SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 62

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SUSAN BRANDNER,

Plaintiff,

- v -

THE HISPANIC SOCIETY OF AMERICA,

Defendant.

INDEX NO. 151166/2016

MOTION DATE 11/29/2023

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

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THE HISPANIC SOCIETY OF AMERICA

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK

Third-Party Defendant.

Third-Party
Index No. 595289/2021

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218
were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff alleges that on December 20, 2014, she tripped and fell on the sidewalk abutting 6l8-620 West 156th Street between Riverside Drive and Broadway, in the County, City, and State of New York.

Pending before the court is a motion where third-party defendant The City of New York (the "City")[1] seeks an order, pursuant to Civil Practice Law and Rules 3212, granting summary judgment in favor of the City, and dismissing the third-party Complaint and all cross-claims as against the City.

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]).

[1] The Notice of Motion and Affirmation in Support were filed on behalf of both The City of New York, and the New York City Department of Parks and Recreation. However, on May 30, 2024, counsel for the movant informed the court in writing that she had intended to file this motion only on behalf of The City of New York, as the New York City Department of Parks and Recreation had previously been dismissed from this case (*see* NYSCEF Doc. No. 72).

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 City's *Prima Facie* Case

The City argues that, pursuant to Section 7-210 of the Administrative Code of the City of New York, the City is not liable for plaintiff s alleged injuries as the City does not own the real property abutting the location where the alleged accident occurred; and the building's classification does not fall under any of the exemptions in the statute. In support of this argument, the City submitted, *inter alia*, a sworn Affidavit from Department of Finance employee David Atik, (NYSCEF Doc. No. 207), who personally conducted a search of the Property Information database for records relating to 618 West 156th Street, New York, New York. In the affidavit,

Mr. Atik concluded that on December 20, 2014 the City of New York was not the owner of this property, and that the property was classified as Building Class P7 (museum), and not as a one-, two-, or three-family solely residential property.

The City submitted a second sworn Affidavit from Anumon George, (NYSCEF Doc. No. 206), an employee of the City's Department of Transportation, who 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 156th street between Broadway Avenue And Riverside Drive East (On The Side Of 618-620 West 156th Street), in the county, City and State of New York, for a period of two years prior to and including December 20, 2014, the date upon which the plaintiff claims to have been injured. The City argues that the results of this search show that the City is not liable under 7-210 of the Administrative Code.

Section 7-210 of the Administrative Code of the City of New York, states that "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." The section further indicates that "[t]his 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." Also, "[n]otwithstanding any other provision 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."

Here, the City has submitted evidence, including a sworn Affidavit from Mr. Atik, that the subject property was not owned by the City, and was classified as Building Class P7 (museum), and not as a one-, two-, or three-family solely residential property. Further, this is not disputed by the opposition filings (discussed below). Given this, the court finds that the City has satisfied its *prima facie* burden for summary judgment, and the burden now shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact.

Opposition

In opposition, The Hispanic Society of America (the "Society") argued that summary judgment must be denied because there remain issues of fact regarding whether or not the City had prior notice of the alleged defect that caused plaintiff's accident, and whether or not the City was responsible for the maintenance and repair of the area where plaintiff fell. Specifically, the Society argues that even if the City was not responsible for the sidewalk itself, the City is responsible for *tree wells*, and the City "failed to address the possibility that the tree well contributed to the subject accident." Specifically, The Society argues:

> Part of the area circled by the plaintiff includes the border of the tree well at the accident location. Plaintiff testified that uneven bricks were the cause of her fall, but nowhere in her testimony does she specifically say that the bricks in the tree well did not contribute to the subject accident […] This is relevant as plaintiff's accident occurred on and/or directly adjacent to a tree well.

The Society also argues that the records produced by the City show at least one 311 complaint regarding the general area where plaintiff's accident occurred, and plaintiff testified that she was aware of three other people (her neighbor, her elevator man and a caretaker) who had made complaints regarding the subject location. Therefore, the Society argued, the City had adequate notice of the subject defect.

Conclusions of Law

In a prior decision in this case, (NYSCEF Doc. No. 142), the court (Hon. Robert R. Reed) addressed Motion No. 006, which had been filed by what was then a third-party-defendant, Urban Arborists, Inc. ("Urban"). Urban had been brought into this action via a third-party complaint filed by the Society. The court had found, in relevant part:

> Plaintiff testified that she was injured on December 20, 2014, at 11:00 a.m. while she was walking her two dogs on 156th Street, between Riverside Drive and Broadway. Plaintiff maintains that she was in front of Boricua College when she fell. She testified that the sidewalk in front of 156th Street was made of bricks in a herringbone pattern. Plaintiff recalls that she was walking on the sidewalk, slightly towards the street side, when she tripped in an area to the left of a tree. Plaintiff maintains that the toe of her boot caught on an uneven surface which caused her to fall forward. Plaintiff reached out her right hand to break the fall, but continued to fall and then to strike her face on the bricks.
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> Plaintiff testified that the bricks which caused her to fall did not lay flat and that there was a difference of about two to three inches between the top brick and the level of the sidewalk. Plaintiff maintains that the sidewalk was a reddish color and that a grayish, rectangular shape of cement or stones created a border around the tree well. Plaintiff testified that at the time of her accident, she was looking forward. She was aware, moreover, that, on other occasions, complaints had been made to "311" by her neighbor and by an elevator worker regarding the poor condition of the subject sidewalk.
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> […]
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> In opposition, ***The Hispanic Society argues that, because the accident occurred directly outside of the tree pit***, any tripping hazard was within the scope of the work performed by Urban. The Hispanic Society contends that Urban breached its duty of care in the performance of its tasks by failing to properly treat ***the sidewalk conditions immediately abutting the tree pit***. It further argues that the Hispanic Society detrimentally relied on Urban, inasmuch as Urban failed to eliminate the sidewalk

> inconsistencies. The Hispanic Society contends the raised brick acted as an instrument of harm to plaintiff, and that The Hispanic Society detrimentally relied upon Urban's expertise in the area.
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> The Hispanic Society contends that the September 17, 2013 correspondence sent by Logan, the work order, the invoice, and photograph of the condition together create an issue of material fact. It argues that Urban was prepared to cut bricks and level the sidewalk. The Hispanic Society argues that the invoice submitted by Urban states that the work it performed included the leveling of all paving lifted by roots. ***The Hispanic Society contends that, based upon Logan's statements, it is evident that Urban worked beyond the tree pit***, as it cut and adjusted bricks that were farther from the trunk in order to not damage the roots.
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> […]
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> Based upon the record, Urban meets its burden and demonstrates that it did not cause the subject accident or breach a duty to The Hispanic Society or to plaintiff. The Hispanic Society fails to meet its burden and does not demonstrate, other than by speculation, that Urban caused a defect in the sidewalk.

The above Order was affirmed by the Appellate Division 1st Department (*see* NYSCEF Doc. No. 163).

It is clear from the decision that plaintiff did not fall because of a condition in or on a tree well, but because of a condition that was on the sidewalk immediately abutting the tree well. It is also clear that in its filings in Motion No. 006, the Society itself conceded that the defective condition was *not* a part of a tree well. Therefore, the court finds it disingenuous that the Society now argues that the "bricks in the tree well may have contributed to the subject accident."

Further, with respect to the Society's arguments regarding any 311 calls providing adequate notice to the City, the Administrative Code 7–201 clearly provides that the relevant standard is "prior written notice," and the Court of Appeals has held that "a verbal or telephonic communication to a municipal body that is reduced to writing" cannot "satisfy a prior written notice requirement" (Gorman v Town of Huntington, 12 NY3d 275 [2009]). *See also* Haulsey v City of New York, 123 AD3d 606 (1st Dept 2014) ("Plaintiff's 311 calls were insufficient to satisfy the statutory requirement, even if her complaints were reduced to writing").

Given the above, the court finds that the Society has failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact sufficient to defeat the City's *prima facie* case.

Conclusion

Accordingly, it is hereby:

ORDERED that the City's motion is **GRANTED**; and it is further

ORDERED that the Complaint and any cross-claims are dismissed as against the City; and it is further

ORDERED that the caption shall be amended to remove the City of New York as a named defendant as well as the names of all parties that were previously dismissed from this case; and it is further

ORDERED that this action, including any pending motions, is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the City must serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made 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 the court's website at the address www.nycourts.gov/supctmanh).

11/14/2024
DATE

J. MACHELLE SWEETING, J.S.C.

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