

O'Reilly v City of New York

2010 NY Slip Op 32240(U)

August 17, 2010

Supreme Court, New York County

Docket Number: 105405/07

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
Index Number : 105405/2007 J.S.C.

PART 5

O'REILLY, PATRICIA
vs
CITY OF NEW YORK
Sequence Number : 005
DISMISS ACTION

INDEX NO. 105 405 / 07
MOTION DATE 7/13/10
MOTION SEQ. NO. 005
MOTION CAL. NO. 95

CAL # 95

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

PAPERS NUMBERED

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

1 to 10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/17/10
AUG 17 2010

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

PATRICIA O'REILLY,

Plaintiff,

-against-

Index No. 105405/07
Motion Date: 7/13/10
Motion Seq. No.: 005
Calendar No.: 95

DECISION AND ORDER

THE CITY OF NEW YORK, FC BATTERY PARK
ASSOCIATES, LLC, APPLE-METRO, INC., BPC
HOTEL, LLC, BPC SITE 25 ASSOCIATES, LLC,
FOREST CITY RATNER COMPANIES, LLC,
FOREST CITY ENTERPRISES, INC., FCR
CONSTRUCTION SERVICES, LLC, FCDT-BPC
CORP., RRG BATTERY PARK, LLC,

Defendants.

-----X

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By notice of motion dated December 30, 2009, City moves pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the claims and cross-claims against it. Plaintiff and co-defendants FC Battery Park Associates, Inc., BPC Hotel, LLC, BPC Site 25 Associates, LLC, Forest City Ratner Companies, LLC, Forest City Enterprises, Inc., FCR Construction Services, LLC, FCDT-BPC Corp., and RRG Battery Park, LLC (collectively, Forest City) and Apple-Metro, Inc. (Apple Metro) oppose.

I. UNDISPUTED FACTS

On August 8, 2006, while walking along a crowded sidewalk, plaintiff tripped and fell on the edge of an empty tree well at 102 North End Avenue in front of Chevy's Restaurant in Battery Park City. (Affirmation of John Orcutt, ACC, dated Dec. 30, 2009 [Orcutt Aff.], Exh. G at 11, 32). She alleges that the fall was caused by a drop of approximately six inches from the sidewalk's edge to the tree well. (Orcutt Aff., Exhs. G at 48, H, O).

At a deposition held on May 14, 2010, William Steyer, Manhattan's Director of Forestry for the New York City Department of Parks (Parks), testified that he conducted a search of computerized records for the area abutting 102 North End Avenue for the two-year period preceding plaintiff's accident and discovered a record relating to a "new tree." (Affirmation in Opposition of Scott B. Pero, Esq., dated June 28, 2010 [June 28 Pero Aff.], Exh. B, at 8). Although Parks normally maintains all trees in its inventory, Steyer testified, they do not do so for the area where plaintiff fell because it is within the jurisdiction of the Battery Park City Authority (BPCA). (*Id.* at 10). And yet, Steyer did not know who owned or planted the tree, and could not affirmatively deny that City owned it, the soil around it, or the abutting sidewalk. (*Id.* at 10-12, 63-64). He also found no maintenance records pertaining to the tree. (*Id.* at 15-16).

Steyer also testified that if the soil level of a tree well is significantly below the sidewalk level, a tripping hazard results which Parks would, after contacting the abutting landowner, add soil or install cobblestones. (*Id.* at 21-22-25, 28). If City receives a request for maintenance for a tree well, however, it would be referred to BPCA or Battery Park Conservancy; City does not work on the trees within BPCA's jurisdiction.

(*Id.* at 17-18).

II. PERTINENT PROCEDURAL BACKGROUND

On September 15, 2006, plaintiff timely filed a notice of claim with City and on January 5, 2007, commenced this action by serving a summons and complaint on City, FC Battery Park Associates, LLC, BPC Hotel, LLC, Apple Metro, and Promus Hotels, Inc. (Promus). On or about June 13, 2007, City served its answer, with cross-claims against the named co-defendants. (Orcutt Aff., Exh. C). On June 21, 2007, FC Battery Park Associates, LLC and Promus Hotels, Inc. served their answer, with cross-claims against City, Apple Metro, and BPC Hotel, LLC. (*Id.*, Exh. D). On July 11, 2007, Apple Metro served its answer, with cross-claims against named co-defendants. (*Id.*, Exh. E).

On January 16, 2008 plaintiff served a bill of particulars, alleging, *inter alia*, that defendants are responsible for obstructions on the sidewalk, causing her to fall into “an uneven, mis-leveled, unprotected, uncovered tree-pit/well”(*id.*, Exh. F ¶ 15), and that City had constructive notice of the dangerous condition (*id.*, ¶ 23).

