

Ortiz v W&M Props., Inc.
2010 NY Slip Op 31101(U)
May 6, 2010
Supreme Court, New York County
Docket Number: 105401/2008
Judge: Jane S. Solomon
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.

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

PRESENT: JANE S. SOLOMON

PART 55

Justice

artiz

INDEX NO. 105401/08

MOTION DATE _____

- v -

W + M Properties, Inc

MOTION SEQ. NO. 035

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 ...

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-5

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided by the annexed memorandum decision and order

FILED

MAY 07 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/6/10

[Signature]
JANE S. SOLOMON 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 55

-----x
VIRGINIA ORTIZ,

Plaintiff,

-against-

Index No.: 105401/2008

DECISION and ORDER

W&M PROPERTIES, INC, ONE UNION SQUARE
EAST CONDOMINIUM, BEST BUY, CO., INC.,
BEST BUY STORES, L.P., NEW YORK UNION
SQUARE RETAIL, L.P., W&M PROPERTIES,
LLC., W&M PROPERTIES OF NEW YORK, LLC.,

Defendants.
-----x

JANE S. SOLOMON, J.:

FACTS

Plaintiff Virginia Ortiz (Ortiz) sues defendants for injuries she suffered as a result of a trip and fall on spalled concrete in the sidewalk on the east side of Union Square just north of 14th Street in Manhattan, near a building where each defendant has an interest or relationship. Other than defendant One Union Square East Condominium (One Union Square), each defendant moves for summary judgment.

Based on the submissions, which include a complete Offering Plan for One Union Square, One Union Square owns the land and building abutting the sidewalk where Ortiz claims to have fallen on November 2, 2007. The building is a mixed use condominium consisting of residential units, represented by a "Residential Board" and four commercial units--garage, theater, retail and office--together represented by a "Commercial Board".

FILED

MAY 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

These Boards are represented on the Condominium Board which operates the building.

The retail unit, owned by defendant New York Union Square Retail, L.P. and managed by one of the W&M defendants (collectively herein NYUSR),¹ has tenants, one of which is defendant Best Buy Stores L.P., i/s/h/a Best Buy Co., Inc. (Best Buy), whose store abuts the sidewalk where Ortiz fell.

Ortiz testified at her deposition that the defect which caused her to fall was approximately two inches across and one and a half to two and a half inches deep. She submits photographs of the sidewalk taken two days after her fall. The photographs depict a slight spalling located at the intersection of four flagstones in the sidewalk. The two flagstones bordering the spalling form a straight edge along its length (see photographs attached to Affirmation in Opposition, Ex. E). Ortiz also testified that she regularly walked down that street and had noticed the condition on previous days (Ortiz EBT, attached to Best Buy's Motion for Summary Judgment, Ex. H, p.46-7).

DISCUSSION

A. Nature of the Defect:

Movants contend that the surface defect was a trivial

¹ The W&M defendants are W&M Properties, Inc., W&M Properties, LLC, W&M Properties of New York, LLC. They have made one of the motions, along with NYUSR, that is the subject of this decision.

condition. Ortiz counters that the pictures (attached to NYUSR's Motion, Ex. E) show the existence of the depression in the concrete, that it was large enough to catch a shoe, and also notes that her statements regarding its dimensions are unrefuted.

Whether a dangerous or defective condition exists is generally a question of fact for the jury (*Trincere v. County of Suffolk*, 90 NY2d 976, 977 [1997]); however, summary judgment may be granted where a defect is trivial (*Id.*). A court must, therefore, examine the facts presented "including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Id.* [internal quotation marks omitted]).

After having made such an inquiry and in reviewing the photographs, which show that, while the spalling may not be as deep as Ortiz contends, there was an erosion in the pavement that created an edge which may have been capable of catching a shoe and throwing the wearer off balance. "While a gradual, shallow depression is generally regarded as trivial . . . the presence of an edge which poses a tripping hazard renders the defect nontrivial" (*Argenio v. Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept, 2000][citations omitted]). Accordingly, the court cannot conclude as a matter of law that the defect was so trivial that Ortiz may not have her day in court.

Best Buy further argues that the defect was open and

[* 5]

obvious and not inherently dangerous. A court may grant summary judgment to a landowner or licensed occupier on the ground that the condition complained of by a visitor was both open and obvious and, as a matter of law, not inherently dangerous (*Broodie v. Gibco Enterprises, Ltd.*, 67 AD3d 418 [1st Dept, 2009]). Best Buy argues that the defect was not dangerous because Ortiz admitted having seen it prior to her fall, but never reported it to anyone (Ortiz EBT, attached to Best Buy's Affirmation in Support, Ex. H, p.48). As a matter of law, this statement does not prove that the eroded area was not inherently dangerous, and summary judgment cannot be granted on this ground.

B. Duty To Maintain the Sidewalk:

NYUSR argues that One Union Square, and not it, has the duty to maintain the building's common elements, including the abutting public sidewalks. One Union Square counters that it has no such duty because public sidewalks are not enumerated in the building's common elements (Offering Plan, attached to W&M's Affirmation in Partial Opposition, Ex. B, p.308-310). Specifically, One Union Square claims that the only reference to "sidewalk" in the offering plan's "common elements" section is found in section 8.3-15, governing the "[d]riveway and private sidewalk adjoining said driveway on East 15th Street providing access to the [residential] Building" (Offering Plan, at 309), so that the public sidewalk abutting the building is not its

* 6]
responsibility.

