

Moodhe v City of New York

2007 NY Slip Op 31673(U)

June 1, 2007

Supreme Court, Queens County

Docket Number: 0028453/2006

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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DAVID MOODHE,

Plaintiffs,

- against -

THE CITY OF NEW YORK, G. ROSE ASSOCIATES,
LLC, ROMA DELI SPANISH AMERICAN FOOD
LOUIS P. CORP., GALVIN BROTHERS, INC. AND,
TBO SITESCAPES, INC.,

Defendants.

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Index
Number: 28453/06

Motion
Date: MAY 1, 2007

Motion
Cal. Number: 14

Motion Seq. No. 1

The following papers numbered read on this motion by defendant TBO Sitescapes, Inc. for summary judgment, Cross-Motion by defendant Galvin Brothers, Inc. to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) or, in the alternative, for an order, pursuant to CPLR 3211 (c), treating the instant 3211 motion to dismiss as a motion for summary judgment dismissing the complaint as asserted against it and cross-motion by TBO to amend its answer.

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

Motion by TBO for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a defect in the public sidewalk abutting the premises 76-14 21st Avenue, between 76th and 77th Street on December 3, 2005.

In order to obtain summary judgment, the movant must make a prima facie showing that it is entitled to said relief, by tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). TBO has met its initial burden by showing proof in the form of an affidavit from its president, Kristine Barron, averring that it "is a landscape contractor and does not perform any sidewalk maintenance, installation or repair." Moreover, she avers that TBO was never an owner, contractor, subcontractor or designer of the sidewalk and never performed any landscaping or sidewalk work at the subject location.

The burden thereupon shifted to plaintiff to demonstrate the existence of a triable issue of fact. In this regard, plaintiff annexed to its opposition papers a print-out of a sidewalk construction permit issued by the City to TBO on November 29, 2005 granting TBO permission to repair the sidewalk on 21st Avenue from 20th Avenue to 76th Street. The contact name listed in the permit for TBO is Kristine Barron.

In its reply, TBO annexes another affidavit of Kristine Barron, this time acknowledging the permit for sidewalk repair but stating that it had subcontracted the sidewalk work to another entity. In addition, Barron states that the work was done on the north side of 21st Avenue rather than the south side as alleged in the complaint. As proof of Barron's representation that the permit was for work on the opposite side of 21st Avenue, TBO annexes a copy of an Internet Web page entitled "Mapquest" which shows a street map of the area.

TBO fails to establish that the area listed in the sidewalk repair permit does not encompass the location of the accident. This Court may not take judicial notice of a private Web site or the information contained therein where there was no showing that the Web site was of undisputed reliability (see NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co., 8 Misc 3d 33 [Appellate Term, 2nd & 11th Jud. Dists. 2004]). Since the accuracy of the map information depicted in the copy of the "Mapquest" page has not been established, TBO has failed to prove that the sidewalk work performed pursuant to the permit was at a different location.

In addition, in her affidavit in support of the motion, Barron averred in categorical terms that TBO is only a landscaper that does not perform sidewalk repairs. But in her affidavit in reply, after being confronted with a sidewalk repair permit that she had taken out for TBO to do sidewalk repair work in the area that plaintiff alleges, she now explains that TBO had subcontracted the sidewalk work.

Therefore, the opposition papers raise a question of fact as to whether TBO caused the alleged defect at the subject location, thereby precluding the granting of summary judgment.

Cross-motion by Galvin to dismiss the complaint as asserted against it, pursuant to CPLR 3211(a)(1) and (7), or, in the alternative, to treat the instant cross-motion as one for summary judgment, pursuant to CPLR 3211 (c), and granting summary judgment, pursuant to CPLR 3212, dismissing the complaint as asserted against it is granted to the extent that the instant cross-motion to dismiss is deemed a cross-motion for summary judgment, and summary judgment is granted to Galvin, dismissing the complaint and any cross-claims asserted against it.

Although the Court, prior to treating a CPLR 3211 motion as a CPLR 3212 motion for summary judgment, must provide adequate notice to the parties of its intention to do so in order that the parties may be afforded the opportunity to submit additional proof bearing upon summary judgment (see CPLR 3211 [c]), here, the cross-motion specifically seeks to be treated as one for summary judgment and, therefore, the opposing parties have had ample notice of the possibility that the Court would treat the cross-motion as such. Moreover, plaintiff and TBO, the only parties who opposed the cross-motion, have already treated it as one for summary judgment in their opposition papers. Therefore, since the parties have charted a summary judgment course, this Court deems the instant cross-motion as one for summary judgment.

Galvin has proffered evidence in admissible form to establish its prima facie entitlement to summary judgment. In support of its motion, Galvin annexes an affidavit of its superintendent/foreman, Brian Giordano, who avers that Galvin was hired by the City's Department of Design and Construction (DDC) to install pedestrian ramps at designated locations in Queens County. He further avers that Galvin never performed any sidewalk work on the eastbound sidewalk on 21st Street between 76th and 77th Street, but that the only work it performed in the area was the installation of a pedestrian ramp across the street from 76-14 21st Avenue. Annexed to the cross-motion is a copy of the bid booklet, bid information, project description, bid bond and contract demonstrating that the

work it performed to sidewalks in Queens County was the installation of pedestrian ramps.

In its opposition papers, plaintiff fails to set forth any evidence that raises a question of fact. Plaintiff does not allege or show that the defect was located in the vicinity of a pedestrian ramp and offers no proof to indicate that Galvin did perform sidewalk work at the subject location. Indeed, plaintiff's opposition papers support Galvin's entitlement to summary judgment.

Plaintiff annexes a print-out of a street opening permit issued to Galvin on May 29, 2002 granting it permission to open the sidewalk for the purpose of installing pedestrian ramps on 21st Avenue for a maximum length of 25 feet from 76th Street. The permit listed the specific location of the work to be done as the intersection.

The complaint, however, alleges that the location of the sidewalk defect was on 21st Avenue between 76th and 77th Street, 97 feet, three inches from the curb of 76th Street. Therefore, the proof proffered by plaintiff shows that the only sidewalk work that Galvin performed was the installation of pedestrian ramps, whereas plaintiff does not allege that the sidewalk defect upon which he tripped was in the area of a pedestrian ramp, and that the only work that Galvin did was at the intersection of 21st Avenue and 76th Street, i.e., the corner of 76th Street, not between 76th and 77th Street - the location identified by plaintiff. Moreover, it shows that the closest distance to the location of the accident that Galvin could possibly have done work was over 70 feet away.

Since the only basis upon which Galvin was named as a defendant in this action was this street opening permit which does not show that Galvin did any work to the sidewalk at the location alleged in the complaint, but which shows that the work that Galvin applied for permission to do was at a different location, Galvin is entitled to summary judgment dismissing the complaint and any cross-claims asserted against it.

The opposition papers of Roma fail to raise an issue of fact so as to defeat the granting of summary judgment.

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

Cross-motion by TBO to amend its answer to the complaint denying paragraphs 73 to 81 of the complaint instead of admitting said paragraphs is granted, there appearing no opposition. The proposed amended answer annexed to the cross-motion as Exhibit "B" is deemed served and filed, nunc pro tunc.

Dated: June 1, 2007

KEVIN J. KERRIGAN, J.S.C.