

Spininger v Graybar Elec. Co., Inc.

2007 NY Slip Op 30959(U)

April 18, 2007

Supreme Court, Queens County

Docket Number: 0006962/2005

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

PHIL SPININGER,

Plaintiff(s),

- against -

GRAYBAR ELECTRIC COMPANY, INC. and
THE CITY OF NEW YORK,

Defendant(s).

-----X

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Motion
Date: 04/17/07

Motion
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Motion Seq. No. 1

The following papers numbered 1 to 4 read on this motion by defendant Graybar Electric Company Inc. for summary judgment dismissing the complaint and all cross-claims.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... 1-4

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

Motion by Graybar for summary judgment dismissing the complaint and any cross-claims as against it is granted, there appearing no opposition.

In order to obtain summary judgment, movant must make a prima facie showing that it 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]). Graybar has met its burden.

Plaintiff allegedly sustained injuries as a result of tripping and falling over a piece of metal sticking out of a defective curb on Queens Plaza North between 21st and 22nd Streets in Queens County, adjacent to Graybar's premises on October 17, 2004(see plaintiff's verified complaint, paragraphs 10-12, Exhibit "A"; plaintiff's deposition transcript p. 14, Exhibit "E"; verified bill of

particulars, paragraph 7, Exhibit "C").

A property owner is not liable for repairing and maintaining abutting public property unless the owner actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges the abutting owner with the responsibility to repair and maintain the public property 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]).

No ordinance or statute is involved in this case that would impose either a duty or liability upon Graybar with regard to the maintenance and repair of the curb. The New York City Administrative Code §§19-152 and 7-210 places the duty to repair sidewalks upon the abutting property owners, and §7-210 specifically imposes liability upon abutting property owners for any injuries resulting from their breach of that duty. However, in the instant case, the defective area upon which plaintiff allegedly tripped was not the sidewalk but the curb. Section 7-201 (c) of the Administrative Code states, in relevant portion, "The term 'street' shall include the curbstone." Conversely, "sidewalk" is defined in §19-101 as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." Thus, it is clear that neither §19-152 nor §7-210 imposes upon a property owner a duty to repair and maintain curbs (see Irizarry v. The Rose Bloch 107 University Place Partnership, 12 Misc 3d 733 [Supreme Court, Kings County 2006]).

Furthermore, no issue has been raised as to whether Graybar created the defect or made some special use of the subject curb area. Since Graybar had no duty to repair and maintain the curb, it was plaintiff's burden to show evidence that Graybar created the defect or caused it through some special use (see Pratt v. Villa Roma Country Club, Inc., 277 AD 2d 298, 299[1st Dept 2000] ("No ordinance or statute is alleged here. Thus, it was incumbent upon the plaintiffs to raise a triable issue of fact that the defendant either created or caused the defective condition, or derived a special benefit from the abutting property unrelated to public use Since the plaintiffs failed to come forward with any opposing evidence demonstrating that the defendant created or caused the defective condition, or made a special use . . . the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint").

In any event, Graybar has proffered evidence in admissible form to establish that it neither created the condition that allegedly

caused plaintiff to trip nor made a special use of the curb. Joseph Sabatino, director of operations of Graybar, averred in his affidavit in support of the motion that Graybar never made any repairs or did any work to the subject curb and did not make any special use of the curb at any time. Plaintiff has not appeared to oppose the instant motion and, thus, has failed to rebut plaintiff's prima facie showing of entitlement to summary judgment.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed as against Graybar.

Dated: April 18, 2007

KEVIN J. KERRIGAN, J.S.C.