NYUSR relies on the definition of "common elements" found in the Condominium Act, Real Property Law (RPL) § 339-e(3)(h).² RPL § 339-e(3) governs where common elements are not otherwise defined. Here, however, the offering plan defines common elements, and while its definition of "common elements" in section 8.3-1 does not mention "public sidewalks," it defines common elements as "the entire Property, including the Land and all parts of the Building and improvements thereon other than the Units," (emphasis added). Furthermore, section 8.3-17 states that a "general common element" consists of "any and all other Common Elements in the Property not included in the Units (id.)."

In this connection, Administrative Code §7-210 places responsibility and liability for the maintenance of the public sidewalk on the owner of real property abutting those sidewalks.³ The First Department has noted that, in a condominium, "owners of individual units are not liable for injuries sustained as a result of defects in the common elements" (*Rothstein v. 400 East*

² RPL 339-e, which lists definitions in the Condominium Act, states: "3. "Common elements," unless otherwise provided in the declaration, means and includes: (a) The land on which the building is located . . . (h) All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.

³ It reads, in relevant part: "a. It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition."

54th Street Co. 51 A.D.3d 431 [1st dept, 2008]). Since One Union Square owns the land, and the sidewalk abuts its perimeter, unless there is another controlling provision, One Union Square is responsible for the abutting sidewalks.

NYUSR also relies on section 6.9-3 of the condominium's By-Laws in attempting to establish One Union Square's control of the public sidewalks. This provision relates to the separate burdens on the boards for each part of the building. As relevant, it states:

"public areas of the Building and those areas exposed to public view shall be kept in good appearance . . . by (a) each Board with respect to such parts of the Building required to be maintained by it and in the case of the Residential and Commercial Boards (specifically including but not limited to, snow, ice and litter removal for the sidewalk areas under each Board's respective jurisdiction) . . . " (Offering Plan, at 395-6).

From this language, it appears that it was contemplated that there would be a delegation of responsibility for the maintenance of the public areas, including "sidewalk areas" to the residential and commercial boards, as was appropriate for the portions of the property owned by the unit owners they represent.⁴

⁴ The Offering Plan defines the Commercial Board as consisting of seven members, drawn from each of the four commercial units, with operational control over all matters solely concerning the commercial units. Two of these representatives come from the Retail Unit--NYUSR. The Commercial Board is governed by the overarching Condominium Board (in which members of the Commercial Board and Residential Board are members) in matters that jointly affect both the residential and

There is no evidence in the offering plan that a commercial unit owner such as NYUSR is directly responsible for maintenance of any abutting sidewalk. Accordingly, it cannot be directly liable to Ortiz for her injury.

One Union Square appears to be the only defendant directly exposed to liability to Ortiz. However, its cross-claim against NYUSR for apportionment remains. This is because neither did a thorough analysis of the condominium documents and it may be that NYUSR, as an owner of the Retail Unit is liable to One Union Square for any failure that it or the Commercial Board had in properly maintaining the sidewalk. As a result, NYUSR's motion is granted to the extent that the complaint is dismissed against it, and otherwise denied.

Finally, Best Buy claims that it too had no responsibility for upkeep of the sidewalk and provides testimony to that effect from its store's General Manager, Christopher Forrest (Forrest EBT, attached to Best Buy's Motion, Ex. I, p.35-6). One Union Square opposes Best Buy's claim by making reference to a copy of the lease, provided by NYUSR in its motion (Standard Form of Store Lease, attached to NYUSR's Motion, Ex. A),⁵ as proof that Best Buy had a duty to maintain the sidewalk.

commercial units. (See. Offering Plan, pg. 2).

⁵ The lease is not prominently situated within Exhibit A. It is appended to the end of NYUSR's attachment of the complaint, the answers and crossclaims of the parties, the amended

Notably, the lease was highlighted before being copied for the court, and as a result, the highlighted areas are entirely illegible. Moreover, One Union Square does not quote from the lease, or direct the court to any specific provision of interest. Accordingly, there is no discernable evidence in the record that rebuts Best Buy's testimony and its motion must be granted.

In accordance with the foregoing, it hereby is

ORDERED that NYUSR and W&M's motion for summary judgment is granted to the extent that the complaint is dismissed as against them, and otherwise denied as to any remaining cross-claims against them; and it further is

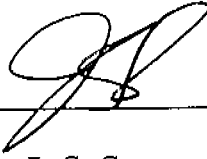
ORDERED that Best Buy's motion for summary judgment dismissing the complaint and all cross-claims against it is granted, and the complaint is severed and dismissed as to it, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed upon the submission of an appropriate bill of costs; and it further is

complaint, the amended answers of all defendants, and several demands for bills of particulars.

ORDERED that counsel for the remaining parties shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on May 24, 2010 at 2:00 PM.

Dated: May *p*, 2010

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
MAY 07 2010
NEW YORK
COUNTY CLERK'S OFFICE