to maintain the property at between [sic] West Broadway and Church Street, adjacent to the Post Office and in front of the 9/11 Memorial Museum and/or negligently maintaining the property at or near that location in failing to repair and/or correct the defect in the sidewalk adjacent thereto." Doc. 37.

On March 23, 2018, defendant filed the instant motion for summary judgment dismissing the complaint pursuant to CPLR 3212. Doc. 27. In support of the motion, defendant submits an attorney affirmation; the pleadings, plaintiff's deposition transcript; the accident report; a photograph of the accident site marked at plaintiff's deposition; plaintiff's bill of particulars; affidavits of Richard Gill, Robert Petrides and Carla Bonacci in support of the motion; and a memorandum of law. Docs. 29-41.

In his affidavit, Gill, Principal Property Specialist in the Property Records/Legal Graphics Section of defendant's law department, as well as the Custodian of the Record Property Maps maintained by defendant, represents that he is responsible for maintaining the records of all properties owned, operated, or controlled by defendant. Doc. 38. He states that defendant "does not own Vesey Street, between Church Street and West Broadway. . . and/or the sidewalk located thereat." Doc. 38 at par. 8.

Petrides states in his affidavit that he was employed by defendant from December 2006 until January 2018 and that he held the position of Program Director, World Trade Center ("WTC") Logistics from 2013 to 2016. Doc. 39 at par. 2. In that role, he communicated with outside agencies, obtained New York City Department of Transportation ("DOT") permits for work within and adjacent to the site, and maintained the site perimeter fence for defendant. Doc. 39 at par. 3.

According to Petrides, defendant's role at the site as of the date of the alleged accident was limited to shoveling snow and removing trash from the area between the fence line and the curb, which tasks were performed by a contractor hired by defendant. Doc. 39 at pars. 10-11. His review of "all the [DOT] permits that were granted to [defendant] to occupy the sidewalk and/or roadway on Vesey Street between Church Street and West Broadway and [which] were in effect on January 31, 2014" revealed that defendant did not "operate, control or undertake any [ ]

maintenance functions” at that location other than shoveling snow or removing trash. Doc. 39 at par. 11. Any other activity defendant performed in the vicinity as of the date of the accident occurred behind the construction fence visible in the photograph marked at plaintiff’s deposition. Doc. 39 at par. 12.

In her affidavit, Carla Bonacci, Assistant Director for Infrastructure and Project Development in defendant’s WTC Construction Department, states that she has been involved in the reconstruction of the WTC since 2001. Doc. 40 at par. 1. Her responsibilities included managing project teams, including defendant’s staff and consultants and contractors, with respect to planning and design of WTC projects, including construction of streets and sidewalks. Doc. 40 at par. 2. Bonacci states that defendant “has not performed any construction work for the northern sidewalk surface of Vesey Street that abuts the [post office at 90 Church Street] where [p]laintiff claims she fell.” Doc. 40 at par. 9. As of the date of the alleged incident, a WTC perimeter fence remained in place along the southern sidewalk of Vesey Street between Church Street and West Broadway, including the entrance to the temporary WTC PATH station on the southern side of Vesey Street, which opened in 2008. Doc. 40 at par. 10. Any street level construction by defendant was performed inside an area secured by a perimeter fence inaccessible to the public. Doc. 40 at par. 10.

In support of the motion, defendant argues that it is entitled to summary judgment dismissing the complaint because it did not own, operate or control the location where plaintiff fell, and did not perform any construction work in that area. It asserts that the activities that it performed in the area, i.e., shoveling snow and clearing trash, did not cause or contribute to the accident. Defendant further maintains that summary judgment must be granted because plaintiff cannot establish the cause of her fall.

In an affirmation in opposition, plaintiff's counsel argues that the motion must be denied because plaintiff identified what caused her fall, i.e., a defective sidewalk. Doc. 45 at par. 2. He further asserts that permits he obtained pursuant to a FOIL request reveal that defendant or its contractors arranged for construction work to be performed in the area where plaintiff fell and thus may have made a special use of the sidewalk. Doc. 45 at pars. 5-7, 14-15.

In an affidavit in opposition, plaintiff argues that, after the terrorist attacks of 2001, Vesey Street was closed to pedestrian traffic for several years. Doc. 44 at par. 4. Vesey Street was gradually opened for pedestrian traffic to walk on one side of the street, and the fence bordering Vesey Street was gradually shifted in stages to allow additional traffic down the block. Doc. 44 at par. 4. Plaintiff further stated that the accident occurred when she "stepped down onto a mis-leveled area of the pedestrian walkway" on Vesey Street. Doc. 44 at par. 6.

In reply, defendant's attorney argues that plaintiff's affidavit in opposition improperly seeks to feign an issue of fact regarding the cause of her fall. Doc. 51 at par. 9. Defendant's attorney further argues that defendant neither exercised control, nor made special use of, the area where plaintiff was allegedly injured.

#### **LEGAL CONCLUSIONS:**

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum*

*of Art*, 27 AD3d 227, 228 (1st Dept 2006). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. See *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Here, defendant established its prima facie entitlement to summary judgment by establishing that plaintiff did not know what caused her to fall and by establishing that it neither owned nor controlled or maintained the area where the alleged incident occurred.

However, in opposition to the motion, plaintiff raised material issues of fact regarding how the accident occurred and whether defendant maintained or controlled that area.

First, in asserting that defendant did not know what caused her fall, defendant relies on plaintiff's deposition testimony that she did not fall on a foreign object. In opposition to the motion, plaintiff raises an issue of fact by stating in an affidavit that she fell on a defective sidewalk. Defendant claims that plaintiff is feigning an issue of fact by mentioning the defective sidewalk in her affidavit, since she did not mention it at her deposition. This contention is disingenuous, since plaintiff was not even asked about a defective sidewalk at her deposition despite alleging, in her amended notice of claim and bill of particulars, that this was the cause of her fall. See *Bolton v ABM 75 Realty LLC*, 2012 NY Slip Op 31941(U) at \*\*8 - \*\*9 (Sup Ct New York County 2012).

Further, although defendant submits evidence establishing that it did not own, operate or control the location where plaintiff fell, and did not perform any construction work in that area, plaintiff raises issues of fact regarding these claims. Specifically, in opposition to the motion, plaintiff submits documents obtained via FOIL requests which reveal that defendant hired contractors to perform work at or near the location of the accident. Additionally, despite denying

any involvement in the area where plaintiff allegedly fell, defendant concedes that it shoveled snow and cleared trash at that location. Thus, issues of fact exist regarding why defendant undertook certain work in the area if it did not own, maintain or control that location.


Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant The Port Authority of New York and New Jersey for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that, within 20 days after entry of this order, plaintiff shall serve this order, with notice of entry, on defendant; and it is further

ORDERED that this constitutes the decision and order of the court.

4/16/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE