

Bonsignore v City of New York

2010 NY Slip Op 31517(U)

June 7, 2010

Supreme Court, New York County

Docket Number: 105648/06

Judge: Barbara Jaffe

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6-10-10

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

PRESENT: JAFFE BARBARA JAFFE J.S.G.

PART 5

Index Number : 105648/2006

BONSIGNORE, EDWARD

vs
CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JUN 10 2010

RECEIVED

JUN 09 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT CIVIL

NEW YORK
COUNTY CLERK'S OFFICE

MIAE

Dated: 6/7/10

JUN 07 2010

[Signature]

BARBARA JAFFE J.S.G.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----x
EDWARD BONSIGNORE,

Plaintiff,

-against-

Index No. 105648/06

Motion Date: 4/6/10

Motion Seq. No.: 001

Argued: 4/27/10

DECISION AND ORDER

CITY OF NEW YORK and HUDSON RIVER
PARK TRUST,

Defendants.
-----x

BARBARA JAFFE, JSC:

For plaintiff:
Frank Braunstein, Esq.
Frank J. Laine, P.C.
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Plainview, NY 11803
516-937-1010

For defendant Hudson River Park Trust:
Bradley J. Corsair, Esq.
The Law Offices of Edward Garfinkel
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Brooklyn, NY 11201
718-250-1100

This action arose on December 4, 2005 when plaintiff, a New York City Police Department (NYPD) police lieutenant was allegedly injured when the horse he was riding stepped into a sinkhole covered by a puddle in a parking area used by the NYPD at Pier 63. (Affirmation of Bradley J. Corsair, Esq., dated Jan. 15, 2010 [Corsair Aff.], Exh. G).

By notice of motion dated January 15, 2010, defendant Hudson River Park Trust (Trust) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Only plaintiff opposes the motion.

I. BACKGROUND

In December 1994, the New York State Department of Transportation (DOT) and Basketball City, Inc. (Basketball City) entered into a lease for the space at Pier 63 in Manhattan in issue here (the premises). (Corsair Aff., Exh. A). The lease expired on December 31, 2000. (*Id.*).

Pursuant to paragraphs 11 and 12 of the lease, Basketball City agreed to take care of the premises, maintain them in good condition, and make all necessary and appropriate structural and non-structural repairs. (*Id.*) Paragraph 11 also provides that if the DOT determines that any hazardous condition existed, it may demand that Basketball City fix it and if it fails to so, DOT may take possession of the premises and terminate the lease. However, the parties also agreed that DOT's right to terminate the lease "shall create no obligation or liability upon [DOT] to inspect the premises, nor to take any corrective action to make repairs . . ." (*Id.*).

Since 1998, Trust has been designing, building, and operating the Hudson River Park. (Corsair Aff., Exh. C; Affidavit of Connie Fishman, dated Jan. 11, 2010 [Fishman Affid.]). Sometime between 1998 and 2003, Trust succeeded the DOT as lessor of the premises. (*Id.*).

In August 2003, Basketball City and City entered into a license agreement by which a NYPD horse-mounted unit took possession of the portion of Pier 63 that was leased to Basketball City. (Exh. B; Fishman Affid.). The area covered by the license agreement includes the area where plaintiff was allegedly injured. (*Id.*) The license requires City to repair damage to the premises caused by it, its horses, or its employees, contractors, etc., and to repair and maintain sidewalks, curbs and passageways adjoining and/or appurtenant to the premises, and Basketball City to make all exterior and structural repairs, except for those caused by City's negligence. (*Id.*, p. 7, 11). Although the lease had expired by August 2003, Basketball City and the NYPD remained in possession of the premises. (Fishman Affid.).

On or about April 25, 2006, plaintiff served his summons and complaint, alleging claims against Trust and City for negligence and a violation of General Municipal Law § 205-e. (Corsair Aff., Exh. D). On or about July 13, 2006, Trust served its answer. (*Id.*, Exh. E).

On July 15, 2008, plaintiff testified at a deposition that he was working on the date of his accident, that he had noticed the sinkhole in the parking lot two months prior to his accident, that he reported the hole to Police Officer Darren Scali, and that Scali told him the hole had been there a long time, that City agencies had been notified of it but were arguing over who was responsible for repairing it, and that NYPD maintenance people had repeatedly tried to repair it. Plaintiff had also observed personnel employed by Trust occasionally looking around Pier 63 and he believed they were involved with planning. (Affirmation of Frank Braunstein, Esq., dated Feb. 19, 2010 [Braunstein Aff.], Exh. B).

