

Martin v Ho Bong Chung

2007 NY Slip Op 33158(U)

September 28, 2007

Supreme Court, New York County

Docket Number: 0117743/2004

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 : 117743/2004

MARTIN, RONALD

vs

CHUNG, HO BONG

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 117743/04

MOTION DATE 9/26/07

MOTION SEQ. NO. 002

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 _____

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 defendants 300 W.53, LLC s/h/a 300 West 53rd Associates, Philip Pilevsky, Sheila Pilevsky, Albert Nassim, Edmond Nassim and Crescent Properties, for an order, pursuant to CPLR 3212, dismissing the complaint of plaintiff Ronald Martin, is granted to the extent that the following claims are dismissed:

- (1) claims related to the installation of a non-ornamental projection/structure that extended from the subject premises beyond the building line in violation of statues, codes, ordinances, laws or rules;
- (2) claims related to permitting the installation of non-ornamental projection/structure and the hanging of plastic strips from the projection/structure;
- (3) failing to make Reliable obtain the necessary NYC permits to perform sidewalk alterations - drilling holes in the sidewalk; and
- (4) claims related to a "special use" by the moving defendants.

It is further

Dated: _____

J.S.C.

Check one. FINAL DISPOSITION

NON-FINAL DISPOSITION

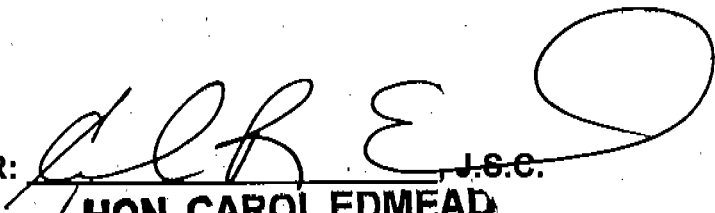
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

PAPERS NUMBERED
FILED
OCT - 3 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

FILED
OCT - 3 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated 9/28/07

ENTER:  J.S.C.
HON. CAROL EDMED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

* 3]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

RONALD MARTIN,

Plaintiff,

Index No. 117743/04

-against-

DECISION/ORDER

HO BONG CHUNG, RELIABLE PRODUCE, INC.,
SPACE SIGN COMPANY, INC.,
300 W. 53, LLC, 300 W. 53 ASSOCIATES,
PHILILP PILEVSKY, SHEILA PILEVSKY,
ALBERT NASSIM, EDMOND NASSIM, CRESCENT
PROPERTIES, SPACE SIGN PERMIT CO., INC.,
and ALL METALS MECHANICAL CONTRACTOR,
INC.,

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants 300 W.53, LLC s/h/a 300 West 53rd Associates, Philip Pilevsky, Sheila Pilevsky, Albert Nassim, Edmond Nassim and Crescent Properties (the "moving defendants"), move herein for an order, pursuant to CPLR 3212, dismissing the complaint of plaintiff Ronald Martin ("plaintiff").

This is an action for personal injuries allegedly sustained by plaintiff on January 4, 2002 as a result of a slip and fall on water/ice on the sidewalk abutting the "deli" of co-defendant Reliable Produce, Inc. ("Reliable") on 8th Avenue and 53rd Street, New York, New York (the "subject premises"). Moving defendants are the owners of the subject premises.

Plaintiff's Deposition Testimony

The accident occurred on January 4, 2002 at approximately 6:30 a.m. It was still dark outside, but there was street lighting (p. 15). On the date of the accident, it was very cold and

very dry. It had not rained or snowed within the 24 hour period prior to his accident (p. 14). The accident happened on 53rd Street and 8th Avenue, on the 8th Avenue side in front of what was then called Reliable Foods, based on the name on the awning (p. 17). Plaintiff went into Reliable Foods for coffee, as he was exiting the store plaintiff slipped and fell on wet ice (pp. 22-24). It was ice covered with water (p. 25). After his accident he could see that the water and ice emanated from a dropped plastic funneling down toward the curb (p. 25). On the sidewalk in front of Reliable Foods, there is a small walk space and then there are lots of flowers and plants on a "stage" going up four tiers, and there is a plastic drop material that is extended more than six feet from the wall of the building to the sidewalk (p. 27).

The ice on which he fell was caused by a man watering the walk area with a hose between the plastic drop and the plants. He was watering this walk area on the morning of plaintiff's accident. After plaintiff fell, he looked up and realized that he was on ice and water and he saw the man standing there behind the plastic drop with a hose in his hand watering down the area behind the plastic drop and the sidewalk area (pp. 28-29).

