Gazzaley v City of New York
2009 NY Slip Op 32843(U)
November 30, 2009
Supreme Court, New York County
Docket Number: 108295/07
Judge: Eileen A. Rakower
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.

SCANNED ON 12/7/2009

[* 1]

4

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

PRESENT: RAKOWER Justice

PART 5

Index Number : 108295/2007

GAZZALEY, JACK

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 108295/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for ___

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3,4
Replying Affidavits	5

Cross-Motion: ☑ Yes ☐ No

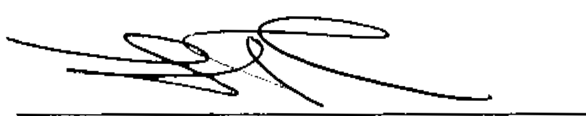
Upon the foregoing papers, it is ordered that this motion

FILED
DEC 07 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 11/30/09



HON. EILEEN A. RAKOWER, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

---X

JACK GAZZALEY,

Plaintiff,

Index No.108295/07
Decision/Order
Mot. Seq.:002

- against -

THE CITY OF NEW YORK, EMIGER REALTY ASSOCIATION, LLC and BELLA CUCINA, INC.,

Defendants.

---X

FILED
DEC 07 2009
COUNTY NEW YORK CLERK'S OFFICE

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when he tripped and fell "Approximately 12 feet east of the easterly side of Lexington Avenue at the curb and just north of the curb on the north side of East 87th Street" in the County and State of New York on May 10, 2006. Plaintiff alleges that he was "caused to trip . . . as a result of an improperly installed, raised, broken and defective portion of the curb and sidewalk." Defendant Bella Cucina, Inc. ("Bella", the lessee of the restaurant abutting the sidewalk, brings cross-claims against the owner of the abutting property, defendants Emiger Realty, LLC ("Emiger") and the City of New York ("City"). Bella and Emiger now move for summary judgment pursuant to CPLR 3212, dismissing the complaint and any cross-claims against them. Plaintiff opposes. City does not submit papers.

Plaintiff testifies that he was crossing the street in the cross walk and he quickened his pace when he heard a car honk at him. As he approached the curb "at an accelerated pace," his left foot got caught in a hole or missing portion of the metal curbstone.

Bella, in support of its motion, submits: the pleadings; the deposition transcript of plaintiff; the deposition transcript of Nalik Zeigler, record searcher and testifier for City; the deposition testimony of Anastasios Manessis, Co-Owner and Vice President of Bella; and the deposition testimony of Genc Murati,

superintendent of the building adjacent to the accident location. Bella points out that the defect which plaintiff allegedly tripped on was located on the curb, and that such a defect is known as "bull nosing." Mr. Manessis testifies that the only maintenance that he performs on the sidewalk is to sweep and remove snow. Thus, Bella argues, as City is responsible for the curb, plaintiff cannot establish that Bella is liable for his injuries.

Plaintiff, in opposition, submits: the affidavit of Jacob Munn, Registered Architect; a copy of the big apple map; a portion of Mr. Manessis' deposition transcript; a portion of Mr. Murati's deposition transcript; a copy of the results of a "Highway/Sidewalk Violation Search; and a portion of plaintiff's deposition transcript. Plaintiff argues that there is a question of fact as to whether Bella caused or created the defect.

Mr. Manessis testifies that an "ice chopper," which is described at Manessis' deposition as "a pole with a metal base to it, coming . . . to a point," is used to break up ice on the sidewalk. Mr. Munn, in his affidavit, states:

> your deponent is fully familiar with all aspects of construction and construction materials . . . your deponent observed the depression in the curb at the Northeast corner of the intersection of Lexington Avenue and East Eighty Seventh Street. The depression, or hole, located on the curb within the crosswalk, was the area in which the plaintiff testified that he caught his left foot. Your deponent also observed the defective portion of the sidewalk where the progress of the plaintiff's right foot was altered by the broken and defective sidewalk, causing plaintiff to twist and fall . . . that a portion of the defective condition on the sidewalk, particularly in the area that the Plaintiff indicates that his right foot was placed, is consistent with damage caused in the snow removal process. The sidewalk area is broken and has damage consistent with chopping and the placement of snow removal agents . . .

Emiger, in support of its cross-motion, submits the following, not duplicative of the other parties' submissions: four color photocopies of a photograph of the subject location. Emiger asserts that City is solely liable for injuries caused by defects of the curb. Additionally, Emiger points out that it never performed any repairs in the area, nor did it perform snow or ice removal.

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]).

Administrative Code §7-210 was enacted on September 14, 2003, essentially shifting liability for accidents occurring on the sidewalk from City to the adjacent landowner. However, it is undisputed that the enactment of §7-210 did not relieve City of liability for curbstone defects. (*see* Administrative Code §7-201[c][1][a]).

Plaintiff, at his deposition, circles the offending defect on a color photograph. That photograph is provided in the motion papers. The only area circled is the curb. Thus the moving defendants have made a prima facie showing of their entitlement to judgment as a matter of law and the burden shifts to plaintiff to raise an issue of fact.

Plaintiff attempts to compound the defect by submitting an affidavit, which states that after his left foot caught at the curb, "his right foot caught and slid on a broken and defective portion of the *sidewalk* at the premises . . ." However, at his deposition, plaintiff stated: "I was trying to keep my stability with my right foot and I hit what I felt was an unevenness of the *curb* of this area here in question . . ." It is well settled that a self serving affidavit, which contradicts plaintiff's deposition testimony, "can only be considered to have been tailored to avoid the consequences of earlier testimony." (*Phillips v. Bronx Lebanon Hosp.*, 268 AD2d 318,320[1st Dept. 2000]).

Plaintiff also attempts to create an issue of fact with Mr. Munn's affidavit. Mr. Munn opines that it was not the hole in the metal curb alone that caused plaintiff's fall, but that he was ultimately caused to fall because "the progress of

[his] right foot was altered by the broken and defective sidewalk." The photographs show a clear hole in the curb, or missing portion of the metal curbing. Although Mr. Munn represents that a defect existed on the "sidewalk," it is not identified or clearly evident in the photograph.

While Mr. Manessis testifies that he would use an ice chopper to clear the sidewalk "if it is necessary," there is no evidence that Mr. Manessis caused or created the instant defect. Indeed, the area circled shows finished metal edges that do not meet, and cannot be the result of chopping "Mere conclusory assertions, devoid of evidentiary facts, are insufficient to defeat a well-supported summary judgment motion, as is reliance upon surmise, conjecture, or speculation."(internal citations omitted). (*Grullon v. City of New York*, 297 A.D.2d 261[1st Dept. 2002]).

Wherefore it is hereby

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

ORDERED that any and all cross-claims against defendant Bella Cucina, Inc. are hereby dismissed; and it is further

ORDERED that the cross-motion is granted and the complaint is hereby severed and dismissed as against defendant Emiger Realty Association, LLC, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that any and all cross-claims against defendant Emiger Realty Association, LLC are hereby dismissed; and it is further

ORDERED that the remainder of the action shall continue.

DATED: November 30, 2009

EILEEN A. RAKOWER, J.S.C.

FILED
DEC 07 2009
COUNTY CLERK'S OFFICE
NEW YORK