

Tavares v Aidalena Realty Corp.

2008 NY Slip Op 31727(U)

June 18, 2008

Supreme Court, New York County

Docket Number: 0110680/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 110680/2006
TAVARES, LUIS
VS.
AIDALENA REALTY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for summary judgment

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 for summary judgment by
defendant Aidalena Realty Corp. is granted in accordance
with the attached memorandum decision.

FOR THE FOLLOWING REASON(S):

FILED

JUN 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN
J.S.C.

Dated: 6/18/08

[Signature]
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 IAS PART 36

-----X

LUIS TAVARES,

Plaintiff,

DECISION AND
JUDGMENT

v.

Index. No. 110680/06

AIDALENA REALTY CORP. and
NELRO REALTY LLC,

Defendants.

Motion Seq. 003

FILED

JUN 23 2008

COUNTY CLERK'S OFFICE
NEW YORK

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LING-COHAN, DORIS, J.S.C.

In this personal injury action, defendant Aidalena Realty Corp ("Aidalena") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it and pursuant to CPLR 8106 and 8303-a for attorneys' fees.

Plaintiff, Luis Tavares ("Tavares") alleges, in the complaint, that on July 6, 2005, he was seriously injured when he tripped and fell on a defect in the sidewalk adjacent to 644 West 185th Street and 220 Wadsworth Avenue. At his examination before trial, Tavares clarified that he tripped and fell on a broken sidewalk in front of a gate that belongs to the 220 Wadsworth Ave. Building (Fronce Aff., Ex. G, Tr. pp.20-30 and 35, Exs. H, I and J) It is undisputed that Nelro Realty LLC ("Nelro") owns the 220 Wadsworth Avenue building and the gate.

Maria Cespedes, a long time employee of Aidalena and its property manager, testified that Aidalena did not install the gate and that the gate belongs to the 220 Wadsworth Avenue building. (Fronce Aff., Ex. K, p. 11) In addition, she testified that the 644 West 185th Street

tenants do not use the gate or the area behind it; that there is no access from 644 West 185th Street to the area behind the gate and that Aidalena never performed any work or maintenance on the sidewalk in front of the gate, did not cause the condition on the sidewalk in front of the gate and did not make any special use of the sidewalk. (Fronce Aff. Ex. K, pp. 11, 20, 24 & 26)

Julian Pena, the superintendent for the 220 Wadsworth Avenue building testified that he was employed at the 220 Wadsworth Avenue building before the accident occurred; that the gate belongs to 220 Wadsworth Avenue and that he cleans and shovels the sidewalk area in front of the gate. (Fronce Aff., Ex. M, pp. 6, 11-14, 17-19 and 23-24)

Aidalena contends that the complaint and cross claims should be dismissed as against it because, based on the undisputed testimony that Nelro owns the 220 Wadsworth Avenue building and the attached gate where the accident allegedly occurred, Aidalena owes no duty to the plaintiff with respect to the condition of the sidewalk.

Plaintiff does not oppose Aidalena's motion. However, co-defendant Nelro contends that there are questions of fact regarding where and how the accident occurred which preclude dismissal of its cross claim against Aidalena. Nelro argues that the hospital records state that plaintiff tripped and fell over a large plant pot, rather than on a piece of broken sidewalk, and that such inconsistencies in the description of how the accident occurred raise questions that cannot be answered on the papers before the court.

DISCUSSION

Summary Judgment

On a motion for summary judgment, the proponent of the motion must 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]) The motion must be supported by an “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])

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require 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 tender an acceptable excuse for the failure to do so. (*Vermette v. Kenworth Truck Co.*, 68 NY2d 714 (1986); *Zuckerman v. City of New York*, supra at 560) Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and Swift v. Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v. Bower & Gardner*, 46 NY2d 765, 767 [1978])

“A defendant may be held liable in negligence only when it breaches a duty owed to the plaintiff.” (*Strauss v. Belle Rlty. Co.*, 65 NY2d 399 [1985]) As the Court of Appeals stated in *Pulka v. Edelman*, 40 NY2d 781, 782 (1976) “[I]n the absence of a duty, there is no breach and without a breach there is no liability.” (See also, *Kimbar v. Estis*, 1 NY2d 399, 405 [1956])

The New York City Administrative Code Section 7-210 imposes a nondelegable duty upon the owner of real property abutting any sidewalk to maintain the sidewalk in reasonably safe condition. The section further states that such property owner, “shall be liable for any . . . personal injury. . . proximately caused by the failure of such owner to maintain such sidewalk in

[* 5]
a reasonably safe condition. “ (NYC Admin Code Section 7-210[b])

In *Rodgers v. City of New York*, 34 AD3d 555 (2nd Dept 2006), plaintiff alleged that he slipped and fell in a hole in front of 751 Union Street. In that case, the Appellate Division granted summary judgment dismissing the complaint against the owner of 753 Union Street, and stated:

Generally, liability for a dangerous condition on real property must be predicated upon occupancy, ownership, control or special use of the premises [T]he appellant established a *prima facie* case that she owed no duty to the plaintiff by submitting an affidavit indicating that she owned the property at 753 Union Street, that she did not contract for any utility or sidewalk work at 751 Union Street on or before the date from the accident, that she had not derived any special uses of the sidewalk in front of either 751 or 753 Union Street, and that she did not create a defect or hazardous condition on the sidewalk located in front of either address.