By opinion and order dated February 3, 2009, another justice of this court summarily dismissed the claims against Promus, on the ground that it was not responsible for the area where plaintiff fell, noting that plaintiff’s photographs reflected no visible defect in the sidewalk flag. (Orcutt. Aff., Exhs. J, O). On February 27, 2009, plaintiff filed a notice of motion for reargument, maintaining that the defective condition was “a multi-inch deep vertical drop into a tree-well constituting a tripping hazard,” and that “the condition of the sidewalk flag(s) next to the tree-well is totally irrelevant.” (*Id.*, Exh. M). Court records reflect that the motion was denied without opinion.

III. CONTENTIONS

City denies owning or having any duty to maintain the tree well, it being within the exclusive jurisdiction of the BPCA, and argues that even if it was responsible for the tree well, it received no prior written notice of any defect and thus, pursuant to New York City Administrative Code § 7-201, may not be held liable for plaintiff's injuries. (Orcutt Aff.]). In support, it submits Steyer's affidavit and deposition (*id.*, Exh. Q), a copy of the Public Authorities Law which created BPCA (Affirmation of Andrew Lucas, ACC, dated June 23, 2010 [June 23 Lucas Aff.], Exh. B), printouts from BPCA's and City's websites (*id.*), and the settlement agreement between City and the New York State Urban Development Corporation (NYUDC) dated June 6, 1980 and its accompanying Memorandum of Understanding among City, the NYUDC, and BPCA (*id.*, Exh. D). City also argues that it cannot be held liable because the tree well was open and obvious, and that there was no actionable defect, by virtue of law of the case or alternatively, an independent review of the record. In support, its submits plaintiff's deposition testimony, photographs of the tree well, and the February 3, 2009 decision and order dismissing the claims as against Promus (*id.*, Exhs. G, H, J).

In response, plaintiff and co-defendants maintain that City fails to establish an absence of a triable issue of fact (Affirmation of Stephen Bigham, Esq., dated July 7, 2010 [Bigham Aff.]), that Steyer's testimony raises a triable issue of fact as to City's ownership or duty to maintain the tree well (*id.*, Exh. A at 8, 10, 18), and that prior written notice of a tree well defect is not required (Affirmation of Scott B. Pero, Esq., dated Mar. 18, 2010). Plaintiff also argues that written notice is not required as City caused and created the dangerous condition when it installed the tree well, that a vertical

drop in a tree well is an actionable defect, that the February 2009 order indicating that no defects appear in the abutting sidewalk slab is immaterial, that the condition was neither open nor obvious given the crowds on the sidewalk, and that whether a condition is open and obvious is a question of fact for the jury. (Affirmation in Opposition of Charles E. Green, Esq., dated Feb. 19, 2010 [Green Aff.]).

IV. ANALYSIS

Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad*, 64 NY2d at 853). When the party seeking summary judgment demonstrates entitlement to judgment, the burden shifts to the opponent to “rebut that *prima facie* showing” (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]), by producing “evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 968 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A. Law of the case

“Once an issue is judicially determined, either directly or indirectly, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation.” (*Holloway v Cha Cha Laundry, Inc.*, 97 AD2d 385, 386 [1st Dept 1983]; see also Siegel, NY Prac § 448 [3d ed]). Here, as the prior court made no factual findings concerning the tree well, and as plaintiff limits her cause of action to the tree well, the

February 2009 order does not constitute the law of the case and thus, does not bind me. Moreover, given Steyer's admission that a vertical drop in a tree well constitutes a tripping hazard, the defect in issue here is actionable. (*Cf Nin v Bernard*, 257 AD2d 417 [1st Dept 1999] [presence of a dangerous or defective condition generally a jury question]).

B. Ownership of the tree well

Non-party BPCA is a public benefit corporation, created by statute. Through assignment and eminent domain, it is the fee owner and lessor of Battery Park City (NY Public Authorities Law § 1971; *Dime Savings Bank of New York, F.S.B, Pesce*, 217 AD2d 299, 300 [1st Dept 1995], *lv denied*, 88 NY2d 874 [1996]), and specifically leases the property at 102 North End Avenue (*Fred Geller Elec. Inc. v Battery Park City Auth.*, 2002 NY Slip Op. 50273(U) [Sup Ct, New York County 2002]). The transfer of title from City to BPCA is confirmed by the settlement agreement between City and NYUDC, which recognizes the state's acquisition by "statutory power of condemnation all right, title and interest of the City" to the area (June 23 Lucas Aff., Exh. C at 1, 2), the memorandum of understanding between City and the State of New York, which provides that NYUDC "will acquire, through the exercise of its power of eminent domain, fee simple absolute title to all lands presently leased by NYC to BPCA," and an official condemnation notice (June 23 Lucas Aff., Exh. D ¶ 1).

