Ransom v City of New York
2022 NY Slip Op 33154(U)
September 20, 2022
Supreme Court, New York County
Docket Number: Index No. 156612/2016
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART 62**

Justice

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CONNIE RANSOM,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS & RECREATION,

Defendants.

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INDEX NO. 156612/2016

MOTION DATE 06/05/2022

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

THE CITY OF NEW YORK

Plaintiff,

-against-

DOM'S LAWNMAKER, INC.

Defendant.

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Third-Party
Index No. 595081/2021

The following e-filed documents, listed by NYSCEF document number (Motion 009) 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff CONNIE RANSOM on April 17, 2016, at approximately 4:00 p.m., when she tripped and fell due to an alleged "unleveled/unpaved/depressed/ tree well" in front of the premises known as Sombrero Mexican Restaurant, located at 303 West 48th Street, in the County, City and State of New York.

Pending before the court is a motion in which third-party defendant Dom's Lawnmaker, Inc. (the "Contractor") seeks an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, granting it summary judgment and dismissing all claims against it. Also pending is a cross-motion in which defendants The City Of New York, the New York City Department Of Transportation, and the New York City Department Of Parks & Recreation (collectively, the "City") seek:

(i) an order, pursuant to CPLR 3211, dismissing the complaint for failing to state a meritorious cause of action and/or in the alterative;

(ii) an order, pursuant to CPLR 32l2(a), granting the City leave to file a tardy motion for summary judgment post-Note of Issue for good cause and upon leave, and/or;

(iii) an order, pursuant to CPLR 32l2, granting summary judgment to the City on the grounds that, pursuant to Section 7-201 of the Administrative Code of the City of New York, the City did not have prior written notice of the defect that allegedly caused plaintiff s accident.

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]).

The New York State Court of Appeals has held that "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction […] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Contractor's Motion for Summary Judgment

The Contractor, (Dom's Lawnmaker Inc.), argues that it was hired by the City for the sole purpose of removing various tree stumps in the area, including a tree stump that had previously been located at the accident site. The Contractor argues that its job was to remove the stump and back-fill to grade, which it did to the satisfaction of the City. It argues that it was not hired to replace the sidewalk slab, and that the missing sidewalk slab is the primary basis upon which plaintiff's action is based.

There was no opposition to this motion and the City does not dispute the Contractor's account that it was hired to remove the stump and not to replace the sidewalk slab, which is the crux of plaintiff's claim. The City also does not dispute that the work done by the Contractor was inspected by the City and paid in full.

Accordingly, the Contractor's motion for summary judgment dismissing the claim against it is GRANTED.

City's Motion for Dismissal or Summary Judgment

The City argues that an empty tree well is not a defective condition and that the City is not liable because it did not cause or create the defective condition or have prior written notice of the same. In support of their argument, the City attached two sworn affidavits. The first affidavit was by RONNY GUERRERO, a paralegal working at the Department of Transportation of the City of New York (NYSCEF Document #305). Guerrero averred that he personally conducted a search in the pertinent electronic databases and identified and requested a search for corresponding paper records of permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps

for the sidewalk located at West 48th Street between 8th Avenue and 9th Avenue (on the side of 303 West 48th Street) in the County, City, and State of New York. This search encompassed a period of two years prior to and including April 17, 2016, the date that plaintiff claims to have been injured as a result of a trip and fall on a sidewalk defect.

The second affidavit was by YELENA BOGDANOVA, a paralegal assigned to the Department of Parks & Recreation of the City of New York, who personally conducted a search for installation records, which include complaints, service requests, inspections, work orders, permits and permit applications for the location at 303 West 48th Street, County, City and State of New York, for three (3) years prior to and including April 17, 2016 (NYSCEF Document #306).

The City argues that the results of these searches show that the City did not have prior written notice of the alleged defective condition and that the City did not cause and/or create the alleged defective condition.

While this court finds the record to be sufficient in this case to establish that the City did not have prior written notice of the alleged defect, the City failed to establish that it did not cause or create the defect.

Here, plaintiff alleges not only that the tree stump was improperly removed, but that the City negligently failed to install a replacement sidewalk slab over the tree well after the stump had been removed. Importantly here, plaintiff alleges that as a result of the City's act or omission, a "hole" was left in the sidewalk that caused plaintiff to trip and fall. In a circumstance such as this, where plaintiff alleges that the City caused and/or created the defective condition, prior written notice is not required.

