

Johnson v 222 W. 83rd St., LLC

2007 NY Slip Op 32788(U)

August 31, 2007

Supreme Court, New York County

Docket Number: 0117415/2005

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 117415/2005

JOHNSON, MARIA E.

vs

222 WEST 83RD STREET LLC.

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 117415/05

MOTION DATE 8/30/07

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

ORDERED that the motion of defendant Oxford Park Avenue Cleaners, Inc. for an order, pursuant to CPLR 3212, granting summary judgment in favor of Oxford, dismissing the Complaint of plaintiff Maria E. Johnson and all cross-claims against Oxford, is denied. It is further

ORDERED that counsel for defendant Oxford Park Avenue Cleaners, Inc. shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for all parties.

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

FILED
SEP 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/31/07

[Signature]
HON. CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST PRECEDENCE

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

MARIA E. JOHNSON, x

Plaintiff,

-against-

Index No. 117415/05

DECISION/ORDER

222 WEST 83RD STREET, LLC, SAMSON
MANAGEMENT LLC, OXFORD PARK AVENUE
CLEANERS, INC., MENASHE J. MURAD and
WESTSIDE VETERINARY CENTER,

Defendants.

EDMEAD, J.S.C. x

FILED
SEP 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff Maria E. Johnson (“plaintiff”) alleges that she tripped on the sidewalk in the vicinity of 220 and 222 West 83rd Street, New York, New York (the “accident site”), on May 9, 2005 at approximately 10:00 a.m. Defendant Oxford Park Avenue Cleaners, Inc. (“Oxford”) operates a dry cleaning business at 222 West 83rd Street.

Defendant Oxford moves for an order, pursuant to CPLR 3212, granting summary judgment in favor of Oxford, dismissing the Complaint of plaintiff and all cross-claims against Oxford, on the ground that no material issues of fact exist to be tried.

Plaintiff's Deposition Testimony

The accident happened on 83rd Street on the sidewalk on 222 (p.9) The accident occurred after plaintiff had passed the entrance of 222 West 83rd Street. (p. 23) But, she does not know how many feet past the entrance she had walked when she fell. (p. 24) There was a cleaners near where the accident occurred. (p. 27) The pen in Exhibit A is “somewhere in this part here [she] tripped. I can't tell you exactly where I tripped.” (p. 35)

Reggie Asanovic's Deposition Testimony

Reggie Asanovic ("Asanovic") is the superintendent of 222 West 83rd Street. (p. 6) His responsibilities included keeping the outside of the building safe and clean, including the sidewalk. (pp. 10-11) His employees did not report to him that there were cracks or crevices on the sidewalk before May of 2005. And, he did not note any cracks in the sidewalk of the premises that he was in charge of outside of 222 West 83rd Street before May of 2005. (p. 13) Even after Oxford was a tenant, he and his staff were responsible for the sidewalk outside of 222 West 83rd Street. (p. 23) Oxford was not responsible for reporting or inspecting any problems with the sidewalk. (p. 23) If there was a defect, he would repair it if it was a small job. (p. 24) He does not know if a company was called by Samson to do sidewalk repairs during his tenure. (pp. 24-25) The crack where plaintiff fell is some 20 to 30 feet from Oxford's dry cleaners. (pp. 35-36). Exhibit 4 depicts the entrance to Oxford but it does not depict the crack where plaintiff fell. (pp. 36, 37)

Before 2005, he had seen the separation in the sidewalk identified by plaintiff as the accident site. He never took any action with regard to that separation. He viewed that as the separation line between the property 220 and 222 West 83rd Street. (p. 28)

Jong Lim's Deposition Testimony

He is the owner of Oxford. (p. 4) He does not know if his lease requires him to fix the sidewalk outside of 222 West 83rd Street, if it is broken. During the term of his lease, he has never fixed the sidewalk outside of Oxford by filling in cracks or any other way. Nor has he ever seen anyone from the building at 222 West 83rd Street doing any work to the sidewalk during the term of his lease. (p. 6) To the best of his knowledge no one ever fell in front of his store during

2005. (pp. 13-14)

Oxford's Contentions

No triable issue of fact exists because plaintiff did not fall in front of the business operated by Oxford, which premises is leased from property owner 222 West 83rd Street, LLC ("222 West") pursuant to a lease with defendant Samson Management LLC ("Samson"), the managing agent for 222 West. Oxford only occupies a portion of the accident site.

Plaintiff testified that the photograph marked as defendant's Exhibit "A" depicts the crack that caused her fall, and that she fell near the pen shown in the photo. The staircase depicted at the top of the photos leads to the entrance of the children's museum. The dry cleaners is not in the picture.

Without taking any position as to whether this lessee is responsible for sidewalks pursuant to the lease, case law supports that regardless, no liability can be imputed if the fall did not occur on the sidewalk in front of Oxford's leased premises. Plaintiff's testimony and the accompanying photographs clearly establish that plaintiff did not fall on the sidewalk in front of the business operated by Oxford demonstrating Oxford's entitlement to summary judgment as a matter of law.