Plaintiff has seen this watering take place on several occasions, at different times of the day, before his accident (p. 29). On these occasions, three or four times, plaintiff complained to the store personnel (p. 29). He would make these complaints intermittently for some time between November and December when the weather turned cold (p. 30). On one occasion, his friend, Allan Colin was with him and complained to the store personnel about the ice and water (p. 33). After his third complaint about the condition, plaintiff went to the building and complained to the doorman at the building and Allan Colin was with him (p. 34). When plaintiff and Colin advised the doorman about Reliable hosing down the sidewalk making ice/water, the

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doorman said the owners, managers or board of directors or someone was aware of the problem (pp. 34-35).

Deposition Testimony of Edmond Nassim

He is the vice-president of Crescent Properties (p. 8). None of the partners were involved in the day-to-day activities at the subject premises (p. 29). As part of the lease between Reliable and the moving defendants, Reliable was permitted to erect an awning in front of the lease property (p. 33). The moving defendants approved the application for Reliable to erect an awning (p. 35). He was aware, based on his visits to Reliable, that Reliable was in fact selling flowers and plants outside of the subject premises and not vegetables (pp. 38-39).

No one from the building ever contacted either Crescent Properties or the LLC regarding complaints involving the tenant, Reliable (pp. 49-50).

The Moving Defendants' Contentions

The moving defendants are out of possession landlords, and owed no duty to the plaintiff herein and did not cause or create the transient condition complained of, i.e., water/ice on the sidewalk. The condition on the sidewalk was caused solely by the actions of the tenant in utilizing a hose on the walkway at the time of the accident, and the moving defendants had no notice whatsoever that Reliable had caused a dangerous condition by using a hose without a nozzle to water the sidewalk causing large amounts of water to flow to the sidewalk which in freezing conditions caused the water to freeze and create a slippery condition, prior to the occurrence.

Plaintiff's Bill of Particulars fails to cite any statute, code, ordinance law or rule other than claiming that the moving defendants violated Building Law NYC Ch. 26 Admin. Code,

Title C Sub - Art 4 to support their claim that defendant created/permitted a violation that caused plaintiff's alleged injuries. However, plaintiff's own testimony demonstrates that the sole and proximate cause of plaintiff's accident and alleged injuries are the actions of Reliable.

The moving defendants did not derive a special use, namely increased monthly rental, as a result of Reliable erecting an awning outside the leased property, or from Reliable using a portion of the sidewalk to sell merchandise.

Plaintiff's Opposition

According to the affidavit of Allan Colin ("Colin"), he owns and operates Colin Publications at 315 West 53rd Street, and has operated out of this location for more than forty years. During the winter months of 2000 and 2001, Reliable repeatedly watered its flowers in sub-freezing weather causing a very hazardous situation in a very high traffic area. The water would run out onto the 8th Avenue sidewalk where it would freeze into black ice. He witnessed this many times. Complaints were repeatedly made to both the store management and the desk people in the building. Calls were made, including two by him, to the managing agent, Crescent Properties, in the hope that they could remedy the situation. Detailed messages were left, but there was never a response. Colin then wrote a letter, dated December 19, 2001, to Crescent Properties, attached to the affidavit in opposition, describing the situation.

Based on Colin's affidavit and letter, the moving defendants had actual notice that its co-defendant tenant was violating the terms of its lease by selling flowers in water buckets outside the subject premises in an area exceeding the maximum 3 feet distance from the building line; they permitted the tenant to enclose the exterior area of the premises by hanging plastic sheets from the awning and bolting them onto the sidewalk in violation of Building Laws, NYC; they

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visited the premises on several occasions prior to plaintiff's accident; the situation was visible and apparent; it was foreseeable that plaintiff would be injured by water being poured from a hose outside the subject premises in freezing weather; the moving defendants failed to address or remedy the situation; and the frozen water/ice was the proximate cause of plaintiff's injury.

The Moving Defendants' Reply

It is clear that the affidavit prepared by Colin, an associate of plaintiff's, was obtained only after the summary judgment motion was served and filed by the moving defendants herein. Moreover, Colin has apparently kept safe in his records a copy of a letter allegedly mailed to Crescent Properties in 2001. It is clear that the purpose of said affidavit is solely to defeat the motion for summary judgment and should therefore be ignored. Colin's assertions that he made telephone calls to Crescent Properties are simply unsubstantiated assertions that should be given no weight or merit. Moreover, the letter mailed to Crescent Properties has an incomplete address.