These documents are admissible as "ancient documents," more than 30 years old and not susceptible of any claim of fraud or invalidity (*Essig v 5670 58 Street Holding Corp.*, 50 AD3d 948, 948-49 [2d Dept 2008] [stock certificates more than 30 years old and free from any indication of fraud or invalidity]; *Tillman v Lincoln Warehouse Corp.*,

72 AD2d 40, 44 [1st Dept 1979]), and they confirm what cannot be reasonably disputed, namely, that BPCA owns Battery Park City and leases the property at 102 North End Avenue. That BPCA owns Battery Park City, however, does not necessarily relieve City of liability for torts arising from the condition of the tree well.

The settlement agreement reserves certain responsibilities to City, including “the operation and maintenance of all Civic Facilities dedicated to it, including, without limitation, the streets and water, sewer and other public utilities . . . [and] fire, police, sanitation and other municipal services to the Project Area in the same manner and to the same extent as such services are provided [to] neighborhoods in the City of New York” (June 23 Lucas Aff., Exh. C ¶ 6), and the memorandum of understanding reiterates City’s duty “to furnish all municipal services and maintain facilities required by its existing lease with BPCA . . . the operation and maintenance of streets, water, sewer and other public utilities. . .” (*id.*, Exh. D ¶ 1 [f]). City’s database contains a reference to a tree on 102 North End Avenue, which Steyer could not explain it, and City acknowledges its general responsibility for adding soil to tree wells and ensuring that they are level. Moreover, City’s responsibility for tree wells has been presumed regardless of the ownership of the abutting property. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]).

Accordingly, although City has demonstrated that BPCA owns the area where plaintiff fell, it has not satisfied its burden of demonstrating that it is not liable for the tree well.

C. Applicability of New York City Administrative Code § 7-201

In *Vucetovic*, the Court of Appeals held that for purposes of the Sidewalk Law

(NYC Admin Code § 7-210) a sidewalk does not include tree wells. (10 NY3d 517).

Thus, City remains liable for tree wells (*id.*), with certain exceptions not in issue here.

It must next be determined whether written notice of tree well defects is required.

Pursuant to New York City Administrative Code §7-201(c)(2):

[n]o civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any . . . sidewalk . . . or any part or portion of any [sidewalk] including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice . . .

As Administrative Code § 7-201(c)(2) provides that prior written notice must be given for defects on a sidewalk or “encumbrances thereon or attachments thereto,” then notwithstanding that tree wells are not part of the sidewalk under § 7-210, they come within the purview of § 7-201. Consequently, written notice must be given to City before its liability for tree well defects may attach. (*Shulman v House of the Redeemer*, 2010 NY Slip Op 32038[U] [Sup Ct, New York County 2010]; *Tucker v City of New York*, Sup Ct, New York County, June 17, 2009, Smith, J., index No. 101463/04).

Plaintiff’s alternative argument that written notice is not required because City caused or created the defect by constructing a tree well that is not flush with the sidewalk is unsupported and does not rule out other causes for the dearth of soil in the tree well. (*See LoCurto v City of New York*, 2 AD3d 277 [1st Dept 2003] [evidence does not support negligent installation rather than normal deterioration]). To the extent that the dearth of soil was caused by erosion or other deterioration, City’s liability for its alleged failure to correct the defect depends on whether it received prior written notice. Concededly, no written notice was received by City.

Given this result, City's argument that it may not held liable because the condition was open and obvious need not be addressed.

V. CONCLUSION

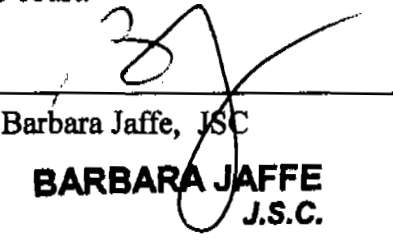
Accordingly, it is hereby

ORDERED, that defendant City of New York's motion to dismiss is granted, and the complaint and all cross-claims against it are dismissed; with costs and disbursements to defendant City of New York as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

This constitutes the decision and order of the court.


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 17, 2010
New York, New York

AUG 17 2010

FILED
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE