Breite v City of New York

2007 NY Slip Op 30598(U)

April 3, 2007

Supreme Court, Queens County

Docket Number: 0027297/2004

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Justice | Part **10**

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MELVIN BREITE and NORMA BREITE,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, THE NEW YORK CIT DEPARTMENT OF TRANSPORTATION, SAYMA JABBAR, SHMUEL COHEN and AHUVA S. COHEN,

Defendants,

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Index Number: 27297/04

Motion Date: 03/20/07

Motion Cal. Number: 2

Motion Seq. No. 1

The following papers numbered 1 to 22 read on this motion by defendants Shmuel Cohen and Ahuva S. Cohen for summary judgment dismissing the complaint against said defendants and cross-motion by defendant Sayma Jabbar for summary judgment dismissing the complaint and any cross-claims against said defendant.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.............	1-4
Notice of Cross-Motion............................	5-8
Affidavit in Opposition-Exhibits..................	9-11
Affirmation in Opposition-Exhibits................	12-14
Reply Affirmation-Exhibit.........................	15-17
Reply Affirmation-Exhibit.........................	18-20
Supplemental Affidavit............................	21-22

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

Motion by the Cohens for summary judgment on the issue of liability dismissing plaintiff's complaint against them is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a raised, cracked and uneven portion of the public sidewalk adjacent to the premises 123-16 85th Avenue and/or 123-18 85th Avenue in Queens County on November 29, 2003.

The Cohens owned the premises 123-16 and Jabbar owned 123-18. Both properties are exclusively residential premises.

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]). The Cohens have met their burden.

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

Section 7-210 of the New York City Administrative Code imposes liability upon property owners for injuries resulting from their failure to maintain and repair the public sidewalks abutting their properties. That section, however, specifically excludes owner- occupied residential premises of less than four families (see Admin. Code §7-210 [b]). It is not disputed that 123-16 is a one-family home occupied by the Cohens. Therefore, no statutory liability attaches to the Cohens for injuries sustained as a result of their failure to maintain or repair the sidewalk abutting their property. Moreover, there is no issue in this case of whether a special use of the sidewalk has been made.

With respect to the only other possible basis of liability, plaintiffs contend that there is a question of fact as to whether the Cohens created or contributed to the defective sidewalk condition by virtue of repairs that they admittedly made to the sidewalk. In this regard, plaintiffs stress that Ahuva Cohen, in her deposition, stated that she could not remember whether the sidewalk repair was done before or after November 29, 2003, the date when Melvin Breite allegedly tripped and fell on the sidewalk.

However, Cohen merely testified that she was not certain as to the year when the sidewalk was repaired. When shown the photograph of the sidewalk marked as defendant's exhibit A (annexed to the motion as Exhibit E and to plaintiff's opposition papers as Exhibits E and F), Cohen was asked, "Looking again at what was marked as Defendant's A on June 8, 2006, is that the way your sidewalk looked on November 29, 2003?" She replied, "It's possible. This is what it looked like before it was repaired and I don't remember the year we repaired it" (transcript pp. 15-16).

Therefore, the fact that Cohen testified that she repaired the sidewalk on some indeterminate date does not raise a question of fact as to whether the repair caused the defect upon which Breite tripped, since she also testified that the photograph which Breite acknowledges as a fair and accurate depiction of the sidewalk at the time he tripped was the state of the sidewalk before the repair was done. Plaintiffs provide no evidence to rebut Cohen's testimony that they did not create the defect(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]).

Without merit is plaintiffs contention that even if the repair was done subsequent to the accident, it still raises a question of fact as to whether the Cohens "assumed responsibility for maintaining the sidewalk." Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York and §2904 of the New York City Charter. Therefore, there is no issue that the Cohens are responsible for repairing and maintaining the sidewalk abutting their premises. However, these sections do not impose liability upon homeowners for the breach of that responsibility.

Only §7-210 of the New York City Administrative Code imposes liability upon property owners for injuries resulting from their failure to maintain and repair the public sidewalks abutting their properties. That section specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]). Since there is no dispute that the Cohens' property is a one-family residence occupied by them, they are not liable for injuries sustained as a result of their failure to maintain or repair the abutting sidewalk, as a matter of law. For the same reason, whether or not the Cohens had actual or constructive notice of the defect is irrelevant.

Cross-motion by Jabbar for summary judgment is denied. Although the premises 123-18, of which Jabbar was the owner, is a residential premises of less than four families, the record on this motion raises a question of fact as to whether Jabbar occupied said premises and, therefore, whether she is exempt from liability pursuant to §7-210.

Jabbar's contention that the defect upon which plaintiff allegedly tripped was not in front of her property but in front of Cohens' is improperly raised for the first time in her reply and, therefore, may not be considered (Dannasch v. Bifulco, 184 AD 2d 415, 417 [1st Dept 1992]).

Accordingly, the motion is granted and the complaint is dismissed as against the Cohens. The cross-motion for summary

judgment must be denied.

Dated: April 3, 2007

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KEVIN J. KERRIGAN, J.S.C.