Costosa v City of New York

2007 NY Slip Op 31676(U)

June 15, 2007

Supreme Court, Richmond County

Docket Number: 0103571/2005

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
--x
JOYCE COSTOSA,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant(s).
--x

C-2
Present:
Hon. Thomas P. Aliotta

Decision and Order
Index No. 103571/05
Motion No. 848-001

The following papers numbered 1 to 2 were used on this motion the 2nd day of May, 2007:

	Pages Numbered
Notice of Motion for Dismissal and Summary Judgment by Defendant, with Supporting Papers and Exhibits (dated March 13, 2007)...	1
Affirmation in Opposition by Plaintiff, with Exhibits (dated April 24, 2007)...	2

Upon the foregoing papers, the motion is denied.

Defendant City of New York moves by notice of motion for an order pursuant to CPLR 3211(a)(7) dismissing the complaint, and/or CPLR 3212 granting it summary judgment. Plaintiff Joyce Costosa opposes the motion.

This action arises from injuries allegedly sustained by plaintiff from a trip and fall on November 15, 2004 at approximately 2:45 P.M. directly across the street from 41 Foote Street in Staten Island, New York. To the extent applicable, plaintiff alleges that a height differential at the location of a crack in the sidewalk was a substantial factor in causing her to fall. Her notice of claim was filed on February 10, 2005. This action was commenced by the filing and service of a summons and complaint on or about November 28, 2005. Issue was joined by the service of an answer on or about January 31, 2006.

In support of its application, the City contends that the sidewalk defect which allegedly caused plaintiff's fall is trivial, and therefore not actionable as a matter of law. In particular, the City relies on their Exhibit "E", which plaintiff identified at her deposition as a picture that fairly and accurately depicts the condition of the sidewalk where she fell. Moreover, plaintiff conceded that there was no height differential visible in the picture (Costosa E/B/T p 33). Based upon said exhibit and plaintiff's testimony, the City alleges that any defect which may exist at the site of plaintiff's injury is trivial.

In opposition, plaintiff has submitted an affidavit from her son, Faustino Costosa, a retired New York City Police Sergeant. In his affidavit, Mr. Costosa states that one day after the accident, he visited the location and measured the height differential at the crack to be 1 ½ inches. He further states that the angle from which the picture marked as Exhibit "E" was taken makes it difficult to observe the difference in height.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see Rotuba Extruders v. Ceppos, 46 NY2d 223; Herrin v. Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment, the function of the court is issue finding, not issue determination (see Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732), and in making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (see Glennon v. Mayo, 148 AD2d 580). In order to prevail, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324), and upon its failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v. City of New York, 49 NY2d 557, 562). In this regard, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable (at 562). Thus, summary judgment, which operates to deprive a party of his or her day in Court,

is only appropriate where the movant's initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (see Persaud v. Darbeau, 13 AD3d 347).

With this criteria in mind, the Court concludes that the City sustained its initial burden, but that a triable issue of fact has been raised regarding, e.g., whether the defect in question can be described as "trivial", and/or whether it may nevertheless have constituted a trap, snare or nuisance (see Trincere v. County of Suffolk, 90 NY2d 976; *cf.* Portanova v. Kantlis, __AD3d__, 833 NYS 2d 652).

Accordingly, it is

ORDERED that the motion is denied.

ENTER,

/S/________________________
HON. THOMAS P. ALIOTTA, J.S.C.

DATED: JUN 15, 2007

[* 4]

ALL PARTIES NOTIFIED BY EVE/pt on 6/18/2007

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