

Perez v El Mundo Dept. Store, Inc.

2011 NY Slip Op 32720(U)

October 20, 2011

Supreme Court, New York County

Docket Number: 111409/2010

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE **BARBARA JAFFE**
J.S.C.
Justice

PART 5

Index Number : 111409/2010
PEREZ, MARIA LUISA
VS.
EL MUNDO DEPARTMENT STORE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT
CALL # 118

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

is motion to/for summary judgment
No(s) 1
No(s) 2,3
No(s) 4

Upon the foregoing papers, it is ordered that this motion is

OCT 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPLISHING DECISION / ORDER**

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

Dated: 10/20/11
OCT 20 2011

BARBARA JAFFE, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 5

-----X
 MARIA LUISA PEREZ and HERMAN PEREZ,

Index No. 111409/10

Plaintiffs,

Motion Subm.: 8/9/11

Motion Seq. No.: 003

-against-

DECISION & ORDER

EL MUNDO DEPARTMENT STORE, INC., FATA
 INVESTMENTS, INC., and THE CITY OF NEW
 YORK,

Defendants.

-----X
 BARBARA JAFFE, JSC:

For plaintiff:

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For City:

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For El Mundo:

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 Peisner Girsh *et al.*
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 212-964-0020

By notice of motion dated June 17, 2011, defendant City moves pursuant to CPLR 3212 for an order dismissing the complaint against it. Plaintiffs and defendant El Mundo Department Store, Inc. (El Mundo) oppose.

I. BACKGROUND

On May 16, 2010, plaintiff Maria Luisa Perez was allegedly injured when she tripped and fell on the sidewalk on the south side of West 173rd Street in front of 4086 Broadway in Manhattan, between Wadsworth and St. Nicholas Avenues (the premises). (Affirmation of Suzanne K. Colt, ACC, dated June 17, 2011 [Colt Aff.], Exh. A).

On or about July 14, 2010, plaintiffs served City with their notice of claim, and on or about August 24, 2010 with a summons and complaint. (*Id.*, Exhs. A, B). On or about

September 14, 2010, City served its answer. (*Id.*, Exh. C).

In a discovery response, City represented that a search of its records for the accident location for the two years prior to and including plaintiff's accident date yielded two permits and one inspection. One of the permits was issued to Vales Construction Corp. (Vales) for it to open the roadway and/or sidewalk at West 173rd Street between St. Nicholas and Wadsworth Avenues for a City Department of Design and Construction (DDC) reconstruction project (the project). The permit was valid from April 15, 2010 to June 9, 2010. (*Id.*, Exh. E).

By affidavit dated June 7, 2010, Thomas Foley, a DDC Assistant Commissioner, states that he searched DDC's database for documents related to the project and reviewed the search results and that "although work was performed in that area, no work was done on the sidewalk on the south side of West 173rd Street in that block, adjacent to the building whose address is 4086 Broadway." The documents reviewed by Foley are not annexed. (*Id.*, Exh. F).

II. CONTENTIONS

City argues that it may not be held liable as it did not own the premises abutting the sidewalk on which plaintiff fell. In support, City submits an affidavit from David C. Atik, a City employee, who attests that his search of City's records reveals that City did not own the premises on May 16, 2010 and that the premises is classified as a Class K1 (store building). (Colt Aff., Exh. D). City also denies that it caused or created any dangerous condition on the sidewalk, relying on Foley's statement that no work was performed for the project at the accident location. (*Id.*).

Plaintiffs assert that City's motion is premature as discovery has not yet commenced and no depositions have been held, and that triable issues remain as to what repairs or work were

performed by or on behalf of City at the location of her accident. (Affirmation of James W. Bacher, Esq., dated July 7, 2011).

El Mundo maintains that City fails to establish, *prima facie*, that it did not cause or create the dangerous condition as Foley's affidavit is self-serving and conclusory and City fails to provide information about the scope of work on the project, and that City's motion is premature. (Affirmation of Jason J. Rebhun, Esq., dated July 13, 2011).

In reply, City disagrees. (Reply Affirmation, dated July 20, 2011).

III. ANALYSIS

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. (Admin. Code 7-210[c] [City liable for injury caused by failure to maintain 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 . . ."]]). Therefore, after September 14, 2003, the effective date of the Sidewalk Law, the abutting property owner, not City, is generally liable for accidents caused by the failure to maintain a sidewalk. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, City has established that it is not the abutting landowner and that the premises is not exempt. (See *Nicoletti v City of New York*, 77 AD3d 715 [2d Dept 2010] [City established *prima facie* entitlement to dismissal by showing that plaintiff fell on sidewalk abutting property owned by another entity]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [dismissing action against City as plaintiff fell on sidewalk abutting property owned by corporate entity and

not exempt]; *see also Forbes v Aaron*, 81 AD3d 876 [2d Dept 2011] [as premises was four-family multiple dwelling, liability for defective sidewalk shifted from City to abutting premises owner]; *Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [City entitled to dismissal of complaint as it did not own property on which plaintiff fell, and as property was vacant lot and thus not exempt pursuant to section 7-210]).

However, as discovery has not yet commenced and to the extent that City may be held liable if it caused or created a defective condition on or made special use of the sidewalk (*see Harakidas v City of New York*, 86 AD3d 624 [2d Dept 2011] [New Sidewalk Law did not shift tort liability from abutting owner to City “where the sole proximate cause of the injury is a defect created by the City's affirmative act of negligence”]; *Adler v City of New York*, 52 AD3d 549 [2d Dept 2008] [although City established that abutting property was not exempt under section 7-210, discovery may lead to information showing that City created condition or made special use of sidewalk]; *Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [Sup Ct, Kings County 2007] [finding no indication in New Sidewalk Law that City may not be held liable if it caused or created defect or made special use of sidewalk]), City has not established that it did not cause or create the dangerous condition as the permit issued to Vales reflects that it performed work on behalf of City in the area where plaintiff fell, and Foley’s conclusion that Vales performed no work in front of the premises is self-serving, conclusory, and unsupported by any of the documents that he allegedly reviewed. The other parties are entitled to question Foley about his conclusion and to review the documents underlying it.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC 
BARBARA JAFFE
J.S.C.

DATED: October 20, 2011
New York, New York
OCT 20 2011


OCT 24 2011
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COUNTY CLERK'S OFFICE