

Hamer v Gillen

2007 NY Slip Op 30128(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0009094

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-6-06 (#002)
12-15-06 (#003)
ADJ. DATE 10-6-06 (#002)
12-15-06 (#003)
Mot. Seq. # 002 - MG
003 - MD

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LOUIS HAMER, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 :
 SHARON GILLEN and TOWN OF BABYLON, :
 :
 :
 Defendant. :
-----X

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Upon the following papers numbered 1 to 35 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 23 - 33; Replying Affidavits and supporting papers 34 - 35; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by the defendant Sharon Gillen for an order granting summary judgment in her favor and the motion by the defendant Town of Babylon for summary judgment in its favor are determined as follows.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when he stumbled on a sidewalk in front of 9 Farragut Avenue in Lindenhurst. The plaintiff was dropping off some carpeting at the adjoining property which was owned by the defendant Sharon Gillen. The plaintiff alleges that he injured his knee when he stumbled on a

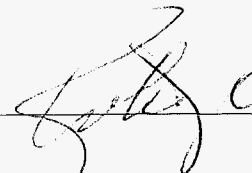
portion of the sidewalk that was raised and uneven. Gillen had complained to the defendant Town of Babylon years earlier about the sidewalk and the Town performed some repairs but did not repair the area where the plaintiff fell. Gillen and the Town now move for summary judgment in their favor.

An abutting landowner will not be liable to a pedestrian injured as a result of a defect on a public sidewalk unless the landowner created the defective condition or caused the defect to occur because of some special use of the sidewalk (*see Hausser v Giunta*, 88 NY2d 449; *Fishelberg v Emmons Ave. Hosp. Corp.*, 26 AD3d 460 [2d Dept 2006]; *Roman v City of New York*, 6 AD3d 691 [2d Dept 2004]).

Here, Gillen has made a prima facie showing of her entitlement to summary judgment by demonstrating that she did not create the defective condition and did not put the sidewalk to a special use. In opposition, the plaintiff contends that, because Gillen was aware of the defect, she had a duty to warn the plaintiff about the condition. Contrary to the plaintiff's contention, an owner of property owes no duty of care to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the owner created or contributed to it (*see, Galindo v Town of Clarkstown*, 2 NY3d 633; *Galperina v Mandelbaum*, 27 AD3d 520 [2d Dept 2006]; *Pensabene v Inc. Village of Valley Stream*, 202 AD2d 486 [2d Dept 1994]). Accordingly, the motion by Gillen for summary judgment is granted.

The motion by the Town for summary judgment is denied as untimely since it was not made within 120 days of the filing of the note of issue and the Town has made no showing of good cause for the delay (*see, CPLR 3212[a]*; *Brill v City of New York*, 2 NY3d 648; *Dettmann v Page*, 18 AD3d 422 [2d Dept 2005]; *Thompson v Leben Home for Adults*, 17 AD3d 347 [2d Dept 2005]).

Dated: MAR 05 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION