

Casesa v Gilmartin

2007 NY Slip Op 30595(U)

March 19, 2007

Supreme Court, Queens County

Docket Number: 0010476/2005

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
ANTHONY CASESA and ISABELLA CASESA,
Plaintiff(s),

Index
Number: 10476/05

- against -

Motion
Date: 03/13/07

ROBERT GILMARTIN and DONNA GILMARTIN,
Defendant(s).

Motion

Cal. Number: 2

-----X
ROBERT GILMARTIN and DONNA GILMARTIN,
Third-Party Plaintiffs,

Motion Seq. No. 2

-against-

CITY OF NEW YORK,
Third-Party Defendant.

-----X

The following papers numbered 1 to 10 read on this motion by defendants/third-party plaintiffs Gilmartin for summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation-Exhibit.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants/third-party plaintiffs for summary judgment on the issue of liability dismissing the complaint is granted.

Anthony Casesa allegedly sustained injuries as a result of tripping and curbing abutting Gilmartin's property located at 911 Crossbay Boulevard in Queens County on August 14, 2003. He testified in his deposition that the location where he tripped was by a telephone pole at the curb line, where the curb meets the sidewalk (see deposition transcript pp. 50-51). The curb was raised from the sidewalk (id.). He stated that the asphalt was depressed approximately one inch to an inch and-a-half from the top of the curb. He hit the top of the curb - the curb line of the sidewalk.

An abutting property owner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the property owner created the defective condition or caused it through some special use, or unless a statute charges the owner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

There is no statute, in this case, imposing liability upon defendants for the consequences of failing to repair and maintain the sidewalk abutting their property. The only statute that shifts liability upon property owners is §7-210 of the Administrative Code. However, the accident occurred prior to that statute's effective date of September 14, 2003 and, thus, does not apply to plaintiffs with respect to the instant matter. Moreover, no issue has been raised in this case as to whether plaintiffs made a special use of the sidewalk. The only issue raised in this case, therefore, is whether defendants actually created the defective condition.

The depositions of the parties and the photographs annexed to the moving and opposition papers indicate that the sidewalk consists of a curbside asphalt-paved area followed by the regular portion of the sidewalk the flags of which directly touch defendants' property.

The defective portion upon which plaintiff allegedly tripped was the curbside asphalt area. As to this area, Robert Gilmartin testified in his deposition that he never performed any repairs or work (see deposition p. 16). He only stated that he was uncertain as to whether he had ever done any repairs to the sidewalk flags that touch his property, as distinct from the curbside area. Contrary to the characterization of Gilmartin's testimony by plaintiffs' counsel, Gilmartin at no point in his deposition expressed uncertainty as to whether he performed any work at the area where plaintiff allegedly tripped.

Plaintiffs' counsel contends that Gilmartin's deposition

testimony should be disregarded because his assertion that there had been a curbside tree that was removed by the City is not corroborated by any evidence and, in fact, is contradicted by the fact that no records were found indicating that there had been a curbside tree that was removed by the City. Counsel contends that a jury could conclude, based upon this discrepancy, that Gilmartin lied when he stated that he never did any work to the area where plaintiff tripped. Counsel's argument is based entirely upon conjecture and is without merit.

Gilmartin testified that the premises had been purchased in 1977. He stated that there had been trees by the curb and that the City removed them, although he never saw the City perform such work. Although Gilmartin does not offer any proof to corroborate his statement that the City removed trees, this fact alone does not raise any issue regarding the honesty of his testimony.

Plaintiffs' counsel bases his conclusion that Gilmartin's testimony is perjured upon the fallacious argument that a search revealed no records by the City of any tree removal or work at that location. The record searches, however, only go back two years from the date of the accident, to 2000 or 2001. With respect to the existence of any curbside trees at that location, John Bero, an employee of the Department of Parks and Recreation, stated in his deposition that the existence of any such trees would be reflected in the Parks Department logs which go back only as far as 1991. When asked if he knew when the trees were removed, Gilmartin stated that he did not remember. Therefore, there is no basis for counsel to conclude that Gilmartin was being untruthful in his testimony.

In order to obtain summary judgment, movant must make a prima facie showing that he is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Defendants have met their burden.

Plaintiffs have failed to rebut Gilmartin's testimony that defendants did not create the defect or cause any repairs or work to be done to the curbside area of the sidewalk (see Nilsen v. City of New York, 28 AD 3d 625 [2nd Dept 2006]; Bachman v. Town of North Hempstead, 245 AD 2d 327 [2nd Dept 1997]).

Counsel's conclusion that since no record exists in the Parks Department database reflecting the presence of a tree, "it can mean only that the defendants unscrupulously removed a City tree without the proper permits and paved over the area with asphalt,

thereby creating the defective condition that caused the plaintiff's injury," amounts to pure speculation.

Therefore, the opposition papers fail to rebut defendants' prima facie showing of entitlement to summary judgment, as a matter of law.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: March 19, 2007

KEVIN J. KERRIGAN, J.S.C.