Similarly, in *Hines v. City of New York*, 43 AD3d 869, 870 (2nd Dept 2007) the court found that the defendants:

established their *prima facie* entitlement to judgment as a matter of law by submitting evidence in admissible form demonstrating that they were not the owners of the property abutting that part of the public sidewalk on which the accident occurred, and that, in any event they did not negligently construct or repair the sidewalk or otherwise create the defective condition or cause the defect to occur by some special use of the sidewalk..

In this case, Aidalena has established its *prima facie* case by submitting the affidavit of Maria Cespedes, Aidalena’s property manager, which states that Aidalena is not the owner of the property abutting the sidewalk where the accident allegedly occurred and that Aidalena did not

maintain or repair the sidewalk or create the condition on the sidewalk or make any special use of the sidewalk. (Fronce Aff., Ex. L) In addition, Aidalena has submitted the deposition of Julian Pena, the superintendent of 220 Wadsworth Avenue who testified that Nelro owns and maintains the property abutting the part of the sidewalk where the accident occurred.

Nelro does not dispute that it owns the property where the accident occurred and that Aidalena did not maintain or repair the sidewalk or make any special use of the sidewalk. Nevertheless, Nelro argues that summary judgment is unwarranted because there are inconsistent statements about how and where the accident occurred. In support of this argument, Nelro produces plaintiff's hospital records that indicate that plaintiff's injury occurred when he tripped over a plant pot.

Nelro's argument is without merit. The hospital records that Nelro relies on do not state where the plant pot was located (Friedler Aff., Ex. A) and Nelro does not allege that Aidalena had a plant pot on the sidewalk adjacent to 644 West 185th Street. The inconsistent hospital record may raise a question of fact as to how plaintiff sustained his injuries, but they do not provide any evidence of Aidalena's negligence and they fail to raise a question of fact regarding Aidalena's liability, and they do not implicate Adelina in any way. Here, there is no admissible evidence¹ demonstrating that Aidalena had any duty to the plaintiff and Nelro's shadowy semblance of an issue of fact is insufficient to defeat the motion. (*See De Groes v. De Groes*, 17

¹ It is well established that medical records relating to the cause of plaintiff's injuries are inadmissible hearsay as admissions unless the proponent can establish that the patient was the source of the information. Here, Nelro has failed to make such a showing. (*See, Rivera v. City of New York*, 293A.D.2d 383 [1st Dept 2002]) Moreover, the medical records do not qualify as business records because Nelro has failed to demonstrate that the statement was germane to treatment and diagnosis. (*Id.*)

AD2d 930 [1st Dept 1962])

Attorneys' Fees

CPLR Section 8303-a(a) provides in pertinent part:

If in an action to recover damages for personal injury . . . [a] cross-claim is commenced or continued by a defendant and it is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorneys' fees not exceeding \$10,000.

CPLR Section 8303-a(c) states that in order to find that the maintenance or continuance of a cross claim is frivolous, a court must find that the cross claim was continued in bad faith primarily to delay or harass and/or that it was maintained in bad faith without any reasonable basis in law or fact and that it was unsupported by a reasonable argument for an extension, modification or reversal of existing law.

Aidalena claims that Nelro's refusal to discontinue the cross claim against it after the testimony established that Aidalena did not own the property where the accident occurred was frivolous because all of the evidence adduced made it clear that no viable claim existed against Aidalena. Aidalena has failed, however, to demonstrate that Nelro's decision to continue its cross claim was made in "bad faith" to delay or harass and/or that it had no basis in law or fact or could not supported by a reasonable argument for an extension, modification or reversal of existing law. Because the court finds that Nelro's maintenance of its cross claim does not meet the definition of frivolous contained in CPLR 8303-a(c), that branch of Aidalena's motion for attorneys' fees and costs is denied. (*See, e.g. Velasquez v. Long Island Power Authority*, 2007 WL 2684815 [Sup. Ct. Nassau County])

Accordingly, it is

ORDERED that the branch of Aidalena's motion seeking summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the branch of the motion seeking attorneys' fees and costs is denied; and it is further

ORDERED that the remainder of the action is severed and shall continue

And the Clerk is directed to enter judgment accordingly.

DATE 6/18/08



Hon. Doris Ling-Cohan, J.S.C.

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FILED
JUN 23 2008
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