

Pacheco v Executive Motor Inn, Inc.

2007 NY Slip Op 32830(U)

July 30, 2007

Supreme Court, Queens County

Docket Number: 0025644/2005

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
LUZ PACHECO and RALPH PACHECO,
Plaintiffs,

Index
Number: 25644/05

- against -

Motion
Date: JULY 17, 2007

EXECUTIVE MOTOR INN, INC., AND THE
CITY OF NEW YORK,

Motion
Cal. Number: 13

Defendants.

Motion Seq. No. 1

-----X

The following papers numbered 1 to 12 read on this motion by defendant Executive Motor Inn, Inc. for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Affirmation in Opposition-Exhibits.....	8-10
Reply Affirmation.....	11-12

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

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

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Executive has met its burden.

Plaintiff, a Postal letter carrier, was stepping down from her mail truck when she allegedly broke her ankle as a result of tripping and falling upon a curb on South Conduit Avenue adjacent to the premises 151-67 North Conduit Avenue in Queens County on

August 1, 2005. Executive was the owner of the premises 151-67.

A property owner is not liable for repairing and maintaining abutting public property unless the owner actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges the abutting owner with the responsibility to repair and maintain the public property and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

No ordinance or statute is involved in this case that would impose either a duty or liability upon Executive with regard to the maintenance and repair of the curb. The New York City Administrative Code §§19-152 and 7-210 places the duty to repair sidewalks upon the abutting property owners, and §7-210 specifically imposes liability upon abutting property owners for any injuries resulting from their breach of that duty. However, in the instant case, the defective area upon which plaintiff allegedly tripped was not the sidewalk but the curb. Section 7-201 (c) of the Administrative Code states, in relevant portion, "The term 'street' shall include the curbstone." Conversely, "sidewalk" is defined in §19-101 as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." Thus, it is clear that neither §19-152 nor §7-210 imposes upon a property owner a duty to repair and maintain curbs (see Irizarry v. The Rose Bloch 107 University Place Partnership, 12 Misc 3d 733 [Supreme Court, Kings County 2006]).

Furthermore, no issue has been raised as to whether Executive created the defect or made some special use of the subject curb area. Since Executive had no duty to repair and maintain the curb, it was plaintiff's burden to show evidence that Executive created the defect or caused it through some special use (see Pratt v. Villa Roma Country Club, Inc., 277 AD 2d 298, 299[1st Dept 2000]). Plaintiff has not alleged that Executive created the condition or made a special use.

Plaintiff's counsel concedes that a property owner has no duty with regard to curbstones. However, he contends that plaintiff alleges in both her bill of particulars and deposition that she fell on the broken sidewalk and curb and the photographs show that the defective condition exists on both the curb and the sidewalk. Therefore, argues counsel, summary judgment must be denied.

The bill of particulars states that the defective condition was at the "curbline/sidewalk." This phraseology, however, is not

of plaintiff's authorship, but was drafted by her attorney and, as in the fashion of pleadings prepared by attorneys, is deliberately broad and ambiguous so as to cover all bases.

In contrast, plaintiff's own testimony in her deposition unambiguously establishes that the area upon which she tripped was limited to the curb.

Counsel quotes an excerpt of her testimony from page 37, lines 17-21 of the deposition transcript as follows:

Q: Where did you fall?

A: On the pavement.

Q: On what pavement?

A: The sidewalk in front of the Executive Motor Inn.

This excerpt, taken out of context, is misleading. Plaintiff continues in lines 22-25 and page 38, lines 1-15:

Q: You told him you fell on the sidewalk or the curb?

A: Sidewalk, curb. Right on the edge of the street.

Q: On the edge of the street meaning the separation between the roadway and the curbing?

. . .

Q: What do you mean on the edge of the street?

A: What separates the sidewalk onto the street, the edge.

Q: The curb?

A: The curb.

On page 82, she testified:

Q: . . . Did the accident occur the moment you step down on the curb?

A: Yes.

Q: You stepped down and what happened?

A: I fell. It happened so fast.

Q: You step down and fell in what direction?

A: Onto the sidewalk.

Contrary to counsel's out-of-context interpretation of plaintiff's deposition testimony and the non-specific language of the bill of particulars which he tailored in his own words to this litigation, plaintiff's actual testimony was that she fell immediately upon stepping with her right foot onto the curb and that when she fell she landed on the sidewalk.

She also testified as follows:

Q: The moment you fell, was your right foot in contact with the curb?

A: Yes.

(P 83, ll 20-22).

Plaintiff also testified that the curb area where she stepped was broken and the curb was missing (p. 85). She further testified as follows:

Q: . . . Where did you place your foot?

A: Within this crosswalk.

Q: . . . You placed your foot in the crosswalk in the curb where there appears to be a missing curb, correct?

A: Yes.

(P. 106)

Q: Is the spot where your foot stepped shown in the photo?

A: Yes.

Q: Where the missing curb is?

A: Yes.

(P. 110)

There is no statement by plaintiff that she stepped onto the sidewalk, but only onto the curb - or, rather, the area where the curb was missing, and that area, according to plaintiff, was limited to the crosswalk.

A review of the photographs annexed to the affirmation in opposition depicts an area of the curbstone that is broken and missing. There is a small area of the edge of the sidewalk immediately abutting the missing curb area slightly larger than the dimensions of a metro card that is chipped. However, plaintiff does not allege that she fell on this sidewalk area.

Even had she testified that this chipped area of sidewalk was where she stepped, it is a defect that is so de minimis as to be non-actionable, as a matter of law.

A property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance, and the Court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to defendant (see Hymanson v. A.L.L. Assocs., 300 AD 2d 358, 358 [2nd Dept 2002]). An examination of all of the facts presented, including the dimensions and morphological appearance of the defect along with the time, place and circumstance of the injury leads this Court to conclude that the sidewalk defect depicted was too trivial in nature to form the basis of a complaint (see Trincere v.

County of Suffolk, supra). The trivial nature of the sidewalk condition, however, is academic, since the record on this motion fails to raise a question of fact as to whether plaintiff's injuries were caused by the defect in the sidewalk.

Although plaintiff's attorney would not permit her to mark on the photograph the exact spot where she placed her foot, she indicated where she, in fact, stepped. On page 106 of the deposition transcript the following is reported:

Q: Can you show me the area where your foot made contact?

MS. DAVIS: Indicating the missing area with sand, the area next to the vehicle.

Therefore, plaintiff indicated that the spot where she stepped was limited to that part of the missing curb area where there was sand. An examination of the photographs annexed to the opposition papers clearly shows that only the area of the street where the curbstone was missing is sandy, but that no area of the sidewalk is sandy. Plaintiff's husband, Ralph Pacheco took the photographs and plaintiff stated in her deposition that the photographs are a fair and accurate depiction of the sidewalk and curb on the day of the accident.

Therefore, the unambiguous evidence presented establishes that the sole location of plaintiff's alleged trip and fall accident was the curb, which is a street condition over which Executive bears no responsibility.

Accordingly, the motion is granted and the complaint is dismissed as against Executive.

Dated: July 30, 2007

KEVIN J. KERRIGAN, J.S.C.