

Skinner v City of New York

2010 NY Slip Op 31068(U)

April 27, 2010

Sup Ct, NY County

Docket Number: 114204/06

Judge: Barbara Jaffe

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

PRESENT: JAFFE
Index Number : 114204/2006 BARBARA JAFFE
J.S.C.

PART 5

SKINNER, RICHARD

vs

CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

CALL # 117

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion, Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3
4, 5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 03 2010

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 4/27/10
APR 27 2010

[Signature]
BARBARA JAFFE 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 : PART 5

-----X

RICHARD SKINNER,

Plaintiff,

-against-

Index No. 114204/06
Motion Date: 04/20/10
Motion Seq. No.: 004
Calendar No.: 117

THE CITY OF NEW YORK, 1804 WASHINGTON
AVENUE CORPORATION, RICK ELEZI MANAGEMENT,
INC. and CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Defendants.

-----X

BARBARA JAFFE, JSC:

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By notice of motion dated January 5, 2010, defendants 1804 Washington Corporation (1804) and Rick Elezi Management, Inc. (REM) (collectively, movants) seek an order summarily dismissing the action against them. Plaintiff opposes the motion; co-defendants City of New York (City) and Con Edison Company of New York, Inc. (Con Ed) do not oppose. For the following reasons, the motion is granted.

I. UNDISPUTED FACTUAL BACKGROUND

On November 22, 2005, plaintiff was injured when he fell into an empty tree well adjacent to 106 East 17th Street, a brownstone owned by 1804 and managed by REM.

(Affirmation of D. Bradford Sessa, Esq. dated Jan. 5, 2010 [Sessa Aff.]). At the time of the accident, one of the building's two exterior lights was broken. (Sessa Aff., Exh. N at 97-98). There was nothing surrounding the tree well at the time of the accident, as movants had removed a one-foot iron fence that they had previously installed around its perimeter. (Sessa Aff., Exh. O at 27-30). According to REM's president, the fence was purely decorative and was removed because it would not stay up. (*Id.* at 30).

The accident occurred as follows: That evening, as plaintiff and a friend walked west on East 17th Street towards plaintiff's car, which was parked by the tree well, plaintiff stepped into the tree well, lost his balance, and fell forward, first striking his hand on his car and then landing face down on the sidewalk. (Sessa Aff., Exh. N at 36-39). After helping plaintiff up, his friend photographed the empty tree well. (Sessa Aff., Exh. R). At his deposition, Skinner testified that the tree well was four inches deep. (Sessa Aff., Exh. N at 29-30).

II. PERTINENT PROCEDURAL BACKGROUND

On February 3, 2006, plaintiff commenced an action in Rockland County by serving movants with a summons and complaint. (Sessa Aff., Exh. A). On May 5, 2006, movants served Con Edison and City with a third-party complaint. (*Id.*, Exh. C). On September 25, 2006, plaintiff commenced a separate action arising out of the same accident in New York City, by serving a summons and complaint on City. (Sessa Aff., Exh. L). On April 20, 2007, another justice of this court ordered that the Rockland County action be transferred to New York County and consolidated it with the action against City. (Sessa Aff., Exh. L). Plaintiff filed his note of issue and certificate of readiness on September 10, 2009. By notice of motion dated November 18, 2009, Con Edison moved for an order summarily dismissing the claims against it, which is

granted without opposition in a separate decision and order issued today.

III. MOVANTS' MOTION TO DISMISS

A. Contentions

Movants argue that they are not legally responsible for the tree well, made no special use of it, and had no duty to illuminate the sidewalk. (Sessa Aff.). They rely on *Vucetovic v Epson Downs, Inc.*, 10 NY3d 517 (2008), and Elezi's testimony that the fence was decorative and had been removed before plaintiff's accident. (Sessa Aff., Exh. O, 27-30).

In response, plaintiff argues that the earlier installation of the fence connotes movants' special use of the tree well, that the fence served as a visual cue of the empty tree well, and that defendants failed to light the area adequately. (Affirmation in Opposition of Ira H. Lapp, Esq. dated Mar. 5, 2010 [Lapp Aff.]). In support, he relies on Elezi's testimony that he installed the fence (Sessa Aff., Exh. O, 27-30), and annexes photographs of the building depicting a broken exterior light (Lapp Aff., Exh. A).

B. Analysis

Pursuant to Administrative Code § 7-210, a property owner is responsible for the sidewalk abutting its property. In 2008, the Court of Appeals held that for purposes of this provision, a sidewalk does not include tree wells, for which the municipality remains liable. (*Vucetovic*, 10 NY3d 517). Nevertheless, a property owner may still owe a duty relating to a tree well if it creates a defective condition on it or uses it for a special purpose, such as when it installs an object on it, or varies its construction. (*Kaminer v Dan's Supreme Supermarket/Key Food*, 253 AD2d 657 [1st Dept 1998]; see *Fuller v PSS/WSF Housing Co.*, 70 AD3d 415 [1st Dept 2010] [applying special use exception to a tree well]).

Here, as it is undisputed that plaintiff fell within a tree well, movants cannot be held liable for his injuries unless their installation of the fence constituted a special use. Even if the installation may have constituted a special use, however, the fence had been removed before plaintiff's accident and absent any evidence that the plaintiff's injury arose from such use, movants cannot be held liable. (*Cf Fuller*, 70 AD3d 415 [plaintiff's fall caused by his own inattention in tripping in dirt area of tree well, and not by defendant's adjacent fence]; *Darringer v Furtsch*, 225 AD2d 577 [2d Dept 1996] [although defendant's placement of receptacle in sidewalk constituted a special use, there was no evidence that receptacle caused fall]). Counsel's assertion that plaintiff's accident resulted from the absence of the fence (*Lapp Aff.*) is unsupported by any contention by plaintiff that he knew of and relied upon the presence of the fence when he proceeded as he did.

The sufficiency of the exterior lighting is irrelevant, absent any requirement that movants "illuminate their property during all hours of darkness." (*Miller v Consolidated Rail Corp.*, 9 NY3d 973, 974 [2007]; *Peralta v Henriquez*, 100 NY2d 139, 145 [2003]). And, notwithstanding the imputation of a duty to light their own curb or step (*Peralta*, 100 NY2d at 145), such a duty does not extend to the tree well for which movants are not otherwise responsible.

IV. CONCLUSION

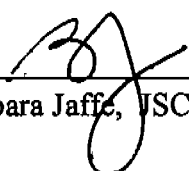
Accordingly, it is hereby

ORDERED, that 1804 Washington Avenue Corporation's and Rick Elezi Management, Inc.'s motion for an order granting them summary judgment is granted, and the action against them is dismissed with costs and disbursements to them and taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk is directed to enter judgment

accordingly; and it is further

ORDERED, that the remainder of this action shall continue.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC

DATED: April 27, 2010
New York, New York

BARBARA JAFFE
J.S.C.

APR 27 2010

FILED

MAY 03 2010

NEW YORK
COUNTY CLERK'S OFFICE