Robles v City of New York
2006 NY Slip Op 30758(U)
November 15, 2006
Supreme Court, New York County
Docket Number: 104461/05
Judge: Eileen A. Rakower

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

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RAMON ROBLES, an infant by his mother and natural guardian, YUDERKA ROBLES

Plaintiff,

Index No. 104461/05

- against -

Decision and Order

THE CITY OF NEW YORK and CENTURY APARTMENTS LLC.,

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injures allegedly sustained on September 25, 2004 when his bicycle hit a raised tree stump which was located on the sidewalk in front of 4305 Broadway. Defendant Century Apartments LLC. ("Century") , the abutting landowner, moves for summary judgment pursuant to CPLR §3212.

Effective September 14, 2003, §7-210 of the New York City Administrative Code generally transferred responsibility for the maintenance and repair of sidewalks from the City of New York to the adjacent landowner. Defendant City of New York ("City") does not take a position on the motion.

Defendant Century argues that while it is responsible for the maintenance and repair of sidewalk flags, the tree well created by the City is not a sidewalk flag. Additionally, Century claims that the City created the allegedly dangerous condition by cutting down the tree and leaving a stump. Thus it both created the alleged defect and was responsible for its repair.

Century, in support of its motion, offers the deposition testimony of Mr. Bruce Miller, Managing Agent of Century Apartments. Mr. Miller testified that he has been employed by defendant Century for approximately twenty years. According to Mr. Miller, the tree had been planted within the last ten years by the City and that Century has not made any modifications to it or the stone well which surrounds it. Further,

Mr. Miller testified that he never received any complaints about the subject area during the time that he was employed. Century also offers the deposition testimony of Mr. William Styer, Director of Forestry in the Borough of Manhattan. Mr. Styer testified that the tree located at the accident site was removed by contractors hired by the City on June 30, 2003. Mr. Styer stated that it was normal practice to leave behind a tree stump until a new tree was planted.

Century argues that it made no special use of the area in which plaintiff Ramon Robles' accident occurred and thus the "Doctrine of Special Benefit" does not apply. Century claims that the testimony of both Mr. Miller and Mr. Styer establish the fact that the City planted the tree as a decorative measure for public benefit. Additionally, plaintiff's deposition testimony establishes that the tree stump was open and obvious and thus Century is not liable for his injuries. Finally, as stated earlier, Administrative Code §7-210 is not applicable because the code only applies to the sidewalk flags abutting the land and not to the decorative stone area which contained the tree stump.

Plaintiff counters that Century knew of the dangerous condition and had a duty to repair it. Further, plaintiff asserts that a wall jutting out from the building line caused plaintiff to ride into the area of the tree well, and thus there is a question of fact as to whether Century can be held liable for the accident. Plaintiff offers an affidavit stating "[a]fter only being on the sidewalk for a short distance, I was forced over to the far side of the sidewalk because of a wall that had jutted out into the sidewalk near 4305 Broadway." Additionally, plaintiff provides a photograph of the area which shows the wall, cars which are parked partially on the sidewalk, and the tree well in question.

The Doctrine of Special Use applies to landowners if they utilize an area solely for private use and convenience that is in no way connected with public use. Reyes v. CSX Transp., Inc., 19 A.D.3d 193 (1st. Dept. 2005). The imposition of such duty is based upon the land occupier's access to and ability to exercise control over the special use structure or installation. Id. At 194.

Administrative Code of the City of New York § 7-210 (c) provides "[i]t shall be the duty of the owner of real property abutting any sidewalk, including but not limited to, the intersection quadrant for the corner property, to maintain such a sidewalk in a reasonably safe condition."

Administrative Code of the City of New York § 19-152 provides

> "[t]he owner of any real property, at his or her own cost and expense shall (1) install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property, including but not limited to the intersection quadrant for corner property...".

Century has established that it did not plant, maintain, remove or make special use of the tree well in question.

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118 [92 N.E.2d 918]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019 [116 N.Y.S.2d 857])In addition, "[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512.) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890.) *Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 (1st Dept. 1989).

Plaintiff asserts that he was forced into the dangerous area by a protruding brick wall. Plaintiff provides photographs showing the wall and its relationship to parked cars and the treewell. The motion for Summary judgment must be denied because the finder of fact must determine whether plaintiff was indeed forced into a dangerous area by the brick wall which jutted out and was a part of the adjacent building. Where there is a question of comparative negligence, the finder of fact must make the determination.

Wherefore it is hereby

ORDERED that defendant Century Apartments LLC.'s motion for summary judgment is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: November 15, 2006

EILEEN A. RAKOWER, J.S.C.