Ramsey v City of Mount Vernon
2021 NY Slip Op 33580(U)
October 4, 2021
Supreme Court, Westchester County
Docket Number: Index No. 56660/2019
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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SARAH RAMSEY,

Plaintiff,

-against-

THE CITY OF MOUNT VERNON and MOUNT VERNON HEIGHTS CONGREGATIONAL CHURCH,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION & ORDER

Index No: 56660/2019

Motion Sequence Nos. 2 and 3

The following papers (NYSCEF document nos. 34-55; 70-84) were read on: (1) the motion by the defendant, Mount Vernon Heights Congregational Church, for an order granting summary judgment dismissing the complaint asserted against it (sequence no. 2); and (2) the motion by the defendant, City of Mount Vernon, for an order granting summary judgment dismissing the complaint asserted against it (sequence no. 3).

Motion Sequence No. 2
Notice of Motion-Affirmation-Statement of Facts-Exhibits (A-I)
Affirmation in Opposition (by plaintiff)-Response to Statement of Facts-Exhibits (A-F)
Reply Affirmation-Exhibit (A)-Memorandum of Law

Motion Sequence No. 3
Notice of Motion-Affirmation-Exhibits (A-G)-Affidavit
Affirmation in Opposition (by plaintiff)-Exhibits (A-F)
Reply Affirmation-Affidavit

Upon reading the foregoing papers, it is

ORDERED the motion by the defendant, Mount Vernon Heights Congregational Church, is granted, and so much of the complaint that asserts a cause of action against Mount Vernon Heights Congregational Church is dismissed (sequence no. 2); and it is further

ORDERED the motion by the defendant, City of Mount Vernon, is granted, and so much of the complaint that asserts a cause of action against the City of Mount Vernon is dismissed (sequence no. 3).

Plaintiff commenced this action to recover monetary damages after she allegedly fell and sustained injuries as a result of a defective condition on a public sidewalk located in the defendant City of Mount Vernon (City). The defendant, Mount Vernon Heights Congregational Church (Church), owns the property abutting the subject sidewalk. The complaint alleges, *inter alia*, that both the City and the Church negligently owned, operated, managed, maintained and controlled the subject sidewalk.

Following the completion of discovery, the Church moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing so much of the complaint as asserts a cause of action against it (sequence no. 2). The City separately moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing so much of the complaint as asserts a cause of action against it (sequence no. 3). Plaintiff opposes both motions. The motions are consolidated for joint disposition and decided herein as follows.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant satisfies her *prima facie* burden, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

Motion by the Defendant Church
Sequence No. 2

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Maya v Town of Hempstead*, 127 AD3d 1146, 1147 [2d Dept 2015]). An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee "either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk which imposes liability upon that party for injuries caused by a violation of that duty" (*O'Toole v City of Yonkers*, 107 AD3d

866, 867 [2d Dept 2013] [internal quotation marks omitted]; *see Maya*, 127 AD3d at 1147). "Special use occurs where a landowner whose property abuts a public street or sidewalk derives a special benefit unrelated to the public use, and is therefore required to maintain a portion of that property. Special use is a use different from the normal intended use of the public way" (*O'Brien v Village of Babylon*, 196 AD3d 494, 495 [2d Dept 2021] [internal citations omitted]).

Here, the Church established its *prima facie* entitlement to judgment as a matter of law dismissing the complaint by demonstrating that it did not create the alleged defective condition in the sidewalk and that it did not make special use of the subject sidewalk (*see Maya*, 127 AD3d at 1147-1148; *Peretz v Village of Great Neck Plaza*, 130 AD3d 867, 869 [2d Dept 2015]). Further, although Mount Vernon Code § 227-56 imposes a duty on landowners to keep contiguous sidewalks in good condition, it does not impose tort liability upon such persons for injuries caused by a violation of that duty (*see Maya*, 127 AD3d at 1148; *Ribacoff v City of Mount Vernon*, 251 AD2d 482, 483-484 [2d Dept 1998]). Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, plaintiff failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Plaintiff's contention that the special use exception applies is without merit. The evidence submitted including, the deposition testimony of the plaintiff, the photographic evidence, and plaintiff's response to the Church's statement of material facts wherein plaintiff does not dispute that the photographs attached to the Church's moving papers depict the location of where she fell, together establish that the location of plaintiff's fall was not in the area of the sidewalk which contained the Church's driveway (*see Kronenberg v Narayan*, 135 AD3d 711, 712 [2d Dept 2016]). To the extent not specifically addressed herein, the court finds plaintiff's remaining arguments unavailing. Accordingly, the motion by the defendant Church is granted, and so much of the complaint that asserts a cause of action against the Church is dismissed.

Motion by the Defendant City
Sequence No. 3

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies" (*Zielinski v City of Mount Vernon*, 115 AD3d 946, 947 [2d Dept 2014]; *see Trinidad v City of Mount Vernon*, 51 AD3d 661, 662 [2d Dept 2008]). "The only recognized exceptions to the prior written notice requirement involve situations in which either the municipality created the defect through an affirmative act of negligence, or a 'special use' confers a special benefit upon the municipality" (*De La Reguera v City of Mount Vernon*, 74 AD3d 1127, 1127 [2d Dept 2010]). "The affirmative negligence exception is limited to work by the City that immediately results in the existence of a

dangerous condition" (*Trinidad*, 51 AD3d at 662 [internal quotation marks, brackets, and ellipses omitted]; *see Smith v City of Mount Vernon*, 101 AD3d 847, 848 [2d Dept 2012]). "The special use exception is reserved for situations where a municipality derives a special benefit from the property unrelated to the public use" (*see Budoff v City of New York*, 164 AD3d 737, 739 [2d Dept 2018]).

Here, the City established its *prima facie* entitlement to judgment as a matter of law by presenting evidence including, the affidavit of Phillip Fountain, a Principal Clerk of the Department of Public Works (DPW) for the City of Mount Vernon, demonstrating that it had not received prior written notice of the defective condition in the sidewalk that allegedly caused the injured plaintiff's fall, as required by section 265 of the Charter of the City of Mount Vernon (*see Long v City of Mount Vernon*, 107 AD3d 765, 766 [2d Dept 2013]; *Smith*, 101 AD3d at 847; *De La Reguera*, 74 AD3d at 1127; *Trinidad*, 51 AD3d at 662). Accordingly, the burden of going forward shifted to plaintiff to raise a triable issue of material fact as to whether the City actually was provided with timely prior written notice or whether the affirmative act and special use exceptions were applicable (*see Zuckerman*, 49 NY2d at 557; *Avellino v City of New York*, 107 AD3d 836, 837 [2d Dept 2013]; *Conner v City of New York*, 104 AD3d 637, 638 [2d Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Contrary to plaintiff's assertion, the affidavit of Phillip Fountain, who averred, among other things, that his search of the records maintained by DPW revealed no prior written notice of any defective condition at the subject sidewalk, was sufficient to establish the City's *prima facie* entitlement to judgment as a matter of law (*see O'Brien*, 196 AD3d at 496; *Morreale v Town of Smithtown*, 153 AD3d 917, 918 [2d Dept 2017]). To the extent not specifically addressed herein, the court finds plaintiff's remaining arguments without merit. Accordingly, the motion by the defendant City is granted, and so much of the complaint that asserts a cause of action against the City is dismissed.

ENTER,

Dated: White Plains, New York
October 4, 2021

HON. JOAN B. LEFKOWITZ, J.S.C.