Haberny v Mocio
2007 NY Slip Op 34597(U)
February 26, 2007
Supreme Court, New York County
Docket Number: 109547/2004
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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SANDRA HABERNY,

Plaintiff,

against

SANDRA FRIEDMAN MOCIO, ROSEMARY MOCIO, LABELLA PIZZA OF NYC INC., THE CITY OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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Index Number	109547/2004
Submission Date	Nov. 8, 2006
Mot. Seq. No.	002
Cal. No.	5

DECISION AND ORDER

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Papers considered in review of this motion and cross-motion for summary judgment :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Memorandum of Law	2
Notice of Cross-Motion	3
Memorandum of Law	4
Affirmation in Opposition (City)	5
Affirmation in Opposition (Plaintiff)	6
Reply	7
Letter from Siobhan Forde, Esq. with affidavit	7a

PAUL GEORGE FEINMAN, J.:

Defendants Sandra Friedman Mocio and Rosemary Mocio are the owners of a building abutting the sidewalk where the plaintiff's trip and fall accident occurred in June 2003, prior to the amendment of the Administrative Code's Sidewalk Law. They move for summary judgment in their favor. Defendant La Bella Pizza of NYC, Inc.'s cross motion for the same relief was

previously granted for the reasons set forth by the court in an oral decision on the record on November 8, 2006 (Ct. Reporter Toni Figueroa) and in an appealable written order of the same date. Left undecided at that time was the motion by the Mocios, which for the reasons stated below, is now granted in its entirety.

Factual Background

On June 23, 2003, at about 8:00 p.m., plaintiff tripped and fell on the sidewalk on the East 32nd Street side of the corner premises known as 581 Second Avenue, New York, New York (Not. of Mot. Ex. B, Ver. Bill of Partic. ¶ 3).[1] She suffered a broken left ankle caused by a height differential between two slabs of sidewalk (Ver. Bill of Partic. ¶ 7; Not. of Mot. Ex. C, EBT of Sandra Haberny [hereinafter Haberny EBT] 15,16). The sidewalk slabs at issue were located about two feet away from the curb (Haberny EBT 19), and the slab at issue had many cracks (Haberny EBT 19). The concrete slabs adjoining the one on which she tripped appeared new and lighter in color than the others, "as if they had been recently laid." (Haberny EBT 20).

Photographs of the sidewalk area where plaintiff fell were taken by the investigator hired by plaintiff's attorney just a few days after the accident (Haberny EBT 60-61), and photocopies have been included in the motion papers (Not. of Mot. Ex. E). The five photographs appear to show a sidewalk where at least one of the slabs is lower than the others and where part of the curb is lower than the rest of the curb. Plaintiff testified that when she visited the area where she fell "maybe" two months after her accident, the sidewalk had been repaired (Haberny EBT 87, 88:5).

At the time of the accident, defendants Sandra Friedman Mocio and Rosemary Mocio were

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[1]Although the verified complaint and verified bill of particulars indicate that the accident occurred on June 24, 2003, plaintiff at her deposition indicated that this was a mistake and the correct date was June 23, 2003 (Not. of Mot. Ex. C, EBT of Sandra Haberny 8).

the owners of the premises (Ver. Compl. ¶¶ 1, 6; Ver. Ans. ¶ 1). They had owned the building since 1997; before that time it was owned by their husbands, John and Adam Mocio, and their husband's aunt, who acquired it together in 1977 (Not. of Mot. Ex. D, EBT of Adam Mocio [hereinafter Mocio EBT 10, 11). The ground floor of the premises was leased by the Mocios to co-defendant LaBella Pizza of NYC, Inc., which had assumed a 15-year lease from a prior eatery in 1996 (Not. of Mot. Ex. D, EBT of Adam Mocio [hereinafter Mocio EBT 16-18). According to Adam Mocio, under the terms of the pizzeria's lease agreement, the restaurant had no responsibility to repair the sidewalk but only to keep it clean from dirt and snow, and it was the owner's responsibility to repair the sidewalk (Mocio EBT 44). However, it was Mocio's understanding that under the law as it was written in June 2003, it was the City's responsibility to repair the sidewalks abutting his premises (Mocio EBT 44-45).

Adam Mocio, the husband of Rosemary Mocio, has been the managing agent for the premises since 1978 (Mocio EBT 12; Reply Ex. A, Mocio Aff.). He has taken care of the "day to day occurrences" in the building (Mocio EBT 22:15-16). For work outside the building, he usually hires others (Mocio EBT 23-24). For instance, he hired a licensed contractor to get all the permits and do the pointing and waterproofing of the exterior side wall of the building about five years ago (Mocio EBT 24, 25). In 1988 he hired a licensed contractor to put in new sidewalk on both sides of the building (Mocio EBT 27). That contractor was "an outside independent contractor" who was not supervised, controlled, or directed by Mocio or anyone connected with the premises (Reply Ex. A, Mocio Aff.).

