

Aller v City of New York

2010 NY Slip Op 32723(U)

September 28, 2010

Supreme Court, New York County

Docket Number: 108480/04

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

Aller, N

INDEX NO. 108480104

- v -

MOTION DATE _____

City of New York

MOTION SEQ. NO. 007

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 9-28-10
SEP 28 2010

BARBARA JAFFE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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
NELIDA ALLER,

Plaintiff,

-against-

THE CITY OF NEW YORK, MICHAEL S. APPLEBAUM,
GEORGE HEINRICH, FEROMA CONTRACTING, INC.,
AND C & E PLASTER & CONSTRUCTION CO., INC.,

Defendants.
-----X

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant City:
William A. Grey, ACC
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Corporation Counsel
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New York, NY 10007
212-227-7226

Index No. 108480/04

Motion Subm: 8/10/10
Motion Seq. No.: 007

DECISION AND ORDER
FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

By notice of motion dated May 13, 2010, plaintiff moves for an order restoring the action to the trial calendar, vacating an order dated January 28, 2009 in which City was granted summary judgment, and amending the caption to remove two defendants. City opposes the motion to vacate only.

I. BACKGROUND

On October 8, 2003, plaintiff was injured when she tripped and fell on the sidewalk in front of, and in between, 19 and 21 East 83rd Street in Manhattan. (Affidavit of Gene L. Chertock, Esq., dated May 13, 2010 [Chertock Affid.], Exh. A). It is undisputed that at the time, defendant Applebaum owned the premises at 21 East 83rd Street and defendant Heinrich owned the premises at 19 East 83rd Street. (*Id.*).

By decision and order dated November 21, 2008, another justice of this court dismissed

the action against all of the defendants except City, finding that plaintiff's failure to identify the proximate cause of her injury, the specific building in front of which the accident took place, or the portion of the sidewalk where she tripped warranted summary dismissal of her action against the other defendants. (*Id.*, Exh. A).

Then, after City moved for summary dismissal of the complaint against it solely on the ground that the November 2008 order constituted the law of the case, by decision and order dated January 28, 2009, another justice of this court granted City's motion, submitted without opposition, for an order dismissing plaintiff's claim against it. (*Id.*, Exh. B). The court did not set forth its reasoning.

The Appellate Division, First Department, by decision and order dated April 27, 2010, modified the November 2008 decision to the extent of reinstating plaintiff's claims against defendants Heinrich and Applebaum, finding that plaintiff's testimony as to the location and cause of her injury was not unduly speculative. (*Id.*, Exh. C).

II. MOTION TO RESTORE

The appellate decision reinstated the claims against Heinrich and Applebaum, who do not oppose plaintiff's motion to restore the action to the trial calendar.

III. MOTION TO VACATE

A. Contentions

Plaintiff argues that the decision dismissing her claim against City should be vacated as it was not on the merits and, as City moved for dismissal only on the ground that the November 2008 order constituted the law of the case, the decision could only have been based on the November 2008 order dismissing her claim against the non-City defendants, which is no longer

binding. (Chertock Affid.).

City opposes vacatur on the ground that plaintiff has failed to show that she has a meritorious claim against City. Rather, it alleges that the sidewalk on which she fell was in front of premises owned by Heinrich and Applebaum, and thus, pursuant to New York City Administrative Code § 7-210 (Sidewalk Law), it may not be held liable for plaintiff's injuries. (Affirmation of William A. Grey, ACC, dated June 15, 2010 [Grey Aff.]). City also denies that it performed any work at the location of the accident, relying on a search for any permits, complaints, repair orders, violations, and contracts relating to the location for two years prior to and including the date of plaintiff's accident, which yielded 24 permits, none of which were issued to City or to a City contractor. (*Id.*, Exhs. A, B). City also submits a Big Apple map, which reflects a raised or uneven portion of the sidewalk between 19 and 21 East 83rd Street. (*Id.*, Exh. B).

In reply, plaintiff maintains that City's opposition was untimely served and, in any event, raises issues which were never addressed by the parties or submitted to the court in connection with City's prior motion for summary judgment. She also claims that having found that she had stated a *prima facie* case against Heinrich and Applebaum, the First Department implicitly found that she had stated a claim against City, and observes that as Applebaum's premises is a single-family, owner-occupied residence, City may be held liable under the Sidewalk Law. Moreover, she asserts that whether she fell in front of Applebaum's or Heinrich's premises is a trial issue, that the Big Apple map reflects a defect at the location of her accident, and that even if City received no notice of the defect in the two years before the accident, it failed to demonstrate that it never received notice. (Reply Affidavit of Gene Chertock, Esq., dated June 22, 2010, Exh. B).

B. Analysis

City's sole argument in support of its motion for summary judgment was that the November 2008 order constituted the law of the case. Given the appellate modification finding that plaintiff had set forth a *prima facie* case, the basis for the decision granting City summary judgment has been invalidated, rendering it without precedential value. (*Cf Paz v Trump Plaza Hotel and Casino*, 43 AD3d 805 [1st Dept 2007] [as prior decision dismissing third-party complaint was based on dismissal of plaintiff's complaint, which was then reinstated on appeal, it was not on merits and did not constitute bar to subsequent third-party action]). Thus, the November 2008 order is no longer valid and should be vacated. As City's arguments regarding liability and notice were not addressed in the prior order, they are irrelevant to whether the order should be vacated. In any event, City does not cross-move for summary judgment.

Even if I were to consider City's arguments, absent any dispute that Applebaum's property was a single-family, owner-occupied residence, City may be held liable if plaintiff fell in front of it. (Admin. Code 7-210[c] [City liable for injury caused by failure to maintain sidewalks abutting "one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes . . ."]; *Schwartz v City of New York*, 74 AD3d 945 [2d Dept 2010] [property owners exempt from liability under Sidewalk Law as property was three-family, owner-occupied, and used solely for residential purposes]). Moreover, the Big Apple map reflects that a portion of the sidewalk in front of Applebaum's and Heinrich's property was broken and uneven, which may constitute notice to City of the alleged defect on the sidewalk. (*D'Onofrio v City of New York*, 11 NY3d 581 [2008] [purpose of Big Apple map is to provide notice]; *Katz v City of New York*, 87 NY2d 241 [1995] [same]).

IV. MOTION TO AMEND CAPTION

There is no opposition to plaintiff's motion to amend the caption to remove defendants Feroma Contracting, Inc. and C & E Plaster & Construction Co., Inc., and her claims against them have been dismissed.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted in its entirety; it is further

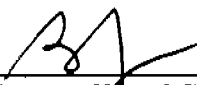
ORDERED, that plaintiff's action against defendants City of New York, Michael Applebaum, and George Heinrich is restored to the trial calendar; it is further

ORDERED, that within 20 days from entry of this order, plaintiff serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is directed to restore the case to the City waiting list under the original calendar number; it is further

ORDERED, that plaintiff's motion to amend the caption of this action by removing defendants Feroma Contracting, Inc. and C & E Plaster & Construction Co., Inc. is granted; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in caption herein.

ENTER:



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

DATED: September 28, 2010
New York, New York

FILED

OCT 04 2010

COUNTY CLERK'S OFFICE
NEW YORK