

Filus v New York City Tr. Auth.

2009 NY Slip Op 32947(U)

December 16, 2009

Supreme Court, New York County

Docket Number: 101968/07

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
SHARON FILUS

Plaintiff,

Index No. 101968/07
Mtn Seq. 006

-against-

THE NEW YORK CITY TRANSIT AUTHORITY,
MAXWELL-KATES, INC., W&M PROPERTIES, INC.,
WIEN & MALKIN LLC and HSBC BANK USA, N.A.

Defendants.

-----x
MAXWELL-KATES, INC.,

Third-Party Plaintiff

Third Party
Index No: 590197/09

-against-

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CON EDISON,

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Third-Party Defendant

-----x
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

This personal injury action arises out of plaintiff's claim that she sustained injuries on November 18, 2005 when she fell on the sidewalk located on the south side of East 15th Street between Union Square East and Irving Place in Manhattan. By this motion, defendant Maxwell-Kates, Inc. (Maxwell-Kates) moves pursuant to CPLR 3212 for summary judgment and dismissal of the complaint and all cross-claims interposed against them. Defendant HSBC Bank USA, N.A. (HSBC) and defendants W&M Properties, Inc., (W&M Properties) and Wien & Malkin LLC ("Wien & Malkin), have advanced cross-motions seeking similar relief.

Background

As briefly mentioned above, plaintiff claims that on November 18, 2005, she sustained injuries after she tripped and fell while walking on the sidewalk located on the south side of East 15th Street between Union Square East and Irving Place in Manhattan near an exit/entrance for HSBC Bank. HSBC Bank is located in the commercial portion of a mixed-use building. The residential portion of the building, known as 1 Irving Place, is managed by defendant Maxwell Kates (see Notice of Motion, Exhibit F). The commercial portion of the building, known as 10 Union Square East, is managed by defendant W&M Properties (id.).

In March of 2006, plaintiff, having placed the New York City Transit Authority on notice of her injuries, appeared for a 50-H Hearing (See Notice of Motion, Exhibit E). During the hearing, plaintiff specifically testified that her accident occurred when she got stuck on what she perceived was the grating at that location. Plaintiff testified as follows:

Q: And what happened as far as your accident?

A: What I remember is, I was walking. My foot got stuck and I went like straight down. Boom.

Q: Which foot got stuck?

A: My right foot.

Q: What did it get stuck on?

A: I think it was the grating. The edge of the grating.

(Transcript, 50-H Hearing, Notice of Motion, Exhibit E, p. 16-17). Plaintiff subsequently commenced this action in 2007.

In early 2009, defendant Maxwell Kates brought a third-party action against Con Edison, alleging that Con Edison was the owner of the subject grating, and was therefore responsible for maintaining that grating. In May of 2009, the New York City Transit Authority moved for dismissal of plaintiff's claims and all of the cross-claims advanced against them. By decision dated June 22, 2009, Hon. Harold B. Beeler granted the motion, and dismissed the claims, largely based on plaintiff's 50-H testimony and the fact that between 2005 and 2009, plaintiff was not able to establish that the Transit Authority had any ownership or control of the subject grating which plaintiff claims caused her accident.

Defendants claim, and Con Edison does not dispute, that the grating referred to by plaintiff in her 50-H testimony is in fact, owned by Con Edison.¹ The grating is also located closest to the commercial portion of the building, 10 Union Square East. Based on the record submitted, including plaintiff's 50-H testimony, summary judgment in favor of defendant Maxwell Kates, the managing agent for the residential portion of property is

¹ The court further notes that although Con Edison submitted opposition to the motions and cross-motions, the opposition challenging ownership of the subject grating was withdrawn at oral argument.

appropriate, inasmuch as it is clear to the court that no amount of additional discovery would enable plaintiff to maintain a prima facie claim against this defendant.

Plaintiff's affidavit in opposition does nothing to change this result. Plaintiff testified at her 50-H hearing that her accident was caused when she tripped on the grating, or, in plaintiff's own words "the edge of the grating" in front of HSBC Bank (Transcript, 50-H Hearing, Notice of Motion, Exhibit E, p. 16-17). The transcript is devoid of any references to cracks in the sidewalk causing her accident (*id.*). Plaintiff's affidavit, which completely contradicts her sworn 50-H testimony, is therefore insufficient to raise the necessary question of fact required to defeat a motion for summary judgment (*Harti v. Lency*, 294 AD2d 296 [1st Dept 2002]).²

With respect to the balance of the moving defendants, the papers submitted indicate that plaintiff has not yet had an opportunity to obtain the discovery claimed necessary to

² Plaintiff's June 9, 2009 Affidavit submitted in opposition to these motions claims that her accident occurred when she

3. [***] "was caused to trip and fall due to a crack in the sidewalk which was located at or near the edge of the metal frame surrounding the grating. My right foot got stuck and/or caught in the crack (sic) portion of the sidewalk and I was caused to fall to the ground.

4. [***] the crack in the sidewalk which caused my fall extended from the corner/edge of the metal frame surrounding the grating diagonally to the adjacent tree well" [***]) (Plaintiff's Affidavit in Opposition).

successfully oppose motions for summary judgment. As such, the balance of the summary judgment motions are denied with leave to renew upon the completion of discovery (CPLR 3212(f); Barr Altman, Lipshie and Gerstman; New York Civil Practice Before Trial [James Publishing 2009] § 37:380, § 37:480).

Accordingly, it is

ORDERED that the motion advanced by defendant Maxwell-Kates, Inc., seeking summary judgment and dismissal of plaintiff's complaint and all cross-claims asserted against them, is granted, and the complaint and cross-claims are dismissed; and it is further

ORDERED that the cross-motion advanced by defendant HSBC Bank USA, N.A. seeking summary judgment is denied with leave to renew upon the completion of discovery; and it is further


ORDERED that the cross-motion advanced by defendants W&M Properties, Inc. and Wien & Malkin LLC ("Wien & Malkin), is denied with leave to renew upon the completion of discovery; and it is further

ORDERED that the clerk of court enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/16/09

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HON. WALTER B. TOLUB, J.S.C.