

Counihan v City of New York

2004 NY Slip Op 30321(U)

March 2, 2004

Sup Ct, NY County

Docket Number: 10368/91

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 7
Justice

MAUREEN COUNIHAN,

010368

INDEX NO. 10368/1991

Plaintiff,

MOTION DATE Jan. 6, 2004

- v -

THE CITY OF NEW YORK, 247-10 ASSOCIATES,
A General Partnership by its Partners, et al.,

MOTION SEQ. NO. 006

Defendants.

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Petition-- Order to Show Cause -- Affidavits -- Exhibits _____	<u>1</u>
Answering Affidavits -- Exhibits _____	<u>2, 3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion by the non-municipal defendants for summary judgment is DENIED in accordance with the annexed memorandum Decision and Order.

FILED
MAR 15 2004
COUNTY CLERK'S OFFICE
NEW YORK

Paul G. Feinman
J.S.C.

Dated: March 2, 2004

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

-----X

MAUREEN COUNIHAN,
Plaintiff,

against

Index Number 10368/91
Motion Date 01/05/04
Motion Seq. No. 006

THE CITY OF NEW YORK, 247-10 ASSOCIATES,
A General Partnership by its Partners, H.P.
INVESTMENT CO., FRANK T. CHIARELLO, AMC
10TH STREET ASSOCIATES, THOMAS F.
CAMPENNI and 3S EQUITIES, THE THOMAS
FELIX ASSOCIATES, INC., d/b/a ROBERT-
THOMAS CO., RENE VALTE and THOMAS
P. CAMPENNI, Individually,
Defendants.

DECISION AND ORDER

-----X

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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1</u>
City's Affirmation in Opposition	<u>2</u>
Plaintiff's Affirmation in Opposition	<u>3</u>
Reply	<u>4</u>

PAUL G. FEINMAN, J.:

The non-municipal defendants move for summary judgment pursuant to CPLR 3212 and dismissal of the complaint and cross claims as against them. For the reasons set forth below, the motion is denied in its entirety.

¹ Although it appears that the motion was orally argued before the Hon. Louise Gruner Gans, a decision was not rendered prior to the effective date of her retirement, December 31, 2003. The motion and the action were transferred to this court's inventory effective January 5, 2004. The court has rendered its decision solely upon the papers enumerated.

Plaintiff was injured on March 8, 1990, after she exited the premises known as 274 East 10th Street, New York, New York, and tripped and fell as a result of snow and ice that had accumulated in a raised elevated broken or cracked portion of the sidewalk in front of the premises (Not. of Mot. Ex. A, Verified Complaint ¶¶ 1, 41-43). She alleges that although the heavily trafficked sidewalk had a section which was improperly paved or constructed and had improper drainage, allowing snow and ice to accumulate in that area, there was no warning to pedestrians, and the superintendent was negligent in attending to the removal of the snow and ice or applying salt or sand (Not. of Mot. Ex. C, Bill of Part. ¶¶ 4, 6-8).

According to plaintiff's deposition testimony, she exited her apartment building about 10:00 a.m. on March 9, 1990 (Not. of Mot. Ex. C, Counihan Dep. 22, 23). She was "treading very cautiously, because there was a light snowfall the night before," and as she neared the curb, her foot went into a "pothole" that had been "camouflaged" by the ice and snow, causing her to lose her balance and to fall on her shoulder, head and hip (Counihan Dep. 45). No salt or sand or other abrasive had been spread on the sidewalk (Counihan Dep. 51-52). While plaintiff could not identify who among defendants' employees or agents had shoveled the snow, someone "had tracked a shovel from the east to the west." (Counihan Dep. 54-55). She characterized the snow accumulation alternately as a "dusting" (Counihan Dep. 50), and "a lot of snow" which made it impossible for her to "see any sidewalk in front of" her building and no other (Counihan Dep. 67, 72). She stated any previous snow had disappeared and the streets had been clear (Counihan Dep. 50).

A tenant in the apartment building, John Davis, took photographs of the sidewalk area that afternoon (Counihan Dep. 57), which are attached to defendant's Reply as Exhibit B. According to plaintiff, the photographs show more slush than had existed in the morning when she fell (Counihan

Dep. 63). The photographs also appear to show snow in front of other buildings on the block and, in the photograph on which plaintiff indicated the location of her fall, it is apparent that even in the afternoon, some snow remained in the area she fell. Plaintiff testified that she had occasion to note prior to her accident that the sidewalk was cracked or broken (Counihan Dep. 60, 61). She had never noticed that it had been repaired (Counihan Dep. 62).

