

Kleckner v Meushar 34th St. LLC

2009 NY Slip Op 32887(U)

November 30, 2009

Supreme Court, New York County

Docket Number: 107967/07

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla
Justice

PART 5a

Index Number : 107967/2007
KLECKNER, HERBERT W.
VS.
MEUSHAR 34TH STREET LLC
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

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

in 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 in accordance with the accompanying decision/order.

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/1/09

Saliann Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
HERBERT W. KLECKNER,

Plaintiff,

- against-

MEUSHAR 34TH STREET LLC, VERIZON
NEW YORK, INC., AND THE CITY OF NEW
YORK,

Defendants.

-----X

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For Defendant Meushar, 34th Street LLC:
Raftar and Associates PLLC
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New York, NY 10006

Papers considered in review of these motions and cross motions for summary judgment:

- Notice of Motion 1
- Notice of Motion 2
- Notice of Cross-motion 3
- Affs in Opp 4,5,6,7
- Replies. 8,9,10,11,12

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Verizon New York, Inc. (“Verizon”) moves for summary judgment dismissing the complaint and cross claims asserted against it, defendant Meushar 34th Street LLC (“Meushar”) moves for summary judgment dismissing the complaint asserted against it, and plaintiff Herbert W. Kleckner (“Kleckner”) cross moves for partial summary judgment on his complaint only

- seeking a judicial determination that defendant The City of New York (“City”) was responsible for the maintenance of the subject tree well.

On March 4, 2007, Kleckner tripped and fell when his right foot got caught in the gap between a metal grate in a tree well and the adjacent sidewalk located in front of 555 West 34th Street (“subject premises”). The gap was a few inches wide and approximately three inches deep. Kleckner commenced this action seeking to recover damages for the injuries he sustained as a result of his fall from Meushar, the alleged owner of the subject premises, Verizon, the alleged lessee/tenant of the subject premises, and the City.

Kleckner alleged that Meushar, Verizon and the City were negligent in failing to maintain the sidewalk and metal grate in a reasonably safe condition.

On October 27, 2005, Verizon sold the subject premises to Meushar. Pursuant to a lease agreement dated December 21, 2005 (“lease agreement”), Meushar then leased the subject premises to Verizon. Paragraphs 9.1 and 9.2 of the lease agreement provide,

9.1 Tenant, at its sole cost and expense, shall, throughout the Term, keep and maintain the Premises in a safe and secure condition, and shall make arrangements for the removal of all rubbish, snow and ice from the sidewalks adjacent to the Premises. Tenant, throughout the Term, shall have the right, but not the obligation, to make other repairs to, and/or perform other maintenance in respect of, the Premises. Subject to the first sentence of this Section 9.1, in no event shall Tenant have any obligation to undertake any maintenance, or make any repair to any portion of the Premises, and Landlord shall accept the Premises on the Expiration Date in such condition as Tenant elects to deliver to Landlord.

9.2 Tenant shall permit Landlord, or any authorized representative of Landlord to enter the Premises, at all reasonable times, upon reasonable notice, for the purpose of inspecting all or any part of the Premises.

The lease agreement defines “Premises” as “the land and the building, and all easements, rights and appurtenances with respect thereto.”

Verizon now moves for summary judgment dismissing the complaint and cross claims asserted against it, arguing that under the Administrative Code of the City of New York, the City is responsible for the maintenance and repair of trees and tree wells and therefore, Verizon can not be held liable for Kleckner’s injuries. Verizon further argues that, in any event, pursuant to the lease agreement, Verizon was not responsible for any sidewalk repairs outside of cleaning debris, snow and ice, and because Kleckner did not trip on debris, snow or ice, Verizon can not be held liable for his injuries. Finally, Verizon argues that it performed no work or repairs to the subject sidewalk, as evidenced by the deposition testimony of its facilities manager Lufus Owusu (“Owusu”).

Meushar also moves for summary judgment dismissing the complaint and cross claims asserted against it, arguing that under the Administrative Code of the City of New York, the City is responsible for the maintenance and repair of tree wells and therefore, Meushar can not be held liable for Kleckner’s injuries. Meushar further argues that, in any event, Meushar can not be held liable for Kleckner’s injuries because Verizon held the net lease for the subject premises at the time of the accident and was responsible, pursuant to the lease agreement, for maintaining the subject premises, including the land, the building, and the appurtenances thereto, in a safe condition, and Meushar took no action relative to the subject treewell.

Kleckner cross moves for partial summary judgment on his complaint only seeking a judicial determination that defendant The City of New York ("City") was responsible for the maintenance of the subject tree well. Kleckner also opposes Verizon and Meushar's motions, arguing that: (1) Department of Parks Director of Forestry William Steyer's ("Steyer") deposition transcript annexed by Verizon and Meushar in support of their respective motions was not signed and therefore, can not be considered by the Court; and (2) the photographs referred to and relied upon by Meushar were not properly authenticated within the moving papers and therefore, must be disregarded.

In opposition to the motions and cross motion, the City first argues that triable issues of fact exist as to the cause of the accident, specifically, whether Kleckner was caused to fall by stepping on the sidewalk, the tree well or the gap between the metal grate and the sidewalk.

