

Motta v City of New York

2007 NY Slip Op 30459(U)

March 26, 2007

Supreme Court, New York County

Docket Number: 0104091/2004

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: RAKOWER
Justice

PART 5
Part 5

Index Number : 104091/2004

MOTTA, JOHN

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

3

4

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/26/07

EILEEN A. RAKOWER c.

J.S.C. [*1]

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 5

-----X
JOHN MOTTA,

Plaintiff,

Index No.
104091/04

- against -

Decision and
Order

THE CITY OF NEW YORK, 403 W. 43RD STREET
RESTAURANT, INC. and NINTH AVENUE REALTY, LLC

Defendants.

FILED
APR 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he slipped and fell on ice on a sidewalk on December 26, 2002 in the County and State of New York. Defendants 403 W. 43rd Street Restaurant, Inc. and Ninth Avenue Realty, LLC ("Moving Defendants") move for summary judgment pursuant to CPLR 3212 and CPLR 3211(a)(7). Plaintiff opposes moving defendants' motion. Defendant the City of New York ("City") does not submit papers.

Plaintiff asserts that after making a delivery he slipped and fell over a portion of the icy sidewalk which was lifted from an overgrown tree root. Defendant 403 W. 43rd Street Restaurant, Inc. leased space at 403 W. 43rd Street, and defendant Ninth Avenue Realty, LLC owned and was the lessor of that space located at 403 W. 43rd Street.

Moving defendants, in support of their motion, submit the pleadings, the verified bill of particulars, the deposition testimony of John Motta, the deposition testimony of Tony Edwards and three photographs which purport to provide an orientation of the location of the cellar doors in relation to the tree and the adjoining buildings located at 401 and 403 W. 43rd Street.

Initially, moving defendants argue that the accident occurred prior to the enactment of Section 7-210 of the New York Administrative Code. Thus, in order for the adjoining landowners to be held liable for a dangerous condition on the sidewalk, it must be shown that they caused or created the condition or made special use of the sidewalk in question.

Here, the condition complained of involved both an icy condition and a portion of the sidewalk which was raised by a tree root. To the extent that plaintiff alleges movants may have created the icy condition with salt, movants supply the deposition testimony of John Motta:

Q: Did you notice any salt on the ice in that area?

A: No there was not (Motta deposition, page 18, lines 9-11)

Moving defendants next argue that, even if they had some duty to clear their own sidewalk, plaintiff's accident did occur outside Le Madeleine's and thus, the complaint fails to state a cause of action. While the verified bill of particulars states that the accident occurred at 403 W. 43rd Street, and refers to pictures which are not attached to the moving papers, moving defendants submit that plaintiff testified at his deposition in detail that there were no photos and described the area in some detail as 47th Street.

Q: You were asked before about pictures. Are you aware of whether or not any pictures have been taken of the sidewalk, the uprooted sidewalk or the area where this accident occurred?

A: Not to my knowledge.

Q: Did you ever go back to the site of the accident?

A: No. (Motta deposition, page 84, lines 3-10)

Q: Just so I'm correct; you indicated that this accident happened at 47th Street?

A: Yes.

Q: And that is the side of the street that you were parked on; is that correct?

A: Yes.

Q: And the cellar doors were actually on 47th Street, not on Ninth Avenue?

A: On 47th Street, yes. (Motta deposition, page 87, lines 15-23)

Plaintiff, in opposition, provides climatological data for the month in question, the deposition testimony of John Motta, and the lease governing the use and possession of the store and Garden in the building known as 403-405 West 43rd Street, basement of 607 Ninth Avenue, and portion of the basement and ground floor of 609 Ninth Avenue collectively.

Plaintiff attempts to show that defendants caused or created the condition complained of by pointing to the testimony Tony Edwards, owner of Le Madeleine's, in which Mr. Edwards states that he, or an employee, would have removed snow from the sidewalk and that he did not recall if there was any snow removal done in front of the restaurant on the day in question.

Q: Did you maintain a contract with anyone with regard to snow removal?

A: No.

Q: In or about December of 2002 who would have physically done the snow removal?

A: Myself, a porter, a busboy, a waiter, or a Maitre D'.

Q: By what means would that snow removal be done, would it be shoveled, would there be—

A: Shoveled.

Q: Was there any snow removal on December 26th, 2002?

A: Not to my knowledge. I can't remember. (Edwards deposition, page 13, lines 7- 21).

Rather than addressing the inconsistencies between the bill of particulars which states that the accident occurred on 43rd Street and the deposition testimony which indicates that the accident occurred on 47th Street, plaintiff shifts the burden to defendants to submit conclusive evidence that would determine the exact location of the fall. Plaintiff argues that the photographs submitted by moving defendants are insufficient because they are not accompanied by any surveys which would show where each property begins and ends. Further, plaintiff argues that Ninth Avenue owned both properties in dispute. To the contrary, plaintiff submits nothing to

indicate that Ninth Avenue owned property at 47th Street.

To grant summary judgment it must clearly appear that no material and triable issue of fact exists. The party opposing the motion must demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970). Where defendants make a prima facie showing sufficient to warrant judgment dismissing the complaint, the burden then shifts to the plaintiffs to lay bare their proof and demonstrate the existence of a triable issue of fact. *Feliz ex rel. Rios v. Beth Israel Medical Center*, __ NYS2d __, 2007 WL 851760 (N.Y.A.D. 1 Dept.), 2007 N.Y. Slip Op. 02489.

Plaintiff submits no evidence that would show that defendants caused or created the condition on which plaintiff fell or made special use of the sidewalk in question. Additionally, plaintiff fails to establish that this accident occurred in front of 403 W. 43rd Street. Climatological data showing an icy condition may have existed is not sufficient to create a duty owed by moving defendants to plaintiff or to overcome the inconsistencies in plaintiff's description of the location of the accident.

Wherefore it is hereby

ORDERED that defendants' 403 W. 43rd Street Restaurant, Inc. and Ninth Avenue Realty, LLC's motion for summary judgment is granted.

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

DATED: March 26, 2007

FILED



EILEEN A. RAKOWER, J.S.C

APR 02 2007

NEW YORK
COUNTY CLERK'S OFFICE