

Storper v Kobe Club

2009 NY Slip Op 31397(U)

June 25, 2009

Supreme Court, New York County

Docket Number: 112445/2007

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

VIVIAN STORPER,

Plaintiff,

-against-

KOBE CLUB, 1414 APF LLC, APF
PROPERTIES, LLC, GREEN 1414
PROPERTY LLC, SL GREEN REALTY
CORP., RED SQUARE (NY) LLC and
MIX IN NEW YORK,

Defendants.

INDEX NO. 112445/07

MOTION DATE April 29, 2009

MOTION SEQ. NO. 002

MOTION CAL. NO. 3

The following papers, numbered 1 to 4 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, the motion of defendants 1414 APF LLC and APF Properties LLC for summary judgment in their favor dismissing the complaint and all cross claims against them is decided in accordance with the accompanying decision and order.

Dated: 6/25/09

FILED
JUN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 61

-----X
VIVIAN STORPER,

DECISION AND
ORDER

Plaintiff,

-against-

Index No. 112445/2007

KOBE CLUB, 1414 APF LLC, APF PROPERTIES, LLC,
GREEN 1414 PROPERTY LLC, SL GREEN REALTY CORP.,
RED SQUARE (NY) LLC and MIX IN NEW YORK,¹

Defendants.

FILED
JUN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
O. PETER SHERWOOD, J.:

In this action to recover damages for personal injuries, motion sequence 002 and 003 are consolidated for purposes of disposition. In motion sequence 002, defendants 1414 APF LLC and APF Properties LLC move pursuant to CPLR § 3212 for an order granting summary judgment in their favor dismissing the complaint and any cross claims asserted against them on the ground that the sidewalk defect which is alleged to have caused plaintiff Vivian Storper's accident is within 12 inches of a New York Transit Authority grate and, therefore, they, as owners of the premises adjoining the sidewalk, had no duty to maintain that area of the sidewalk. In motion sequence 003, defendants Kobe Club, Red Square (NY) LLC and Mix in New York also move pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any cross claims against them on essentially the same ground as motion sequence 002, and further claiming that as tenants they had no duty to maintain the sidewalk at issue under either their lease or the City's Sidewalk law.

Background

Plaintiff Vivian Storper ("Storper" or "plaintiff") alleges that on March 5, 2007, at approximately 10:30 a.m., she tripped and fell on a raised and broken portion of the public sidewalk surrounding a New York City Transit Authority vault cover located adjacent to 68 West 58th Street, New York, New York ("the premises"). Although the premises are currently owned by Murray Hill Properties, it is undisputed that defendants 1414 APF, LLC and APF properties, LLC were the

¹By stipulation dated June 26, 2008, the complaint and all cross claims were discontinued without prejudice as against defendants Green 1414 Property LLC and SL Green Realty Corp. (Sohnen Affirm. Ex. "D").

owners at the time of Storper's accident (Sohen Affirm. Ex. "H", pp. 6-7), and Kobe Club was the ground floor commercial tenant.

Storber testified at her deposition that she was walking on the sidewalk along 58th Street in Manhattan on a clear day, heading east toward Fifth Avenue, looking straight ahead, when the toe of her right foot caught on a raised and broken portion of the sidewalk and caused her to fall forward. Storber stated that she had never previously walked along this same sidewalk, did not know of anyone complaining of the condition, and knew of no other accidents occurring in the same area. As a result of her fall, Storber sustained serious injuries including multiple fractures of her left shoulder (Sohnen Affirm. Ex. "F", pp. 14-15, 17-19, 24-25).

Storber was shown color photographs of the sidewalk in question marked at her deposition as defendant's "A" through "D". Storber stated that the photographs depicted the area as it looked at the time of her accident. She identified the location of her accident by drawing a circle on the photograph marked defendant's "D". The photograph shows a vault running along the length of the front entryway to the premises framed by the sidewalk. The point circled by Storber depicts a raised and cracked portion of the sidewalk framing the vault (Sohnen Affirm. Ex. "E"; Beyda Affirm. Exs. "D" and "G").

Non-Party witness Thomas O'Connell testified at his deposition on February 6, 2009, that he had been the chief engineer for the premises for four and one-half years and had been associated with the premises in other capacities for thirteen years (*id.* at pp. 6-7). As part of his duties, O'Connell conducted a daily inspection of the exterior of the premises, including the sidewalk adjacent to it, looking for defects or cracks and reporting such defects to his supervisor, the operating engineer, who at the time of the accident was Ed DiNicola (*id.* at pp. 7-8, 9-10, 14-15). First Quality Maintenance was the company retained to perform cleaning and maintenance at the premises (*id.* at pp. 10-11). The sidewalk in front of the premises along 58th Street was swept and hosed down every morning by the night porter (*id.* at pp. 1-12). O'Connell was shown the photograph marked as defendant's exhibit "D" at plaintiff's deposition (*id.* at p. 26). He identified the area depicted in the photograph as the sidewalk in front of the Kobe Club (*id.*) and stated that it depicted an MTA vault and the "apron" of the vault, which ran east along the premises building line to the curb, and was all MTA property (*id.* at pp. 23, 30). O'Connell's company would not perform repairs on MTA

property, but would report any areas of disrepair to the MTA or the City (*id.* at p. 24). O'Connell testified that the area, which bore the circle placed by plaintiff at her deposition, depicted a portion of the sidewalk where the MTA, rather than his company, would make repairs (*id.* at p. 31). He stated that about six years earlier the MTA had conducted some repair work on the vault (*id.* at pp. 21, 31). O'Connell did not know how long the condition depicted in the photograph had existed and knew of no complaints made to him or anyone else about the condition (*id.* at p. 32).

Discussion

Defendants 1414 APF LLC and APF Properties, and defendants Kobe Club, Red Square (NY) LLC and Mix in New York separately move for summary judgment dismissing the complaint and any cross claims against them upon the ground that it did not owe Storber a duty. The necessary elements of a cause of action in negligence are: (1) the existence of a duty on the part of the defendant to the plaintiff; (2) a breach of that duty; and (3) and that such breach was the proximate cause of the events which produced the plaintiff's injury (*see, Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]; *Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *Rodriguez v Budget Rent-A-Car Systems*, 44 AD3d 216, 221 [1st Dept 2007]). Without a duty, there can be no breach and, therefore, no liability (*Pulka v Edelman, supra*). Thus, for defendants to prevail on their respective summary judgment motions, they must make a prima facie showing of entitlement to judgment as a matter of law, by tendering evidentiary proof in admissible form that none of the elements necessary to impose liability upon them are present (*see, Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204,208 [1997]). In deciding the motion, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]).

Prior to 2003, the City of New York, as owner of the public sidewalks, generally remained liable for injuries sustained by pedestrians caused by defective conditions in the sidewalk, subject to the requirements of the prior written notice law (*see, Administrative Code of the City of N.Y.* § 7-201 [c]; *Vucetovic v Epsom Downs*, 10 NY3d 517, 520 [2008]; *Hausser v Giunta*, 88 NY2d 449,

452-453 [1996]). An abutting landowner could only be held liable if such landowner affirmatively created the condition, voluntarily but negligently made repairs to the sidewalk, or created the dangerous condition through a special use of the sidewalk for its own benefit (*id.* at p. 453). When both the City and the abutting landowner breached their respective duties to members of the public, both could be held responsible to those injured as a result of the defective condition, with the loss being apportioned between the City and the abutting landowner in accordance with general principles of indemnity and contribution (*see, D'Ambrosio v City of New York*, 55 NY2d 454, 463 [1982]).

Section 7-210 (a) of the New York City Administrative Code, effective September 14, 2003, transferred to the abutting landowner, with limited exceptions not applicable here, “the duty . . . to maintain such sidewalk in a reasonably safe condition,” and provides that such landowner “shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition” (Administrative Code of the City of N.Y. § 210 [a], [b]). The liability of the abutting landowner under section 7-210 is not absolute, but rather is limited to the “negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags” (Administrative Code of the City of N.Y. § 210 [b]).

The movants here do not dispute that the premises falls within the purview of section 7-210. Nevertheless, in reliance on section 2-07 (b) of the New York City Highway Rules (34 RCNY), movants contend that the defective portion of the sidewalk where Storber’s accident occurred was within the area of the Transit Authority’s vault. Since they did not own, install, maintain or repair the sidewalk over the vault, they were not liable for any injuries caused by defects within the sidewalk area belonging to the MTA. Section 2-07 (b) (1), which governs underground street access covers, transformer vault covers and gratings, provides that “the owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the gratings and the area extending twelve inches outward from the perimeter of the hardware.” Movants argue that the deposition testimony and the documentary evidence shows that the defective area of the sidewalk where plaintiff fell was inside the twelve-inch zone of responsibility and, thus, liability for plaintiff’s injuries may not be imposed upon them since the MTA was solely responsible for maintaining this portion of the sidewalk and they did not ever undertake to repair or maintain such portion of the sidewalk.

In opposition, plaintiff does not argue that the defective portion of the sidewalk is outside section 2-07 b's twelve-inch zone of responsibility, but that such provision does not relieve the movants from liability pursuant to section 7-210. Plaintiff relies upon the Court of Appeals decision in *D'Ambrosio v City of New York* (55 NYd2 463, *supra*) for this position. *D'Ambrosio*, which was decided years before New York's new sidewalk law went into effect, involved a trip and fall accident on a metal disc imbedded in the sidewalk which housed the shut-off valve in the service pipe which brought water to the abutting premises from a water main running under the street. The plaintiff commenced an action against the City of New York, which in turn impleaded the abutting landowner, alleging that its negligent maintenance of the water box installed for the special use and benefit of the premises caused plaintiff's accident and resulting injuries. The Court held that the so-called "special benefit" rule, which allowed municipalities with primary responsibility for maintaining their sidewalks in a reasonably safe condition to shift liability to adjoining landowners where the plaintiff's injuries resulted from such landowners failure to maintain a sidewalk installation constructed for the special use and benefit of its property, was "no longer available to shift entirely such liability to the landowner (*id.* at 457). Rather, the Court held that "the liability is to be apportioned between the municipality and the landowner based upon their respective degrees of fault" (*id.*).

The holding in *D'Ambrosio* is inapplicable to the facts of this case. In the first instance, the vault at issue does not involve a sidewalk installation for the special use and benefit of the abutting property. Secondly, the duty owed and the liability resulting from any breach of duty is governed by statutes that did not exist at the time *D'Ambrosio* was decided. Application of such statutory provisions together with the deposition testimony and documentary evidence submitted upon these motions makes clear that movants are not responsible for the defect in the sidewalk that caused plaintiff's accident and resulting injuries as it is clear that such defect was within the 12-inch radius of the MTA vault. Therefore, movants had no liability under section 7-210.

In support of their respective motions, the moving defendants rely on a decision of the Appellate Division, First Department, in the case of *Cruz v New York City Transit Authority* (19 AD3d 130 [2005]). The plaintiff in *Cruz* tripped and fell over a raised corner of sidewalk near a grating owned by the Transit Authority. In finding that the trial court had erroneously granted

summary judgment in favor of the Transit Authority, the Court held that 34 RCNY § 201 applied to subway gratings owned by the Transit Authority, but found triable issues of fact existed with respect to whether the defective condition at issue was within the Transit Authority's 12-inch zone of responsibility under the statute. Plaintiff contends that the holding in *Cruz* does not change or limit what plaintiff contends is the concurrent responsibility of the landowner and the MTA for maintenance and repair of the sidewalk. This court finds plaintiff's position to be unpersuasive. Rather, the statutes discussed herein have altered the respective duties of landowners and owners of sidewalk installations (*see, Lightsy v City of New York*, 2007 WL 4241904 [Sup. Ct. Queens Co. 2007]; *cf. Cuevas v City of New York*, 32 AD3d 372 [1st Dept 2006]). The court, in reaching this result, is guided by the principle that "'legislative enactments in derogation of the common law, and especially those creating liability where none previously existed,' must be strictly construed" (*Vucetovic v Epsom Downs*, 10 NY3d *supra* at 521, quoting *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004]). The City Council in enacting 34 RCNY § 201 made clear its goal to shift responsibility for sidewalk installations and the 12-inch radius surrounding such installations to the owners thereof.

Conclusion

In view of the above, it is

ORDERED, that the defendants' respective motions pursuant to CPLR § 3212 for an order granting summary judgment in their favor dismissing the complaint and all cross claims against them is granted and the complaint and all cross claims are dismissed; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 6/25/09

ENTER,

P. P. Sherwood

PETER SHERWOOD

J.S.C.

FILED
JUN 26 2009
COUNTY CLERK'S OFFICE
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