

Montalbano v 136 W. 80 St. CP

2010 NY Slip Op 30483(U)

March 3, 2010

Supreme Court, New York County

Docket Number: 112714/08

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY

PART _____

Index Number : 112714/2008

MONTALBANO, FRANK

vs

136 WEST 80

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

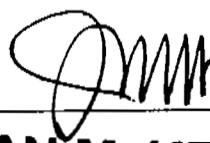
MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

MAR 10 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/3/10



JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----X

FRANK MONTALBANO,
Plaintiff,

Index No. 112714/08

-against-

136 W. 80 ST. CP, JAMES CALLANAN, and
80TH STREET OWNERS CORP.,

Defendants.

-----X

KENNEY, JOAN, M., J.S.C.

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For Defendants:

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Papers considered in review of this motion to change venue:

Papers

Notice of Motion, affirmation in support, Exhibits
Notice of Cross motion, affirmation in support, Exhibits
Affirmation in opposition, Exhibits
Affirmation in opposition
Affirmation in Opposition to Motion-in-Chief and Cross Motion
Reply affirmation
Reply affirmation

Numbered

1-6
7-19
20-26
27
28
29
30

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In motion sequence 001, defendant 80th Street Owners Corp. (Owners) moves, pursuant to CPLR 3212, for an Order dismissing plaintiff's complaint and all cross claims. Defendant James Callanan (Callanan) cross-moves, pursuant to CPLR 3212, for identical relief.

Factual Background

The following facts are undisputed. On March 24, 2008, at approximately 7:30 P.M., plaintiff was walking on the sidewalk located between 134 West 80th Street and 136 West 80th Street, New York, New York, when he allegedly tripped and fell over a raised and uneven block of sidewalk. As a result of the alleged accident, plaintiff sustained bilateral elbow fractures, with the right elbow suffering a dislocated fracture, which required surgery and the implantation of a prosthetic radial

head. Defendant Owners is the owner of 134 West 80th Street, and defendant Callanan is the owner of 136 West 80th Street. Plaintiff brings this action in negligence against the defendants.

Legal Analysis

A moving party seeking dispositive relief must make a prima facie showing of entitlement to judgment as a matter of law. Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient enough to raise an issue of fact warranting a trial. *St. Claire v Empire General Contracting & Painting Corp.*, 33 AD3d 611 (2nd Dept 2006).

Administrative Code of the City of New York (Administrative Code) section 7-210 imposes liability for the failure to maintain public sidewalks abutting real property on the owners of the abutting real property. The Code defines “real property” as including “real estate, lands, tenements and hereditaments, corporeal or incorporeal.” Administrative Code § 1-112 (11).

Here, defendant Callanan presents evidence that the land abutting the sidewalk where the plaintiff’s accident occurred is actually owned by defendant Owners, even though part of Callanan’s building was built on that piece of Owners’ land. Callanan submits the affidavit of Angelo J. Fiorenza, a professional land surveyor, who affirms that the entire wall supporting the westerly side of the stairway to Callanan’s building lies upon Owners’ land and the expansion joint of the sidewalk in front of that wall lies on Owners’ land.

Callanan argues that, since it is actually Owners’ land that abuts the sidewalk, pursuant to Administrative Code section 7-210, Owners is the party liable for the failure to maintain that piece of sidewalk.

As a matter of law, the court agrees that, if the land abutting the sidewalk is owned by Owners, under section 7-210, Owners would be the party potentially liable even though part of

Callanan's building is encroaching on that land. Looking at the language of section 7-210, as well as the definition of real property under section 1-112, the intention of section 7-210 is to make landowners whose property abuts the sidewalk liable for their failure to maintain the sidewalk. The situation presented here is very unique in that we have a structure encroaching on land owned by someone else, which abuts the sidewalk. However, structures are built and structures are demolished, but the land always remains. Therefore, in a situation such as the one presented here, it would only make sense that the owner of the actual land abutting the sidewalk be the one liable for a failure to maintain such sidewalk.

That being said, defendant Owners and plaintiff had an opportunity to raise an issue of fact in regard to the ownership of the land. Both parties failed to do so. Neither party disputes the findings of Mr. Fiorenza. Instead, both Owners and plaintiff argued that Callanan exercised control over the sidewalk and admitted in his deposition that the portion of the sidewalk where defendant fell was within his property line. The fact that Callanan exercised control over the sidewalk is irrelevant here, as section 7-210 makes no mention of holding a person who exercises control of the sidewalk liable. The language of the Code is plain and clear that it is the owner of the abutting real property who is liable for a failure to maintain the sidewalk. Administrative Code § 7-210.

Further, although Callanan stated, in his May 2009 deposition, that the portion of the sidewalk where defendant fell was within his property line, at that time, he was unaware of the fact that the land abutting that piece of sidewalk was owned by Owners. It was not until after the May 2009 deposition that Mr. Fiorenza rendered his findings.

Callanan having prevailed on his cross motion, defendant Owners' motion for summary judgment is denied because Owners did not make a prima facie case showing that Callanan's property abutted the sidewalk where plaintiff's accident occurred.

Accordingly, it is

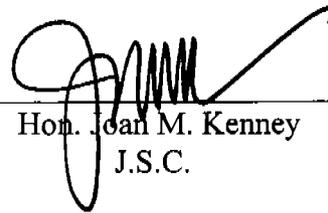
ORDERED that defendant 80th Street Owners Corp.'s motion for summary judgment is denied; and it is further

ORDERED that defendant James Callanan's cross motion for summary judgment dismissing the complaint and cross claims against him is granted and the complaint is hereby severed and dismissed as against defendant James Callanan, and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue and the parties are to appear as scheduled to Mediation 2 scheduled for April 13, 2010.

Dated: March 3, 2010

ENTER:



Hon. Joan M. Kenney
J.S.C.

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