Tian Hua Xia v 13602 Roosevelt Ave. LLC
2021 NY Slip Op 31684(U)
May 17, 2021
Supreme Court, New York County
Docket Number: 150037/2020
Judge: David Benjamin Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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TIANHUA XIA,

Plaintiff,

- v -

13602 ROOSEVELT AVENUE LLC, WALGREEN CO., and SOL GOLDMAN INVESTMENTS, LLC,

Defendants.

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INDEX NO. 150037/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISS.

In this trip and fall case, defendants 13602 Roosevelt Avenue LLC ("13602"), Duane Reade, Inc. i/s/h/a Walgreen Co. ("Duane Reade") and Sol Goldman Investments, LLC ("SGI") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Tianhua Xia opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on January 2, 2017 in which plaintiff allegedly tripped and fell on a "dangerous and defective condition", i.e., an uneven sidewalk adjacent to a metal utility plate ("the steel plate") located in front of the Duane Reade pharmacy ("the store") located at 13602 Roosevelt Avenue in Queens, New York ("the premises"). Doc. 1. Plaintiff commenced the captioned action by filing a summons and complaint on January 2, 2020. Doc. 1. Defendants 13602 and SGI joined issue by filing their answer on January 17, 2020. Doc. 6. In

their answer, 13602 and SGI denied all substantive allegations of wrongdoing except admitted that 13602 was the owner of the premises. Duane Reade joined issue by filing its answer on January 27, 2020, denying all substantive allegations of wrongdoing except for admitting that it leased a portion of the premises. Doc. 8.

On or about March 17, 2020, the defendants served a notice to admit on the plaintiff. Doc. 28. Annexed to the notice to admit were certain photographs the plaintiff had provided to the defendants in which a circle was made around a portion of the sidewalk depicted therein. Exs. A-C to Doc. 28. In response to the notice to admit, the plaintiff admitted, inter alia, that the photographs accurately depicted the location of the accident as it appeared at the time of the occurrence and that the areas circled in the photographs accurately depicted the "dangerous and defective" condition which caused the alleged accident. Doc. 29. The area circled by the plaintiff in the photographs was close to the steel plate on the sidewalk. Doc. 28 at Exs. A-C.

The defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, they argue that, since the plaintiff allegedly fell on a sidewalk defect located within 12 inches of the steel plate, they had no duty to maintain that area. Doc. 21. In the alternative, the defendants maintain that, even if they had a duty to maintain the area, the plaintiff was injured by a non-actionable trivial defect. Doc. 21. They further assert that the motion is not premature.

In support of the motion, the defendants submit the notice to admit and responses thereto, affidavits of their respective representatives, as well as evidence submitted in the case of *Andrade v 13602 Roosevelt Avenue LLC*, Sup. Ct., Queens Co. Index No. 16054/14, which involved a trip and fall on the steel plate located on the sidewalk adjoining the premises.

Thomas Cashman, the manager of the store since 2015, submits an affidavit in which he attests that the allegedly defective area of the sidewalk circled by the plaintiff in the photographs marked at her deposition still appears substantially the same. Doc. 30. Cashman further avers that he measured the distance from the defect circled by the plaintiff in the photographs to the steel plate and determined that it was approximately 10-11 inches. Doc. 30. Additionally, Cashman represented that neither Duane Reade staff nor anyone hired by the store performed any repairs to the allegedly defective area prior to the occurrence. Doc. 30. Nor did Duane Reade receive any complaints regarding the area prior to the accident. Doc. 30.

Richard Steiner, Director and Managing Counsel for Walgreen's, submits an affidavit in which he attests that: he is familiar with properties owned and leased by Walgreen's and its subsidiaries, such as Duane Reade; Duane Reade was the lessee of the store; Duane Reade did not lease, own, install, inspect, maintain, repair, or make any use of the steel plate in front of the store; and Duane Reade never received any complaints about the sidewalk defect circled by the plaintiff. Doc. 31.

Christopher Nigro, currently Walgreen's Director of Store Care and, from 2012-2018, Duane Reade's Regional Facilities Asset Manager, states in an affidavit that he is familiar with properties owned and leased by Walgreen's and Duane Reade in New York City, including the store in question. He represents that he searched the Walgreen's database of maintenance and repair records for Walgreen's and Duane Reade stores dating back to 2012 and determined that neither Duane Reade, Walgreen's, nor anyone retained on their behalf, performed any repairs to the steel plate or the allegedly defective area of the sidewalk adjoining the premises. Doc. 32. Nor was Nigro aware of any complaints received by the store regarding the area of the sidewalk circled by plaintiff. Doc. 32.

Louisa Little, Vice-President and Treasurer for Solil Management, LLC ("Solil"), which operates the office and employee payroll for SGI, the managing agent of the premises, also submits an affidavit in support of the motion. Doc. 33. Little avers that: she is familiar with the properties managed by SGI; the steel plate is not owned, leased, or controlled by Solil or SGI; neither Solil nor SGI had any involvement with the installation, inspection, repair, or use of the steel plate; and neither Solil nor SGI ever received any complaints about the steel plate. Doc. 33.

Defendants also submit the order of the Supreme Court, Queens County (Kerrigan, J.) granting 13602 summary judgment in the *Andrade* case on the ground that the steel plate on which plaintiff in that matter allegedly slipped "was placed by defendant Hylan Datacom as an access cover to an underground vault it installed in the sidewalk for defendant Time Warner to house cable and that Time Warner was the owner of the diamond plate access cover." Doc. 35. The Court reasoned, inter alia, that 13602 had no responsibility for the plaintiff's accident since it did not own, install or perform any work on the steel plate; 34 RCNY §2-07(b) of the Highway Rules renders owners of such plates responsible for the maintenance of the same, including the street or sidewalk extending 12 inches outward from the perimeter of the plate; and that the Highway Rules are not superseded by Administrative Code §7-210, which renders adjoining landowners liable for sidewalk defects. Doc. 35.

