

Lewis v Port Auth. of N.Y. & N.J.

2009 NY Slip Op 32502(U)

October 23, 2009

Supreme Court, New York County

Docket Number: 111113/2008

Judge: Karen Smith

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

PRESENT: _____
Justica

PART _____

Index Number : 111113/2008

LEWIS, MARY

vs

PORT AUTHORITY 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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is disposed of pursuant to the annexed memorandum decision and order.

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

FILED

OCT 27 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-22-09

KSS
Karen S. Smith J.S.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: PART 62

-----X
MARY LEWIS,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, CITY OF NEW YORK, RACHEL BRIDGE
CORP., and THE GEORGE UNITS LLC,
Defendants.

-----X

Index no.: 111113/2008
Motion seq.: 001
Motion date: 6/2/2009

DECISION AND ORDER

FILED
OCT 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

PRESENT: KAREN S. SMITH, J.S.C.:

Co-defendant the Port Authority of New York and New Jersey's ("the Port Authority") motion to dismiss pursuant CPLR § 3211 and for summary judgment pursuant to CPLR § 3212 is denied, in part, and granted, in part, as provided for more specifically below.¹

This case arises from an incident on September 25, 2007, in which plaintiff tripped and fell on a sidewalk in front of 1365 Saint Nicholas Avenue between 178th and 179th Street in New York, New York. Plaintiff commenced this action by filing summons and complaint on August 14, 2008. The Port Authority interposed a verified answer on September 8, 2009. The Port Authority now moves to dismiss pursuant to CPLR § 3211(a)(1) and for dismissal pursuant to CPLR § 3212.²

The basis for the Port Authority's application for dismissal pursuant to CPLR § 3211(a)(1), dismissal based on documentary evidence, is a contract the Port Authority submits, which, it claims, relieves it of all liability for the area where the accident occurred. While it would appear at a first reading of the agreement that the Port Authority is not liable for the maintenance of the area where the accident occurred, as the plaintiff and co-defendant Rachel

¹ Defendant City of New York's motion for summary judgment was withdrawn by stipulation on July 29, 2009.

² In fact, as this is a post-answer motion, it is a 3212 motion to dismiss based on 3211 grounds and other ground.

Bridge Corp. point out, there is evidence to suggest otherwise.

In the deposition of Paul Gembara, the Port Authority's Principal Property Specialist, Gembara identified the subject defect as an expansion joint and acknowledged that while sidewalks are not within the Port Authority's duty to maintain under the agreement, expansion joints are. If that were the only basis for the Port Authority's motion, the Court would have to deny the application.³ However, the Port Authority also seeks dismissal of the action pursuant to CPLR § 3212, on the basis that the defect which caused the accident is trivial.

The Port Authority argues that the subject defect is trivial as a matter of law, and thus cannot give rise to a negligence action. The Port Authority submits a transcript of the 50-h hearing of plaintiff Mary Lewis, in which she describes the defect as a flat piece of metal protruding a quarter of an inch from the sidewalk. The Port Authority argues that the height differential of the defect from the rest of the sidewalk was small and that it did not function as a trap, as the defect was not hidden and the accident occurred on a sunny, clear day.

Plaintiff responds by arguing that the Port Authority fails to conclusively establish the triviality of the defect, and that the issue is better suited to an assessment by a jury. Plaintiff does not contest the Port Authority's description of the defect. In describing the defect, plaintiff's counsel, like the Port Authority's, relies solely on Mary Lewis's 50-h hearing testimony, in which she describes the defect as being 3-5 inches wide and raised one-quarter of an inch. Plaintiff does not submit photographs or other evidence as to the defect.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues

³ While deciding the motion on other grounds, the Court notes that it does not agree with the Port Authority's argument that, as a bi-state agency, the Sidewalk Law does not apply to it. Although the Port Authority was immune from suit at its creation, the statutes regulating it were amended in 1950 to expressly provide that it is liable "for tortious acts committed by it and its agents to the same extent as though it were a private corporation" (N.Y. Unconsolidated Law § 7106; *See also Ageson v. Catherwood*, 26 NY2d 521, 525 [1970][holding that the Port Authority "is subject to New York's laws involving health and safety, insofar as they may affect the public"]. In addition, the Port Authority could be held liable on a theory that it caused or created the defect.

of fact requiring a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557).

The owner of a public passageway is not liable for “trivial defects on a walkway not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection” (*Morales v. Riverbay Corporation*, 226 AD2d 271 [1996]). Although there is no minimal dimension test, “in the absence of other contributing factors, the differential in height between the alleged defect and the sidewalk may loom large in determining whether the defect poses a hazard of sufficient magnitude to be actionable.” (*Thomas v. City of New York*, 301 AD2d 387 [1st Dept. 2003]). Courts have held that “differences in elevation of about one inch, without more...are non-actionable” (*Morales*, 226 AD2d 271, citing *Hecht v. City of New York*, 89 AD2d 524 [1st Dept. 1982]; *Mascaro v. State of New York*, 46 AD2d 941 [3rd Dept. 1974]; *Allen v. Carr*, 28 AD2d 155 [4th Dept. 1967]).

Here, the Port Authority makes a *prima facie* showing of entitlement to summary judgment by submitting the 50-h hearing of plaintiff, in which she testified that she tripped on a smooth piece of metal which protruded from the sidewalk one-quarter of an inch; plaintiff also testified that the incident happened on a clear, sunny day. Plaintiff did not contest the height differential of the defect, nor did she present any evidence that the defect presented a trap or nuisance. As such, the subject defect is trivial as a matter of law, non-actionable. While the other defendants do not move for summary judgment, the court’s findings apply to them as well. CPLR 3212(b) provides that “[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.” Since the defect is non-actionable, the Court dismisses the complaint in its entirety.

Accordingly, it is

ORDERED that co-defendant the Port Authority of New York and New Jersey’s motion to dismiss pursuant to CPLR § 3211 is hereby denied; it is further

ORDERED that co-defendant the Port Authority of New York and New Jersey’s motion for summary judgment pursuant to CPLR § 3212 is hereby granted; it is further

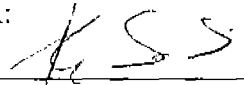
ORDERED that the Clerk enter judgment in favor of the Port Authority of New York and

New Jersey, City of New York, Rachel Bridge Corp., and the George Units LLC, dismissing the case in its entirety.

The foregoing constitutes the decision and order of this court.

Dated: October 23, 2009

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
OCT 27 2009
COUNTY CLERK'S OFFICE
NEW YORK