Further, Asanovic's testimony is consistent with plaintiff's own testimony regarding the fact that the photographs do not establish that plaintiff fell in front of Oxford. Asanovic never saw anyone affiliated with Oxford dry cleaners do anything to the subject sidewalk crack.

Plaintiff's Contentions

Issues of fact exist for a jury to determine regarding the contractual rights, responsibilities and duties of the co-defendants to each other and the accident site. Oxford's lease provides in

part that the lessee - Oxford - is responsible to take good care of and to maintain the sidewalks contiguous and in front of the demised premises, as well as adjacent to the premises, at its sole cost and expense.

Further, it is plaintiff's position that the accident clearly happened in the area contiguous to the leased premises. Therefore, Oxford's lease inputs liability on Oxford.

222 West's Contentions

The sole basis for Oxford's motion is that plaintiff did not fall on the sidewalk in front of its premises, or the business premises operated by Oxford, and that the alleged hazardous condition was not its responsibility to repair. In order to support its contentions, it relies on the testimony of witness Asanovic, the superintendent of the building located at 222 West 83rd Street. Based on Asanovic's deposition testimony, he could not definitively testify as to the distance of the alleged defect from the Oxford storefront. Further, Oxford's entrance occupies a large portion of the building at 222 West 83rd Street and abuts the sidewalk in front of 222 West 83rd property. It is not clear where the measurement began as there are two ends of the storefront. The witness Jong Lim, the owner of Oxford, testified that he had not seen anybody from the building at 222 West 83rd Street doing any type of work to the sidewalk during his occupancy of business. Furthermore, he testified that it was his responsibility to clean up the sidewalk.

In light of these issues, there are certainly questions of fact that should go before a jury as to which party was responsible for maintaining the sidewalk at issue.

Oxford's Reply

Essentially, 22West and Samson argue that Oxford's motion should be denied alleging Asanovic's testimony is vague and ambiguous regarding the distance between Oxford's

storefront and the sidewalk defect that allegedly caused plaintiff's fall. Asanovic was very clear regarding his testimony, which is consistent with plaintiff's own testimony, and photographs which show the defect is nowhere near Oxford's store. Co-defendants ignore the photographs entirely. Further, plaintiff did not fall on the sidewalk that divides 220 and 222 West 83rd Street. Plaintiff testified that she had passed the entrance to 222 West 83rd Street at the time of her fall.

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]).

It is well settled that in order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing

papers (*Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134, 718 N.Y.S.2d 287 [1st Dept 2000] citing *Lesocovich v. 180 Madison Ave. Corp.*, 81 N.Y.2d 982, 985, 599 N.Y.S.2d 526, 615 N.E.2d 1010; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

This court concludes that defendant Oxford has failed to make the requisite showing sufficient to entitle Oxford to summary judgment.

It is uncontested that plaintiff did not fall on the sidewalk *directly in front of* Oxford. But, Oxford has failed to establish that the area where plaintiff fell is not an area for which Oxford bears some responsibility to maintain and or repair.

This court recognizes that speculation is unable to defeat a motion for summary judgment. (See *Jenkins v New York City Housing Authority*, 11 AD3d 358 [1st Dept.2004]; and *Hyman v Queens County Bancorp.*, 307 A.D.2d. 984 [2d Dept.2003]. Plaintiff's imprecise, often equivocal answers in her deposition testimony do not translate into speculation. It is important to note that plaintiff's deposition testimony is not a precise, erudite rendition of the location of her accident. Her testimony is hesitant to a large degree. Plaintiff was unable to say "exactly" where she fell. That does not, however, translate into a win for Oxford. It is sufficient to raise an issue of fact to be decided by the jury.

Because Oxford cleaners is not in the photograph marked by plaintiff as the site of her accident does not prove, as a matter of law, that Oxford was not responsible for the maintenance of that location.

Also, Asanovic testified that the "separation" identified as the crack where plaintiff fell, is the dividing line between 220 and 222 West 83rd Street. However, his testimony alone is

insufficient to establish that the "crack" is actually the property line and if it is, who bears responsibility for a fall on that line/crack.

Conclusion

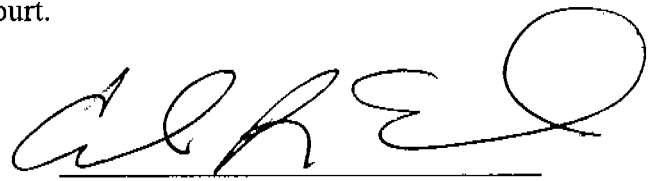
Based on the foregoing, it is hereby

ORDERED that the motion of defendant Oxford Park Avenue Cleaners, Inc. for an order, pursuant to CPLR 3212, granting summary judgment in favor of Oxford, dismissing the Complaint of plaintiff Maria E. Johnson and all cross-claims against Oxford, is denied. It is further

ORDERED that counsel for defendant Oxford Park Avenue Cleaners, Inc. shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of this court.

Dated: August 31, 2007



Carol Robinson Edmead, J.S.C.

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