

Reyes v Macpin Realty Corp.

2010 NY Slip Op 30790(U)

April 6, 2010

Supreme Court, Queens County

Docket Number: 22791/2006

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER
Justice

IA Part 12

ALEJANDRINA REYES, et al. x

Index
Number 22791 2006

- against -

Motion
Date February 16, 2010

MACPIN REALTY CORP., et al.

Motion
Cal. Number 32

x

Motion Seq. No. 2

The following papers numbered 1 to 41 read on this motion by defendant/third-party plaintiff Macpin Realty Corp. (Macpin) and defendant George Butsikaris Realty, Inc. (Butsikaris) for summary judgment dismissing plaintiffs' complaint as against them on the grounds that the condition complained of was trivial as a matter of law and therefore not actionable and they did not create or have actual or constructive notice of the condition and for summary judgment in their favor on their counterclaims, and on these cross motions by defendant/third-party defendant HQ East Pacific Trading, Inc. (HQ) for summary judgment in its favor dismissing plaintiffs' complaint, the third-party complaint and all cross claims against it and to strike plaintiffs' complaint based on plaintiff Pedro Iturvibe's willful failure to appear for a deposition in violation of an order of the Court and by defendant/third-party defendant Benigno Eumana Lopez (Lopez) for summary judgment in his favor dismissing plaintiffs' complaint and all cross claims against him on the grounds he did not breach any duty owed to plaintiffs that caused plaintiff Alejandrina Reyes' alleged accident; the alleged condition complained of was trivial and de minimus as a matter of law and, in any event, plaintiffs have not and cannot establish that the alleged condition was a proximate cause of plaintiff Reyes' accident, and to dismiss plaintiffs' complaint because plaintiff Iturvibe failed to appear for an examination before trial in violation of multiple court orders.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-7
Notices of Cross Motion - Affidavits - Exhibits	8-19
Answering Affidavits - Exhibits	20-26
Reply Affidavits	27-40
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

This is an action by plaintiffs seeking damages for personal injuries allegedly sustained by plaintiff Reyes on June 6, 2006, when she tripped and fell on a raised and broken sidewalk adjacent to premises located at 94-20 and 94-22 Roosevelt Avenue, Jackson Heights, New York owned by defendant/third-party plaintiff Macpin and managed by defendant Butsikaris. Defendant/third-party plaintiff Macpin leased 94-20 Roosevelt Avenue to defendant/third-party defendant Lopez pursuant to a lease and rider dated May 1, 2002. Defendant/third-party plaintiff Macpin leased 94-22 Roosevelt Avenue to defendant/third-party defendant HQ pursuant to a lease and rider dated August 1, 2002.

Paragraphs 4 of both leases provide in pertinent part that the “[o]wner shall maintain and repair the public portions of the building, both exterior and interior ... Tenant shall ... take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition”

The branches of the cross motions of defendant/third-party defendant HQ and defendant/third-party defendant Lopez seeking to dismiss the complaint of plaintiff Iturvibe were withdrawn by so-ordered stipulation of the parties dated February 16, 2010.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra.*) Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in

admissible form sufficient to establish the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra.*)

A property owner or possessor is not liable in negligence unless it created the allegedly dangerous condition or had actual or constructive notice of its existence. (*See Rosas v 397 Broadway Corp.*, 19 AD3d 574 [2005]; *see also Winby v Kustas*, 7 AD3d 615 [2004]; *Voss v D&C Parking*, 299 AD2d 346 [2002].) While an out-of-possession owner or lessor is generally not liable for injuries that occur on its premises, one who retains control of the premises, or contracts to repair or maintain the property, may be liable for defects. (*See Ever Win, Inc. v 1-10 Industry Assocs., LLC*, 33 AD3d 845 [2006]; *see also Winby v Kustas, supra*; *Eckers v Suede*, 294 AD2d 533 [2002].) Control may be evidenced by lease provisions making the owner or landlord responsible for repairs or by a course of conduct demonstrating that the owner or landlord has assumed responsibility to maintain a particular portion of the premises. (*See Winby v Kustas, supra.*)

In this case, in light of the provisions contained in the subject leases whereby defendant/third-party plaintiff Macpin agreed to maintain and repair the public portions of the building, both exterior and interior, and defendants/third-party defendants HQ and Lopez agreed to be responsible for non-structural repairs to the adjacent sidewalks, defendant/third-party plaintiff Macpin failed to meet its burden of establishing as a matter of law that it was an out-of-possession landlord with no control over the subject premises or that it was not obligated by the leases to repair the allegedly defective condition on the sidewalk adjacent thereto. (*See Lalicata v 39-15 Skillman Realty Co., LLC*, 63 AD3d 889 [2009]; *see also Dunitz v J.L.M. Consulting Corp.*, 22 AD3d 455 [2005]; *Winby v Kustas, supra.*)

Moreover, defendant/third-party plaintiff Macpin had a nondelegable duty to maintain and/or repair the subject sidewalk. This sidewalk is not part of the demised premises since it is owned by the City of New York and the Sidewalk Law (Administrative Code of the City of New York § 7-210) imposes upon the owner of real property abutting any sidewalk “the duty ... to maintain such sidewalk in a reasonably safe condition” and provides that the owner “shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” (Administrative Code of the City of New York § 7-210[a],[b].) Thus, defendant/third-party plaintiff Macpin could not assign and/or delegate its obligations under the Code to the tenants in possession, defendants/third-party defendants HQ and Lopez. (*See Castillo v Bangladesh Society, Inc.*, 12 Misc 3d 1170A [2006].)

Defendant/third-party plaintiff Macpin and defendant Butsikaris also seek summary judgment on the grounds that the alleged defective condition was trivial and they did not have notice of it.

It is well settled that the issue of whether a dangerous or defective condition exists depends on the particular facts of each case and is generally a question of fact for the jury. (See *Trincere v County of Suffolk*, 90 NY2d 976 [1995]; see also *Corrado v City of New York*, 6 AD3d 380 [2006]; *Riser v New York City Housing Auth.*, 260 AD2d 564 [1999].) In determining whether a defect is trivial as a matter of law, the court must examine the facts presented, including the width, depth, elevation, irregularity and appearance of the condition, along with the time, place and circumstances of the injury. (See *Trincere v County of Suffolk*, *supra*.) “There is no minimal dimension test or per se rule that a defect be of a certain minimum height or depth in order to be actionable.” (*Boxer v Metropolitan Transportation Auth.*, 52 AD3d 447, 448 [2008], quoting *Trincere v County of Suffolk*, *supra* at 977.)

Upon consideration of the photographic exhibits and conflicting expert affidavits submitted by the parties, as well as, the time, place and circumstances of the subject accident, triable issues of fact exist concerning whether the alleged defect was too trivial to be actionable. (See *Boxer v Metropolitan Transportation Auth.*, *supra*; see also *Mishaan v Tobias*, 32 AD3d 1000 [2006]; *Adsmond v City of Poughkeepsie*, 283 AD2d 598 [2001].)

A triable issue of fact also exists concerning whether defendant/third-party plaintiff Macpin and defendant Butsikaris had constructive notice of the alleged defective condition based on the photographs and the parties’ examinations before trial testimony. (See *Salvia v Hauppauge Route III Assocs.*, 47 AD3d 791 [2008]; see also *Sotomayor v Pafos Realty, LLC.*, 43 AD3d 905 [2007]; *DeGruccio v 863 Jericho Turnpike Corp.*, 1 AD3d 472 [2003].)

Accordingly, the branch of the motion of defendant/third-party plaintiff Macpin and defendant Butsikaris for summary judgment in their favor dismissing plaintiffs’ complaint as against them is denied.

Defendant/third-party defendant HQ presented competent evidence demonstrating its entitlement to summary judgment as a matter of law. This evidence, which included, among other things, the subject lease and the affidavit of its former principal, Le Qu Chang, established that defendant/third-party defendant HQ owed no duty to plaintiff Reyes to maintain or repair the subject sidewalk through its lease with defendant/third-party plaintiff Macpin or by statute; that the alleged defective condition was structural and the responsibility of defendant/third-party plaintiff Macpin; and that it did not create alleged defective

condition, make any repairs to the subject sidewalk or use the sidewalk for a special purpose. (See *Berkowitz v Dayton Construction, Inc.*, 2 AD3d 764 [2003].)

Plaintiffs, defendant/third-party plaintiff Macpin and defendant Butsikaris, in opposition, failed to raise any triable issues of fact.

Plaintiffs' contention that triable issues of fact exist concerning whether defendant/third-party defendant HQ owed plaintiff Reyes a duty and breached that duty is unsupported and without merit. The contention of defendant/third-party plaintiff Macpin and defendant Butsikaris that an issue of fact exists concerning whether defendant/third-party defendant HQ created the alleged defective condition is also unsupported and without merit. In addition, since defendant/third-party plaintiff Macpin and defendant Butsikaris failed to present any evidence tending to show that plaintiff Reyes' path was directed toward the alleged defective sidewalk condition because of display racks placed on the sidewalk by defendant/third-party defendant HQ, their claim regarding special use is without merit. (See *Lopez v City of New York*, 19 AD3d 301 [2005]; see also *Betances v 700 West 176th Street Realty Corp.*, 250 AD2d 504 [1998].)

Accordingly, defendant/third-party defendant HQ's cross motion for summary judgment is granted and plaintiffs' complaint, the third-party complaint and all cross claims against it are dismissed.

In light of the foregoing, the branch of the motion of defendant/third-party plaintiff Macpin and defendant Butsikaris, in effect, seeking summary judgment in their favor and against defendant/third-party defendant HQ on the third-party claims and cross claims for common-law and contractual indemnification is denied as academic.¹

Defendant/third-party defendant Lopez' cross motion for summary judgment is denied.

Defendant/third-party defendant Lopez failed to establish through competent evidence that plaintiff Reyes' fall did not occur on the sidewalk abutting the premises leased by him. In addition, although a plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action (see *Scott v Rochdale Village, Inc.*, 65 AD3d 621 [2009]; see also *Manning v 6638 18th Avenue Realty Corp.*, 28 AD3d 434 [2006]; *Oettinger v Amerada Hess*

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In their notice of motion, defendant/third-party plaintiff Macpin and defendant Butsikaris seek summary judgment on their "counterclaims," but no counterclaims are asserted in their answers.

Corp., 15 AD3d 638 [2005]), contrary to defendant/third-party defendant Lopez' contention, plaintiff Reyes, at her examination before trial, clearly identified the cause of her fall as the elevated and broken sidewalk. (See *Howe v Flatbush Presbyterian Church*, 48 AD3d 419 [2008]; see also *Jackson v Fenton*, 38 AD3d 495 [2007]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920 [2005].) Furthermore, while defendant Lopez established that he did not owe a duty to plaintiff Reyes to maintain or repair the sidewalk through his lease with defendant/third-party plaintiff Macpin or by statute, defendant Lopez failed to submit sufficient evidence, such as, an affidavit of a person with personal knowledge of the facts or appropriate examination before trial testimony, demonstrating that he did not create or have actual or constructive notice of the alleged defective condition. (See *Zuckerman v City of New York*, *supra*; see also *Atkinson v Golub Corp. Co.*, 278 AD2d 905 [2000]; *Gladstone v Burger King Corp.*, 261 AD2d 357 [1999].)

Defendant/third-party defendant Lopez' assertion that he is entitled to summary judgment on the ground that the alleged defective condition was too trivial to be actionable is also unavailing since, as noted herein, a triable issue of fact exists concerning same.

The branch of the motion of defendant/third-party plaintiff Macpin and defendant Butsikaris, in effect, seeking summary judgment in their favor and against defendant/third-party defendant Lopez on the third-party claims and cross claims for common-law and contractual indemnification is denied as premature.

Dated: April 6, 2010

J.S.C.