Mocio was unaware of any violations pertaining to the 32nd Street side of the building's sidewalk and was unaware of any conditions on that portion of the sidewalk prior to plaintiff's

accident (Mocio EBT 30). Mocio thought that the building had received a violation in about 1994 concerning a "defect" in the sidewalk on the Second Avenue side of the property, but that it was "dismissed" when the City inspector came to investigate it (Mocio EBT 28-29). When shown the photographs of the sidewalk area taken by plaintiff's attorney's office, Mocio indicated that he had never noticed the problem with the level in the sidewalk and never noticed that the metal edge of the sidewalk where it meets the curb, had "sunk in." (Mocio EBT 40, 42). He postulated that the only way the condition could have occurred is if "somebody had dug out – you had to dig the street or something out." (Mocio EBT 42:14-15). He stated that there is "a lot of digging that goes on" in the roadway adjacent to that area of the curb, and that he remembered seeing Con Ed and City trucks, and perhaps others, as well, working on East 32nd Street (Mocio EBT 52:5-6,8-9, 14-23, 67).

Mocio was first told of plaintiff's accident by telephone by a non-native English speaking employee of LaBella Pizza, who said that "a couple of days ago" a person had fallen "on the beam on the street. . . the beam that hits the sidewalk" (Mocio EBT 55:10; 64:5-6, 10-11). He was also told by the pizzeria owner that the employee had said that the sidewalk was "broke," and the employee told Mocio that the street had sunk and the metal in the sidewalk had broken and caused an accident (Mocio EBT 53:21-22; 54:25; 55:2-4). When Mocio visited the location, the employee pointed to the curb and said that the plaintiff had fallen over the broken metal which, according to Mocio, was not broken at the time of his visit (Mocio EBT 54-55). Neither Mocio nor the owner of the pizzeria knew that the sidewalk was damaged (Mocio EBT 58). He did not notice any damage to the sidewalk (Mocio EBT 54). To his knowledge, the sidewalk has not been replaced or repaired (Mocio EBT 60). He did not believe that the owner of the pizzeria had done any repairs (Mocio EBT 65). He did not know how the sidewalk came to be repaired (Mocio EBT 58). He was

unaware of any work by Con Ed on the sidewalk (Mocio EBT 68).

The owner of LaBella Pizza of NYC, Inc., Joseph Calcagno, testified that he was aware that the corner of 32nd and Second Avenue had "always been under construction" because there is "some type of gas problem on that corner" and Con Ed or other City workers are "always digging up the street every other month" (Cross-Mot. Ex. F, EBT of Joseph Calcagno [hereinafter Calcagno EBT] 9, 25:23-25; 26:2-24). During the time his store has been at the location, "the sidewalk has been broke(sic) and repaired ... numerous times" (Calcagno EBT 48:18; 24-25; 49:2). He assumed it was repaired by "some City agency" or a utility company such as the telephone company or Con Edison (Calcagno EBT 49: 8-14). Calcagno himself never hired any contractors to work on any portion of the sidewalk (Calcagno EBT 29). He was not aware of any defects in the sidewalk on Second Avenue at East 32nd Street in June 2003 (Calcagno EBT 33). He was not aware of any defects or conditions in the sidewalk on the East 32nd Side, no one ever made any complaints to him, and he had not received any notices to cure violations from the City concerning the sidewalk (Calcagno EBT 34, 35, 50). When shown the photographs of the uneven sidewalk, he stated that he had never noticed the sidewalk defect and no one had brought it to his attention prior to plaintiff's accident (Calcagno EBT 40, 41, 42). After receiving the summons in this case, Calcagno noticed that the sidewalk was repaired but had no idea when it had been repaired (Calcagno EBT 50).

The Mocio defendants move for summary judgment and dismissal of the complaint on the basis that they had no duty to plaintiff to repair the sidewalk, and that there is no evidence to support the conclusion that a duty had been imposed on them by statute or case law. LaBella Pizza cross-moves for summary judgment and dismissal of the complaint on similar grounds was previously granted by decision and order dated November 8, 2006. The City opposes the Mocio's motion

based on the statement of Adam Mocio that he had the sidewalk replaced in 1988, and that the lease between the owners of the premises and the tenant apparently states that the owner is liable for repairs to the sidewalk and not the tenant. Plaintiff opposes the motion, but did not oppose the cross-motion, arguing that the Mocios concede having repaired the sidewalk in the past and that it there is a question of fact and credibility as to whether or not they had undertaken other repairs over the years, including the ones made subsequent to plaintiff's accident, which would show that they had retained responsibility for the maintenance and condition of the sidewalk.

Legal Analysis

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

To establish a prima facie case of negligence, plaintiff must demonstrate (1) that defendants

owed her duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether an alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 (2002). It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy" (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], *aff'd* 72 NY2d 888 [1988], citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 [1983]).

