

O'Reilly v City of New York

2009 NY Slip Op 30265(U)

February 3, 2009

Supreme Court, New York County

Docket Number: 105405/07

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____ **J.S.C.**
Justice

PART 5

Index Number : 105405/2007

O'REILLY, PATRICIA

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/3/09


EILEEN A. RAKOWER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
PATRICIA O'REILLY,

Seq. No.
001

Plaintiff,

Index No.
105405/07

- against -

**DECISION
/ORDER**

THE CITY OF NEW YORK, FC
BATTERY PARK ASSOCIATES, LLC.,
APPLE-METRO, INC., BPC HOTEL, LLC.,
and PROMUS HOTELS, INC.,

Defendants.

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER, J.

Plaintiff, brings this action for personal injuries allegedly sustained on August 8, 2006, when she was caused to fall as a result of defects in a tree-well, located at 102 North End Avenue in the County and State of New York. Plaintiff contends that "Defendants were negligent in placing obstructions on the sidewalk; in impeding the normal use of the sidewalk; in improperly and negligently diverting the pedestrian flow of traffic; in causing the plaintiff to walk into a dangerous and defective condition; in causing the plaintiff to walk off the proper sidewalk into a surface not intended for walking; in failing to provide the plaintiff with a safe place to walk.". Defendant Promus Hotels, Inc. ("Promus") asserts cross-claims for indemnification and contribution against defendants the City of New York ("City"), Apple-Metro, Inc. ("Apple" is the manager of Battery Park Fresh, LLC), and BPC Hotel, LLC ("BPC"). Defendants FC Battery Park ("FC Battery") and BPC also assert cross-claims for indemnification against defendants City, Apple, and Promus. Promus now moves for summary judgment pursuant to CPLR §3212. Plaintiff and defendant Apple each oppose the motion, and no other party submits papers.

Promus, in support of its motion, submits: (1) a notice of motion; (2) counsel's affirmation; (3) the summons and complaint; (4) the answers submitted by Promus

Hotels and by FC Battery Park; (5) plaintiff's bill of particulars, (6) plaintiff's response to defendant's combined demand for discovery and inspection ("D&I"), annexing documents including photographs of the subject location; (6) the licensing and management agreements between Promus and BPC Hotel ("BPC"); (7) a memorandum of law in support of its motion; and, counsel's reply affirmation, attaching the affirmation of Dennis McGinn ("McGinn"), Regional Claims Manager for the Eastern Region of Hilton Hotels Corporation. Promus argues that summary judgment should be granted because City is responsible for all injuries arising from tree-wells; also, that, as property manager and pursuant to its agreement with the property owner, BPC, it had no duty to the plaintiff; and, finally, even if it had a duty, that alleged obstructions in the sidewalk were not the proximate cause of plaintiff's injuries.

Plaintiff, in opposition, does not submit any exhibits. By attorney affirmation, plaintiff claims that Promus has not met its prima facie burden and that summary judgment should not be granted because issues of fact exist, including whether Promus caused the condition, and because plaintiff has not yet had the opportunity to conduct discovery on this issue or depose a Promus witness.

Apple adopts plaintiff's opposition and submits counsel's affirmation and the ground lease agreement between defendant FC Battery Park Associates, LLC as landlord and Battery Park Fresh, LLC as tenant. Apple also contends that Promus has failed to meet its prima facie burden and that further discovery must be conducted because issues of fact exist as to, among other things, Promus' responsibility for sidewalk maintenance and repairs in relation to FC Battery Park.

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]).

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Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied.

CPLR 3212(f) states, in relevant part:

Facts unavailable to the opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion . . .

Prior to the enactment of Administrative Code § 7-210, effective September 14, 2003, the municipality, not the abutting landowner, was responsible for the maintenance of the sidewalk. The exception to this was where the abutting landowner either created the defect or derived a special benefit from the sidewalk unrelated to public use. (*Spangel v. City of New York*, 285 A.D.2d 425 [1st Dept. 2001]). However, with the passing of § 7-210, the abutting sidewalk became not just the responsibility, but the liability of the landowner. Pursuant to Administrative Code of the City of New York § 7-210 (c), effective as of September 14, 2003 (and applying to accidents occurring on or after such date), the City of New York is not liable for personal injuries proximately caused by the failure to maintain sidewalks in a reasonably safe condition, except for sidewalks abutting one, two, or three-family residences which are used exclusively for residential purposes, or except where the City is the abutting property owner. Title 19 of the Administrative Code further 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.”

