Alvarez v City of New York
2021 NY Slip Op 30606(U)
January 7, 2021
Supreme Court, Richmond County
Docket Number: 151566/2019
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2
---X
IRMA ALVAREZ,

Plaintiffs,

-against-

THE CITY OF NEW YORK, and STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY,

Defendants.
---X

HON. THOMAS P. ALIOTTA, J.S.C

DECISION AND ORDER

Index No.: 151566/2019

Motion No. 003

Recitation of the papers as required by CPLR 2119 (a) of the following papers numbered "1" through "5" were marked fully submitted on November 6, 2020

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant THE CITY OF NEW YORK Affirmation in Support, Exhibits (dated December 19, 2019)	1
Affirmation in Opposition by Plaintiff IRMA ALVAREZ Affirmation in Support, Exhibits (dated February 27, 2020)	2
Reply Affirmation by Defendant THE CITY OF NEW YORK, (dated March 9, 2020)	3
Sur-Reply by Defendant THE CITY OF NEW YORK (dated October 30, 2020)	4
Plaintiff IRMA ALVAREZ' Response to the Sur-Reply of THE CITY OF NEW YORK (dated November 3, 2020)	5

Upon the foregoing papers, the motion (No. 003) by defendant THE CITY OF NEW YORK seeking dismissal of the complaint and all claims against it pursuant to CPLR 3211(a)(7) or CPLR 3212 is granted.

FACTS

Plaintiff IRMA ALVAREZ (hereinafter "plaintiff") commenced this action against defendants THE CITY OF NEW YORK and THE STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY[1] to recover damages for injuries she sustained when she slipped and fell on the floor of the subway station located on the lower level of the St. George Ferry Terminal near the entrance to the STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY's (hereinafter "SIRTOA") train station. According to plaintiff, there was a slippery substance existing on the floor which caused her to fall and sustain multiple injuries.

In the current application, defendant THE CITY OF NEW YORK (hereinafter "The City") now moves for summary judgment dismissing the complaint and argues that it is not a proper party to this action since it does not own, manage, maintain, control, operate, supervise or inspect the premises where plaintiff's accident occurred. In support, the City submits a copy of a Compliance Conference Order dated December 3, 2019, wherein co-defendant SIRTOA stipulated that they own and operate the area where the accident occurred. Thus, the City argues that it cannot be found liable for causing or creating the subject condition which plaintiff alleged caused her to fall.

According to the City, it is well established that liability for injuries caused by a dangerous condition upon land is predicated upon occupancy, ownership, control, or special use

[1] By way of motions to dismiss, claims against defendants PORT AUTHORITY OF NEW YORK and NEW JERSEY, NEW YORK CITY TRANSIT AUTHORITY and THE MTA have been previously dismissed.

of the property. Since it is uncontested that plaintiff's allegations arise out of the ownership, *etc.*, of said property, the action against the City should be dismissed. The City further argues that while none of the depositions have been held, there is no discovery that would lead to any additional evidence sufficient to deny the City's motion. Accordingly, the within motion is not premature and should be granted in favor of the City.

In opposition, plaintiff argues that the City's motion is both procedurally and substantively flawed and, therefore, should be denied. In particular, plaintiff argues that the City has waived its right to move to dismiss the complaint pursuant to CPLR 3211(a)(1) since it failed to either raise the defense in its answer or in a pre-answer motion. Plaintiff further argues that the City is not entitled to seek dismissal pursuant to CPLR 3211(a)(7) since plaintiff's complaint, taken as true, plainly sets forth a cause of action sounding in negligence as against the City. According to plaintiff, the complaint clearly evinces claims of negligence in regard to the City's involvement with the situs and that it had both actual and constructive notice of the defective condition. Moreover, without an affidavit by some with knowledge establishing the plaintiff failed to state a cognizable claim, the Court is limited solely to the four corners of the complaint which properly evinces a claim of negligence against the City. Therefore, the City's motion must be denied.

With regard to summary judgment dismissing the complaint pursuant to CPLR 3212, plaintiff argues that the City failed to submit a proper affidavit or sworn statement in support in accordance with CPLR 3212(b), but it relies exclusively on an attorney's affirmation, the pleadings, SIRTOA's stipulation in the compliance conference order and an unverified, inadmissible photo purportedly showing the site of the incident. Plaintiff claims that such proof is insufficient to eliminate all triable issues of fact, *e.g.*, regarding the City 's maintenance,

supervision, management, inspection, or repair of the site where plaintiff's incident occurred. Given that the City failed to meet its burden, plaintiff incurred no burden to demonstrate the existence of a triable issue, and the motion must be denied.

Plaintiff further argues that the City's motion is premature given that discovery remains outstanding regarding the City's occupancy, control and special use of the area where plaintiff claims to have fallen. According to plaintiff, the City has been unresponsive in this regard, but bases its argument solely on its lack of ownership status. Thus, the motion is premature, and must be denied.

DISCUSSION

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (*see* Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]); Herrin v. Airborne Freight Corp., 301 AD2d 500, 500-501[2nd Dept. 2003]). The party moving for summary judgment has been held to bear the initial burden of establishing its right to judgment as a matter of law (*see* Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]) and, in this regard, "the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v. Educational Testing Serv, 251 AD2d 528, 531 [2nd Dept. 1998]). Nevertheless, upon a *prima facie* showing by the moving party, it is incumbent upon the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*see* Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat the motion (*id*).

With particular regard to premises liability, the obligation to respond in damages for a dangerous condition is generally predicated on ownership of the premises (*see* Breland v. Bayridge Air Rights, Inc., 65 AD3d 559, 560 [2nd Dept. 2009]). In this regard, it is well settled that the owner of property has a duty to maintain its premises in a reasonably safe condition (*see* Kellman v. 45 Tiemann Assoc., 87 NY2d 871, 872 [1995]). Where ownership is not present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*see* Alexopoulos v. City of New York, 33 AD3d 828 [2nd Dept. 2006]).

Here, in the opinion of this Court, the City has met its *prima facie* burden of establishing its right to judgment as a matter of law. In opposition, plaintiff has failed to raise a triable issue of fact. More specifically, the City has submitted satisfactory proof establishing that it did not own or operate the area where the accident occurred and, therefore, owed no duty of care to plaintiff. Both the plaintiff's complaint and bill of particulars sufficiently describe the area where she fell as "the St. George Terminal – Lower Level subway station, located in Staten Island, New York, upon entering the State Island Rapid Transit terminal." Subsequently, SIRTOA has admitted that it owns and operates that area of the ferry terminal in a Compliance Conference Order dated December 3, 2019. It is noted that although SIRTOA did not sign the Compliance Conference Order, it has neither opposed the City's motion nor cross-moved to vacate the Compliance Conference Order. This silence is deemed an admission thereby obviating the need for discovery on the issues of ownership, supervision, maintenance, control, etc. (*see generally* Colgan v. Colgan, 94 AD3d 689, 690 [2d Dept. 2012]). The failure to respond is an admission of the allegations (*see* Berroa v. MisrahiEyeglasses, 94 AD3d 579 [2d Dept. 2012]).

In addition, the City indicated in its November 13, 2019 Response to the Preliminary Conference Order, that it made a request for records to the New York City Department of Transportation, Division of Legal Affairs (NYC DOT), for accident reports, complaints, inspection sheets, incident reports, work orders, *etc.* relative to the subject location. However, the NYC DOT indicated that there were no records to exchange pertaining to the subject location since the incident did not occur on property owned by the City. Thus, since it has been sufficiently established that the City did not own or operate the area of the ferry terminal where the incident occurred, it owed no duty to plaintiff, and therefore cannot be held liable for a dangerous condition existing thereon (*see* Hindin v. Maffei, 251 AD2d 545 [2nd Dept. 1998]).

In opposition, plaintiff has failed to raise a triable issue of fact in regard to the City's alleged ownership or control of the subject location, including any unsupported allegations of special use. While plaintiff objects to the submission of an unauthenticated photograph, and an affidavit of a NYC DOT employee based on his review of said photograph, other proof, including (1) plaintiff's identification of the location of her fall in the pleadings, along with (2) SIRTOA's admission of ownership and control, and (3) a search for records which failed to uncover any records relating to the City's involvement with the location, are, together sufficient to establish the City's lack of ownership and operational status of the subject accident location. It should be noted that plaintiff has failed to raise "special use" in any of the pleadings and, therefore, cannot now be heard to argue liability based on such a theory (*see* Pinn v. Baker's Variety, 32 AD3d 463, 464 [2nd Dept. 2006]). In any event, liability based upon special use is premised upon ownership and control (*see* Donatien v. Long Is Coll. Hosp., 153 AD3d 600, 600-601 [2nd Dept 2017]). Since SIRTOA has admitted ownership and control of the premises where plaintiff alleges to have fallen, and there is no other proof regarding any other obligation incurred

by the City, *e.g.*, that the City made special use of that area for its own benefit (*see* Minott v. City of New York, 230 AD2d 719 [2nd Dept. 1996]), summary judgment dismissing the complaint is warranted.

Finally, plaintiff's argument that the motion is premature is without merit. In this regard, the Court may deny a motion for summary judgment if it appears from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated. It is incumbent on the opposing party, however, to provide an evidentiary basis to suggest that discovery might lead to relevant evidence (*see* Northfield Ins. Co v. Golob, 164 AD3d 682, 683-684 [2nd Dept. 2018]). The mere "hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion" (Savage v. Quinn, 91 AD3d 748, 750 [2nd Dept. 2012]). Here, there is no basis for the assumption that further discovery would lead to evidence regarding the City's involvement in the subject premises. Thus, the motion is not premature.

Accordingly, it is hereby:

ORDERED that the motion (No. 003) by defendant THE CITY OF NEW YORK for summary judgment is granted and the complaint and any counter-claims are hereby severed and dismissed; and it is further

ORDERED that the motion (No. 003) by defendant THE CITY OF NEW YORK for summary judgment is granted without opposition as against defendant, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY, and the complaint and any cross-claims are hereby severed and dismissed; and it is further

ORDERED, that defendant THE CITY OF NEW YORK shall serve a copy of this order with notice of entry through NYSCEF; and it is further

ORDERED, that the caption of this action is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2
---X
IRMA ALVAREZ,

Plaintiffs, Index No.: 151566/2019

-against-

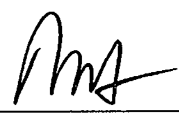
STATEN ISLAND RAPID TRANSIT
OPERATING AUTHORITY,

Defendants.
---X
and it is further

ORDERED that the Clerk enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.

Dated: January 7, 2021