

Tavis v New York City Tr. Auth.

2007 NY Slip Op 33203(U)

September 20, 2007

Supreme Court, New York County

Docket Number: 0108907/2002

Judge: Donna Marie Mills

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.

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

PRESENT : DONNA M. MILLS
Justice

PART 21

TAVIS, IRENE

INDEX No. 108907/02

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 004

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for renewal.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

FILED
OCT 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9-20-07

J. S. C.
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

----- X

IRENE TAVIS,

Plaintiff,

INDEX NO.
108907/02

-against-

THE NEW YORK CITY TRANSIT AUTHORITY,
THE CITY OF NEW YORK, 885 THIRD AVENUE
CORPORATION and TEMCO SERVICE INDUSTRIES,

Defendant.

----- X

FILED
OCT 09 2007
NEW YORK
COUNTY CLERK

DONNA MILLS, J.:

Plaintiff moves for an order renewing the motion for summary judgment of defendant New York City Transit Authority ('Transit') and upon renewal denying Transit's motion.

In the underlying action plaintiff, Irene Tavis, sought to recover damages for personal injuries allegedly sustained on April 21, 2001 when she was caused to slip and fall by garbage and debris on a subway staircase on the northeast corner of 53rd Street and Third Avenue in Manhattan. The staircase was owned by defendant 885 Third Avenue Corporation and led from the Third Avenue sidewalk to the Lexington Avenue subway station.

On December 8, 2005 Transit cross-moved for summary judgment. By decision and order dated December 14, 2005 the court (R Lippmann, J) granted the cross-motion on the ground that Transit did not have notice of the alleged condition (see plaintiff's exhibit C). The court also granted the motion by Temco Service Industries and the cross-motion by the City for summary judgment (*id.*) Thereafter, by decision dated August 21, 2006, the court dismissed

plaintiff's action against the remaining defendant, 885 Third Avenue Corporation (*id.*).

On February 15, 2007 the Court of Appeals decided Bingham v. New York City Transit Authority (8 NY3d 176 (2007)) wherein the plaintiff asserted, among other things, failure to keep and maintain the subway in a proper and safe condition and failure to provide notice or warning of the defective condition (*id.* at 179). The Court found for the plaintiff and reinstated her complaint holding that the Transit Authority could be found responsible for accidents on stairways owned by third parties which primarily, but not exclusively, were used as a means of access to and egress from the subway. The Court further held that the carrier has a non-delegable duty to use reasonable care to see that the stairway remain in a safe condition, or, where appropriate, to take such precautions or give such warnings as would protect those using the stairway against unforeseen danger (*id.* at 180-181). Prior to Bingham the prevailing law in the First Department was that the Transit Authority could be held responsible for hazardous conditions on stairways owned by third parties only in instances where the stairway provided access "exclusively" for a New York City subway station (*id.* at 180).

Plaintiff, relying on Bingham, made the instant motion for renewal pursuant to CPLR 2221(e)(2) (change in the law) on or about April 16, 2007 arguing, *inter alia*, that since Transit has a non-delegable duty of care, its failure to inspect, clean and maintain the stairway renders notice irrelevant. Transit does not oppose the motion on the merits. Instead, Transit, relying on Glicksman v. Board of Education, (278 AD2d 364, 366 [2d Dept 2000]), contends that the motion is untimely because plaintiff's failure to move to reargue or renew, or to appeal the December 14, 2005 order within 30 days of service of the order with notice of entry (January 25, 2006) cut off plaintiff's ability to seek review of that order (court records and exhibit A to

plaintiff's reply affirmation confirm plaintiff's contention that a Notice of Appeal was filed). In reply plaintiff contends that the 30-day period for an appeal or motion to reargue has no bearing on a motion to renew and that the instant motion is timely because the December 15, 2005 order, which granted Transit's cross-motion, was not a final disposition. According to plaintiff, the August 21, 2006 order which dismissed plaintiff's case against the remaining defendant and which was served with notice of entry on September 12, 2006 constituted a final order and brought the December 14, 2005 order up for review under CPLR 5501(a)(1).

The timeliness of plaintiff's motion presents a threshold issue. The CPLR does not impose a time limit for making a motion for leave to renew (see Glicksman v. Board of Education, *supra*, at 366). The August 21, 2006 order which dismissed plaintiff's claims against the remaining defendant was a final disposition which expressly "modified" and "affirmed" and thereby resurrected the December 14, 2005 order (see plaintiff's exhibit C; Burke v. Crosson, 85 NY2d 10, 15 [1995] [final order disposes of all the causes of action between the parties and leaves nothing for judicial action apart from mere ministerial matters]). In Glicksman v. Board of Education, *supra*, relied on by Transit, the plaintiff moved for leave to renew based on a change in decisional law. The Second Department, after noting that the CPLR imposes no time limit for a motion to renew (as opposed to 30 days for a motion to reargue--see CPLR 2221[d][3]), imposed a 30-day time limit by holding that a motion to renew is untimely if the motion was made after judgment was entered and the time to appeal (30 days) had expired (see Glicksman v. Board of Education, *supra*, at 366). Subsequently, in Luna v. Port Authority of New York and New Jersey, (21 AD3d 324 [1st Dept 2005]) the *nisi prius* court granted defendants' motion and cross-motion for summary judgment in June 2002. A year later, in June

2003, plaintiff moved to reargue/renew defendants' motions based on the deposition of a witness which took place on May 16, 2002, a month after the final submission date of the motions and therefore not before the court. The First Department found the branch of plaintiff's motion which sought reargument to be untimely while finding that the branch of the motion which sought renewal should have been granted because "a motion for leave to renew is not subject to the same time restraints as govern a motion for leave to reargue. A motion for leave to renew must 'contain reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3])" (Luna v. Port Authority of New York and New Jersey, *supra* at 326). The First Department implicitly found that the motion was timely, despite the passage of 12 months between the order and plaintiff's motion for leave to renew.

The December 14, 2005 order was served with notice of entry on January 25, 2006, which is approximately 15 months before April 16, 2007, the date plaintiff brought the instant motion. The August 21, 2006 order, which revived the December 14, 2005 order, was served with notice of entry on September 12, 2006, approximately 7 months before plaintiff brought the instant motion. Bingham, *supra*, which triggered plaintiff's motion, was decided on February 15, 2007, September 14, 2007, 2 months before the instant motion. To the extent that Luna is inconsistent with Glicksman, which set the time to move for leave to renew at 30 days after entry of judgment, this court is both inclined and bound to follow the First Department. The court concludes that the instant motion is not untimely. As noted above, plaintiff's motion has not been opposed on the merits.

Accordingly, plaintiff's motion is granted and it is hereby

ORDERED that plaintiff's action against Transit be restored to the trial calendar and it is further

ORDERED that Transit's prior motion for summary judgment is denied.

Counsel is directed to serve a copy of this order on the Clerk of the trial support office, which upon receipt thereof shall mark its records accordingly.

This constitutes the decision and order of the court.

DATED: 9/20, 2007



J.S.C.

DONNA M. MILLS, J.S.C.

FILED
OCT 09 2007
NEW YORK
COUNTY CLERK'S OFFICE