

Vucetovic v Epsom Downs, Inc.

2006 NY Slip Op 30210(U)

September 18, 2006

Supreme Court, New York County

Docket Number: 0113773/2004

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 113773/2004

VUCETOVIC, DZAFER

vs

EPSOM DOWNS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 7/20/06

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 (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
SEP 21 2006
NEW YORK
COUNTY CLERK'S OFFICE

SEP 18 2006

Dated: _____



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

REASON(S) TO BE FULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
DZAFER VUCETOVIC and ZYLA
VUCETOVIC,

Plaintiffs,

-against-

EPSOM DOWNS, INC.,

Defendant.
-----X

Decision/Order

Index No.: 113773/04

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Def's motion [sj] w/PWT, JR. affirm in support, exhs.	1
Pltfs' affid in opp (DV) w/exh	2
Pltfs' affirm in opp (CSS)	3

-----X

FILED

SEP 21 2006

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant moves for summary judgment dismissing the plaintiff's complaint.

Discovery has been completed and plaintiff filed his note of issue on March 16, 2006.

This motion was brought within 120 days of such filing, therefore it will be considered by the court. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The motion is opposed.

Plaintiff Dzafer Vucetovic¹, age 47, fell as he was walking along 58th between 2nd and 3rd Avenues in New York County. It was a dry day and there was no precipitation or wet condition on the sidewalk. At his EBT, plaintiff was showed photographs of the

¹The other named plaintiff is his wife who asserts a directive action for loss of consortium.

sidewalk. He examined them and testified "I tripped right there. I put my right foot right there and I twisted and fell," referring to the edge of an empty tree well or "pit" in the sidewalk. Presently, in his sworn affidavit in opposition, plaintiff clarifies that: "I tripped and fell when my right foot stepped into the tree pit and got caught against the edge of one of the cobble stones in the pit." Plaintiff admits that he was not looking down at the time of his accident, but looking straight ahead in the direction he was heading.

Defendant owns the building abutting the sidewalk on which the tree well is located. Plaintiff contends that the defendant was negligent in its ownership, operation, management, maintenance and control of the tree well because it failed to repair this dangerous and/or hazardous condition that existed in front of its building on 58th Street.

In support of his arguments and claims, plaintiff relies upon the "sidewalk law" which became effective on September 14, 2003, a few months before his accident. Local Law 49, Admin. Code § 7-210.

Defendant argues that it should be granted summary judgment, dismissing the complaint for three reasons. First, defendant contends it did not have actual or constructive notice of the dangerous condition alleged.

Defendant alternatively argues that it did not create the dangerous condition complained of and that the City removed the tree that had been planted in the well. In support, defendant offers the EBT testimony of M. Javier, its employee, and that of Mr. Issembert, an officer. Both have testified that defendant made no repairs or changes to the sidewalk or the pit.

Defendant's third argument is that plaintiff's accident was not due to a defect on the *sidewalk* at all, but because plaintiff stepped on the edge of the tree well or into the

tree well itself. Defendant contends that it is not legally obligated to make repairs to the tree well or the cobblestones surrounding it, only to the flagstones that constitute the sidewalk. Therefore, defendant argues, the sidewalk law is entirely inapplicable to plaintiff's accident, it is not otherwise legally responsible for his accident, and summary judgment should be granted to it, dismissing the case.

Discussion

On a motion for summary judgment the movant has the initial burden of setting forth evidentiary facts to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if this burden is met, will it then shift to the opposing party who must establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. Where only issues of law are raised, summary judgment is appropriate. See: Hindes v. Weisz, 303 AD2d 459 (2nd dept. 2003).

This is a case of first impression involving the legal issue of whether a tree pit or tree well or "pit" in or on a sidewalk is part of that sidewalk, and therefore the legal responsibility of the abutting landowner to maintain and repair under section 7-210 of the Administrative Code effective September 13, 2004.

Although defendant relies upon a number of cases holding that a landowner is not responsible for sidewalk defects unless it created the defect, or had notice of it, or made a special use of the sidewalk, these cases all involve accidents predating the

change in the Administrative Code adding the sidewalk law. Admin. Code § 7-210; Hausser v. Giunta, 88 NY2d 449 (1996); Diaz ex rel. Martinez v. Eminent Associates, LLC, 31 AD3d 296 (1st dept. 2006); See also: Rodriguez v. City of New York, 12 AD3d 282 (1st dept. 2004).

With the enactment of section 7-210 the legislature imposed a specific duty on a real property owner to maintain the sidewalk abutting its property. Before the change in the code, a real property owner had no codified duty to make sidewalk repairs and as a general matter, the City was liable for accidents caused by sidewalk defects. Hausser v. Giunta, *supra*; Diaz ex rel. Martinez v. Eminent Associates, *supra*; Rodriguez v. City of New York, *supra*. The imposition of tort liability used to turn largely on the facts of the individual case and issues of notice. A real property owner could only be held responsible for injuries on a sidewalk if it created the defect, made a special use of the sidewalk, or had notice of the dangerous condition. Hausser v. Giunta, *supra*; Diaz ex rel. Martinez v. Eminent Associates, *supra*; Zektser v. City of New York, 18 AD3d 869 (2nd dept. 2005). With the addition of this new code provision, however, a violation of the sidewalk law is, for tort purposes, "evidence of negligence" against the abutting property owner. Elliot v. City of New York, 95 NY2d 730 (2001).