At a deposition taken on March 11, 2009, Scali, who was a member of the NYPD mounted unit at the time of plaintiff's accident, testified that in 2001 or 2002 he was the officer assigned to stable and vehicle maintenance at Pier 63, that the sinkhole became apparent after the NYPD took possession of the premises, that he had placed cones around the sinkhole, that another police officer had replaced the grill on the grate next to the sinkhole, that his supervisor told him that the City Department of Environmental Protection was responsible for fixing the hole, and that he had filled out a work order pertaining to the hole for the NYPD building maintenance section. Scali never spoken to anyone at Trust about the hole and was unaware that Trust had any responsibility for the hole or that Trust had attempted to repair it. According to him, only City employees had tried to repair it. (*Id.*, Exh. C).

At a deposition held on March 19, 2009, James Koth, Trust's vice-president for operations and maintenance since 2003, denied having ever visited Pier 63, and asserted that no one from Trust's maintenance division would have visited Pier 63, that he was unaware of any procedure by which Basketball City could register complaints with Trust pertaining to Pier 63,

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that no one from the NYPD maintenance section had contacted him about the parking lot, catch basins, or sewers at Pier 63, that no one from his department had ever performed or requested that anyone else perform work at Pier 63, and that he was unaware of any complaints made to Trust concerning Pier 63. (Corsair Aff., Exh. M).

II. CONTENTIONS

Trust denies any liability for plaintiff's injuries as the lease requires Basketball City to make any necessary repairs, and the license agreement only requires City and Basketball City to make repairs. (Corsair Aff.). It also denies that it or any contractor hired by it caused or created the sinkhole, that any of its employees entered the premises, that it designed or constructed the parking area or drain, or that it ever received a complaint about the condition or was aware of it. (Fishman Affid.). Trust thus argues that it is an out-of-possession landlord which owes no duty to plaintiff and that it lacked actual or constructive notice of the condition and did not create it. It also observes that the lease had expired before the date of plaintiff's accident, and remained in effect solely by virtue of Basketball City's and City's presence on the premises as holdover tenants.

Plaintiff asserts that Trust's motion should be denied as it fails to address his claim under General Municipal Law § 205-e and as the lease and license are not properly authenticated. (Braunstein Aff.). He argues that his claim under GML § 205-e is not subject to the same standards of notice as a common-law negligence claim, and that Trust had notice of the sinkhole given its long-standing existence and as Trust employees had inspected Pier 63. Plaintiff relies on New York City Administrative Code §§ 27-127 and 27-128 which provide that an owner is responsible for maintaining its premises, and argues that a violation of these provisions

constitutes a predicate for Trust's liability here, notwithstanding its status as an out-of-possession landlord. Finally, plaintiff contends that Trust failed to prove that Basketball City and City were holdover tenants and that therefore, the provisions of the lease governing repairs were in effect that the time of the accident.

In reply, Trust denies the applicability of GML 205-e or any liability for negligence as liability under either theory requires, and that plaintiff has not shown that his injury resulted from a defect which would render an out-of-possession landlord liable. (Reply Affirmation of Bradley J. Corsair, dated Apr. 5, 2010]). It contends that as plaintiff testified that he observed only employees of Trust's planning department at the premises, and as both he and Scali testified that all attempts to repair the hole were made by City employees or departments, plaintiff had not established that Trust had notice of the hole or took any responsibility for it. Trust also observes that the lease was authenticated by its president, who also attested to the fact that City and Basketball City remained on the premises as holdover tenants.

III. DISCUSSION

A. Applicable law

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material

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issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

Moreover, “as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.” (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff’s cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. (*Solomon v City of New York*, 66 NY2d 1026 [1985]). When it is alleged that there exists a dangerous or defective condition on the premises, a duty arises from occupancy, ownership, control, or a special use of the premises. (*Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1st Dept 1998], *lv denied* 73 NY2d 783).

Pursuant to GML § 205-e(1), “in addition to any other right of action or recovery under any other provision of law,” an employee of any police department may recover damages arising from the negligence of any person if such injury occurs “while in the discharge or performance at any time or place of any duty imposed.” A plaintiff asserting a claim under GML § 205-e must identify a statute or ordinance with which the defendant allegedly failed to comply and establish that the defendant’s negligence caused the plaintiff harm. (*Aversa v New York City Housing Auth.*, 233 AD2d 217 [1st Dept 1996]).