In relation to any alleged breach of the provisions of the Building Code, there is no evidence that there was a violation of the Building Code, and even if there was, moving defendants argue that no liability for the happening of plaintiff's accident flows from such violation. By signing the Application to the Department of Buildings, moving defendants herein "authorized the applicant [by counsel, Reliable] to file this application for the work specified herein and all future amendments." Moving defendants simply authorized the application, they did not approve or guarantee the work in any way, nor did they certify that the work itself was in compliance with the Building Code. Moreover, there is no evidence, other than plaintiff's unsubstantiated assertions that Reliable, by erecting the awning and the "plastic sheets" it did,

violated Building Laws NYC, Ch. 26. Code, Title C, Sec 408.1(b)(1).

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 Perl binder*, 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

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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]).

The moving defendants have established entitlement to dismissal of the following claims:

- (1) claims related to the installation of a non-ornamental projection/structure that extended from the subject premises beyond the building line in violation of statues, codes, ordinances, laws or rules;
- (2) claims related to permitting the installation of non-ornamental projection/structure and the hanging of plastic strips from the projection/structure;
- (3) failing to make Reliable obtain the necessary NYC permits to perform sidewalk alterations - drilling holes in the sidewalk; and
- (4) claims related to a “special use” by the moving defendants.

There is no documentation that the moving defendants were issued any violations, citations concerning this awning. And, even if the awning amounted to a violation of the

Building Code, there is no evidence that this awning was in any way related to plaintiff's accident.

Thus, plaintiff's claims as they relate to the erection and maintenance of the "awning" are dismissed.

Plaintiff does not offer any opposition with respect to the moving defendants' motion for summary judgment concerning their "special use" of the subject premises.

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

Where there is a question of weather being a factor in causing a dangerous condition, in general, to impose liability for an injury proximately caused by a dangerous condition, a defendant must either have created the dangerous condition, or had actual or constructive notice of the condition, and a reasonable time to undertake remedial actions (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646; *Yearwood v Cushman & Wakefield*, 294 AD2d 568, 742 NYS2d 661; *Negron v St. Patrick's Nursing Home*, 248 AD2d 687, 671 NYS2d 275). Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d

251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

Duty of Care

“Negligence consists of a breach of a duty of care owed to another” (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff’s injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv. dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

In the instant case, an issue of fact exists concerning both actual and constructive notice to the moving defendants of the water/ice condition created by their tenant Reliable.

The credibility of the assertions made in the Colin affidavit and letter is a matter for the jury. Great deference is accorded to the factfinding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witness. It is axiomatic that “[c]redibility of witnesses and resolution of conflicting proofs are matters properly for determination by a jury” (*Mazariegos v New York City Transit Auth.*, 230 A.D.2d 608, 609 [1996]).

Also plaintiff’s deposition testimony raises as issue of fact and requires a determination

by the factfinding jury concerning the moving defendants' notice of a dangerous condition.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants 300 W.53, LLC s/h/a 300 West 53rd

Associates, Philip Pilevsky, Sheila Pilevsky, Albert Nassim, Edmond Nassim and Crescent

Properties, for an order, pursuant to CPLR 3212, dismissing the complaint of plaintiff Ronald

Martin, is granted to the extent that the following claims are dismissed:

- (1) claims related to the installation of a non-ornamental projection/structure that extended from the subject premises beyond the building line in violation of statues, codes, ordinances, laws or rules;
- (2) claims related to permitting the installation of non-ornamental projection/structure and the hanging of plastic strips from the projection/structure;
- (3) failing to make Reliable obtain the necessary NYC permits to perform sidewalk alterations - drilling holes in the sidewalk; and
- (4) claims related to a "special use" by the moving defendants.

It is further

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

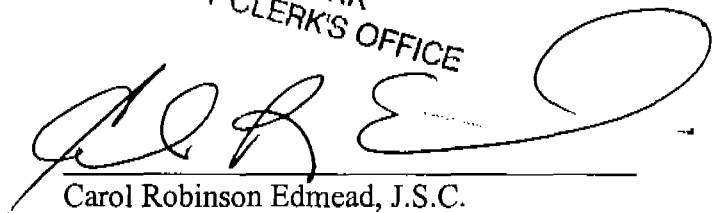
This constitutes the decision and order of this court.

Dated: September 28, 2007

FILED

OCT - 3 2007

NEW YORK
COUNTY CLERK'S OFFICE



Carol Robinson Edmead, J.S.C.