

**Padilla v City of New York**

2022 NY Slip Op 33377(U)

October 6, 2022

Supreme Court, New York County

Docket Number: Index No. 159235/2019

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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ROSA PADILLA,

Plaintiff,

- v -

THE CITY OF NEW YORK, PORT AUTHORITY OF NEW YORK AND NEW JERSEY, GEORGE WASHINGTON BRIDGE BUS STATION DEVELOPMENT VENTURE, LLC, UPPER MANHATTAN EMPOWERMENT ZONE DEVELOPMENT CORPORATION, PNC BANK, PNC FINANCIAL SERVICES GROUP, INC.

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 48

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

On September 23, 2019, plaintiff commenced this action asserting negligence claims against defendants. Plaintiff’s complaint alleges that on March 30, 2019, she tripped and fell over a metal track in the sidewalk in front of 4206-4208 Broadway, New York, New York (the “Premises”), sustaining injuries (NYSCEF Doc. No. 1 [Complaint at ¶2]; NYSCEF Doc. No. 25 [Notice of Claim]).

The City now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff’s complaint and all cross-claims against it, arguing that it is exempt from liability under Administrative Code §7-210 and that, even if it were not, dismissal is required because the City did not receive prior written notice of the metal track as required under Administrative Code §7-201. In support of its motion, the City submits the affirmation of David Atik, an employee of the New York City Department of Finance (“DOF”), who attests that his search of the DOF’s Property

Tax System database reveals that the City did not own the Premises on the date of plaintiff's incident and that the Premises is classified as Building Class Z9, and not as a classified one-, two-, or three-family residential property (NYSCEF Doc. No. 35 [Atik Aff. at ¶¶2-6]). The City also submits the affidavit of Henry Williams, a New York City Department of Transportation ("DOT") employee, detailing his search of DOT records related to the sidewalk of "Broadway between West 178th and West 179th Street (side of 4208 Broadway)" for the two-year period prior to and including the date of the subject incident (NYSCEF Doc. No. 34 [Williams Aff. at ¶¶3]). The City separately attaches the records produced by that search (NYSCEF Doc. No. 33]).

In opposition, plaintiff argues that the motion is premature because discovery is incomplete, as she has not had an opportunity to depose the City's witnesses regarding the City's property search and records. She also argues that: (1) the City is not entitled to summary judgment under Administrative Code §7-210 because it has not established that the subject metal track falls within the category of defective sidewalk conditions for which liability is shifted from the City under that statute; and (2) the City is not entitled to summary judgment under Administrative Code §7-201 because an issue of fact exists as to whether the subject metal track existed prior to the two year period encompassed by the City's records search.

### DISCUSSION

On a motion for summary judgment, the movant bears the burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence demonstrating the absence of any material issues of fact (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 [2005]). If this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the

existence of material issues of fact requiring a trial (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). The City has failed to meet its burden here.

Administrative Code §7-210 does not, at this juncture, provide grounds for summary judgment. That statute provides, in pertinent part, that:

Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags ... This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

Notwithstanding any other provisions of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two-, or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition...

(Administrative Code §7-210[b], [c] [emphasis added]).

This provision shifts tort liability for injuries arising from a defective sidewalk condition from the City to the owner of the property abutting that sidewalk, except where the property in question is a one-, two-, or three-family residential property that is owner occupied and used exclusively for residential purposes (Santos v City of New York, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018] citing Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 520 [2008]).

A property owner's responsibility under Administrative Code §7-210 is not unlimited, however, but "mirrors the duties and obligations of property owners" in Administrative Code §19-152 (Scuteri v 7318 13th Ave. Corp., 52 Misc 3d 391, 396 [Sup Ct, Kings County 2016], affd in part, appeal dismissed in part, 150 AD3d 1172 [2d Dept 2017]). Under that statute, "[t]he owner of any real property ... shall ... install, construct, repave, reconstruct and repair the sidewalk flags

in front of or abutting such property ... which contain a substantial defect” (Administrative Code §19-152[a] [emphasis added]). “Substantial defect” is defined to include, inter alia, a “hardware defects which shall mean (i) hardware or other appurtenances not flush within 1/2" of the sidewalk surface or (ii) cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition (Administrative Code §19-152[a][6]).

Accordingly, tort liability arising from the metal track will shift to the owner of the Premises under Administrative Code §7-210 only if the metal track constitutes a “hardware” or an “appurtenance” under Administrative Code §19-152. However, these terms “do not refer to things that, by their very nature, are intended to protrude from the sidewalk” such as signposts, fire hydrants, and light posts but instead refer to “that category of street hardware that is meant to be imbedded in the sidewalk and, when properly constructed, is flush with the surrounding sidewalk” (King v Alltom Properties, Inc., 16 Misc 3d 1125(A) [Sup Ct, Kings County 2007]) and, at this juncture, there is insufficient information in the record to determine which of these categories the subject metal track falls within. In short, as it is not clear whether the metal track falls within the ambit of Administrative Code §§19-152—and, by extension, Administrative Code § 7-210—the City’s motion for summary judgment on this ground is denied.

Neither has the City established that summary judgment based on a lack of prior written notice under Administrative Code §7-201 is appropriate. Section 7-201 of the Administrative Code provides, in pertinent part, that:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given to the commissioner of transportation or any

person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger, or obstruction complained of, or the place otherwise made reasonably safe.

(Administrative Code §7-201[c][2]).

The City contends it has met its prima facie burden under Administrative Code §7-201 through its submission of the Williams affidavit and the records attached thereto (See Elstein v City of New York, 209 AD2d 186, 187 [1st Dept 1994]; Bunn v City of New York, 180 AD3d 550, 551 [1st Dept 2020]). In opposition, plaintiff argues that summary judgment is premature because she has not had the opportunity to depose a City witness with knowledge of these records. She further argues, in the alternative, that she has raised a question of fact as to whether the subject metal track existed prior to the two-year period encompassed by the City's records search through her submission of Google Maps photos purportedly showing the location of plaintiff's trip and fall in July 2011 (NYSCEF Doc. No. 42).

The Court finds the latter argument unpersuasive—the Google Map photos plaintiff submits are not authenticated, are of poor quality, and, in any event, do not clearly depict the metal track at issue to reveal its condition in 2011 (See Rivera v City of New York, 181 AD3d 479 [1st Dept 2020] [plaintiff's reliance on Google maps photos to show the location she described walking to in her testimony was “misplaced” where photos were not authenticated and did not definitively show that plaintiff fell in front of defendant's building]).

The Court agrees, however, that it is premature to grant summary judgment to the City pursuant to Administrative Code §7-201, because facts essential to justify opposition to this branch

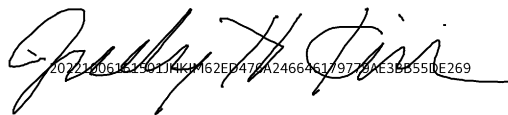
of the City’s motion may exist but are not currently known by plaintiff (See CPLR §3215(f); see also Figueroa v City of New York, 126 AD3d 438, 439 [1st Dept 2015] [“summary judgment should be denied as premature where the movant has yet to be deposed”]) Specifically, plaintiff has not had the opportunity to depose a City witness with knowledge of the records produced in support of the motion, which deposition could reasonably reveal, “information relevant to the existence of both prior written notice and whether any work was conducted at the subject location is within the [exclusive] knowledge [and] control of the City” (Begam v City of New York, 40 Misc 3d 1225(A) [Sup Ct, Queens County 2013] [internal citations omitted]; but see Kokubu v The City of New York, 2017 WL 3086808 [Sup Ct, NY County 2017]).

In light of the foregoing, it is

**ORDERED** that the City of New York’s motion for summary judgment is denied; and it is further

**ORDERED** that within twenty days of the date of this decision and order, plaintiff shall serve a copy of this decision and order with notice of its entry upon all defendants as well as the Clerk of the Court (60 Centre St., Room 141B), and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119) in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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10/6/2022  
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE