

Houston v 115 W. 10th St. Corp.

2009 NY Slip Op 31105(U)

May 12, 2009

Supreme Court, New York County

Docket Number: 108783/07

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Index Number : 108783/2007
HOUSTON, GERI
 VS.
115 WEST 10TH STREET
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

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

this motion to/for _____

PAPERS NUMBERED

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 *is denied per attached*

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

FILED
 MAY 19 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 5/12/09

EJG

 J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: EMILY JANE GOODMAN

PART 17

Motion

Index Number : 108783/2007
HOUSTON, GERI
 VS.
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INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
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this motion to/for _____

PAPERS NUMBERED

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 *is decided per attached*

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

Dated: 9/12/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check If appropriate: DO NOT POST REFERENCE

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
GERI HOUSTON,

Plaintiff,

Index No.
108783/07

-against-

115 WEST 10TH STREET CORP. and CROSSTOWN
CUSTOM SHADE AND GLASS, INC.,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

In this personal injury action, motion sequence numbers 002 and 003 are consolidated for disposition. In motion sequence 002, defendant 115 West 10th Street Corp. (West 10th Street) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims as against it, on the ground that the condition on which plaintiff Geri Houston (Houston) bases her claim is too trivial to be actionable. In motion sequence 003, defendant Crosstown Custom Shade and Glass, Inc. (Crosstown) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims as against it.

Houston alleges that she tripped and fell on the sidewalk adjacent to 115 West 10th Street, New York, New York (the Building), on March 29, 2007, at approximately 8:00 p.m. West 10th Street owns the Building, and Crosstown is the ground floor commercial tenant.

Houston testified at her deposition that the street was fairly well lit and that she could see where she was going. Houston said that she had walked along this same sidewalk often, probably at least five times a week, and that there was nothing blocking the sidewalk at the time of her accident. She tripped on a depression in the sidewalk that she estimated to be an inch to an inch and a half deep. Houston stated that, as a result of her fall, she sustained serious injuries, including a fractured left hip that required surgery.

Houston identified the location of her accident by placing an "x" on photographs marked at her deposition. Houston stated that she had observed this condition for years and never complained about it or knew anyone who complained about it.

West 10th Street submits the affidavit of Dr. Anthony Storace, P.E., (Storace), a professional engineer who took measurements and photographs of the defect at issue. He states that the change in elevation in the sidewalk in the area where Houston fell is 1/4 inch. West 10th Street argues that, assuming the accident occurred as Houston alleges, this court should dismiss the complaint on the ground that the defect she identifies is so trivial as to be nonactionable, that the defect did not have any characteristics of a snare or trap and that it was open and obvious. Thus, West 10th Street asserts that, based

on Houston's testimony and the measurements taken by Storage, this court should find that the alleged defect nonactionable as a matter of law.

Pointing out that there is no minimal dimension test or per se rule that holds that a sidewalk defect must be of any dimension to raise a question of fact, Houston contends that Storage failed to adequately measure the defect. Houston asserts that Storage only mentioned the height differential between the tops of the adjacent sidewalk flags. She argues that, in doing so, the expert ignored major aspects of the defect, including the width and depth of the gap that is apparent in the marked photographs that Houston identified at her deposition. Houston states that Storage also ignored the height of the edges exposed by this gap. As a result, Houston argues that West 10th Street's summary judgment motion should be denied.

Moreover, Houston's expert, Stanley Fein, P.E. (Fein) states that his inspection revealed a gap between the flagstones of two inches in width at the point where Houston said she fell. Fein explains that in this gap there was a depression of 3/4 inches in depth and that on each side of the gap the edges of the adjoining flagstones were sharp and abrupt.

Fein avers, within a reasonable degree of certainty as a safety engineer, that the condition constituted a tripping

hazard. He opined that the length, width and depth of the gap between the flagstones, coupled with the sharp and abrupt edges on both sides of the gap, could easily cause a person walking eastward or westward to trip on the sidewalk. According to Fein, this gap represented a trap or nuisance to pedestrians using the sidewalk.

West 10th Street replies that, unlike Storace, Fein does not provide a foundation for his claimed measurements. West 10th Street points out that Fein does not state the size of the area that was of a 3/4 inch depth, and that he does not dispute that the difference in height between the adjacent sidewalk stones was only 1/4 inch in the area where Houston fell, as attested to by Storace. West 10th Street states that Fein's affidavit does not provide any evidence on which this court can base a ruling that the defect is actionable.

Under CPLR 3212, West 10th Street must show that Houston's claims have no merit. In order to do so, West 10th Street must make a prima facie showing of entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this prima facie showing has been made, in order to defeat a motion for summary judgment, the party opposing the motion must set forth the existence of a

factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

"[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997). Generally the question of whether a sidewalk defect is dangerous is a question of fact to be determined by a jury. *Id.* There are situations, however, where a court may determine that a defect is trivial, based on an examination of the facts presented, and in such cases, dismissal may be appropriate. *Id.* Further, in addressing whether a shallow dip or depression in a parking lot was a trivial defect, the Appellate Division, First Department, stated that "while a gradual, shallow depression is generally regarded as trivial ... the presence of an edge which poses a tripping hazard renders the defect nontrivial," and that it would be appropriate to assess the hazard posed by the defect "in view of the peculiar facts and circumstances" of the case. *Glickman v City of New York*, 297 AD2d 220, 221 (1st Dept 2002) (citations and internal quotation marks omitted).

In the instant case, however, West 10th and Houston each submit the report of an expert who described different aspects of the defect in question. In a case where there was an elevation differential of 3/4 inch to one inch, yet there was also a gap of

up to 1 ½ inches in width, the First Department found that such a defect was a "hazard whose existence should be determined and evaluated by a trier of facts." *Herrera v City of New York*, 262 AD2d 120, 120 (1st Dept 1999). Similarly in the instant action, the description of the defect provided by the parties' experts indicates that there is a question of fact as to whether the defect is trivial or dangerous. Thus, West 10th Street's summary judgment motion is denied.

In motion sequence 003, Crosstown moves for summary judgment, dismissing the complaint and all cross claims against it. Crosstown states that, in 1996, the commercial space on the first floor of the Building was leased by M&J Management, LLC, which in turn leased the space to Crosstown. The lease states in part, at paragraph 4:

Owner shall maintain and repair the public portions of the building, both exterior and interior ... Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto, Except that Owner will make repairs to the sidewalk ...

(p.1 of Lease Agreement and p. A-1 of Addendum). That provision remains in effect in the agreement extending the term of the lease through December 2010.

Crosstown argues that summary judgment is appropriate because it did not owe Houston a duty. To state a negligence

cause of action, "a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party." *Becker v Schwartz*, 46 NY2d 401, 410 (1978). Without a duty, there can be no breach of duty, and therefore no liability. *Pulka v Edelman*, 40 NY2d 781, 782 (1976).

The owner or tenant of property abutting a public sidewalk may be liable to a person injured on that sidewalk only where the owner or tenant "either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk which imposes liability upon that party for injuries caused by a violation of that duty." *Lowenthal v Theodore H. Heidrich Realty Corp.*, 304 AD2d 725, 726 (2d Dept 2003).

There is no evidence that Crosstown created the condition, that it used the sidewalk for a special use or that it violated any statute or ordinance.

Section 7-210 (a) and (b) of the New York City Administrative Code, effective September 14, 2003, creates a duty for landowners, with limited exceptions not applicable herein, to maintain sidewalks adjacent to their property in a reasonably safe condition. It states, in part

(a) It shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition. (b) Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any ... personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags

The New York City Council adopted this statute to transfer tort liability from the City to adjoining property owners, in order to save the City money and to place liability with the entity legally responsible for repairing the sidewalks. *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 (2008).

Crosstown argues that both Administrative Code § 7-210 and the lease place the burden of maintenance and repair of the sidewalk upon the owner of the property, West 10th Street. Thus, Crosstown contends that it had no duty, contractually or otherwise, to repair the sidewalk.

Crosstown states that it does not know if any cross claims were asserted against it, because it was never served with West 10th Street's answer. To the extent that there are any such cross claims, however, Crosstown argues that they must be dismissed due to West 10th Street's failure to serve Crosstown with its answer and to provide notice of any cross claims.

In opposition to Crosstown's motion, Houston asserts that

questions of fact exist as to whether section 7-210 applies to Crosstown, as the Building's commercial lessee. Houston states that Title 7 of the Administrative Code does not define the term "owner," and that Crosstown has failed to show that section 7-210 limits liability solely to a fee owner as opposed to a commercial lessee.

Crosstown maintains that Administrative Code § 7-210 is clear on its face, and concerns the "liability of a real property owner" for its failure to maintain and repair the sidewalk that abuts its premises. According to Crosstown, the provision is not vague or ambiguous in any manner. It further asserts that the legal terms "landowner" and "lessee" have distinct legal definitions.

This court grants Crosstown's motion for summary judgment. In a case discussing liability of both a commercial tenant and a property owner, the First Department stated that issues of fact existed as to whether the owner and tenant were liable based on the special use doctrine, and, that the owner was additionally "under a statutory nondelegable duty to maintain the sidewalk" pursuant to section 7-210. *Cook v Consolidated Edison Co. of N.Y., Inc.*, 51 AD3d 447, 448 (1st Dept 2008). As no mention was made as to the tenant's liability under section 7-210, and, as the plain language of the statute imposes a "nondelegable duty"

on "owners" but not tenants, plaintiff's argument is unpersuasive. Therefore, Crosstown has shown that it did not owe a duty to Houston, such that she does not have a claim as against Crosstown.

Crosstown's motion for summary judgment is granted and the complaint and any cross claims are dismissed as against it.

Accordingly, it is

ORDERED that the motion for summary judgment of defendant 115 West 10th Street Corp., motion sequence 002, is denied; and it is further

ORDERED that the motion for summary judgment of defendant Crosstown Custom Shade and Glass Inc., motion sequence 003, is granted, and the complaint is hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

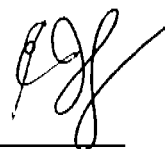
ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: May 12, 2009

FILED
MAY 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



J.S.C.