

Terry v City of New York
2009 NY Slip Op 30220(U)
January 30, 2009
Supreme Court, New York County
Docket Number: 100048/2005
Judge: Matthew F. Cooper
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MATTHEW F. COOPER

PRESENT. _____

PART 52

Index Number : 100048/2005

TERRY, CHRISTOPHER

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

§ motion to/for _____

PAPERS NUMBERED

Notice of Motlon/ 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):

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED

FEB 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/29/09

MF
MATTHEW F. COOPER *J.P.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: CIVIL TERM: PART 52

-----X
CHRISTOPHER TERRY

Plaintiff,

Index No. 100048/2005
Mot. Seq. No. 004

-against-

DECISION AND ORDER

THE CITY OF NEW YORK and CHURCH OF ST.
ANTHONY OF PADUA, INDIAN RIVER, LEWIS
CO., N.Y.

Defendants.
-----X

For the Plaintiff:

Christopher Terry, Esq.
40 Exchange Place, Suite 1205
New York, NY 10005
(212) 422-1020

For Defendant Church of St. Anthony of Padua

Peter James Johnson, JR, Esq.
Leahy & Johnson, P.C.
120 Wall Street
New York, NY 10005
(212) 269-7308

Papers and exhibits considered in review of the motions and cross-motions:

- Notice of Motion:
- Expert Affidavit
- Affirmation in Opposition
- Reply Affirmation

FILED
FEB 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Matthew F. Cooper, J.

Plaintiff, Christopher Terry, brought this action against defendants for injuries he sustained from a slip and fall that is alleged to have occurred on February 16, 2004, at 154 Sullivan Street, New York, New York. Plaintiff contends that because defendant Church of St. Anthony of Padua ("the Church") owns the property at this location it is thereby responsible for the maintenance of the sidewalk area and liable for any subsequent injuries caused by a defective condition. The Church denies ownership of the property and now moves for summary judgement dismissing plaintiff's complaint pursuant to CPLR 3212. Defendant the City of New York takes no position on the motion.

Background

Plaintiff alleges that on February 16, 2004, he was caused to slip and fall as a result of a snow and/or ice condition on the sidewalk at 154 Sullivan Street. The location is approximately 60 feet from the corner of Thompson Street and 140 feet from the corner of Sullivan Street. Plaintiff filed a Notice of Claim on February 23, 2004, and a Summons and Verified Complaint on December 7, 2006. The Verified Complaint alleges that the Church owned, maintained, managed, controlled, supervised, and operated the premises, public walkways and public sidewalks abutting 154 Sullivan Street. In its Verified Answer dated December 26, 2006, the Church denied all allegations of ownership, maintenance, management, control, supervision, and operation of the sidewalk where plaintiff allegedly fell.

On June 6, 2008, plaintiff appeared for a deposition at which he identified the location where he fell as in front of the Church of St. Anthony of Padua . The Church produced Mr. Glen Barbieri, its facilities manager, for a deposition on July 17, 2008, at which he testified that the Church did not own the area where plaintiff allegedly fell.

Plaintiff filed his Note of Issue on August 21, 2008. The Church, however, denies that it was ever served with the Note of Issue.¹ Defendant filed this motion for summary judgment to dismiss the complaint on October 23, 2008.

Analysis

The Church moves for summary judgment on the ground that the Church owed no duty to the plaintiff because the Church did not own the property abutting the sidewalk where plaintiff

¹At oral argument on January 21, 2009, the City of New York stated that it too was never served with the Note of Issue.

allegedly fell. In support of its assertion, the Church submitted the following evidence which it contends settles the issue of ownership: deposition testimony of the Church facilities manager, Glenn Barbieri, indicating that the Province of the Immaculate Conception of the Franciscan Friars ("the Province") owns the property where plaintiff fell; an affidavit of Fr. Joseph F. Lorenzo, O.F.M., stating that the Church does not own the disputed property; and an affidavit of architect Denise P. Beckaert concluding that the property abutting the location where plaintiff fell is used by the Province and is not owned by the Church. In opposition to the Church's motion, plaintiff submitted the last known deed for 154 Sullivan Street, indicating that the Church was the grantee of 154 Sullivan Street; results of a Certificate of Occupancy search for the property at 141/153 Thompson Street, also known as 154 Sullivan Street, identifying this property as "to be occupied by the St. Anthony of Padua Church;" and an affidavit of licensed professional engineer, Richard Berkenfeld, also asserting that the location where plaintiff fell is owned or managed by the Church.

On a motion for summary judgment, where an opposing party has demonstrated by admissible evidence "the existence of a factual issue requiring a trial of the action," the court shall deny the motion. *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965, 968 (1985); CPLR § 3212(b). Plaintiff, by his submission of the most recent deed for 154 Sullivan Street, the Certificate of Occupancy search records, and the affidavit of a licensed engineer, has demonstrated by admissible evidence that a factual issue exists regarding ownership, maintenance, management, control, supervision, and operation of the sidewalk at 154 Sullivan Street. Consequently, the resolution of the case by summary judgment is not appropriate.

It is noted that in opposing the Church's motion, plaintiff argues that the motion should be denied because the Church failed (1) to file the motion within 60 days of plaintiff filing the Note of

Issue and (2) to attach all the pleadings to their motion. The Church states that it was never served with the Note of Issue and that its motion for summary judgment was served, if not filed, within 60 days of the filing of Note of Issue. The rule of this court is that a motion for summary judgment must be *filed* no later than 60 days after the Note of Issue is *filed*. In order for the court to reach the merits of an untimely motion, a showing of good cause for the delay is required. *Brill v. City of New York*, 2 NY3d 648, 652 (2004). It has been held by the First Department that a party's failure to serve the Note of Issue on the moving party "constitutes good cause for a late summary judgment motion." *McFadden v. 530 Fifth Ave. RPS III Assoc., LP*, 28 AD3d 202, 203 (1st Dept 2006). In light of the Church's denial that it was ever served with the Note of Issue, the court finds good cause exists to allow the late motion. Further, plaintiff's contention that the Church's failure to attach all pleadings with its motion is not persuasive since the pleadings were previously submitted with plaintiff's prior motion. *Stiber v. Cotrone*, 153 AD2d 1006, 1007 (3d Dept 1989). In any event, irrespective of any procedural defects, the court has concluded on the merits of the motion that summary judgment cannot be granted as triable issues of fact remain.

In light of the foregoing, it is ORDERED that defendant Church of St. Anthony of Padua's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: January 30, 2009

ENTER:



 Matthew F. Cooper, J.S.C.

FILED
 FEB 03 2009
 COUNTY CLERK'S OFFICE
 NEW YORK