An out-of-possession landlord is generally not responsible for a dangerous or defective

condition on the premises unless it: (1) exercises control over the premises by virtue of its contractual responsibility to repair and maintain or assumes responsibility for repairs through a course of conduct; (2) creates the condition; or (3) has actual or constructive notice of it. (*Rossal-Daub v Walter*, 58 AD3d 992 [3d Dept 2009]; *Ever Win, Inc. v 1-10 Industry Assocs., LLC*, 33 AD3d 845 [2d Dept 2006]). Where an out-of-possession landlord retains only the right to visit and inspect the premises, it does not have sufficient control over the premises to be held liable for a defective condition therein. (*Grady v Hoffman*, 63 AD3d 1266 [3d Dept 2009]; *Schwegler v City of Niagara Falls*, 21 AD3d 1268 [4th Dept 2005]; *Deebs v Rich-Mar Realty Assocs.*, 248 AD2d 185 [1st Dept 1998] [right of access alone insufficient to impose liability]). However, a landlord's control may be established if it reserves the right to make repairs on the premises, but only if the allegedly defective condition arises from a design or structural defect or a specific statutory violation. (*Vasquez v The Rector*, 40 AD3d 265 [1st Dept 2007]).

B. Analysis

As the lease is annexed to Trust's counsel's affirmation and Trust's president swore that she had personal knowledge of it, it is admissible. (*DeLeon v Port Auth. of New York and New Jersey*, 306 AD2d 146 [1st Dept 2003] [attaching leases to attorney's affirmation is sufficient for admission in evidence]). Moreover, Trust's president avers that although the lease had expired, City and Basketball City were in possession of the premises when plaintiff was injured, and plaintiff submits no evidence to the contrary.

The lease did not give Trust the right to make repairs, but provided not only that it had a right of termination but also that the right to terminate did not constitute an obligation to inspect or make repairs. There is also no proof of any course of conduct engaged in by Trust by which it

took responsibility for repairs in the parking area, or that it either caused or created the condition, or had any notice of it, all of which is supported by plaintiff's and Scali's testimony that only City was involved with repairing the hole and that no complaints were made to anyone else.

Even if the lease gave Trust the right to make repairs, plaintiff neither alleges nor proves that the sinkhole resulted from a structural or design defect or a statutory violation. (*See Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686 [2d Dept 2006] [landlord not liable even though lease gave it right to enter premises for repairs and inspections absent violation of statutory provision or structural defect]).

For all of these reasons, Trust has met its burden of establishing, *prima facie*, that it did not have sufficient control of the premises to be held liable for plaintiff's injury, and that it neither caused nor created the condition or have notice of it. (*See Greco v Starbucks Coffee Co.*, 58 AD3d 681 [2d Dept 2009] [out-of-possession landlord established entitlement to dismissal based on proof that it gave up control of premises, was not obligated to maintain or repair it, and did not violate specific statutory provision]). Plaintiff failed to raise any triable issue as to Trust's liability for common-law negligence.

While it has been held that the notice required for a GML § 205-e claim differs from that required for common-law negligence (*see Terranova v New York City Tr. Auth.*, 49 AD3d 10 [2d Dept 2007], *lv denied* 11 NY3d 708 [2008]; *Lusenskys v Axelrod*, 183 AD2d 244 [1st Dept 1992], *lv denied* 81 NY2d 300 [1993]), before a defendant may be held liable pursuant to GML § 205-e, the plaintiff must prove that the circumstances surrounding the defendant's failure to comply with governmental regulations, such as the Administrative Code, resulted from the defendant's neglect, omission, or wilful or culpable negligence. (*Id.*).

Here, plaintiff offers no proof that his injuries were caused by Trust's neglect, omission, or wilful or culpable negligence. (See *Lustenring v 98-100 Realty, LLC*, 1 AD3d 574 [2d Dept 2003], *lv denied* 2 NY3d 791 [2004] [dismissing GML § 205-a claim based on alleged violations of Administrative Code §§ 27-127 and 27-128 absent evidence that defendant premises owner created or knew of condition constituting violations]; *Williams v City of NY*, 256 AD2d 332 [2d Dept 1998], *lv denied* 93 NY2d 804 [1999] [GML § 205-e claim dismissed as plaintiff failed to show that defendant's alleged violation resulted from its neglect, omission, or culpable negligence]).

IV. CONCLUSION

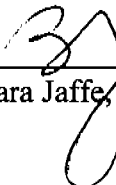
Accordingly, it is hereby

ORDERED, that defendant Hudson River Park Trust's motion for an order granting it summary judgment is granted, and the complaint is dismissed against defendant Hudson River Park Trust with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue.

This constitutes the decision and order of the court.

ENTER:


Barbara Jaffe, JSG
COUNTY CLERK'S OFFICE
NEW YORK

DATED: June 7, 2010
New York, New York

JUN 07 2010