

Scheele v City of New York

2008 NY Slip Op 30228(U)

January 24, 2008

Supreme Court, New York County

Docket Number: 0118204/2004

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER
J.S.C.

PART 5

Index Number : 118204/2004

SCHEELE, MICHAEL

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 118204/04

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

1
2, 3, 4
5

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JAN 28 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/28/08

[Signature]
EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
MICHAEL SCHEELE,

Plaintiff,

Index No.
118204/04

Seq No.: 001

- against -

Decision and
Order

THE CITY OF NEW YORK and
BJW ASSOCIATES, LLC,

Defendants.

FILED
JAN 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he stepped on a manhole cover and fell into the manhole that was located on the sidewalk near the curb at the southeast corner of 5th Avenue and East 19th Street New York, New York on May 7, 2004. Defendant BJW Associates, LLC ("BJW"), owner of the building adjacent to the accident site, moves for summary judgment pursuant to CPLR 3212. Defendant the City of New York ("City") does not oppose BJW's motion and also seeks summary judgment dismissing plaintiff's claims as against it. Plaintiff opposes defendants' motions. Plaintiff also brings a cross-motion seeking summary judgment as against City. City does not oppose plaintiff's cross-motion.

BJW, in support of its motion, submits: the pleadings; the bill of particulars; plaintiff's deposition transcript; two black and white photocopies of the manhole cover and the accident site taken after repairs were made to the site; the deposition transcript of Bob Macyshyn, Building Manager; an affidavit by Mr. Macyshyn; the deposition transcript of Gregory Tolwinski, Water and Sewer Construction Supervisor for the Department of Environmental Protection ("DEP"); and a DEP "service request" dated January 21, 2005. Plaintiff, in support of his cross-motion, submits many of the same exhibits and also submits a color photo copy of the manhole taken immediately after the accident. City, in support of its cross-motion, submits, in addition to the

above exhibits, the deposition transcript of Cynthia Howard, Record Searcher for the Department of Transportation ("DOT") and six permits.

BJW argues that City owned the manhole cover and was responsible for its maintenance. According to the deposition testimony of plaintiff, the "concrete lip" beneath the sidewalk, in which the cover sits was broken, causing the cover to become unstable and tilt upward when he stepped on it. Thus, BJW claims that, as a matter of law, City is liable for plaintiff's accident.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Pursuant to 34 RCNY § 2-07(b)(1), governing Underground Street Access Covers, Transformer Vault Covers and Gratings, the owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware.

City concedes it owns the manhole in question. Plaintiff does not allege that the accident was caused by a defect in the sidewalk outside of the twelve inch perimeter around the manhole. Rather, he alleges that the manhole cover itself was ill-fitted. Thus, BJW has shown that it was not responsible for the manhole or its cover.

City, in support of its motion for summary judgment dismissing plaintiff's claims as against it, argues that it did not have prior written notice of the defect which caused plaintiff's accident. City relies on New York City Administrative Code §7-210(c)(2), which states in relevant part:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any .

. . sidewalk . . .being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice . . . was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice.

Plaintiff, in opposition, argues that this was not a defect in the sidewalk, requiring prior written notice. It was a defect in the concrete lip on which the manhole cover sits. Plaintiff supplies the testimony of Mr. Tolwinski, where he described the manhole:

Q: Then let's talk about manholes that would not have a casting beneath it. Are there certain manholes like that around the City?

A: Yes.

Q: For manhole covers that don't have castings, how do they sit in the ground.

A: On a lip.

Q: Is that a concrete lip?

A: Yes.

...

Q: From this picture can you tell is this the type of hole that manhole cover simply sits on a concrete lip?

A: Yes.

...

Q: . . . if there is no type of casting there, what are the different ways the manhole cover could end up like this if someone stands on one side?

...

A: . . . something would have to be broken.

Q: What would have to be broken?

A: Either the cover or - - you refer to it as a casting, but it's a lip.(Tolwinski Deposition Page 25-27).

The legislature, by enacting prior written notice requirements, has acknowledged that municipalities cannot be aware of every dangerous condition on its streets and public walkways. (*Poirier v. City of Schenectady*, 85 N.Y.2d 310[1995]). The court in *Blake v. City of Albany*, 48 N.Y.2d 875[1979] stated:

Such notice provisions are enacted to insure that a municipality has a reasonable opportunity to cure defective conditions, the existence of

which it could not be expected to know absent some sort of positive appraisal.

Here, however, the defect which caused plaintiff's accident was not visible on the surface of the sidewalk. Rather, it was alleged to be a defect in the manhole lip beneath the surface that caused the cover to upturn, allowing plaintiff to fall into the hole. Indeed, a photograph of the manhole taken by a witness after the accident shows that a good part of the concrete lip is broken or missing.

City's reliance on §7-201(c) is misplaced. The question is whether City affirmatively monitored the condition of its manhole covers pursuant to 34 RCNY § 2-07(b)(1) and had no constructive notice of the defect. Where an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area. If no such program of inspection is in place constructive notice of the defect is imputed. (*Hayes v. Riverbend Housing Co., Inc.*, 40 A.D.3d 500[1st Dept. 2007]).

Plaintiff argues that he is entitled to summary judgment because City failed to affirmatively inspect. Plaintiff asserts that Mr. Tolwinski's admitted that during the eighteen years that he has worked for DEP, he never saw nor heard anyone discuss the inspection of manhole covers (Tolwinski Deposition, Page 28). Concedely, Mr. Tolwinski also testified that it was not his job to perform maintenance and/or inspection of the manholes and he did not have any information regarding the same (Id. at Page 14).

City, fails to oppose plaintiff's motion. Despite the fact that it would be in exclusive possession of documentation demonstrating it did perform inspections and/or maintenance of the manhole covers, City fails to put forth any such proof in admissible form.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant BJW Associates, LLC, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that defendant the City of New York's cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against The City of New York on the issue of liability; and it is further

ORDERED that a trial on the issue of damages is directed.

DATED: January 24, 2008



EILEEN A. RAKOWER, J.S.C

FILED
JAN 28 2008
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