

Higuero v City of New York

2010 NY Slip Op 31932(U)

July 20, 2010

Supreme Court, New York County

Docket Number: 106440/03

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
Justice C.

PART 5

Index Number : 106440/2003
HIGUERO, EDWARD
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
CAL # 60

INDEX NO. 106440/03
MOTION DATE 5/25/10
MOTION SEQ. NO. 001
MOTION CAL. NO. 60

this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JUL 23 2010
NEW YORK
COUNTY CLERKS OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 7/20/10
JUL 20 2010

BARBARA JAFFE J.S.C.
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
EDWARD HIGUERO,

Plaintiff,

-against-

Index No. 106440/03
Motion Date: 5/25/10
Motion Seq. Nos.: 001,
Calendar Nos.: 60,

DECISION & ORDER

THE CITY OF NEW YORK and MAX CAPITAL
MANAGEMENT CORP.,

Defendants.

-----X
MAX CAPITAL MANAGEMENT CORP.,

Third-Party Plaintiff,

-against-

FILED
JUL 23 2010
NEW YORK
COUNTY CLERKS OFFICE

GRAND CENTRAL PARTNERSHIP, INC.,

Third-Party Defendant.

-----X
MAX CAPITAL MANAGEMENT CORP.,

Second Third-Party Plaintiff,

-against-

METRO NORTH RAILROAD,

Second Third-Party Defendant.

-----X
BARBARA JAFFE, JSC:

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For Metro North Railroad:

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By notice of motion dated March 16, 2010, defendant/third-party plaintiff/second third-party plaintiff Max Capital (Max) moves pursuant to CPLR 3212 an order summarily dismissing plaintiff's complaint and all cross-claims against it. Plaintiff opposes. By notice of cross-motion dated March 19, 2010, second third-party defendant Metro North Railroad (Metro North) moves pursuant to CPLR 3212 for an order dismissing Max's second third-party complaint and any cross-claims against it. By notice of motion dated February 18, 2010, third-party defendant Grand Central Partnership, Inc. (GCP) moves, without opposition, pursuant to CPLR 3212 for an order summarily dismissing Max's third-party complaint and all cross-claims against it. City takes no position. The motions are consolidated for decision.

I. UNDISPUTED FACTUAL BACKGROUND

Plaintiff seeks damages for personal injuries he sustained as a result of a trip and fall, described as follows in his amended verified complaint:

On August 22, 2002, at approximately 4:45 pm, plaintiff exited his office building onto Lexington Avenue, near the intersection of 45th Street. From the west side of Lexington Avenue, he crossed 45th Street from south to north. As he stepped up onto the curb at the northwest corner of Lexington Avenue and East 45th Street, his foot became wedged in a gap between two sections of the curb which was covered by a protruding strip of metal. This strip of metal protruded over the gap in the curb and was bent and curved upwards over the gap in the curb. This strip of metal extended from the base of the building at the northwest corner of East 45th Street and Lexington Avenue. . . .

After his foot became wedged in the gap in the curb and underneath the protruding strip of metal, [plaintiff] tripped over the protruding metal strip and fell against a parked car and onto his left side. . . .

(Affirmation of Charles Sosnick, Esq., dated Mar. 16, 2010 [Sosnick Aff.], Exh. A).

In his verified bill of particulars, plaintiff also alleges that “[d]efendant was negligent in maintaining the sidewalk surrounding its property [and that a]t a point where two sections of sidewalk were not flush with each other failing to fully enclose the gap between two sections of the sidewalk,” leaving the “full height of the gap exposed to the street,” and by allowing “the

strip [of] metal covering the gap's length to protrude over the curb without covering the gap within the curb." (*Id.*, Exh. D).

At his deposition, taken on July 21, 2006, plaintiff testified that he had crossed the street at East 45th Street at its intersection with Lexington Avenue, and that as he approached the northwest corner and began to step from the street onto the curb, his foot got caught on a lip which was part of a metal strip on the sidewalk, that the lip was one inch off the curb where the sidewalk met the curb, and that he was not sure if his foot hit the top of the metal strip before he fell or if it was the lip or the space beneath it that caused him to fall. As his right shoe was substantially damaged, he knew that it had gotten caught on the lip. (*Id.*, Exh. E). Photographs marked at the deposition depict a long, diamond-patterned metal strip, or expansion joint, running between the sidewalk slabs, with the lip of the joint in the middle of the curbstone, approximately one inch from either side of the curbstone, and hanging over a partially-filled gap between the strip and the bottom of the curb. (*Id.*, Exh. F). Plaintiff also testified that he told emergency room personnel that he had fallen on the sidewalk, and otherwise expressed uncertainty during the deposition as to whether his foot ever touched the sidewalk. (*Id.*, Exh. 2).

