

Loiacono v City of New York

2010 NY Slip Op 32188(U)

August 13, 2010

Supreme Court, New York County

Docket Number: 106799/09

Judge: Barbara Jaffe

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

PRESENT: JAFFE ~~BARBARA JAFFE~~
Justice J.S.C.

PART 5

Index Number : 106799/2009
LOAICONO, PETER
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
CAL # 75

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for summary judgment

PAPERS NUMBERED	
1	_____
2	_____
3	_____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/13/10
AUG 13 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
PETER LOIACONO,

Plaintiff,

-against-

Index No. 106799/09
Motion Date: 6/29/10
Motion Seq. No.: 001
Calendar No.: 75

DECISION & ORDER

THE CITY OF NEW YORK,

Defendant

BARBARA JAFFE, JSC:

For plaintiff:
Edward H. Gersowitz, Esq.
111 Broadway - 12th Floor
New York, NY 10006
212-385-4410

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK

For defendant:
Anthony Bila, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-1411

By notice of motion dated April 23, 2010, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes. For the reasons that follow, the motion is granted.

I. PERTINENT BACKGROUND

On February 13, 2008, plaintiff tripped and fell on an allegedly cracked and broken portion of the sidewalk in front of 150 West 13th Street in Manhattan. (Affirmation of Anthony Bila, Esq., dated Mar. 23, 2010 [Bila Aff.], Exh. B). On or about May 13, 2009, plaintiff served defendant with a summons and complaint (*id.*), and on or about May 22, 2009, defendant served its answer (*Id.*, Exh. C).

II. CONTENTIONS

Defendant disclaims liability for plaintiff's injuries on the grounds that New York City

Administrative Code § 7-210 relieves it of responsibility for sidewalk and submits, in support, the affirmation of David C. Atik, an attorney in its Department of Finance, who states that his search of the Real Property Assessment Division database reflects that defendant does not own the portion of the property abutting the sidewalk on which plaintiff fell. (Bila Aff., Exh. D).

Defendant also asserts that there is no evidence that it caused or created the defective condition and submits, in support, the affidavit of an employee of its Department of Transportation who conducted a fruitless search of municipal records for applications submitted during the two years prior to and including plaintiff's accident for permits, permits, corrective action reports, notice of violations, complaints, maintenance and repair orders, contracts, or violations. (*Id.*, Exh. E).

In opposition, plaintiff contends that there exists an issue of fact as to whether defendant caused or created the alleged defect, and that, pursuant to CPLR 3212(f), more discovery is necessary to determine if defendant made special use of the sidewalk. (Affirmation of Edward H. Gersowitz, Esq. dated June 11, 2010). In support, he annexes a Con Edison work order obtained through discovery in a concurrent action against the National Psychological Association for Psychoanalysis Inc. and Con Edison, indicating that on December 30, 2005, Con Edison opened the street on West 13th Street between Sixth and Seventh Avenues. (*Id.*, Exh. A).

In reply, defendant argues that the Con Ed report is inadmissible hearsay, that its fruitless search for records created during the two-year period constitutes a sufficient basis for finding that it neither caused nor created the defective condition, and that plaintiff's request for further discovery is based on speculation. (Reply Affirmation of Anthony Bila, Esq. dated July 6, 2010).

III. ANALYSIS

The party seeking summary judgment must show prima facie entitlement to judgment as a

matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the prima facie showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

Pursuant to the New York City Administrative Code § 7-210, the owner of real property abutting any sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk. Therefore, after September 14, 2003, the abutting property owner, not defendant, is generally liable for accidents caused by sidewalk defects. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, defendant has established that it is not the abutting landowner and has thus demonstrated, *prima facie*, that it may not be held liable for plaintiff's injuries. (*Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [City entitled to dismissal of complaint as it did not own property on which plaintiff fell, and as property was vacant lot and thus not exempt pursuant to section 7-210]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [defendant established that property abutting sidewalk was owned by corporate entity and was not exempt]; *Lauray v City of New York*, 62 AD3d 467 [1st Dept 2009] [denying leave to serve late notice of claim as plaintiff had no viable claim against defendant; location of plaintiff's accident on sidewalk was in front of commercial business]).

To the extent that defendant may be held liable if it caused or created a defective condition on or made special use of a sidewalk resulting in an injury occurring after the effective date of the new Sidewalk Law (*Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [Sup Ct, Kings County 2007] [finding no indication in New Sidewalk Law that City may not be held liable if it caused or created defect or made special use]; *see also Adler v City of New York*, 52 AD3d 549 [2d Dept 2008] [although City established that abutting property was not exempt under section 7-210, discovery may lead to information showing that City created condition or made special use of sidewalk]), it also has established that it neither caused nor created any condition on, nor made special use of, the sidewalk.

As the Con Edison work order, even if admissible, contains no indication that defendant performed any work at the subject location, it neither raises an issue as to whether defendant caused or created a defective condition on the sidewalk, nor provides a basis for believing that further discovery may lead to relevant evidence as to whether defendant made special use of the sidewalk (CPLR 3212[f]; *see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009] [“the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion”]).

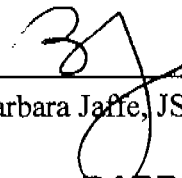
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the defendant City of New York’s motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: August 13, 2010
New York, New York

AUG 13 2010

FILED
AUG 18 2010
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COUNTY CLERK'S OFFICE