In *Vucetovic v. Epsom Downs* (10 N.Y.3d 517 [2008]), the Court of Appeals addressed the issue of whether any exception to the definition of “sidewalk” might exist within the area defined by the boundaries in Title 19 of the Administrative Code. The court ultimately held that, despite their inclusion in the physical boundaries articulated in Title 19, tree wells are not part of the “sidewalk” for purposes of Administrative Code § 7-210, which imposes tort liability on property owners who fail to maintain city-owned sidewalks. (*Id.* at 518-519).

Plaintiff's complaint and bill of particulars specify that her accident occurred when obstructions on the sidewalk and the flow of pedestrian traffic caused her to step from the sidewalk into a mis-leveled tree-pit. The submissions fail to make clear what kind of obstruction existed on the sidewalk, which party was responsible for that obstruction, and what if any method of directing pedestrian traffic was employed to cause plaintiff to walk into the tree well. Photographs submitted with plaintiff's notice of claim depicting the scene of the accident show stanchions placed along a plaza area a full sidewalk slab away from the tree well. The sidewalk flag next to the tree well appears to be free of defects.

Promus has submitted evidence that it owns operates and licenses a system under the name "Embassy Suites." Pursuant to a license agreement, BPC Hotel LLC obtained the license to operate an Embassy Suites hotel located at Site 25, Battery Park City, New York, New York. Pursuant to a separate agreement, Promus became the manager of that hotel. Apple provides a lease between FC Battery Park Associates, LLC and Battery Park Fresh, LLC for the premises known as Battery Park City, Site 25, New York, New York and described as a Retail Unit or Chevy's complex. That Retail Unit lease provides:

"Common Areas" shall mean the plaza areas, if any, driveways, aisles, sidewalks, loading docks, passageways, atrium, landscaping, courts, stairs, ramps, elevators, escalators, meeting rooms, public restrooms and other common service areas, now or hereafter provided for the common or joint use and benefit of the tenants and occupants of the Project, their employees, agents, servants, customers and other invitees. Landlord agrees that all facilities typically designated as common areas located in the Project shall be at all times designated as Common Areas for the nonexclusive use by Tenant and its customers, invitees and employees, and by the other tenant, owners and operators of the Project and their respective customers, invitees and employees. The parties acknowledge that some of the Common Area facilities located in the Project will be for the non-exclusive use and benefit of the occupants of the entire Project (including both the Retail Unit and the Hotel Unit) and their respective customers, employees and invitees.

The Retail Unit lease designates responsibility for repairs and maintenance pursuant to Article 13, including common areas. Further, Article 16 provides for the subordination of the Retail Unit lease to the ground lease .

The Retail Unit is distinct from the Hotel Unit. The Hotel Unit is described as “the hotel space of approximately 360,000 square feet and the common elements appurtenant thereto as set forth in the Condominium Documents.” The Retail Unit is “the retail space, including the Premises, of approximately 165,000 square feet and the common elements appurtenant thereto as set forth in the Over lease.”

Apple argues that the Retail Unit lease makes clear that the Ground Lessor as owner is responsible for maintenance and repair of the sidewalks adjacent to the building. Further, it argues that, even if the owner is not, FC Battery Park Associates, LLC as landlord of the Retail Unit is responsible. Apple claims there is an issue as to whether the repair is structural in nature.

Plaintiff and Apple urge that Promus’ motion for summary judgment is premature inasmuch as discovery is outstanding. The discovery they articulate is incomplete is the deposition of Promus to establish that the rights of Promus are subordinate to the ground floor lessor. The documents, however, speak for themselves.

Additionally, Promus is not a party in exclusive possession of information regarding the allegedly defective sidewalk flag such as to determine if the defect was structural in nature. Indeed, no defect in the sidewalk flag is described or visible in the photographs. Instead, it appears the stanchions placed in the plaza, and which encroach on the open walkway, are at the root of plaintiff’s complaint. Plaintiff’s verified bill of particulars makes clear that the accident occurred “on the sidewalk in front of “Chevy’s” Restaurant located at 102 Northend Avenue near Vesey Street, in the County of New York, State of New York and more particularly the sidewalk tree-pit/well thereat.”

The Retail Unit lease makes clear that it includes the common area and plaza appurtenant to it, which is distinct from the common area and plaza appurtenant to the Hotel Unit. Thus, Apple fails to raise an issue of fact regarding Promus’ showing that it did not owe a duty to plaintiff with regard to the area where she had her accident.

Plaintiff has submitted only an attorney’s affirmation in opposition to the motion, and has failed to support the new allegation that the hotel created a defective sidewalk condition in an area over which it had no control.

Wherefore it is hereby

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

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: February 3, 2009


EILEEN A. RAKOWER, J.S.C.

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FEB 09 2009
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NEW YORK