

Montano v Ghatan

2010 NY Slip Op 32954(U)

October 13, 2010

Supreme Court, New York County

Docket Number: 115706/07

Judge: Martin Shulman

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

MARTIN SHULMAN

J.S.C.

PART 1

Index Number : 115706/2007

MONTANO, CARMEN

vs

GHATAN, HABIBOLLAH

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. 115706/07

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <u>A-C</u>	<u>1</u>
Answering Affidavits — Exhibits <u>A-H</u>	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
OCT 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 13, 2010

MARTIN SHULMAN 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: IAS PART 1

-----X
CARMEN MONTANO,

Plaintiff,

Index No. 115706/07

- against -

HABIBOLLAH GHATAN, MOUNES GHATAN,
1810 3rd AVENUE ASSOCIATES, LLC and
MERRICK REAL ESTATE GROUP,

Defendants.

SHULMAN, J.:

Defendant 1810 3rd Avenue Associates, LLC ("Associates") moves for summary judgment on its cross claim for common-law indemnification against defendant Merrick Real Estate Group ("Merrick").

Associates owns real property at 1810 Third Avenue in New York City. Associates hired Merrick as general contractor to construct an apartment building on the site. The construction agreement between Associates and Merrick made Merrick solely responsible for removing all construction debris, waste material and rubbish. When deposed, Merrick's president stated that Merrick was solely responsible to keep the sidewalk free of debris and that Associates did not instruct Merrick's employees as to how to perform their work.

On September 8, 2006, plaintiff Carmen Montano fell on the sidewalk near or abutting the site. Plaintiff was taken to the emergency room and treated for a knee injury. The medical record prepared in the emergency room states that plaintiff "tripped and fell ... stepped on uneven pavement" (Affirmation in Opposition, Ex. G).

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Plaintiff commenced this action against Associates, Merrick, Habibollah Ghatan and Mounes Ghatan. The Ghatan defendants own a laundry business, apparently located at 1814 Third Avenue. At her deposition, plaintiff testified that the Ghatan defendants paid her damages in settlement of her claims against them. Plaintiff further testified that: she was not certain exactly where she fell; she fell due to trash, dirt, soil and wood on the sidewalk; and she did not fall due to the unevenness of the sidewalk.

Associates premises its motion on the allegation that plaintiff fell on debris created by Merrick. Associates contends that Merrick is liable for the accident and that any liability on Associates' part must be vicarious and solely due to its position as owner of the property. Accordingly, Associates seeks an order that if it is held liable it must be indemnified by Merrick.

Merrick opposes the motion on the ground that plaintiff was not sure where she fell. If she did not fall in front of the subject property, Merrick argues it is not responsible. In addition, Merrick claims that plaintiff's fall may have been caused by a raised uneven sidewalk instead of construction debris. Merrick claims that it did not create this alleged defective condition.

The Administrative Code of the City of New York § 7-210 places the duty to maintain and repair public sidewalks upon owners whose property abuts the sidewalk. Section (b) of the statute provides that owners (with some exceptions that do not apply here) are liable for any injury proximately caused by the failure to maintain such sidewalk in a reasonably safe condition. Section (b) states that such failure consists of not repairing or replacing defective sidewalk flags and negligently failing "to remove snow, ice, dirt or other material from the sidewalk." In order to hold an owner liable for

a dangerous condition on a sidewalk or any premises, the owner must have created the dangerous condition (*Early v Hilton Hotels Corp.*, 73 AD3d 559 [1st Dept 2010]), or must have failed to remedy the condition, despite having prior actual or constructive notice of it (*Piacquadio v Racine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [1st Dept 2005]).

An owner is charged with having constructive notice of a defective condition when the condition is visible, apparent and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to discover and remedy the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Irizarry*, 24 AD3d at 373). The absence of evidence demonstrating how long a dangerous condition existed prior to an accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2d Dept 2002]), *lv. to app. den.* 99 NY2d 509 (2003). Alternatively, a defendant may be charged with constructive notice of a dangerous condition if the condition is one that recurs and about which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 [1st Dept 2003]).

A contractor must indemnify an abutting owner who is ultimately found liable where the sidewalk accident is due solely to a contractor's negligent performance or non-performance of an act solely within the contractor's province, so that the owner's liability is purely vicarious (*Simon v Astoria Fed. Sav.*, 27 Misc.3d 1206 [A], 2010 WL 1380369, *7 [Sup Ct, Kings County]; see also *Linares v Fairfield Views, Inc.*, 231 AD2d

418, 420 [1st Dept 1996]). Assuming that construction debris caused the accident, to be entitled to indemnification, Associates must show that it did not create the dangerous condition of debris on the sidewalk, that it had no notice of the debris and that its liability is solely due to its nondelegable duty to keep the sidewalk safe (*id.*). Associates establishes that it did not cause construction debris to be on the sidewalk, but is silent as to notice. It thus fails to show that any liability on its part can be vicarious only.

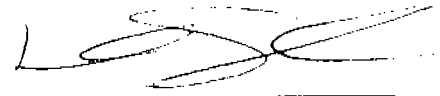
Summary judgment is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by showing there are no genuine issues of material fact to be tried (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In this case, Associates does not succeed in the prima facie showing, which requires a denial of the motion, regardless of the sufficiency of the opposition (*Alvarez*, 68 NY2d at 324).

Merrick's arguments regarding the location of plaintiff's fall and whether she fell because of a defective pavement, instead of construction debris, present issues of fact. Whether plaintiff's emergency room records are admissible to prove she fell due to uneven pavement can be determined at trial (see CPLR 4518 [a]; *Acosta v Trinity Lutheran Church*, 12 Misc.3d 1175 [A], 824 NYS2d 760, *6 [Sup Ct, Kings County 2006]). Accordingly, for the foregoing reasons it is hereby

ORDERED that defendant 1810 3rd Avenue Associates, LLC's motion for summary judgment is denied.

The foregoing constitutes this Court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
October 13, 2010



Hon. Martin Shulman, J.S.C.

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