On June 23, 2009, Max served on Metro North a notice to admit, requesting that it admit that it owned, installed, maintained, and was responsible for the expansion joint at issue. (*Id.*, Exh. H). Metro North never responded. (*Id.*).

At a deposition taken on August 20, 2009, Max's former employee, Dean D. Ferrezza, testified that Max was the owner and manager of the building located at 466 Lexington Avenue, that the building was surrounded by a granite-paved sidewalk, and that it was his duty to examine the covers of the expansion joints in the sidewalks to ensure that they were tacked down properly so as not to cause a tripping hazard. (*Id.*, Exh. G). Had Ferrezza noticed a raised edge on the

cover of an expansion joint, he would have contacted Metro North who would have repaired it, and he had never noticed the gap underneath the lip of the joint where plaintiff fell. (*Id.*)

At a deposition taken on August 20, 2009, Metro North's supervisor of electrical and mechanical maintenance, Steve Stroh, testified that expansion joints in the sidewalks around Max's building are intended to keep the buildings from touching each other, that one of his duties was to check the condition of the expansion joints in the street or on the sidewalk, that the lip of the joint on which plaintiff tripped is part of the street curb and thus was not, in his opinion, Metro North's responsibility to fix, that if an expansion joint in the sidewalk is unsafe, Metro North repairs it, that Metro North is responsible for maintaining expansion joints, and that Metro North approved the installation of the expansion joints. (*Id.*, Exh. I).

II. PERTINENT PROCEDURAL BACKGROUND

On or about March 18, 2004, plaintiff commenced this action. On or about March 23, 2007, Max commenced the third-party action against GCP, and on or about April 25, 2007, it commenced the second third-party action against Metro North. A note of issue was filed on February 1, 2010. (Sosnick Aff.)

III. MAX'S MOTION FOR SUMMARY JUDGMENT

A. Contentions

Max denies that it had a duty to maintain the sidewalk in front of its building, as the accident occurred before the change in law shifting the duty to maintain sidewalks abutting land from co-defendant City to abutting landowners (Administrative Code § 7-210). Relying on Stroh's deposition testimony and Metro North's failure to respond to the notice to admit, Max also contends that it cannot be held liable for plaintiff's injuries as it is undisputed that the expansion joint was installed by Metro North who repairs and maintains it. (Sosnick Aff.). It

denies having received any notice of the defective expansion joint, and relies on plaintiff's allegation in his complaint that his foot was caught in a "gap between two sections of the curb which was covered by a protruding strip of metal." Max thus alleges that plaintiff was on the street when he fell, not the sidewalk and not on Max's property at the time of the accident.

In opposition, plaintiff argues that Ferrezza's deposition testimony raises a triable issue of fact as it permits an inference that he fell on the sidewalk which was Max's responsibility to maintain (Affidavit of Howard D. Simmons, Esq., dated May 14, 2010 [Simmons Affid.], Exh. 2), as do his own deposition testimony about the statements he says he made to emergency room personnel and his uncertainty as to whether his foot touched the sidewalk. He also argues that Max made special use of the sidewalk, and that as the curb was part of the granite sidewalk pavers which Max had inspected and repaired in the past, it was responsible for the curb as well as the pavers. (Simmons Affid.). In lieu of an affidavit from plaintiff, counsel offers his own affidavit setting forth plaintiff's version of the accident based on counsel's information and belief.

In reply, Max denies any special use of the sidewalk and argues that plaintiff's claim to the contrary is unsupported by any evidence. (Reply Affirmation, dated May 24, 2010).

B. Analysis

It is undisputed that City has the duty of maintaining public streets and roadways in a reasonably safe condition. (*Kiernan v Thompson*, 73 NY2d 840 [1988]). Moreover, generally and at a common law, only a municipality is responsible for maintaining public sidewalks. (*D'Ambrosio v City of New York*, 55 NY2d 454 [1982]; *Montalvo v Western Estates, Ltd.*, 240 AD2d 45 [1st Dept 1998]). Although the Administrative Code was amended by shifting tort liability for a failure to maintain a sidewalk from City to abutting landowners, it became effective

after the accident in issue here. (Administrative Code § 7-210 [the Sidewalk Law], eff. Sept. 14, 2003]).

As plaintiff's accident occurred in 2002, Max may be held liable only if it created the defect which allegedly caused the accident, or made special use of the sidewalk. (*Weiskopf v City of New York*, 5 AD3d 202 [1st Dept 2004]). A landowner makes special use of the sidewalk when it derives a special benefit from its use of the sidewalk unrelated to public use. (*Kaufman v Silver*, 90 NY2d 204 [1997]). However, the landowner must have had access and ability to exercise control over the specially-used sidewalk. (*Id.* at 207). A curb is part of the street, not the sidewalk. (*Garris v City of New York*, 65 AD3d 953 [1st Dept 2009] [defendant granted summary judgment based on showing that plaintiff tripped on curb and not sidewalk, which it thus had no duty to maintain]; Administrative Code § 7-201[c][1][a] [defining street as including curbstone]; § 19-101[d] [defining sidewalk as not including curb]).

Given the foregoing, it must first be determined whether the area on which plaintiff tripped was part of the curb or the sidewalk. The photographs depicting the lip of the expansion joint show that it was in the middle of the curbstone, beginning approximately one inch from the edge of the curb and ending approximately one inch from the beginning of the sidewalk. Thus, the lip itself is not part of the sidewalk. Moreover, plaintiff's description of the accident at his deposition raises an inference that he tripped on the lip.

Max has therefore established, *prima facie*, that plaintiff fell on the curb and not the sidewalk, and that Max thus had no duty to maintain the curb or repair the defect. (*Garris*, 65 AD3d at 953). In attempting to raise a triable issue of fact, plaintiff's counsel alleges a version of events that contradicts plaintiff's deposition testimony. It does not create an issue of fact. (*Pippo v City of New York*, 43 AD3d 303 [1st Dept 2007] [party's affidavit that contradicts prior sworn

testimony creates only feigned issue of fact, and is insufficient to defeat properly supported motion for summary judgment]). Plaintiff's testimony that he told hospital employees that he fell on the sidewalk is unsupported, self-serving, and contradicted by his other testimony indicating that he tripped on the lip and that he was unsure when he fell on the sidewalk. His confusion does not raise any factual issues.

Even if plaintiff had fallen on the sidewalk, Max's and Metro North's deposition testimony demonstrates that Metro North owns and maintains the expansion joints in the sidewalk, and Ferrezza's testimony that Max had repaired the curb in 2009 is immaterial, as it is well beyond the effective date of the new Sidewalk Law. Moreover, plaintiff offers no evidence to support his allegations that Max installed or replaced the sidewalk or the expansion joint, or that it made special use of it by deriving a special benefit from or exercising control over it. (*See Cortwright v City of New York*, 68 AD3d 611 [1st Dept 2009] [plaintiffs offered no evidence that defendants had repaired public sidewalk or used it for their own special benefit]).

IV. METRO NORTH'S CROSS-MOTION FOR SUMMARY JUDGMENT

Metro North moves for dismissal on the basis that if the complaint against Max is dismissed, Max's third-party action against it must also be dismissed. As the motion is unopposed, and as plaintiff's claim against Max is dismissed, the third-party complaint against Metro North is also dismissed. (*See Imtanios v Sachs*, 44 AD3d 383 [1st Dept 2007], *lv denied* 9 NY3d 1028 [2008] [in granting summary judgment in main action, court of necessity dismissed third-party action, which was rendered academic by dismissal of main action]).

V. GCP'S MOTION FOR SUMMARY JUDGMENT

For the same reasons as above, the third-party complaint against GCP is dismissed.

VI. CONCLUSION

Accordingly, it is hereby

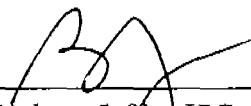
ORDERED, that defendant Max Capital Management Corp.'s motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant Max Capital Management Corp. with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that third-party defendant Metro North Railroad's cross-motion for summary judgment is granted, and the second third-party complaint and all cross-claims are dismissed against defendant Metro North Railroad 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; it is further

ORDERED, that third-party defendant Grand Central Partnership, Inc.'s motion for summary judgment is granted, and the third-party complaint and all cross-claims are dismissed against defendant Grand Central Partnership, Inc. 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.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C. **FILED**

DATED: July 20, 2010
New York, New York

JUL 23 2010

NEW YORK
COUNTY CLERKS OFFICE