

**Bautista v City of New York**

2020 NY Slip Op 30284(U)

February 3, 2020

Supreme Court, New York County

Docket Number: 155174/2018

Judge: Lawrence L. Love

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62

Justice

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INDEX NO. 155174/2018

JACKELINE BAUTISTA,

MOTION DATE 12/19/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, AVALON COMMUNITIES, A&P
REAL PROPERTY, LLC, ASN 50TH ST LLC, THALIA
RESTAURANT

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for Summary Judgment

Upon the foregoing documents, the motion is decided as follows:

The instant action arises out of a trip and fall by plaintiff, which occurred in the street along the curb on 8th Avenue, between 49th and 50th Streets in New York County. Defendant, AvalonBay Communities, Inc. s/h/a Avalon Communities, now moves for summary judgment, dismissing this action as plaintiff fell in the public street and not on the sidewalk abutting defendant's property. In support of its motion, defendant submits plaintiff's sworn testimony from her 50-H hearing, held March 14, 2018, supporting photographs, and the affidavit of Cosmin Anghel, Senior Maintenance Manager of Avalonbay.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957); Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 (1st Dept., 1984) aff'd 65 N.Y.2d 732 (1985). The proponent

of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp., 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957).

Ordinarily a landowner owes no duty to the public to maintain the public street abutting his or her property. Llanos v. Stark, 151 A.D.3d 836. Thus, an owner of land abutting a public street is not liable for injuries sustained as a result of dangerous or defective conditions unless he or she has been instrumental in creating the alleged defect or where a statutory provision provides for both maintenance and liability for failure to maintain such area. Werner v. City of New York, 135 A.D.3d 740, 23 N.Y.S.3d 324 (2d Dept 2016). It is well settled that "[t]o hold an abutting landowner liable to a pedestrian injured by a defect in a public sidewalk [or street], the landowner must have either created the defect, caused it to occur by a special use, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk." Reich v. Meltzer, 21 A.D.3d 543, 544, 800 N.Y.S.2d 593 (2nd Dep't 2005). The enactment of New York City Administrative Code §7-210 transferred to the owner of real commercial property abutting any sidewalk the duty to maintain the sidewalk in a reasonably safe condition. Vucetovic v Epsom Downs, Inc., 10 N.Y.3d 517, 520 (2008) However, Courts interpreting the Administrative Code have clearly established that the obligations and duties imposed upon an adjacent landowner for

sidewalk maintenance and repair pursuant to New York City Code § 7-210(b) apply exclusively to sidewalk flags. Specifically, the New York City codes defines sidewalks as, "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." In all subsequent sidewalk cases, the courts have held that an abutting landowner is not obligated to maintain the curb or the street. In Ascencio v. New York City Hous. Auth., 77 A.D.3d 592, 593 (1st Dept. 2010), the Appellate Division held that defendant land owner was entitled to summary judgment where the affidavits of the Defendant's Superintendent and Supervisor of Grounds attested that defendant made no repairs to, or any special use of, the curb on which Plaintiff fell. In Trent-Clark v. City of New York, 114 A.D.3d 558, 558 (1st Dep't 2014) the Court held that the photographic evidence demonstrated that the purported defect was on the curb which the abutting landowner had no duty to maintain and dismissed the case against abutting landowner.

Here, by Plaintiff's own admission, her accident occurred in a hole in the public street. Further, in the photographs marked by Plaintiff at the 50-H hearing, Plaintiff clearly indicated she tripped inside the public street next to the curb and not on any defect of the sidewalk. Further, Cosmin Anghel attested that Avalonbay does, and did not in 2017, have any ownership or other interest in the public street or curb on 8th Avenue between 49th and 50th Streets. Avalonbay never performed any work in the public street and has never maintained or repaired the public street or curb adjacent to the sidewalk of the building located at 810-828 8th Avenue. Moreover, there are no driveways, garages, or delivery areas on the 8th Avenue side of the building, and Avalonbay has never made any special use of the public street or curb. As such, defendant, Avalonbay, Communities, Inc. has established a *prima facie* entitlement to summary judgment.

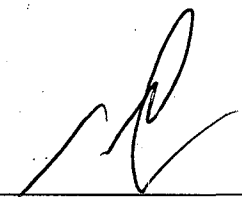
In opposition, plaintiff argues that the summary judgment is premature as discovery is incomplete, however, plaintiff failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the plaintiffs' knowledge and control (see CPLR 3212[f]; Espada v. City of New York, 74 A.D.3d 1276, 1277 (2d. Dept. 2010)).

ORDERED that the motion for summary judgment of defendant AvalonBay Communities, Inc. s/h/a Avalon Communities is granted and the complaint is dismissed against them; and it is further

ORDERED that any cross-claims against said defendant are dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants AvalonBay Communities, Inc. s/h/a Avalon Communities dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

2/3/2020  
DATE

  
LAURENCE L. LOVE, J.S.C.

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