Vargas v Rodriguez

2007 NY Slip Op 32638(U)

August 7, 2007

Supreme Court, Queens County

Docket Number: 0020578/2006

Judge: Peter Joseph Kelly

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

GILBERTO VARGAS,	BY: KELLY, J
Plaintiff,	DATED: August 7, 2007
- against -	INDEX NUMBER: 20578/2006
INGRID RODRIGUEZ, et al.,	MOTION DATE: July 3, 2007
Defendant.	

In this action, the plaintiff seeks to recover for injuries sustained when he allegedly slipped and fell on a public sidewalk adjacent to property owned by the defendants. Specifically, plaintiff alleges that on March 3, 2006, at approximately 7:30 a.m., he was walking past 90-42 179th Place, Jamaica, New York, a premises owned by defendants, when he slipped on ice and snow that had accumulated on the sidewalk by the driveway in front of the premises. The plaintiff testified that a mixture of snow, ice and rain had fallen on the day prior to his accident, but that it had ceased precipitating before he fell.

The defendants, relying on section 7-210 of the New York Administrative Code, assert they are not liable for the plaintiff's accident. Section 7-210 of the Administrative Code, which became effective on September 14, 2003, provides that it "shall be the duty of the owner of real property abutting any sidewalk . . ." to maintain such sidewalk in a reasonably safe condition and makes the property owner liable for personal injuries resulting from a negligent failure to maintain the sidewalk, including "failure to remove snow, ice, dirt or

other material from the sidewalk". The Administrative Code, however, excepts from such liability "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes".

It is clear from the deposition testimony and the documentary evidence submitted, including a certified copy of the certificate of occupancy for the premises, that the property adjacent to the sidewalk on the day of the accident was improved with a two-family residential building that was owner occupied. Nevertheless, the plaintiff asserts that the defendants are not entitled to rely on the aforementioned Administrative Code section since the premises was not being used "exclusively for residential purposes" (NYC Administrative Code §7-210[c]).

In support of this claim, the plaintiff cites the testimony of the defendant Antonio Colclough ("Colclough") who averred that his girlfriend, the defendant Ingrid Rodriguez ("Rodriguez"), the co-owner and co-occupant of the premises, ran an internet based food business at the premises. In an affidavit submitted in reply, Rodriguez averred that she did not run her own business, but rather participated in an internet based co-operative which permitted members to purchase discounted products and allowed members to earn revenue if others were convinced to join the service. Rodriguez claims that she engaged in less than ten transactions between 2003 and 2006 and earned less than $500.00.

Upon the evidence presented, the court finds plaintiff's argument is untenable as it is based upon a faulty and wholly illogical interpretation of the language of the NYC Administrative Code. Although

the phrase "exclusively for residential purposes" is not defined in the Administrative Code section at issue, the meaning of a virtually identical phrase contained in Real Property Tax Law §730[1][a] has been interpreted by the New York State Court of Appeals.

In Town of New Castle v Kaufmann, 72 NY2d 684, the Court held that a taxpayer was entitled to commence a small claims assessment review challenging the Town's valuation of a single family residence that was admittedly improved with a professional office and used part time to run a psychiatry practice, despite the express language of the RPTL excluding from such review property not used "exclusively for residential purposes". The Court of Appeals reasoned that "literal and narrow interpretations" of statutory language should be avoided when it would "thwart the settled purpose of the statute".

The Court therefore found that "[r]esidential taxpayers who occasionally use a portion of their home for business are no more able to expend the time and cost of a regular tax certiorari proceeding than homeowners who use their dwelling exclusively for residential purposes, and should be entitled to a small claims assessment review".

The legislative history of the section 7-210 of the Administrative Code, as set forth in the report of the Committee on Transportation of the New York City Council which was annexed to plaintiff's opposition papers, reveals that the one to three family home exemption from liability was enacted "out of recognition of the fact that small property owners who reside at such property have limited resources and it would not be appropriate to expose such owners to exclusive liability with respect to sidewalk maintenance and repair", which is closely analogous to the rationale set forth in Town of New Castle v Kaufmann,

supra. It is clear that the New York City Council in enacting this section of the Administrative Code did not intend to disqualify one to three family homeowners from the protection of §7-210[c] based upon incidental or occasional internet business use at the premises. To adopt plaintiff's narrow interpretation would certainly thwart the purpose of the code and would subject thousands of small home owners to liability simply for engaging in "e-commerce", which does not transform the essential character of the premises in which these activities take place. The "commercial" activities undertaken here did not require the presence of customers or employees, delivery of merchandise, or anything that could conceivably affect the use or condition of the sidewalk or structure itself.

Clearly, Rodriguez's minor foray into the internet business world can not constitute a commercial endeavor so significant as to destroy the defendants' exemption from liability under the Administrative Code.

However, the applicability of the exception from liability under the Administrative Code is not finally determinative of defendants' liability herein. Although the defendants were not required to undertake any efforts to remove snow from the public sidewalk adjacent to their premises, they could still be liable to plaintiff "if snow and ice removal efforts [they undertook] . . . made the sidewalk more hazardous" (Martinez v City of New York, 20 AD3d 513, 514). While it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against the defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing a prima facie entitlement to judgment in its favor as a matter of law (Zuckerman v City of New York, 49 NY2d 557). Here, a prima facie case is established if the defendants prove they did

not perform snow removal between the time precipitation ceased and the plaintiff's accident (See, Martinez v City of New York, supra; Klotz v City of New York, 9 AD3d 392).

In this regard neither Rodriguez nor Colclough could recall, at their depositions, whether they shoveled or undertook any other snow removal efforts during the aforementioned period. The plaintiff's testimony on this point was, contrary to the defendants' assertion, decidedly equivocal. Initially, the plaintiff averred he could not recall whether the area where he had fell had been shoveled. Only later did the plaintiff testify, and in response to a question concerning whether it appeared that snow removal efforts had been undertaken,"I don't think so, no."

In addition, as the area where the plaintiff alleges he fell was a portion of the public sidewalk within the defendant's driveway, such area could constitute a special use as a matter of law (See, Nguyen v Brentwood Sch. Dist., 239 AD2d 406; Azzara v Revellese, 146 AD2d 592). Therefore a prima facie case is not established solely by submitting testimony that the plaintiff fell on a public sidewalk. To establish entitlement to judgment as a matter of law in this case, it was necessary for the defendants to demonstrate "that [its] special use of the driveway did not cause the hazardous condition" (Savage v Bhah, 297 AD2d 795; see also, Breger v City of New York, 297 AD2d 770; Randazzo v 580 Sunrise Realty Co., 275 AD2d 449). Defendants did not meet this burden.

Since the defendants have not established a prima facie case, it is not necessary to consider the sufficiency of the plaintiff's opposition papers (See, Alvarez v Prospect Hospital, 68 NY2d 320, 325).

Accordingly, after considering the evidence in a light most

favorable to the plaintiff (Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the defendants' motion for summary judgment dismissing the plaintiff's summons and complaint is denied.

Short form order signed simultaneously herewith.

Peter J. Kelly, J.S.C.