As to the defect itself, the City argues, *arguendo*, that even if a defect existed, such defect is trivial and non-actionable, thus requiring dismissal of plaintiff's complaint.

Contrary to the City's arguments however, the New York Court of Appeals held in Hutchinson v Sheridan Hill House Corp., 26 NY3d 66 [N.Y. Ct. of Appeals 2015]:

> A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.

Here, the City asks the court to rely solely on the photographs taken by plaintiff (NYSCEF Document #301) which do not clearly show the dimensions, or the full context of the alleged defect. The City does not proffer any expert opinion, survey, or even any measurements to support the City's argument that the defect was trivial. *Compare* Lovetere v Meadowlands Sports Complex, 143 AD3d 539 (1st Dept 2016) ("Defendants established entitlement to judgment as a matter of law by submitting deposition testimony, expert opinion, and photographic evidence showing that the alleged hazardous defect in the ceramic floor tile (a 'spall') was physically insignificant and trivial"); Forrester v Riverbay Corp., 135 AD3d 448, 449 (1st Dept 2016) ("Defendant established its entitlement to summary judgment by submitting evidence showing that the allegedly uneven floor on which the fur from plaintiff's slippers got caught was a trivial defect and not actionable as a matter of law"); Serafin v Dickerson, 25 Misc 3d 1211(A) (Bronx. County Sup Ct 2009) ("In support of their motion for summary judgment, Defendants' have presented affidavits attesting that '[t]he fence posts are annexed to and placed in the side of the concrete walkway,' photographs which show the chain-link fence closely follows the outline of the concrete strip, and a survey, in which the solid line indicating the concrete strip is identical in length to the

broken line indicating dimensions of the chain-link fence. This evidence is sufficient to satisfy Defendants' prima facie burden of showing the chain-link fence encroachment is de minimis").

On this record, the City has failed to meet its burden in showing that the defect was trivial. *See, e.g.* Munasca v Morrison Mgt. LLC, 111 AD3d 564 (1st Dept 2013) ("The pictures submitted by defendants in support of their motion do not unequivocally demonstrate that the complained-of defect is trivial as a matter of law since its size is not discernable and the photos appear to show that the defect has an edge, which could constitute a tripping hazard […]. There is also no evidence showing the defect's dimensions at the time of the accident […]. Defendants' reliance on plaintiff's testimony that the height difference between the sidewalk flags at the time of her accident was approximately one inch, is insufficient to satisfy their prima facie burden, since the testimony was at best an estimate of the actual size of the defect, and was not based on an actual measurement"); Valentin v Columbia Univ., 89 AD3d 502 (1st Dept 2011) ("Contrary to defendant's contention, it failed to establish that the defect was trivial as a matter of law, since there is a lack of evidence demonstrating the size of the gap between the pavers"); Rivas v Crotona Estates Hous. Dev. Fund Co., Inc., 74 AD3d 541 (1st Dept 2010) ("The motion court improperly determined that dismissal of the complaint was warranted on the ground that the defect that allegedly caused plaintiff's accident was so trivial as to be nonactionable. The photographs, which show a missing portion of a triangular tile in the lobby floor, do not unequivocally demonstrate that defect is trivial […]. In the absence of evidence demonstrating the depth of the defect, and in light of plaintiff's testimony that her injury resulted from her heel getting caught in a hole caused by a missing tile, issues of fact remain as to whether the nature of the defect was such as to constitute a tripping hazard"); Denyssenko v Plaza Realty Services, Inc., 8 AD3d 207 (1st Dept 2004) ("The photographic evidence of the alleged hazard in defendant's parking lot to which plaintiff attributes her harm,

showing a jagged-edged pothole filled with water, does not permit the conclusion that the defect was trivial as a matter of law").

Conclusion

For the aforementioned reasons, it is hereby:

ORDERED that the Contractor's motion dismissing all claims against it is GRANTED; and it is further

ORDERED that the City's cross-motion is DENIED.

9/20/2022				**J. MACHELLE SWEETING, J.S.C.**			
DATE							
CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**