The defendants consist of the property's owner (274-10 Associates), the partners that make up the owner (H.P. Investment Co., Frank Chiarello, AMC 10th Street Associates, 3S Equities, and Thomas F. Campenni), and the managing agents for the property (Thomas Felix Associates, Inc., a part of Robert Thomas Company [Not. of Mot., Aff. in Opp. Ex. B, Trizzino Dep. 7, 8] and Rene Valte [Verified Complaint ¶ 30]).³ According to the representative from H.P. Investment Co., there was a general procedure for all the buildings owned by the company to keep them clean, maintained, and in proper order and he assumed "that this went as far as snow removal and anything else." (Trizzino Dep. 19). He had no knowledge of how snow or ice removal at the various properties was done (Trizzino Dep. 19). He stated that he "guessed" that management would direct the supers or porters as to what their responsibilities were concerning building maintenance, but did not know if there were written guidelines (Trizzino Dep. 20). He assumed any instruction as to their duties would come from Robert Thomas Company, the managing agent (Trizzino Dep. 20). He testified that the managing agent was responsible for "all the repairs on the building" (Trizzino Dep. 23). He did not know what sort of snow removal equipment was used (Trizzino Dep. 23). Curiously absent from the extant record is either the testimony or affidavit of the defendants' superintendent or other individual with actual firsthand

³Identified by the representative from H.P. Investment Co. as "AMC Realty Inc." (Trizzino Dep. 8).

⁴Defendant's witness did not know who Rene Valte is (Trizzino Dep. 8).

knowledge of what transpired regarding snow shoveling back in March **1990**.

Plaintiff's theory of liability is, in essence, one of concurrent causes: the City's negligent maintenance of the sidewalk and the non-municipal defendants' failure to use reasonable care in its snow removal. At the time of plaintiff's accident, liability for injuries resulting from the negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks was normally placed on the municipality and not the abutting landowner unless the owner had constructed or configured the sidewalk for a special use, or affirmatively caused the defect, or negligently constructed or repaired the sidewalk, or there existed a local ordinance or statute specifically charging the abutting landowner with a duty to maintain and repair the sidewalks and imposing liability for injuries resulting from the breach of that duty (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]). Here, the record is devoid of any evidence of a special use of the sidewalk, or that defendants caused the defect or negligently repaired the sidewalk. If this was a sidewalk case, without the issue of snow removal, the non-municipal defendants would clearly be entitled to summary judgment (see, e.g., *Martinez v City of New York*, 293 AD2d 392 [1st Dept. 2002]). However, plaintiff alleges that because defendants failed to properly remove the snow and ice, she did not see the crack and hole in the sidewalk into which she stepped, losing her balance and then falling.

An owner of real property has no duty to the public to remove snow and ice which naturally accumulate on the sidewalk in front of the premises, and will not be liable unless there is evidence that the owner attempted to remove the snow and by such action increased the hazard (*Steo v New York University*, 285 AD2d 420, 421 [1st Dept. 2001]). However, once a property owner undertakes the task of removing snow and ice from a public sidewalk, it must do so with reasonable care (*Glick v City of New York*, 139 AD2d 402, 403 [1st Dept. 1988]).

Here, the non-municipal defendants argue that the record fails to establish they or their agents attempted to remove the snow referred to by plaintiff alternatively as a “dusting” and “a lot of snow” and thereby increased the hazard created by the snow itself as well as aggravating City’s negligent maintenance of the sidewalk. While the circumstantial evidence of plaintiff’s testimony regarding the “tracks” of a shovel across the sidewalk may or may not be found by a finder of fact to support a finding that the defendants’ employees or agents cleared the snow, curiously absent is any testimony or affidavit evidence from defendants’ superintendent or other individual which negates the inference. Suffice it to say, when the extant record is viewed in the light most favorable to the plaintiff as the non-moving party (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1963]), “questions of material fact exist as to ... the nature and extent of [the non-municipal] defendant[s]’ snow and ice removal from the subject sidewalk, thereby precluding summary relief” (*Peasah v C & S Value Stores, Inc.*, 306 AD2d 14 [1st Dept. 2003]). Accordingly, the non-municipal defendants’ motion to dismiss the complaint and cross claims pursuant to CPLR 3212 is denied in its entirety. It is therefore

ORDERED that the motion for summary judgment and dismissal of the complaint pursuant to CPLR 3212 is denied.

This constitutes the decision and order of the court. The court has mailed copies of this decision to all counsel.

Dated March 2, 2004
New York, New York

Paul J. Feinman

J.S.C.

FILED
MAR 25 2004
COUNTY CLERK'S OFFICE
NEW YORK