To prevail on this motion for summary judgment, defendant must prove that, as a matter of law, section 7-210 of the Administrative Code does not apply to the facts of this case. See: Buckholz v. Trump 767 Fifth Avenue LLC, 4 AD3d 178 (1st dept. 2004). Plaintiff has only asserted one cause of action, which is for negligence based upon a code violation. Elliot v. City of New York, *supra*. He has not pled, nor can prove, that

defendant made a special use of the sidewalk, it had notice of a dangerous condition, or that it created the condition alleged. If the sidewalk law does not apply, this case must be dismissed because there would be no basis to hold defendant liable.

In relevant part, the sidewalk law provides as follows:

“§ 7-210. Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

b. 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 . . . “

“Sidewalk” is defined in the administrative code as “that portion of the street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for use by pedestrians.” Admin. Code § 19-101.

“Street” is defined as having the meaning ascribed in section 1-112. Section 1-112 of the Administrative Code provides that the “street” is “[a]ny public street, avenue, road, alley lane, highway, boulevard, concourse, parkway, driveway, culvert, sidewalk, crosswalk, boardwalk, viaduct, square or place . . .”

The language of the code section is to be given its plain meaning and construed according to the fair import of its terms. City of New York v. Castro, 160 AD2d 651 (1st dept. 1990). A literal reading of § 7-210 reveals that the abutting landowner is responsible only for *sidewalk* repairs. There is no indication that this includes repairs to other objects or openings that may be located on, or as a part of, the sidewalk, unless placed there by the owner and therefore constitute a special use thereof. Lucciola v. City of New York, 2005 NY Slip Opn 25584 (Sup. Ct. Bronx Co. 2005). ([Http://www.nycourts.gov/reporter/3dseries/2005/2005_25584.htm](http://www.nycourts.gov/reporter/3dseries/2005/2005_25584.htm)) (*nor*). Were the court to adopt plaintiff's argument, that the entire sidewalk, including the tree well, is the responsibility of the abutting property owner, it would be adding in language or a meaning not expressly codified.

No changes have been made to other code provisions, for example those pertaining to encumbrances on sidewalks, such as trees. Admin. Code §§ 18-106 and 107. Tree pruning and removal continues to be the responsibility of the City. Likewise, section 19-152 pertaining to sidewalk repairs that the Department of Transportation can order a property owner to repair, though modified after the addition in the sidewalk law, has not be changed to include tree wells. Admin. Code § 19-152. It parallels the language in § 7-201, providing that the Department of Transportation can order the property owner to "install, reinstall, construct, reconstruct, repave or repair only those sidewalk flags which contain a substantial defect . . ."

Had the legislature intended to shift responsibility (and therefore tort liability) to the property owner for anything that is part of, or located on, a sidewalk (such as a tree well) it could and should have so articulated. Section 7-210 plainly states that the

abutting property owner is responsible for the maintenance and repair of "sidewalk flags" (i.e. the surfaces of the sidewalk or pavement that form the pedestrian way), but it makes no express reference to tree wells.

Plaintiff has testified (and now further states) that he fell when he was walking along the sidewalk with defendant's building to his left and his root foot closest to the tree well on his right. He fell either when he stepped on the edge of the tree well consisting of cobblestones or into the tree well itself. Under either scenario, he did not fall because of a defect on the sidewalk, but because of the opening of the tree well that is on the sidewalk. Nothing in the sidewalk law requires the property owner to eliminate a tree well, or makes it responsible for fixing the well itself. In opposition, plaintiff has failed to raise a factual dispute whether the sidewalk itself (e.g. the flagstone) was defective.

Based upon the facts of this case which involve no upraised sidewalk, or other defect, the court holds, that as a matter of law, defendant is not legally responsible for maintaining the tree well or repairing it. Since the sole basis for this action is the alleged violation of the "sidewalk law," and that code does not impose a legal responsibility on defendant to make any repairs to the tree well, or the cobblestones surrounding it, there is no violation of the statute, and therefore no evidence of negligence. Elliot v. City of New York, 95 NY2d 730 (2001). Therefore, defendant's motion is granted and the Clerk shall enter judgment in favor of defendant against plaintiff dismissing the complaint and this action.

Conclusion

It is hereby:

ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint is hereby granted; and it is further

ORDERED that the complaint and this case is dismissed; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendant, against plaintiff dismissing this action; and it is further.

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
September 18, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
SEP 21 2006
NEW YORK
COUNTY CLERK'S OFFICE