

Haseley v City of New York

2009 NY Slip Op 31816(U)

August 10, 2009

Supreme Court, New York County

Docket Number: 115345/05

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER

PART 5

Index Number : 115345/2005
HASELEY, NANCY
 VS.
CITY OF NEW YORK
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

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

this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
 Answering Affidavits -- Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED
 1
 2 3
 4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
 AUG 13 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 8/10/09


HON. EILEEN A. RAKOWER

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 5

-----X
NANCY HASELEY,

Plaintiff,

- against -

Index No.
115345/05

DECISION/ORDER

Seq. No.: 002

THE CITY OF NEW YORK, GREGORY J. ABELS
and JANET M. KAPRAL ABELS,
Defendants.

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she fell on the guardrail of a tree well in front of 120 Washington Place in County and State of New York on December 28, 2004. Gregory J. Abels and Janet M. Kapral Abels (“the Abels”) are the owners of the adjacent property. The Abels bring this motion to dismiss all claims and cross claims as against them, asserting they had no responsibility for the tree well or the sidewalk. The City of New York (“City”) brings a cross motion to dismiss all claims as against it. Plaintiff opposes both motions.

The Abels, in support of their motion, provide the summons and complaint, their verified answer, plaintiff’s verified bill of particulars, the examination before trial of Nancy Haseley taken on October 12, 2007, the examination before trial of William Steyer, Director of Forestry for the New York City Parks Department, taken August 4, 2008, the examination before trial of Gregory Abels taken September 25, 2008, and photographs of the offending tree well taken December 29, 2004.

Plaintiff explains in her deposition that the metal tree guard was laying flat down one inch above the sidewalk away from the tree well. When she took the photos the next day, the rail had been moved off of the sidewalk and was laying in toward the tree. Plaintiff, who lives in the immediate vicinity, also stated that she walks her dog regularly, and had not noticed the railing laying on the sidewalk prior to the accident. She had noticed the railing leaning toward the tree prior to the date of the accident.

Mr. Steyer looked at the photographs taken by plaintiff and explained that the Parks Department maintains the tree. In addition, they respond to requests or complaints and do inspections “of a problem in the area or around the area.” However, they do not install the metal rail. “We don’t discourage people from trying to protect their tree well because they plant flowers and other things invade the tree like dogs and people.” When asked if a permit was required to put up a fence or a border around the tree well, he responded that a “ permit would be required if there was digging to install supports and if it effects [sic] the tree roots, then we will require a permit and inspection for that.” A search revealed no such permit for the tree in question. He concluded that there were no permits, complaint or other work orders or repair orders for the tree in question since the census of 1995.

Gregory Abels testified that he resided at the subject building for 38 years. He noted that it is a house, and that he occupies the first, second and third floors. Tenants rent the garden and basement floor, making the building a two family house. Mr. Abels noted that he has one tree well in front of the house, and that the metal work around it was installed on his behalf in 1972 or 1973. He could not remember who installed it. Mr. Abels recognized the tree well depicted in the photographs as the one in front of his house. He was away during the holidays in December 2004, but recalls first seeing the metal railing in the condition depicted in the photographs sometime in the beginning of 2005. Mr. Abels denies ever receiving complaints about the railing. He stated that he monitored the railing to be sure it did not get worse until, ultimately, he removed the metal railing in the spring of 2005.

The Abels urge that, as owners of a two family residence, they are exempt from responsibility for the sidewalk in front of their home. Further, there is no evidence that they created or had notice of the hazardous condition, specifically, the dislodged tree guard. Finally, they had no constructive notice of the hazardous condition, as it was a transient condition, which was neither visible nor apparent for a sufficient length of time prior to the accident to permit them to have addressed it.

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]).

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).

City cross moves, urging that even if City was responsible for the offending guard rail around the tree well which had fallen onto the sidewalk, Administrative Code § 7-201(c) requires that City have prior written notice of the hazardous condition before it can be found to be liable. In support of its cross motion, City provides the notice of claim, its answer, and the results of its own search for any records of defective conditions, including complaints, pertaining to the subject location. The results of the search, as Mr. Steyer stated in his deposition, were negative.

Plaintiff, in opposition to the motion, provides the sworn affidavit of Nancy Haseley, which states, in pertinent part:

While I had passed the tree well and tree guard before my accident, I had often noticed that it was in poor condition - it was not upright as it should be and not affixed to the sidewalk and/or tree well as it should be. It was loose, dislodged from the other sections and basically laying against the tree. It could easily be moved, or pulled aside and in fact, when I had my accident, rather than being pushed inward, into the tree well and toward the tree as I had noticed in the past, it was pushed outward, across the sidewalk. Given the fact that it had been loose and dislodged from the other sections, it is not surprising that it ended up extended outward onto the sidewalk, rather than pushed inward toward the tree.”

Plaintiff urges that the defendants were negligent in allowing the loose and dislodged railing to persist “for months,” as it was foreseeable that it would move onto the sidewalk, causing a danger to pedestrians. Plaintiff states in her affidavit, “[i]f the tree well had been repaired in a timely manner, and was properly upright and secured, it would not have been in that position on the night of my accident and I would not have tripped over it.”

Regarding the cross motion, plaintiff, by counsel, states “plaintiff will provide a Stipulation of Discontinuance to the City of New York, and plaintiff has no objection to amendment of the caption to remove the City of New York as a party defendant.”

Plaintiff argues that the Abels are responsible for the maintenance and repair of the railing since they admittedly installed it. Accordingly, they should have foreseen that its condition would become a tripping hazard.

The Abels have made a prima facie showing that they had no notice of the hazardous condition caused by the displaced railing on the sidewalk. The burden shifts to plaintiff to demonstrate that there is an issue of fact to be determined by the trier of fact. Plaintiff, in an effort to create such an issue, provides her own tailored affidavit, wherein, she opines as follows:

I paid particular attention to the poor and decrepit condition of this tree guard as I have worked in landscape architecture. I had noticed this condition daily over a period of months as I was rather shocked that whoever was responsible for that tree guard did not have it repaired sooner. It seems obvious that the guard in the condition it had been in for several months before my accident not only could potentially damage the tree well but was a potential hazard for pedestrians like myself.

The affidavit seeks to expand on her earlier testimony, which described the difference in the tree guard before the accident and at that time of the accident:

- Q: Was there anything different about it at the time your accident happened compared to the way it usually was?
- A: Usually it was leaning in towards the tree and on the night of the accident, it was lying in the opposite direction in the sidewalk.
- Q: The tree guard, was it still imbedded into the ground at the time your accident happened, as far as you observed?
- A: No, it was loose and lying down.
- Q: Was it lying entirely on the sidewalk or was part of it on the tree bed or was it somewhere else?
- A: It was lying entirely in the sidewalk.

Regarding the four sides of the railing, plaintiff stated in her deposition that on the night of her accident, “[j]ust one [side] was out of place.”

Generally, a self-serving affidavit offered to contradict earlier testimony does not raise a bona fide question of fact and will be disregarded (*Lupinsky v. Windham Const. Corp.*, 293 A.D.2d 317[1st Dept. 2002]). Here, plaintiff’s affidavit, while not contradicting her prior testimony, newly characterizes the state of the railing prior to the date of the accident as dangerous.

The Abels, by way of reply, urge that a “hazardous condition” was created only when the railing was moved from the tree well, a foot from its original placement, onto the sidewalk. There is no evidence that the railing was ever dislodged in this fashion before, but rather, it “uneventfully remain[ed] in place for 35 years.” There is no evidence regarding what caused the railing to move one foot from its place in the tree well onto the sidewalk.

Photographs of the railing taken the day after the accident show the railing in its position leaning toward the tree. At least three sides were as they had been before the night of the accident. While plaintiff herself describes the condition as inherently dangerous, there is no evidence that this was the case. It is not obvious that the railing is dangerous. In order to move the railing from its position leaning in toward the tree to the position dislodged, leaning out and onto the sidewalk, it would take some outside force or intervening act. Indeed, the day after the accident, plaintiff noted that the tree guard "had been pushed back off the sidewalk leaving a trail of dirt to show where it had been to get it out of the way. Someone had just pushed it out of the path of the sidewalk."

There is no evidence that the Abels had prior notice that the railing had been moved onto the sidewalk, thereby creating a tripping hazard. Therefore, the Abels cannot be liable.

Wherefore, it is hereby

ORDERED that the motion to dismiss is granted, and the complaint is hereby severed and dismissed as against defendant Gregory J. Abels and Janet M. Kapral Abels, and the clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the cross motion is granted and the complaint is hereby severed and dismissed as against defendant The City of New York and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED the action is thereby dismissed in its entirety.

Dated: August 10, 2009



Eileen A. Rakower, J.S.C.

FILED
AUG 13 2009
COUNTY CLERK'S OFFICE
NEW YORK