

Hernandez v Wycoff Weintraub Realty Co.

2007 NY Slip Op 30415(U)

March 28, 2007

Supreme Court, Queens County

Docket Number: 0015083

Judge: Lawrence Vincent Cullen

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NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable **LAWRENCE V. CULLEN**
Justice

IAS PART 6

-----X
HELENIO A. HERNANDEZ,

Plaintiff(s),

-against-

Index No.: 15083/04

Motion Date: 2/6/07

Motion Cal. No.: 16

WYCOFF WEINTRAUB REALTY CO. and,
IRV-MAR REALTY,

Defendant(s).

Motion Seq. No.: 4

-----X
IRV-MAR REALTY

Third-Party Plaintiff(s),

-against-

VISTA VISION/WYCKOFF, INC.

Third-Party Defendant(s).

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The following papers numbered 1 to 7 read on this motion by defendant Wycoff Weintraub Realty Co. for an Order, pursuant to CPLR § 3212, granting summary judgment to Wycoff Weintraub Realty Co. as against the plaintiff, Helenio A. Hernandez and dismissing the plaintiff's actions as against Wycoff Weintraub Realty Co. or, in the alternative, granting partial summary judgment on the issue of liability to Wycoff Weintraub Realty Co. as against the defendant/third- party plaintiff, Irv-Mar Realty, for common law and contractual indemnity for any judgment that may be had by the plaintiff, Helenio A. Hernandez, as against Wycoff Weintraub Realty Co., and, further, for an Order dismissing all cross claims and counterclaims as against Wycoff Weintraub Realty Co.; and cross motion by defendant Irv-Mar Realty for an order pursuant to CPLR §3212 granting summary judgment in favor of Irv-Mar Realty and dismissing plaintiff's complaint and co- defendant's cross claims.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1
Answering Affirmation-Exhibits.....	2
Answering Affirmation-Exhibits.....	3
Notice of Cross Motion-Affirmation-Exhibits-Memorandum of Law..	4

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Reply Affirmation.....	6
Reply Affirmation.....	7

Upon the foregoing papers, the motion and cross motion are decided as follows: The motion by defendant Wycoff Weintraub Realty Co. for an Order, pursuant to CPLR § 3212, granting summary judgment to Wycoff Weintraub Realty Co. as against the plaintiff, Helenio A. Hernandez and dismissing the plaintiff's actions as against Wycoff Weintraub Realty Co. or, in the alternative, granting partial summary judgment on the issue of liability to Wycoff Weintraub Realty Co. as against the defendant/third-party plaintiff, Irv-Mar Realty, for common law and contractual indemnity for any judgment that may be had by the plaintiff, Helenio A. Hernandez, as against Wycoff Weintraub Realty Co., and, further, for an Order dismissing all cross claims and counterclaims as against Wycoff Weintraub Realty Co.; and cross motion by defendant Irv-Mar Realty for an order pursuant to CPLR §3212 granting summary judgment in favor of Irv-Mar Realty and dismissing plaintiff's complaint and co-defendant's cross-claims, are denied.

Upon stipulation dated August 25, 2006, the Court (Ritholtz, J.) ordered that summary judgment motions were to be returnable no later than November 20, 2006. The summary judgment motion here was made returnable on November 28, 2006. Accordingly defendants failed to move for summary judgment in compliance with Court's order, or within 120 days of the filing of the note of issue, without good cause shown (CPLR 3212(a); Brill v City of New York, 2 NY3d 648 (2004)).

This action arises from personal injuries plaintiff allegedly suffered when he tripped and fell on snow and ice covering a defect in the sidewalk in front of the premises located at 329-339 Wycoff Avenue, in Queens, on January 29, 2004.

Summary judgment is a drastic remedy and should not be granted when there is any doubt of the existence of a triable issue or where the issue is even arguable (Andre v Pomeroy, 35 NY2d 361 [1974]).

A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (Zuckerman v City of New York, 49 NY2d 557 [1980]), and has the heavy burden of demonstrating the absence of a genuine issue of material fact on every relevant issue raised (Simon v Wohl, 93 AD2d 811 [2d Dept. 1983]). Anything less requires a denial of the motion for summary judgment, regardless of the sufficiency of the in opposing papers (Yates v Dow Chemical Co., 68 AD2d 907 [2d Dept. 1979]).

“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” (Stanchic v Lim, 20 AD3d 411, 412; see Nichilo v B.F.N. Realty Association, Inc., 19 AD3d 666, 667; Zektser v City of New York, 18 AD3d 869).

Whether or not either of the defendants are out of possession, they have a statutory obligation to maintain the sidewalk in a reasonably safe condition and remove substances (snow,

ice, dirt or other material) or be liable for injury (see, NYC Admin Code 7-210; see, Klotz v City of NY, 9 AD3d 392).

Additionally, in order to prove a *prima facie* case of negligence in a trip and fall case, the plaintiff must demonstrate that the defendant created or had actual or constructive notice of the alleged defective condition (see, Gordon v American Museum of Natural History, 67 NY2d 836; see also, Rosario v New York City Transit Authority, 215 AD2d 364). “To constitute constructive

notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” (Gordon v American Museum of Natural History, *supra*, 67 NY2d 836, 837).

Plaintiff’s evidence, including the deposition testimony, plaintiff’s affidavit, the Big Apple Map and photographs of the sidewalk, raises questions of fact whether defendants met their obligation to maintain the sidewalk, whether their alleged failure to do so was the proximate cause of plaintiff’s injuries, and whether the defendants had notice of the condition.

Finally, the branches of both the motion and cross motion seeking to dismiss each defendant’s cross claims against the other are denied. There are issues of fact as to the ownership of the premises and the contractual duties between the defendants to maintain and/or repair the sidewalk.

Accordingly, the motion and cross motion for summary judgment are denied in their entirety and the matter shall proceed to trial.

Dated: March 28, 2007

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LAWRENCE V. CULLEN, J.S.C.