The City further argues that no evidence has been presented that Kleckner fell on a City owned tree well or that the City had prior written notice, actual notice or constructive notice of any allegedly defective condition in the tree well. In support of this argument, the City refers to Steyer's examination before trial testimony. Steyer identified the subject metal grate in a photograph as a "grating in the sidewalk covering over an empty tree well." He could not tell, from looking at the photograph, whether there was ever a tree planted in the subject tree well. He testified that the subject grating was not one that would be recommended by the Parks Department for installation.

At his deposition, Steyer explained that his department was responsible for issuing permits to plant trees in tree wells. He testified that the results of a search of Parks Department tree records for the time period of 1995 up to and including the date of Kleckner's accident revealed no records of any letters, field work sheets, trees, inspections, prunings, tree removal, contracts, tree planting records (which includes records of installation of grates), or complaints for the location of the accident. There were also no records of permits issued to private parties to have trees planted at the subject location from 1995 through the time of Kleckner's accident. Steyer further explained that the City was responsible for maintaining the trees after installation unless the City was aware of a private maintenance contract for a tree.

The City also submits the deposition testimony of its Department of Transportation ("DOT") record searcher Abraham Lopez ("Lopez"). Lopez testified that a DOT standard two year search for records relating to the location of 555 West 34th Street was performed. The search revealed, among other things, a sidewalk construction permit granted to non-City contractor Envirotrac, Ltd. to open the sidewalk in front of the subject premises for the purpose of sidewalk repair. The permit was valid from 10/4/06 through 11/3/06. Lopez did not know whether any of that work was actually performed.

Finally, the City argues that in any event, even if the City had notice of the subject condition, issues of fact exist as to the parties' relative negligence and as to whether the subject condition was too trivial to be actionable.

Discussion

A party moving for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Once a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Administrative Code of the City of New York §7-210 imposes tort liability on property owners who fail to maintain adjacent city-owned sidewalks in a reasonably safe condition. The court in *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517 (2008) further interpreted Section 7-210, holding that civil liability can not be imposed on property owners for injuries that occur in City-owned tree wells.

Here, the court declines to grant summary judgment to any party at this time because issues of fact exist as to Meushar, Verizon and the City's obligations with respect to the subject tree well.¹ First, Steyer's testimony raises an issue of fact as to whether the

¹ The City's contention that an issue of fact exists as to where the accident occurred is without merit. In his notice of claim, §50(h) testimony, bill of particulars and deposition testimony, Kleckner consistently indicated that he tripped on a gap in between the subject grating and the adjacent sidewalk.

Furthermore, Kleckner's argument that Steyer's deposition transcript should not be considered by the court because it was unsigned is without merit. Pursuant to CPLR §3116, a deposition transcript submitted in support of a summary judgment motion may be admitted as though it were signed. *See Zabari v. City of New York*, 242 A.D.2d 15 (1st Dept. 1998).

subject tree well was City-owned. No party has produced any documents evidencing ownership of the tree well. Moreover, Steyer testified that (1) he could not tell, from looking at the photograph of the subject tree well, whether there was ever a tree planted inside; (2) the subject grating was not one that would be recommended by the Parks Department for installation; (3) from the time period of 1995 up to and including the date of Kleckner's accident a search revealed no records of any letters, field work sheets, trees, inspections, prunings, tree removal, contracts, tree planting records (which includes records of installation of grates) or complaints for the location of the accident; and (4) there were no records of permits issued to private parties to have trees planted at the subject location from 1995 through the time of Kleckner's accident.

Second, Meushar and Verizon fail to submit any evidence in support of their respective motions establishing that the subject tree well was City owned and/or that the subject tree well was not owned or installed by either of them. The only evidence presented was Owusu's testimony that a search for records of sidewalk maintenance by Verizon yielded no results, however, that search was limited to only the one year period prior to Kleckner's accident.

Finally, the court finds that issues of fact exist as to Meushar and Verizon's respective lease obligations for the sidewalk area adjacent to the subject premises. Specifically, the lease provides that the tenant "shall, throughout the Term, keep and maintain the Premises in a safe and secure condition" but then later provides that "subject

to the first sentence of this Section 9.1, in no event shall Tenant have any obligation to undertake any maintenance, or make any repair to any portion of the Premises.” As the lease agreement is subject to more than one interpretation, issues of fact exist as to whether the tenant (Verizon) or owner (Meushar) is responsible for maintaining the Premises. Further, the lease agreement defines the “Premises” as “the land and the building and all easements, rights and appurtenances with respect thereto.” This definition of the Premises may, or may not, include the tree well, depending on the objective intent of the parties. As the parties’ intent is not clear on the face of the lease agreement, issues of fact exist as to whether “Premises” includes sidewalks abutting the building and/or tree wells in those sidewalks.

In accordance with the foregoing, it is

ORDERED that defendant Verizon New York, Inc.’s motion for summary judgment dismissing the complaint and cross claims asserted against it is denied; and it is further

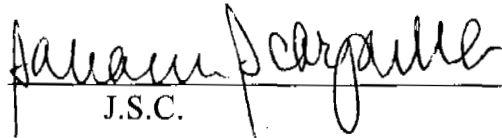
ORDERED that defendant Meushar 34th Street LLC’s motion for summary judgment dismissing the complaint asserted against it is denied; and it is further

ORDERED that plaintiff Herbert W. Kleckner's cross motion for partial summary judgment on his complaint only seeking a judicial determination that defendant The City of New York was responsible for the maintenance of the subject tree well is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
November 30, 2009

ENTER:



J.S.C.

SALIANN SCARPULLA
J.S.C.

FILED
DEC 10 2009
NEW YORK
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