Fedorovskaya v R.L.M. Realty Corp.

2006 NY Slip Op 30682(U)

June 8, 2006

Supreme Court, Kings County

Docket Number: 803/05

Judge: Mark I. Partnow

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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of June, 2006.

P R E S E N T:

HON. MARK I. PARTNOW
Justice.

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YELENA FEDOROVSKAYA,
Plaintiff,

Index No. 803/05

- against -

R.L.M. REALTY CORP., et ano.
Defendants.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant The City of New York (the City) moves for an order, pursuant to CPLR 3211, or, alternatively, pursuant to CPLR 3212, summarily dismissing the complaint of plaintiff Yelena Fedorovskaya and any and all cross claims as against it.

Background

This action seeks to recover damages for injuries sustained by plaintiff on September 21, 2004 when she tripped and fell on the western side of Stillwell Avenue between Mermaid and Surf Avenues in Brooklyn. She alleges that a defective sidewalk, adjoining the commercial premises of defendant R. L. M. Realty Corp ("RLM") at 2911 West 15th Street, caused her fall and contends that both defendants bear responsibility for the sidewalk defect.[1] RLM and the City have denied liability and cross-claimed against each other with the City now asserting that legislative action has shifted its liability in these circumstances to the real property owner(s) abutting the allegedly defective sidewalk(s). More specifically, the City cites Administrative Code of the City of New York §§ 7-210 (b)[2] and (c),[3] effective September 14, 2003, as eliminating its responsibility herein.

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[1] However, plaintiff submits no opposition papers to the City's motion nor indicates that she joins with RLM's opposition.

[2] That provision provides that: "[n]otwithstanding, any other provisions 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 and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to 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."

[3] That provision correspondingly provides that: "[n]otwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than 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) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section."

RLM, which falls into none of the statutory exemptions negating the liability transfer, counters that the City still bears maintenance and repair responsibility considering that the incident occurred in a bus stop area nearby a bus shelter.[4]

Discussion

(a)

The Court of Appeals has explained in *Hausser v Gunta* (88 NY2d 449, 452-453 [1996]) that:

> Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner . . . There are, however, circumstances under which this general rule is inapplicable and the abutting landowner will be held liable. Liability to abutting landowners will generally be imposed where the sidewalk was constructed in a special manner for the benefit of the abutting owner . . . where the abutting owner affirmatively caused the defect . . . where the abutting landowner negligently constructed or repaired the sidewalk . . . *and where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty* [emphasis added] [internal citations omitted]).

There, the Court further held that Municipal Home Rule Law § 11 (1) (j), which prohibits adoption of local laws that would supersede a state statute, "does not prohibit the transfer of a locality's liability to abutting property owners for injuries sustained due to

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[4] Plaintiff's deposition testimony and photographic evidence clearly shows that the incident occurred outside the bus shelter on the bus stop sidewalk area. This evidence negates separate arguments about the City's repair responsibility stemming from its bus shelter ownership and moots concerns about impermissibly applying Administrative Code § 7-210 that addresses sidewalk responsibility.

defective sidewalks" (*id.* at 454; s*ee also Farmer v City of New York,* 25 AD3d 649, 649 [2006] ["An abutting landowner will not be liable to a pedestrian injured on a public sidewalk unless that landowner created the defective condition complained of or caused the defect to occur because of some special use, *or a local ordinance or statute casts a duty upon him or her to maintain and repair the sidewalk and imposes liability for injuries resulting from a breach of that duty*"] [emphasis added] [internal quotation and internal citations omitted]; *Nichilo v B.F.N. Realty Associates, Inc.,* 19 AD3d 666, 667 [2005] ["liability may be imposed on abutting landowners or occupiers where such persons created the defect, or caused it to occur because of some special use of the sidewalk, *or violated a statute or ordinance expressly imposing liability on them for failure to maintain the sidewalk*"] [emphasis added] [internal citations omitted]).

Here, Administrative Code § 7-210[5] imposes such liability as the Appellate Division, First and Second Departments have recognized (*see Jordan v City of New York*, 23 AD3d 436, 437 [2005]; *Zektser v City of New York*, 18 AD3d 869 [2005]; *Rodriguez v City of New York*, 12 AD3d 282 [2004]; *see also Padob v 127 E. 23rd Street LLC,* NYLJ, September 30, 2005, at 18, col 1] ["Essentially, as of 7-210's effective date of September 14, 2003, certain landowners have an affirmative duty to maintain their adjacent sidewalks in a reasonably safe condition"]).