Plaintiff's injury occurred two months prior to the amendment of section 7-210 of the New York City Administrative Code. Prior to the amendment, the New York City Charter imposed on the City a nondelegable duty to maintain the sidewalk in a safe condition (*New York v Kalikow Realty Co.*, 71 NY2d 957, 961 [1988], citing *D'Ambrosio v City of New York*, 55 NY2d 454, 463 [1982]; *Russell v Village of Canastota*, 98 NY 496 [1885]). "[T]he City also had a duty to make certain that the property owner kept the sidewalks safe for pedestrian traffic, and a further duty to make repairs itself, in the event the property owner failed to fulfill its statutory responsibilities." (*Kalikow Realty Co.*, at 961). Liability was only imposed on the abutting landowner or lessee where that landowner or lessee created the unsafe condition or put the public way to a special use for his or her own benefit (*Balsam v Delma Engineering Corp.*, 139 AD2d 292, 298 [1st Dept. 1988], *aff'd* 90 NY2d 966 [1997], citing *Congreve v Smith*, 18 NY 79 [1858] [unsafe condition]; *D'Ambrosio v City*, 55 NY2d 454 [special use]). Where an owner made repairs to a different part of the property, or an area of the street unrelated to where the injury occurred, it was held that the landowner or lessee should not be held responsible for the injury (*see, Roark v Hunting*, 24 NY2d 470, 477

[1969]). Where there was no evidence that repairs were actually commenced or made, a party would not be held liable for causing a defect in a public sidewalk (*Kenyon v City of New York*, 194 AD2d 398 [1st Dept. 1993]).

The Mocio defendants argue that at the time of plaintiff's accident, they did not own the sidewalk, were not responsible for maintaining the sidewalk, had not themselves repaired or caused to make repairs to the sidewalk, as the sidewalk was replaced during the time their husbands owned the building, and did not make a special use of the sidewalk, and that therefore summary judgment in their favor is appropriate.

The City opposes the Mocios' motion, based on Adam Mocio's deposition testimony that under the terms of the lease agreement with the pizzeria, it was the owners' responsibility to repair the sidewalks surrounding the building, and because the owners had previously replaced the sidewalk in 1988. The City argues that summary judgment is appropriate only where the defendant did not control, maintain, repair, or make special use of the portion of the sidewalk where the plaintiff allegedly fell. Although the City relies on *Rubin v City of New York*, 211 AD2d 417 (1st Dept. 1995) in support of its position, *Rubin* actually tend to support plaintiffs' position. In *Rubin*, the plaintiff had fallen on a defective piece of sidewalk located about two feet from an emergency subway exit, and the transit authority successfully argued that the subway exit had been installed 15 years prior to the accident, after which no work had been done since that time on the exist and that they did not maintain, repair, or control the area of the sidewalk where the plaintiff fell. Here, where the Mocios replaced the entire sidewalk 15 years prior to plaintiff's accident and testified that they had never since that time undertaken any repairs of the sidewalk, nor made any special use of the sidewalk, their position is nearly analogous to the Transit Authority in *Rubin*. Moreover,

although there is testimony that the lease agreement between the owner and the restaurant provides that the owners of the premises are to keep the sidewalk repaired, there is also testimony that the owners understood that the City was responsible for sidewalk repairs and that except in 1988, 15 years before plaintiff's accident, they did not in fact undertake any repairs.

Plaintiff argues that the Mocios' motion must be denied because the City's search for contracts, permits, violations, cut forms, or complaints concerning the sidewalk area apparently did not turn up "other parties" who worked on the sidewalk area (Greenberg Aff. in Opp. ¶ 5, p. 3). Her attorney conjectures that it would be unusual for the City or a municipal utility or contractor to repair a sidewalk voluntarily, and that therefore defendants must have repaired the sidewalk and thus maintained a duty to plaintiff to keep the sidewalk in good repair (Greenberg Aff. in Opp. ¶ 7, p. 5).

Although negligence cases, by their nature, do not normally lend themselves to summary dismissal (*see, Villoch v Lindgren*, 269 AD2d 271, 273 [1st Dept 2000] citation omitted), the offering of mere guesses, speculation, or surmises in opposition to a defendant's motion for summary judgment, is insufficient to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Here, neither plaintiff nor the City offer evidence to show that any of the Mocio defendants caused the defect in the sidewalk, and can only offer conjecture and supposition to argue that the Mocios, if unaware of the sidewalk's condition prior to plaintiff's injury, caused the sidewalk to be repaired subsequently and thus should be held to have a duty toward the plaintiff. However, conjecture and surmise is insufficient to defeat a showing of entitlement to summary judgment. Accordingly, the motion for summary judgment and dismissal of the complaint and all cross-claims as against Sandra Friedman Mocio and Rosemary Mocio is granted. It is

therefore

ORDERED that the motion by Sandra Friedman Mocio and Rosemary Mocio for summary judgment is granted and the Clerk of the Court shall enter judgment dismissing the complaint and all cross claims as against these defendants together with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and shall continue under this index number as to the remaining parties.

This constitutes the decision and order of the court, which supplements the court's interim decision and order dated November 8, 2006.

Dated: February 26, 2007
New York, New York

J.S.C.