Van Zile v New York City Tr. Auth.
2008 NY Slip Op 31681(U)
June 10, 2008
Supreme Court, New York County
Docket Number: 0101332/2007
Judge: Donna Marie Mills
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SCANNED ON 6/18/2008

[* 1]

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

PRESENT : DONNA M. MILLS — *Justice*

PART 21

VAN ZILE, DENNIS

Plaintiff,

-v-

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

INDEX NO. 101332/07

MOTION DATE ________

MOTION SEQ. NO. 001

MOTION CAL NO. ________

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1+1A
Answering Affidavits– Exhibits	2+2A
Replying Affidavits	

CROSS-MOTION: ______ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/10/08

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

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

INDEX NO.
101332/07

DENNIS C. VAN ZILE

Plaintiff,

- against -

NEW YORK TRANSIT AUTHORITY, et al.,

DECISION/ORDER

Defendants.

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

DONNA M. MILLS, J:

BACKGROUND

In this action for personal injuries, plaintiff Dennis C. Van Zile seeks damages allegedly resulting from a slip and fall on the public sidewalk located in front of 790-806 Eighth Avenue. Plaintiff alleges that on March 8, 2006, as he was walking in front of the parking garage, operated by defendant ZENITH PARKING LLC (hereinafter "Zenith"), he was caused to trip and fall over an angular piece of metal protruding upwards and through a metal plate. Defendant Zenith now moves for summary judgment dismissing the complaint and all cross-claims against it on the grounds that as tenant of the premises, it owed no duty of care to the plaintiff as it was not in exclusive control of the subway grating nor did it inspect or maintain the subway grating. In addition, Zenith contends that it did not create the alleged defective condition. The plaintiff opposes the summary judgment motion.

APPLICABLE LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). "But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated." Andre v. Pomeroy, 35 N.Y.2d 361 (1974). "To demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it. Gregg v. Key Food Supermarket, 50 AD3d 1093 [2d Dept. 2008]).

In support of its motion, Zenith argues that as a garage tenant it did not own, control, inspect or maintain the subway grating in front of the subject location where plaintiff was caused to fall. Zenith submits the lease between itself and co-defendant Dover Condominium in an effort to establish that it had no duty to maintain the area in front of the garage.

In opposition, plaintiff contends that the rider to the lease requires Zenith to comply with the property owner's obligations under § 7-210 of the Administrative Code of the City of New York. Pursuant to § 7-210 of the Administrative Code, owners of property abutting the public sidewalk have the affirmative duty to maintain the sidewalk and are liable in tort for injuries arising out of its breach of this duty.

Zenith contends that § 7-210 of the Administrative Code explicitly created a non-delegable duty upon landowners to maintain the sidewalk and that the lease between it

and Dover Hotel Associates could not obligate Zenith to repair the sidewalk in front of the premises. Zenith has provided no case law in support of this assertion. Contrarily, in Palka v. Servicemaster Management Services Corp., 83 N.Y.2d 579, 589 (1994), the court held that "when a party contracts to inspect and repair and possesses the exclusive management and control of real or personal property which results in negligent infliction of injury, its assumed duty extends to noncontracting individuals reasonably within the zone and contemplation of the intended safety services." The court in Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 141 (2002), found an exception to the general rule limiting tort liability to third parties when there is the type of "comprehensive and exclusive" property maintenance obligation contemplated by Palka." (citing Palka). Therefore, any duty imposed on the owner by § 7-210 of the Administrative Code could be assumed by a contracting party.

In Palka, when deciding whether to impose liability against the defendant, the court considered whether there was: "reasonably interconnected and anticipated relationships; particularity of assumed responsibility under the contract and evidence adduced at trial; displacement and substitution of a particular safety function designed to protect persons like this plaintiff; and a set of reasonable expectations of all the parties." Palka, supra at 589. Plaintiff had a reasonable expectation that the sidewalk be well maintained and in a condition of good repair. This duty is imposed on the owner of the premises according to § 7-210 of the Administrative Code. Furthermore, this duty was delegated to the tenant by the terms of Paragraph 54 of the rider to the Zenith Lease in the way contemplated by Palka as to cause the defendant to assume a "comprehensive and exclusive" duty to abide with the code.

Lastly, Zenith contends that the subway grating cannot properly be considered a "sidewalk" as it is property of the New York City Transit Authority. It relies on Vucetovic v. Epsom Downs, Inc., 45 A.D.3d 28 (2007), which held that a tree well is not part of the sidewalk. The defendant's reliance is misguided. Title 19 of the Administrative Code, "Streets and Sidewalks," defines "sidewalk" as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." (see Administrative Code § 19-101 [d]). Although the defendant correctly asserts that the trap door is not "intended for the use of pedestrians," what the plaintiff alleges caused his injury is the grating that lies on the sidewalk level intended to allow pedestrians to pass over the trap door. Even though the accident occurred within 12 inches of the grate which is within defendant New York City Transit Authority's "zone of responsibility," this does not absolve it from possible culpability. Administrative Code § 7-210 is clear that an abutting real property owner is charged with the responsibility of maintaining the sidewalk and is liable for personal injuries proximately caused by their failure to maintain said sidewalks, notwithstanding any other provision of law.

Viewing the submission in the light most favorable to plaintiff, this court finds that the defendant has failed to make a prima facie showing that it is entitled to summary judgment as a matter of law. Since the owner of the adjoining property or a contracting party that assumes a comprehensive or exclusive duty is responsible for maintaining the sidewalk, Zenith's motion for summary judgment should be denied.

Accordingly, it is

ORDERED that the co-defendant Zenith's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: 6/10/08

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

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