

Sarracco v NYC Bike Share, LLC
2021 NY Slip Op 32432(U)
November 23, 2021
Supreme Court, New York County
Docket Number: Index No. 154028/2019
Judge: J. Machele Sweeting
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

MICHELE SARRACCO,

Plaintiff,

- v -

NYC BIKE SHARE, LLC, ELK MAS 229 EAST 53RD
LLC, BIG B RESTAURANT ENTERPRISES, INC., CITY OF
NEW YORK

Defendants.

-----X

INDEX NO. 154028/2019

MOTION DATE 10/15/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73

were read on this motion to/for JUDGMENT - SUMMARY.

The underlying action here arises from an alleged occurrence that took place on December 15, 2018, at approximately 11:15 a.m., when plaintiff claims to have tripped and fell over a protruding bolt on the sidewalk from a bicycle rack in front of 229 East 53rd Street.

Pending now before the court is a motion for summary judgment filed by defendant NYC BIKE SHARE, LLC (“NYCBS”) seeking an order, pursuant to CPLR 3212, dismissing with prejudice the complaint of plaintiff MICHELE SARRACCO, along with any and all cross-claims.

Upon the forgoing documents, this motion is DENIED as premature.

Standard for Summary Judgment

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 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 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 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 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 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Instant Motion

Here, NYCBS argues that they lack any relationship with the location of plaintiff’s alleged accident so as to subject them to a duty of care; that NYCBS does not owe plaintiff a duty of care as a third-party beneficiary of the contract between NYCBS and defendant City of New York; that plaintiff has failed to demonstrate that NYCBS proximately caused plaintiff’s damages; and that no issue of material fact exists.

In support of their motion, NYCBS attaches the Affidavit of Laura Fox (NYSCEF Document #54) which, NYCBS argues, establishes that at all times on or before the accident date on December 15, 2018, NYCBS did not own, operate, manage, maintain, or otherwise control the accident location or sidewalk at the location of plaintiff’s alleged accident.

Co-defendants BIG B RESTAURANT ENTERPRISES, INC. (“Big B”) and Elk MAS 229 East 53rd LLC (“Elk”) each filed papers in opposition. They argue, first, that NYCBS’s motion is premature, as no depositions have taken place. They also argue that NYCBS failed to meet their burden in eliminating any material questions of fact.

Analysis and Conclusions

Here, in the “Memo of Law” submitted by NYCBS in support of their motion, they refer to affiant Laura Fox as “the General Manager for NYCBS.” However, Ms. Fox states in her Affidavit that, “I am currently employed as the General Manager for Lyft, Inc. (“LYFT, INC.”).” There is no mention of her being employed by NYCBS in any capacity whatsoever.

In the “Attorney Affirmation Submitted in Reply” to Big B’s opposition papers, (NYSCEF Document # 68), NYCBS attempts to clarify that Ms. Fox is actually “the General Manager of the corporation that owns NYCBS.” However, Ms. Fox herself does not state in her Affidavit that NYCBS is owned by Lyft, Inc. Moreover, the affidavit does not set forth any connection between Lyft Inc. and NYCBS.

Specifically, Ms. Fox’s Affidavit states, *inter alia*:

5. I am personally familiar with the property holdings and policies and procedures of NYCBS - including placement, maintenance, and removal of NYCBS bicycle share stations in the City of New York.

6. Therefore, I can attest and affirm that, at all times relevant herein, including December 15, 2018, NYCBS never owned, operated, or maintained a bicycle share station at the location where Plaintiff’s alleged accident occurred, which she alleges to be the sidewalk in front of 229 East 53d Street, New York, New York.

7. Specifically, NYCBS did not own, manage, maintain, or otherwise control the real property, land or structures at or about the location of Plaintiff’s alleged accident, nor the sidewalks at Plaintiff’s alleged accident location, at any time on or before December 15, 2018.

8. In addition, an NYCBS bicycle station was never placed at the location of Plaintiff’s alleged accident at any time on or before December 15, 2018.

[...]

12. Additionally, NYCBS has never performed any construction or maintenance work at the location of Plaintiff’s alleged accident on 53rd Street, including the concrete sidewalk where Plaintiff was allegedly caused to fall.

13. Indeed, NYCBS did not have the authority to maintain the sidewalk located outside the footprint of its bicycle share stations on or before December 15, 2018.

Importantly, Ms. Fox's affidavit does not state that she reviewed any records, conducted a search of any paper records or electronic databases for repairs, maintenance or any work on the subject sidewalk. Indeed, it does not state whether she even had the authority to review any of NYCBS's records. Simply put, Ms. Fox gives no basis for any of the conclusory statements in her affidavit. As stated above, the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Here, this court finds that NYCBS has failed to make such a showing.

Further, it is undisputed that no party depositions have gone forward; that plaintiff has yet to be deposed; and that the four defendants in this matter have yet to be deposed. Given this, the court further finds that summary judgment is premature at this juncture, as co-defendants Big B and Elk have not had the opportunity to explore key issues such as the precise location where plaintiff fell; who was responsible for the bolt protruding out of the sidewalk from removal of the bicycle rack station; whether NYCBS or any of the other defendants erected or removed the bicycle rack station in question, or whether any of defendant(s) caused/created the defect. *See Belziti v. Langford*, 105 A.D.3d 649 (Sup. Ct. App. Div, 1st Dept. 2013) ("Green's motion for summary judgment was properly denied as premature, since limited discovery has taken place and Green himself has not yet been deposed in this matter"); *Weinstein v. WB/Stellar IP Owner, LLC*, 125 A.D.3d 526 (Sup. Ct. App. Div, 1st Dept. 2015) ("Plaintiff opposed the motion on the ground that it was premature since 'facts essential to justify opposition may exist but cannot then be stated' [...] Stellar's motion should have been denied as premature, since plaintiff had no opportunity to depose Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion").

Finally, with respect to the arguments made by NYCBS alleging procedural defects in the opposition papers, such arguments are unavailing, as the movant here has failed to make out a *prima facie* case for summary judgment. Thus, the motion for summary judgment under these circumstances is denied, regardless of the sufficiency of the opposing papers.

Accordingly, it is hereby:

ORDERED that this motion is DENIED as premature; and it is further hereby

ORDERED that movant, NYCBS is given leave of court to file a motion for summary judgment after relevant discovery has been conducted.

<u>11/23/2021</u> DATE		 J. MACHELLE SWEETING, 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
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE