

Mitchell v City of New York

2005 NY Slip Op 30381(U)

July 13, 2005

Supreme Court, New York County

Docket Number: 110627/00

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 62

Eric Mitchell

INDEX NO. 110627/00

MOTION DATE _____

- v -

The City of New York
et al.

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for cross motions summary judgment

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

PAPERS NUMBERED

12

Answering Affidavits — Exhibits _____

7, 8, 9

Replying Affidavits _____

10

Notice of Cross Motions etc.

3, 4, 5, 6

② Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion cross motions for summary judgment are decided in accordance with the attached memorandum decision.

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

FILED
JUL 22 2005
HON. DORIS LING-COHAN

Dated: 7/13/05

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
ERIC MITCHELL,

Index No. 110627/00

Plaintiff,

Motion Sequence No. 002

-against-

THE CITY OF NEW YORK, BATTERY
PARK CITY AUTHORITY and BATTERY
PARK CITY PARKS CONSERVANCY
CORPORATION,

Defendants.

-----X

BATTERY PARK CITY AUTHORITY
and BATTERY PARK CITY PARKS
CONSERVANCY CORPORATION,

Third-Party
Index No. 3590464/03

Third-Party Plaintiffs,

-against-

NEW YORK MERCANTILE EXCHANGE,

Third-Party Defendant.

-----X

LING-COHAN, J.:

In this personal injury action, third-party defendant New York Mercantile Exchange (NYMEX) moves for dismissal of the third-party complaint of defendants Battery Park City Authority and Battery Park City Parks Conservancy Corporation (together, Battery Park) pursuant to CPLR 3212. Defendant the City of New York (City) cross-moves for dismissal of plaintiff's complaint and all cross-claims against it pursuant to CPLR 3212. Battery Park cross-moves for dismissal of plaintiff's complaint and all cross-claims against it pursuant to CPLR 3212.

On April 30, 1999 at 12:45am, plaintiff Eric Mitchell allegedly was injured when he tripped and fell at the back of the building located at One North End Avenue, New York, New York (Premises). Plaintiff alleges that he suffered personal injuries as a result of a slip and fall accident while working as a security guard for S.E.B. Services of New York, Inc. near the southwest corner of the NYMEX building, located at One North End Avenue. There was an ongoing construction project at the location where plaintiff fell, and immediately prior to his fall, he was caused to walk on a dirt pathway due to the uprooting of the bricks on the sidewalk. Plaintiff asserts that the cause of his slip and fall accident was the accumulation of dirt from the construction project on the bottom of his shoes and on the cement flooring near the recessed southwest entrance to the NYMEX building.

NYMEX is a corporation organized under the Not-For Profit Corporation Law of the State of New York and a tenant at the Premises where plaintiff's injury occurred. Battery Park City Authority is a public benefit corporation of the State of New York. It is the landlord of the Premises and is the owner of the public open space that runs from the west side of the NYMEX building to the water. Battery Park City Parks Conservancy is the organization that maintains all the hard surfaces and public open spaces in Battery Park City, which includes all of the land between the west side of the NYMEX building and the water.

Plaintiff attributes defendants' liability as follows: (1) defendants had a duty to maintain the sidewalk in good repair, (2) Battery Park owned, operated, maintained, managed, and controlled the public sidewalk where plaintiff's injury occurred, and (3) on the day of the accident, defendants had actual or constructive knowledge that the Premises was in a dangerous, defective, and unsafe condition.

In the third-party complaint, Battery Park alleges that it is entitled to indemnification and contribution from NYMEX for any and all damages that may be awarded to plaintiff. Battery Park asserts a breach of contract claim against NYMEX for its failure to procure insurance coverage for it.

NYMEX argues that it is entitled to summary judgment dismissing the third-party complaint because it did not commission the construction project that caused the dangerous condition and it did not own the land on which the construction project was performed.

The City's cross motion to dismiss is based on the assertion that: (1) it was not the owner of the property or the Premises where plaintiff's injury took place, and (2) it did not maintain, nor control the area surrounding the Premises.

Battery Park's cross motion to dismiss is based on the assertion that it did not have actual or constructive notice of any dangerous condition.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "succinctly to warrant the court as a matter of law in directing judgment" (*see* CPLR § 3212 [b]; *Zukerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*see Winegrad v NYU Medial Ctr.*, 64 NY2d 851, 853 [1985]). To grant summary judgment it must be clear that no material and triable issue of fact is presented (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]).

Applying the above principles and as further explained below, NYMEX has made a prima facie showing of its entitlement to judgment as a matter of law. Third-party plaintiff, Battery Park, has not produced any evidence demonstrating the existence of any genuine issues of material fact, and thus, NYMEX's application for dismissal of Battery Park's third-party complaint is granted (*Zuckerman v City of New York*, 49 NY 2d 557, 562 [1980]).

The second cause of action of the third-party complaint is based upon the lease between Battery Park, as landlord, and NYMEX, as tenant. It provides that NYMEX shall indemnify Battery Park for losses arising from, among other things, the:

“construction of the Building or any other work or thing done in or on the Premises or any part thereof, provided that such indemnity relates to items of construction that Tenant, rather than Landlord, is obligated to perform (i.e. that such indemnity does not include or relate to Landlord's bringing utilities and infrastructures to and constructing Landlord's Civic Facilities for the Building or Landlord's maintaining or repairing the electrical closets in the basement of the Building).”

(Affirmation of Michael J. Kozoriz, Exhibit 10, Section 19.01 [a]). NYMEX argues that no indemnity or obligation was triggered by the lease because it is undisputed that the alleged dangerous condition resulting in plaintiff's accident was not caused by any action or inaction of NYMEX, but caused by the uprooting of the sidewalk by the contractor that Battery Park employed. According to the record, plaintiff's injuries occurred as a result of the accumulation of dirt from the construction project on the bottom of his shoes and on the cement flooring near the recessed southwest entrance to the NYMEX building (Mitchell Deposition, pages 59-60). There is ample evidence in the record that the construction and debris on the Premises where plaintiff was injured was a result of a project designed and managed by the Premises' owner, Battery Park (Pomponio Deposition, pages 11-14), rather than NYMEX. Battery Park

commissioned a construction project that included, but was not limited to, general site protection, site/soil preparation, horticultural soil mixes and related soil amendments, concrete base, masonry pavements, and the installation and painting of lighting poles (Affirmation of Michael J. Kozoriz, Exhibit 8). Moreover, NYMEX's motion for summary judgment seeking dismissal of the third-party complaint is unopposed.

The City's motion for dismissal is granted as it has established a prima facie entitlement to judgment which has not been refuted. The record is devoid of any evidence that the City had a duty to maintain the Premises in good repair or that it was negligent in its maintenance of the Premises (*see Hausser v Giunta*, 88 NY2d 449 [1996]). It is undisputed that Battery Park, not the City, owned the Premises where plaintiff's injury took place (Affirmation of R. Alexander Hulten; Pomponio Deposition, pages 11-14). It is also undisputed that Battery Park maintained and controlled the area surrounding the Premises (*id.*). The record is devoid of any other evidence to support plaintiff's claim that the City had a duty to maintain the Premises, and accordingly, there is no basis upon which to impose liability (*see Hausser v Giunta*, 88 NY2d 449, 452 *supra*).

Battery Park's cross motion to dismiss is denied. As discussed above, Battery Park owned, maintained, and controlled the Premises. Battery Park argues that there is no evidence in the record of notice, actual or constructive, of the existence of a dangerous condition on the Premises where plaintiff fell. In order to constitute constructive notice, a defect or dangerous condition must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy the condition (*Morgan v Department of Sanitation of the City of New York*, 250 AD2d 525 [1st Dept 1998]). Battery Park

argues that, according to his own testimony, plaintiff had walked the Premises at least twice prior to his injury without incident and continued to make his rounds as a security guard over the same area for several months without incident, thereby disproving any allegations that Battery Park had actual or constructive knowledge of any dangerous condition (Mitchell Deposition, pages 120-121). “Apart from the duty to warn of dangerous conditions on the property, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it” (*DiVietro v Gould Palisades Corp.*, 4 AD3d 324, 325 [2d Dept 2004]). Bruno Pomponio, Battery Park’s Director of Maintenance, testified in his examination before trial that Battery Park commissioned a construction project that involved the redesign of the planters and the pavement of the Premises (Pomponio Deposition, pages 11-14). He further testified that on the day of plaintiff’s accident, Cleveland Construction Company, Battery Park’s contractor, ripped up the area to run new conduits for a ferry terminal and redesigned the planters for a different look (*id.*). Plaintiff testified that there was a great deal of dirt surrounding the Premises as he made his rounds (Mitchell Deposition, pages 35-50). An abutting landowner may become liable for injury to a pedestrian caused by a defect in the sidewalk where the owner has created the defective condition (*Jeanty v Benin*, 1 AD3d 566, 567 [2d Dept 2003]). It is uncontroverted that the construction and debris on the Premises where plaintiff was injured was a result of a project designed and managed by the Premises’ owner, Battery Park (Pomponio Deposition, pages 11-14). Thus, there is question of fact as to whether Battery Park created the alleged dangerous condition to warrant a denial of Battery Park’s motion for summary judgment.

Accordingly, it is

ORDERED that third-party defendant New York Mercantile Exchange's motion for dismissal of the third-party complaint is granted; it is further

ORDERED that defendant the City of New York's cross motion for dismissal of the complaint and all cross-claims against it is granted; it is further

ORDERED that the cross motion by Battery Park City Authority and Battery Park City Parks Conservancy Corporation for dismissal of plaintiff's complaint and all cross-claims against it is denied; it is further


ORDERED that the Clerk is directed to enter judgment in accordance with this decision, upon proof of service of a copy of this order upon all parties, with notice of entry; and it is further

ORDERED that within 30 days of entry of this decision/order, prevailing defendant and third-party defendant shall serve a copy upon all parties with notice of entry.

HON. DORIS LING-COHAN

Dated:

7/13/05



Hon. Doris Ling-Cohan, J.S.C.

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FILED
JUL 22 2005
NEW YORK
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