

Pierre-Antoine v Plainview Ave. Assoc.

2007 NY Slip Op 31987(U)

July 5, 2007

Supreme Court, New York County

Docket Number: 0113040/2004

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 35

Justice

Index Number : 113040/2004

PIERRE-ANTOINE, MICHELET

vs

PLAINVIEW AVENUE ASSOCIATES

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

113040/04

MOTION DATE

6/28/07

MOTION SEQ. NO.

003

MOTION CAL. NO.

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendants Plainview Avenue Associates, Municipal Credit Union and Broadwall Management Corp., for an order pursuant to CPLR 3212, granting defendants summary judgment dismissing the complaint of Michelet Pierre-Antoine and Maryse Pierre-Antoine is granted. It is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

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Dated: 7/5/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

_____^x
MICHELET PIERRE-ANTOINE and
MARYSE PIERRE-ANTOINE,

Plaintiffs,

Index No. 113040/04

-against-

DECISION/ORDER

PLAINVIEW AVENUE ASSOCIATES,
MUNICIPAL CREDIT UNION and
BROADWALL MANAGEMENT CORP.,

Defendants.

_____^x
EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Plainview Avenue Associates ("Plainview"), Municipal Credit Union ("MCU") and Broadwall Management Corp. ("Broadwall") (collectively, "defendants") move for an order pursuant to CPLR 3212, granting defendants summary judgment dismissing the complaint of Michelet Pierre-Antoine ("plaintiff") and Maryse Pierre-Antoine (collectively "plaintiffs").

Plaintiff claims that on June 6, 2003, while he was going to the MCU, he tripped and fell because of the handicapped ramp at the premises at 1660 Hempstead Turnpike, Hempstead, New York (the "subject premises").

Plaintiff's Deposition

On June 6, 2003 at around 5:00 p.m., on a sunny day, with a dry ground, plaintiff's accident occurred. (Pl.'s dep. p. 11) Plaintiff arrived by car at the parking lot, parked his car, he walked straight ahead right to the entrance of the subject premises. (Pl.'s dep. p. 16) When he was walking towards the MCU, he "...went to a handicap line. Like a blue line or something like

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that. Like handicap parking.” The blue line was “...in front of where [he] tripped.” He approached the handicap blue line, he put his left foot first “...on the driveway. And then [his] second foot, [his] right foot, hit the curb. When [his foot] hit the curb, [he] tripped and then [he] go very fast.” He could not control his fall and he hit his head and shoulder. (Pl.’s dep. p. 18)

When plaintiff’s left foot stepped on the curb/ve his left foot did not slip or trip on anything. It was steady. (Pl.’s dep. p. 24) The toe of his right foot “kicked” the side of the curb/ve. That is what caused him to trip and go forward. (Pl.’s dep. p. 25)

Defendants’ Contentions

Plaintiff clearly tripped and fell because his right toe impacted the curb of the sidewalk when he attempted to step onto the sidewalk from the driveway. Plaintiff did not step on any part of the handicapped ramp at the time of the accident and it is not a cause of plaintiff’s accident. The curb was readily observable to plaintiff by the reasonable use of his senses.

According to the MCU branch manager, and the property manager for Broadwall, there have been no renovations or repairs at the subject premises. Further, there have been no complaints or prior accidents regarding the location of plaintiff’s accident, specifically the handicapped ramp and adjacent curb outside the subject premises. Each is unaware of any dangerous or defective conditions regarding the location of plaintiff’s accident, specifically the handicapped ramp and adjacent curb outside the subject premises.

Plaintiffs’ Contentions

The construction of the sidewalk ramp where plaintiff tripped and fell was not built to the statutory requirements of the State of New York. The requirements governing “Ramps for

Handicapped in Street Curbs” are warranted by section 330 of the Highway Law, Chapter 248 of the Laws of the State of New York. Plaintiff’s expert, A.P. Weber (“Weber”) opined that the inherent design of the ramp is defective and in breach of Chapter 248, Section 330 and Subchapter D, Part 170 of the Laws of New York State - 1975 governing the construction of ramps through sidewalk curbing for physically handicapped persons, thereby creating an unsafe and dangerous condition. The statute imposes an absolute liability for its violation regardless of fault; it may establish negligence, or it may constitute evidence of negligence. Defendants caused and created the defect. Defendant Plainview built the original sidewalk handicap ramp where the plaintiff was injured with the original lessee. In addition, Broadwall was the managing agent of the property since its inception. MCU is the current lessee.

Plaintiff further elaborates in a letter brief requested by the court that the defect in which the plaintiff fell was built by the defendants in either 1996 or 1997. Clearly, the defendants’ constructed the curb ramp prior to the amendment of the Highway Law sec. 330. As a result, the provision covering the defect is proper due to the date of construction, and is applicable.