In opposition, the plaintiff argues that the defendants failed to establish their prima facie entitlement to summary judgment. Doc. 45. The plaintiff further asserts that the motion is premature because depositions have yet to be conducted and issues of fact exist regarding: whether defendants had an ownership interest in, or a duty to maintain, the steel plate; whether defendants had a duty to maintain the sidewalk in the area of the alleged defect; and whether defendants had notice of the alleged condition. Doc. 45. The plaintiff also maintains that the

defendants' argument that they are entitled to summary judgment because they did not own the steel plate is misleading since the plaintiff tripped on the sidewalk. Doc. 45. Further, they argue that summary judgment cannot be granted to the defendants based on the *Andrade* decision since the plaintiff in that matter fell on the steel plate and not on the sidewalk. Doc. 45. Finally, the plaintiff contends that the defendants fail to establish that the condition of the alleged defect was trivial as a matter of law. Doc. 45.

In reply, the defendants argue that they are entitled to summary judgment dismissing the complaint since the plaintiff does not dispute the fact that the sidewalk defect on which she allegedly tripped was within 12 inches of the metal plate. Doc. 47. They further assert that their motion is not premature since the plaintiff fails to specify what facts may exist but cannot be stated until discovery is conducted. Doc. 47.

LEGAL CONCLUSIONS

It is well settled that a party moving for summary judgment motion "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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Such a motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as by pleadings and other proof such as affidavits, depositions and written admissions. *See* CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]) (internal quotation marks and citation omitted). If the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact (*Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Administrative Code §7-210 requires property owners to maintain the sidewalk abutting their property, which is limited to "the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags." However, the New York City Highway Rules provide that the owner of a manhole cover or grating on a street is responsible for monitoring the condition of the same, including the area of the sidewalk within twelve inches of the perimeter of the metal object (34 RCNY 2-07[b]). The Highway Rules expressly provide that the "street" includes the "sidewalk" (34 RCNY § 2-01; *Cruz v New York City Trans. Auth.*, 19 AD3d 130, 131 [1st Dept 2005]). Therefore, an abutting property owner is not responsible for a cover or grating located on a sidewalk (*see Roa v City of New York*, 188 AD3d 504 [1st Dept 2020] citing *Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]).

Here, the defendants have established their prima facie entitlement to summary judgment dismissing the complaint by demonstrating that they were not responsible for the maintenance and/or repair of the metal plate on the sidewalk. As noted previously, in her response to the defendants' notice to admit, the plaintiff admitted, inter alia, that the area of the photographs she circled depicted the uneven sidewalk as it appeared on the day of her accident. Cashman states in his affidavit that the area of the sidewalk circled by the plaintiff on the photographs marked at her deposition was less than 12 inches away from the metal plate on the sidewalk. Thus, the Highway Rules relieved the defendants of any duty they may have otherwise had to repair the defect. Cashman further represents that neither Duane Reade staff nor anyone hired by the store performed any repairs to the allegedly defective area prior to the occurrence and that Duane Reade received no complaints regarding the crack prior to the accident. Steiner, Nigro and Little confirmed that Walgreen's and Duane Reade received no complaints about the allegedly dangerous condition and/or did not install, maintain, or use the metal plate for any reason. The

defendants further establish that, in the *Andrade* decision, Justice Kerrigan held that the metal plate was installed by Hylan Datacom, owned by Time Warner, and that 13602 was entitled to summary judgment in that case since it had no liability for maintaining or repairing the same or the area 12 inches around its perimeter. Since the defendants have made a similar showing here, they are entitled to the dismissal of the complaint.[1] It is thus unnecessary for this Court to address the defendants' contention that the uneven sidewalk constituted a non-actionable trivial defect.

Given that the defendants have established that they had no duty to the plaintiff, they are correct in asserting that any questions of fact regarding whether they had actual or constructive notice that a portion of the sidewalk located within 12 inches of the metal plate was cracked are irrelevant. (*See Timmins v Tishman Constr. Corp.*, 9 AD3d 62 [1st Dept 2004]; *Dinallo v NY Union Sq. Retail, L.P.*, 2012 NY Slip Op 32308[U], [Sup Ct, NY County 2012]).

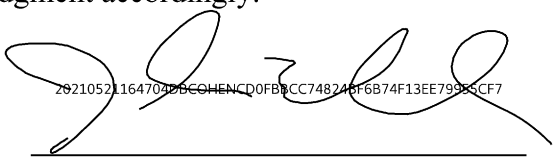
The plaintiff's primary ground for opposing the motion is that it is premature. However, the plaintiff "fail[s] to offer any evidentiary basis to suggest that further discovery may lead to relevant evidence" (*Mayorga v 75 Plaza LLC*, 191 AD3d 606, 608 [1st Dept 2021]; *see also Cruz v City of New York*, 135 AD3d 644 [1st Dept 2016]). It is well settled that "[t]he mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion" (*Island Federal Credit Union v I&D Hacking Corp.*, 2021 NY App Div LEXIS 3082, 2021 NY Slip Op 02986 [1st Dept May 11, 2021] [citation omitted]).

[1] Notably, although the plaintiff asserts that summary judgment should not be granted based on *Andrade*, which was "a completely different case with completely different facts", she simultaneously concedes that the incident in *Andrade* "occurred in the same area as [that which occurred in the] instant case." Doc. 45 at par. 19.

Accordingly, it is hereby:

ORDERED that the motion by defendants 13602 Roosevelt Avenue LLC, Duane Reade, Inc. i/s/h/a Walgreen Co., and Sol Goldman Investments, LLC seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



5/17/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE