

At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 22 day of November 2016

PRESENT:

HON. CAROLYN E. WADE,

Justice

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GUILLERMINA RIVERA,

Plaintiff,

Index No. 23705/11

-against-

ORDER

ST. MARY'S CATHOLIC CHURCH,

Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendant's motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	2 _____
Reply Affidavits/Affirmations.....	3 _____
Memorandum of Law.....	_____

Upon the foregoing cited papers and after oral argument, defendant ST. MARY'S CATHOLIC CHURCH ("Defendant") moves for an order granting it summary judgment, and

dismissal of GUILLERMINA RIVERA's ("Plaintiff") complaint.

The underlying negligence action was commenced by Plaintiff to recover damages for injuries that she allegedly sustained as a result of a defective condition on Defendant's property, located at 246 15th Street in Manhattan.

In support of the instant application, Defendant produces a copy of Plaintiff's December 12, 2012 examination before trial ("EBT") transcript ("Exhibit "D" of Defendant's motion). At her deposition, Plaintiff stated that on February 1, 2010, she tripped and fell on a sidewalk next to a church, but did not recall the name of it (Exhibit "D" pg. 10, lines 11-25 of Defendant's motion). When questioned about the cause of her fall, Plaintiff replied that she "looked down and the ground was a little up" (Exhibit "D" pg. 11, lines 3-6 of Defendant's motion). Plaintiff was then shown four photographs of the subject sidewalk, and was asked to mark an "X" where she fell. She marked an "X" directly next to a round metal object (Exhibit "G" of Defendant's motion [see photograph marked as Exhibit "A"]).

Movant also annexes a copy of the EBT transcript of Reverend Hospodar, who is the Pastor of Defendant, and resides at the church (Exhibit "F" of Defendant's motion). When shown the photograph that Plaintiff previously marked with an "X," the Reverend identified the round metal object on the sidewalk as a well cover installed by the "subway authority" as part of the Second Avenue subway project (Exhibit "F," pg. 20, lines 11-25 of Defendant's motion). He further testified that after returning from a parish trip, he observed a contractor with boring and drilling equipment on the sidewalk (Exhibit "F", pg. 20, lines 11-25, pg. 21, lines 10-25). The church was not notified of the construction project (Exhibit "F" pg. 21, lines 12-16).

Defendant argues that since it did not install the well cover, it is not responsible for its condition. It adds that it has neither repaired the well cover nor the sidewalk immediately surrounding it. Thus, Defendant contends that in the absence of a duty to repair or replace the monitor cover well, it is entitled to summary judgment.

In opposition, Plaintiff, by an attorney's affirmation, avers that the exact location of the accident is not established by the photograph she marked with an "X." She further argues that there are issues of fact as to whether Defendant had actual or constructive notice of the alleged defective condition, and was involved in its creation.

Defendant, in rebuttal, notes that Plaintiff neither refutes that the well cover was at the location of the occurrence nor that the well and its metal cap were installed by the New York City Transit Authority. Defendant points out that the photograph marked as Exhibit "C" at Plaintiff's EBT shows a defect "immediately adjacent to the monitor well cover" (Exhibit "G" of Defendant's motion).

As a general rule, section 7-210 of the Administrative Code of the City New York requires a landowner to maintain the public sidewalk abutting his/her premises. Liability is imposed upon the owner for injuries that result from the failure to maintain the sidewalk in a reasonably safe condition.

However, the New York City Department of Transportation Highway Rules provides an exception to the rule with respect to a sidewalk grating or cover not owned by the abutting landowner:

34 RCNY 2-07(b)(1): "The owners of covers or gratings on a street are responsible for monitoring the conditions of covers and gratings and the areas extending twelve inches outward from the perimeter of the hardware."

34 RCNY 2-07(b)(2): "The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."

34 RCNY 2-01 defines "street" to include a sidewalk.

In the instant case, Plaintiff does not dispute that the New York City Transit Authority owns the subject well cover. Moreover, during her EBT, Plaintiff unequivocally identified an area immediately adjacent to the well cover as the cause of her fall. (Exhibit "G" of Defendant's motion [see the photograph marked as Exhibit "A" at Plaintiff's EBT]). Plaintiff argues that Defendant has not established that the photograph was to scale. However, Plaintiff does not submit an affidavit or other admissible evidence to challenge its accuracy. In fact, Plaintiff's former counsel reportedly produced the photographs that she examined at the EBT.

Accordingly, based upon the above, Defendant's Motion for Summary Judgment is granted. Plaintiff's Complaint is hereby dismissed.

This constitutes the Decision and Order of the court.

A handwritten signature in black ink, appearing to read 'C. Wade', is written over a horizontal line. The signature is enclosed within a large, loopy oval shape.

HON. CAROLYN E. WADE

ACTING SUPREME COURT JUSTICE