Pell v City of New York
2007 NY Slip Op 30966(U)
April 16, 2007
Supreme Court, Queens County
Docket Number: 0027098/2004
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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JEAN PELL,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, GREEN BUS LINES and MOHAMED OMAIRAT,

Defendant(s).

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Index Number: 27098/04

Motion Date: 04/10/07

Motion Cal. Number: 12

Motion Seq. No. 3

The following papers numbered 1 to 10 read on this motion by defendant Mohamed Omairat for summary judgment dismissing the complaint and all cross-claims.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.............	1-4
Memorandum of Law.................................	5-6
Affirmation in Opposition-Exhibits................	7-8
Reply Affirmation.................................	9-10

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

Motion by Omairat for summary judgment dismissing the complaint and any cross-claims as against him is granted.

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]). Omairat has met his burden.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a curb on Rockaway Boulevard 72.5 feet east of the corner of B116th Street adjacent to 202 B116th Street in Queens

County while exiting a bus on July 22, 2004 (see plaintiff's verified bill of particulars, paragraph 2, Exhibit "F" to motion). Omairat was the owner of the premises 202 B116th Street.

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 Omairat 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]).

Plaintiff's counsel concedes that a property owner has no duty with regard to curbstones. However, counsel contends that the alleged defect in the subject curb, consisting of a crack, encroaches upon the adjacent sidewalk and, therefore, there is a question of fact as to whether plaintiff tripped on the curb or the sidewalk. This argument ignores the fact that plaintiff, in her deposition, specifically pinpointed the precise location where she tripped as being the curb. She was shown photographs and asked to circle the location of the defect which caused her to fall (Exhibit "G" to motion, deposition transcript p.71-72). She chose to mark the photograph identified as defendant's exhibit C. This photograph has only the curbstone circled, specifically, a fissure or cavity in the curbstone. No portion of the cracked area of the sidewalk depicted in the photograph is marked (see Exhibit "H" to motion). Consistent with this identification is plaintiff's testimony that as she stepped off the bus, she "fell in a – like a hole or a crack and

twisted my ankle" (deposition p. 32). No portion of the photograph other than the circled curb area fits that description. Plaintiff testified that she stepped off the bus with her left foot, and that her left foot on that very first step off the bus fell into the hole or crack (deposition, pp. 31-37). She identifies that hole or crack as being on the curbstone by specifically circling it. Thus, contrary to the speculative argument of plaintiff's counsel, the deposition testimony of plaintiff and the demonstrative evidence clearly establish that the alleged defect was limited to the curbstone.

Although counsel for plaintiff points out that she testified that she fell on the "sidewalk", that testimony was in response to the question, "When you stepped with that foot, did your foot land on the sidewalk or the street?" (deposition p. 32). She was only asked to choose between the words sidewalk and street. She was not given the third choice of curb and the word "curb" was never used by the attorney for Green Bus Lines when he deposed her. Her description of the location where she tripped as being on the sidewalk, therefore, reflects the limited terms dictated to her by counsel. In any event, she unambiguously demonstrated what she meant by her use of the term "sidewalk" when she marked a narrow portion of the curbstone only.

The argument of plaintiff's counsel that there is an unresolved question of fact because plaintiff was not questioned further regarding the location of the defect after she had identified the curb is without merit. If plaintiff believed that the defect that caused her to fall was not limited to the curb that she identified, as plaintiff's counsel conjectures, counsel would have annexed to the opposition papers an affidavit of plaintiff averring the same.

Therefore, the unambiguous evidence presented establishes that the location of plaintiff's alleged trip and fall accident was the curb over which Omairat bears no responsibility.

Furthermore, no issue has been raised as to whether Omairat created the defect or made some special use of the subject curb area. Since Omairat had no duty to repair and maintain the curb, it was plaintiff's burden to show evidence that Omairat 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"). Plaintiff has failed to show any evidence that Omairat created the condition or made a special use.

In any event, the unrebutted deposition testimony of Omairat establishes that he made no repairs to the curb. He did state that he personally patched the sidewalk from time to time as needed, but not the curb. He also testified that he swept the sidewalk, including the curb on a daily basis. Therefore, Omairat has proffered evidence in admissible form to establish that he did not create the condition that allegedly caused plaintiff to trip.

Omairat does not own or control and is not statutorily obligated to maintain and repair the curb. He has proffered evidence to show that he did not create the condition. Conversely, plaintiff has failed to submit any proof that Omairat did create the condition. Finally, no issue has been raised as to whether Omairat made a special use of the subject curb area.

The opposition papers fail to rebut Omairat's prima facie showing of entitlement to summary judgment, as a matter of law.

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

Dated: April 16, 2007

KEVIN J. KERRIGAN, J.S.C.