That local law equally imposes such liability on RLM as a non-exempt abutting landowner and makes RLM now bear sole not shared responsibility for the bus stop sidewalk

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[5] See fns 1 and 2.

area.[6] Other municipal provisions already have obligated owners to pay for repairs as the Court of Appeals noted in *Gonzalez v Iocovello* (93 NY2d 539, 552 [1999]):

> City Charter § 2904 places the financial burden for repairing sidewalks on property owners and provides that when an owner does not perform needed repairs, the Department of Transportation can do so at the owner's expense. Administrative Code § 19-152 likewise provides that the duty and obligation for sidewalk repair falls on property owners, and that when the owner fails to repair, the City can do so and place a lien on the property.

Consequently, some legal analysts view Administrative Code § 7-210 and its companion provisions[7] as "creat[ing] a new landscape for sidewalk injuries"[8] and "an effort to put real teeth into the loud bark of [Administrative] Code § 16-123 [9] and § 19-152. Perhaps, under penalty of civil liability as opposed to mere fines, property owners will finally take their obligations to maintain abutting sidewalks more seriously" (Clark and Cosgrove,

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[6] Case law before Administrative Code § 7-210 has recognized that "responsibility to maintain bus stops within the City of New York, including the sidewalks and curbs attendant thereto, rests with the City of New York or the owner or lessee of the abutting property" (*Gall v City of New York*, 223 AD2d 622, 623 [1996]).

[7] Administrative Code § 7-211 requires abutting property owners to maintain liability insurance for personal injury and property damage claims arising from their failure to properly maintain abutting sidewalks. Administrative Code § 7-212 allows assignment and City disbursement for 1 year-old or longer unsatisfied judgments for personal injury or death against uninsured abutting property owners.

[8] Kelner and Kelner, Trial Practice, *New Legal Landscape for Sidewalk Accidents in New York City*, NYLJ, September 23, 2003, at 3, col 1.

[9] That provision sets forth property owners' duties to remove snow, ice and dirt from public sidewalks.

Outside Counsel, *Sidewalk Liability Is Transferred from New York City to Landlords*, NYLJ, September 11, 2003, at 4, col 4).

(b)

RLM's argument to make the City liable as a "special user" regarding the portion of the sidewalk between the bus shelter and street, i.e., the area appurtenant to the bus stop, also lacks merit. The Court of Appeals has stressed that "where the abutting landowner 'derives a special benefit from that [public property] *unrelated* to the public use,' the person obtaining the benefit is 'required to maintain' the used property in a reasonably safe condition to avoid injury to others" (*Kaufman v Silver*, 90 NY2d 204, 207 [1997] [emphasis added] [internal citations omitted]; *see also Harris v FJN Properties, LLC.*, 18 AD3d 1089, 1090 [2005] ["liability may be justified when the neighboring landowner derives a benefit from the municipal property which is exclusive from that received by the public as a whole"]).

Here, the general public, not the City, derived a benefit from the bus stop sidewalk area which thus defeats the special use approach as also occurred regarding disputes about other governmental infrastructure such as a street lamp (*Mahler v Incorporated Vil. Of Port Jefferson*, 18 AD3d 450 [2005]); bus lanes (*Towbin v City of New York*, 309 AD2d 505 [2003]); an electrical "pull box" or "hand hole" housing wiring for street lights (*Smith v City of Syracuse*, 298 AD2d 842 [2002]); a catch basin (*Braunstein v County of Nassau*, 294 AD2d 323 [2002]); a water valve vault cover (*Lado v City of Rome*, 269 AD2d 743 [2000]); a manhole cover (*ITT Hartford Ins Co. v Village of Ossining*, 257 AD2d 606 [1999]); a curb box (*Pinon v Town of Islip*, 255 AD2d 568 [1998]); a drainage grating (*Barnes v City of*

Mount Vernon, 245 AD2d 407 [1997]) and a traffic signal box (*Fazio v Town of Mamaroneck*, 226 AD2d 338 [1996]). RLM alone therefore remains liable to plaintiff. Accordingly, it is

ORDERED that the City's motion to dismiss plaintiff's complaint and RLM's cross claims against it is granted.

This constitutes the decision and order of this court.

ENTER,

J. S. C.

HON. MARK I. PARTNOW