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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Index Number : 108811/2006

LUGO, ANIBAL

VS.

HENRY PHIPPS PLAZA EAST

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 3/31/08

MOTION SEQ. NO. 002

MOTION CAL. NO.

n this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED
APR 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

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):

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant Kalimian First Avenue LLC for an order granting summary judgment in its favor dismissing the complaint of plaintiff Anibal Lugo, **is granted**; and it is further

ORDERED that the motion of defendant Kalimian First Avenue LLC for an order granting summary judgment in its favor dismissing all cross claims of co-defendant Henry Phipps Plaza East, Inc., **is granted**; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendant Kalimian First Avenue LLC shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: 4/4/08

CAROL EDMEAD J.S.C.
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 35

ANIBAL LUGO,

Plaintiff,

-against-

HENRY PHIPPS PLAZA EAST, INC., and
KALIMIAN FIRST AVENUE, LLC,

Defendants.

EDMEAD, J.S.C.

Index No. 108811/06

DECISION/ORDER

MEMORANDUM DECISION

Defendant Kalimian First Avenue LLC ("Kalimian") moves for an order granting summary judgment in its favor dismissing the complaint of plaintiff Anibal Lugo ("plaintiff") and all cross claims of co-defendant Henry Phipps Plaza East, Inc. ("Phipps").

This action arises from an incident in which the plaintiff alleges that on April 12, 2006, he tripped and fell due to a broken and missing portion of sidewalk of East 29th Street, between 1st Avenue and 2nd Avenue, New York, NY (the "accident site"). Plaintiff claims that the alleged defect was located near the property line between the buildings located at 340 East 29th Street and 485 1st Avenue. Kalimian was sued as the owner of the building located at 340 East 29th Street, New York, NY. Phipps was sued as the owner of the building located at 485 1st Avenue, New York, NY.

Plaintiff's Deposition Testimony

The accident happened on 29th Street near First Avenue. (p.7) There is a restaurant on the corner. Behind the restaurant is where plaintiff fell. (p. 9) The accident occurred on 29th Street, closer to First Avenue. (p. 10) Plaintiff was right next to the restaurant when the accident

occurred. (p. 14) The cause of his fall was because the sidewalk was not even. Plaintiff hit the part of the sidewalk that was lifted up. (p. 18)

Ladislav Halcin Testimony

Ladislav Halcin ("Halcin") has been a superintendent for about six years working for Kalimian. (p. 8) On the property next to Kalimian's property, repair work was done on an uneven sidewalk in 2006. (p. 35) Looking at the photographs (Pl.'s Exh. 1 and 2), Halcin identified the "cracked area" as being on the adjacent property. (pp. 52-53)

Eddie Ocasio Deposition

Eddie Ocasio ("Ocasio") resides and is the superintendent of the Phipps property. (p. 6) He has been with the company for 31 years, and fifteen years at the subject property. (p. 7)

Ocasio repaired the site of the accident after the accident. (pp. 24-25) His handyman, Paul Campbell, performed the repair. (p. 26) Ocasio was directed to make the repair by Phipps' management office. (p. 26)

Ms. Alexandra Stevens from the managing office made the request for the repair. She showed Ocasio the photograph of the accident site and told him that a "gentleman fell" by that hole and Ocasio and his handyman repaired it. (pp. 51-52)

Kalimian's Contentions

The plaintiff, his wife and their home attendant all testified as to the location of the alleged defects on the public sidewalk that the plaintiff claims caused him to stumble and/or fall. Photographs were marked to clearly identify the location of the two alleged defects. The defendants in this action are the owners of the two closest buildings to the accident location. The undisputed testimony of both superintendents is that the accident location identified by the

plaintiff and his witnesses is located in front of defendant Phipps' property. Neither of the two defects claimed to have existed in the sidewalk are located in front of defendant Kalimian's property.

If there had been any dispute as to whether the defect near the property line was on the Kalimian side of the line, that issue was settled by the actions of the parties. The Kalimian superintendent clearly stated that the area with the hole was in front of Phipps' property, while the Phipps superintendent readily admitted that the hole was subsequently repaired by the Phipps handyman. The post-accident repair, which is admissible as to the issue of control, clearly establishes that the hole was located in front of Phipps' property, not Kalimian.

Since it is only the abutting landowner who has the responsibility to maintain the public sidewalk pursuant to the Administrative Code 7-210, then Kalimian who is not an abutting landowner is entitled to summary judgment on the grounds that it had no duty to maintain the portions of the sidewalk identified by the plaintiff as causing him to fall.

Phipps' Opposition

There is a clear issue of fact as to which property the plaintiff allegedly fell in front of. The fact that Kalimian could insinuate that the alleged defect was not in front of its property from the evidence available in this matter and proffered in their motion is just simply inaccurate.

Kalimian has failed to supply the requisite evidence in admissible form to show that it was not the property owner of the area in question. There is no title search regarding the property in question.

Kalimian's theory is based on photographs in which there were x's made by the plaintiff. These x's are all over the place and inconsistent.

Kalimian's motion is also based on the fact that the accident occurred on one side of the property line and not the other; however, this has not been definitively established.

Plaintiff's Opposition

Plaintiff adopts the arguments of Phipps.

Kalimian's Reply

Kalimian's motion is supported by numerous photographs that were marked by the various deposition witnesses in this action. The photographs show that the alleged defect is on the Phipps side of the property line. In addition, the motion is supported by the fact that it was Phipps' employee who made the post accident repair. This demonstrates that Phipps was in control of the accident location, not Kalimian.

Phipps identifies a single photograph among the many that were marked in this case that has an "x" on the Kalimian side of the property line. However when the photograph is considered in context with all of the evidence, it is clear that the lone photograph relied upon by Phipps does not raise any question of fact.

Neither Phipps nor the plaintiff address the argument of post accident repair in their opposition to this motion. By failing to offer any opposition to this argument, both Phipps and the plaintiff concede this point.

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 Perlbinder*, 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 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]).

Subsequent Repairs

The general rule is that "evidence of subsequent repairs is not discoverable or admissible in a negligence case." *Hualde v Otis Elevator Company,* 235 A.D.2d 269, 270, 652 N.Y.S.2d 38 (1st Dept.1997) *citing Klatz v Armor Elevator,* 93 A.D.2d 633, 462 N.Y.S.2d 677 (2nd Dept.1983). As noted legal scholars have observed "an opposite rule would discourage defendants from repairing dangerous conditions in order to avoid generating evidence against themselves, (see generally, 2 Wigmore, Evidence [Chadbourn rev., 1979], § 283; McCormick, Evidence [2nd ed.], 666-669; Richardson, Evidence [10th ed.-Prince] §§ 168, 221)." *Caprara v Chrysler Corp.* 52 N.Y.2d 114, 122-123, 436 N.Y.S.2d 251, 417 N.E.2d 545 (1981). Furthermore, this general rule applies in a negligence action because "at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value." *Id.* at 122, 436 N.Y.S.2d 251, 417 N.E.2d 545.

However, there are exceptions to the general rule. Evidence of subsequent repairs is

widely held to be discoverable and admissible if there are issues of control and maintenance. *Klatz v Armor Elevator,* 93 A.D.2d 633, 462 N.Y.S.2d 677 *supra.*

It is unrefuted and the Phipps superintendent readily admitted that the accident site was subsequently repaired by the Phipps handyman, at the request of the managing agent, Ms. Stevens, for Phipps. In fact, she showed him a photograph that was at the deposition and advised him that a man had fallen at that site, and that the repair had to be made. This is clear and convincing evidence of control.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Kalimian First Avenue LLC for an order granting summary judgment in its favor dismissing the complaint of plaintiff Anibal Lugo, **is granted**; and it is further

ORDERED that the motion of defendant Kalimian First Avenue LLC for an order granting summary judgment in its favor dismissing all cross claims of co-defendant Henry Phipps Plaza East, Inc., **is granted**; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendant Kalimian First Avenue LLC shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

This constitutes the decision and order of this court.

Dated: April 4, 2008

Carol Robinson Edmead, J.S.C.