Further, the Americans with Disabilities Act has similar if not more stringent curb ramp provisions.

Defendants’ Reply

Plaintiff’s deposition testimony clearly indicates that the handicapped ramp did not cause plaintiff to trip and fall. Plaintiff merely tripped on the curb which was readily observable to plaintiff by the reasonable use of his senses. Plaintiff’s expert, Mr. Weber, only cites Section 330 of the Highway Law, which, as cited by plaintiff and Weber, no longer exists.

The legislature amended Section 330 of the Highway Law effective July 10, 1998 to

eliminate the requirements that the Commissioner of Transportation set, by regulation, standards and design specifications for the curb ramps. It should also be noted that while plaintiff's expert stated that the surface texture of the ramp was not adequate to insure "deep-grooved commuter traction," plaintiff does not allege that he slipped at any point during the accident.

Defendants' further reply in response to the court's request for a letter brief is that as is noted in the plaintiffs' Bill of Particulars, plaintiff's accident occurred on June 6, 2003, which is after the subject amendment. Therefore, section 330 of New York Highway Law had no specific guidelines as to slope or construction of the ramp other than it was to be in accordance with the Federal Americans with Disabilities Act of 1990.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce

admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action)). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Relevant Statutory Law

Section 330 of the Highway Law reads as follows:

§ 330. Ramps (fig 1) in street curbing

No public street, sidewalk adjacent to a curb, sidewalk adjacent to a parking lot, sidewalk adjacent to a private road open to public motor vehicle traffic or highway shall be constructed or reconstructed unless the curbing thereof is designed and constructed so as to allow reasonable access to pedestrian crosswalks for [fig 1] persons with disabilities, in accordance with accessibility guidelines mandated pursuant to the federal American with Disabilities Act of 1990, as amended. [fig 2]

The “Notes” following § 330 reads as follows:

Section 1. Legislative findings. The legislature finds that the federal Americans with Disabilities Act (ADA), enacted in 1990, has far broader application than *section 330 of the highway law*, which requires the construction of curb ramps, where appropriate, on facilities owned by state, local and private entities that accommodate the public. Further, with the enactment of the ADA, the legislature finds that separate regulation of this area by the department of transportation pursuant to *section 330 of the highway law* is redundant and unnecessary and may lead to confusion by those who are responsible for complying with both the provisions of ADA and *section 330 of the highway law*. Therefore, this legislation amends *section 330 of the highway law* to eliminate the requirements that the commissioner of transportation set, by regulation, standards and design specifications for curb ramps.

Plaintiff relies on Section 330 of the New York Highway Law concerning ramps and street curbing to object to summary judgment herein. This court finds that this reliance is misplaced. The only section that plaintiffs’ expert cites had no specifications regarding the slope of the ramp.

Further, absent a statutory violation, plaintiffs have failed to make a *prima facie* showing that defendants had written notice of or created any defect in the sidewalk curb (*Kelly v City of New York*, 172 A.D.2d 350, 568 N.Y.S.2d 744; *see also, Poirier v City of Schenectady*, 85

N.Y.2d 310, 315, 624 N.Y.S.2d 555, 648 N.E.2d 1318).

And, the court finds that the curb was not the proximate cause of the accident. The record shows that plaintiff admits that he kicked the curb, tripped and fell. The curb, at most, provided the occasion or condition for the occurrence, but was not one of the causes (*see, Sheehan v City of New York*, 40 N.Y.2d 496, 503, 387 N.Y.S.2d 92, 354 N.E.2d 832; *Rogers v Huggins*, 106 A.D.2d 621, 622, 483 N.Y.S.2d 110).

Conclusion

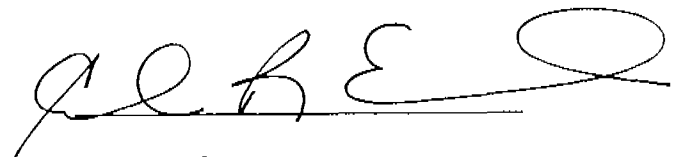
Defendants have established entitlement to summary judgment. Plaintiffs' expert's reliance on Section 330 of the New York Highway Law is misplaced. Based on the foregoing, it is hereby

ORDERED that the motion of defendants Plainview Avenue Associates, Municipal Credit Union and Broadwall Management Corp., for an order pursuant to CPLR 3212, granting defendants summary judgment dismissing the complaint of Michelet Pierre-Antoine and Maryse Pierre-Antoine is granted. It is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

Dated: July 5, 2007



Carol Robinson Edmead, J.S.C.

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