

Leary v Dallas BBQ

2010 NY Slip Op 33105(U)

October 19, 2010

Supreme Court, New York County

Docket Number: 114242/2007

Judge: Lottie E. Wilkins

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

PRESENT: _____

PART 18

Index Number : 114242/2007

LEARY, SUSAN

VS.

DALLAS BBQ

SEQUENCE NUMBER : 001

DISMISS

*10/27/10
ec*

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

RECEIVED

OCT 27 2010

MOTION COURT OFFICE
NYC SUPREME COURT - CIVIL

Motion by defendant(s) Metropolitan Transit Authority/New York City Transit Authority granted in accordance with the attached decision and order.

FILED

OCT 27 2010

NEW YORK COUNTY CLERK

Dated: October 19, 2010

[Signature]
Lottie E. Wilkins 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

-----X
SUSAN LEARY,

Plaintiff,

- against -

DALLAS BBQ, 23rd & 8th LLC d/b/a DALLAS BBQ,
MUTUAL REDEVELOPMENT HOUSES, INC.,
ILGWU HOUSES, INC. THE CITY OF NEW YORK,
THE NEW YORK CITY POLICE DEPARTMENT, THE
METROPOLITAN TRANSPORTATION AUTHORITY
and THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.
-----X

DECISION AND ORDER

Index No. 114242/2007

FILED

OCT 27 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Lottie E. Wilkins, J.:

Defendants Metropolitan Transportation Authority ("MTA") and the New York City Transit Authority ("NYCTA") (collectively, the "Transit Authority") move pursuant to CPLR § 3211(a)(7) to dismiss plaintiff's complaint for failure to state a cause of action or, in the alternative, for summary judgment pursuant to CPLR § 3212. Plaintiff and defendant 23rd & 8th LLC d/b/a Dallas BBQ ("Dallas BBQ") oppose the Authority's motion.

BACKGROUND

This is a personal injury action arising from a trip and fall on a sidewalk in Manhattan at about 6:00 p.m. on May 3, 2007. Plaintiff Susan Leary claims that she was

001

“severely injured” when she tripped and fell on a segment of a disassembled wooden police barricade that was strewn on the sidewalk at the northwest corner of 23rd Street and 8th Avenue in New York County. Plaintiff testified that she tripped on the barricade after ascending a stairway that she used to exit the 23rd Street subway station. She took only “two steps” onto the sidewalk after ascending the stairs in an area between the stairwell and the Dallas BBQ storefront. Plaintiff commenced this action with a summons and complaint filed on or about October 9, 2007 naming Dallas BBQ, Mutual Redevelopment Houses, Inc., ILGWU Houses, Inc., the City of New York, the New York City Police Department (“NYPD”), and the Transit Authority as defendants.

ANALYSIS

Summary judgment is a drastic remedy that should only be granted when no genuine issue of fact requiring trial exists (see, Andre v Pomeroy, 35 NY2d 361 [1974]). Indeed, the Court’s role on a motion for summary judgment is issue-finding, not issue-solving, and all competent evidence must be viewed in the light most favorable to the party opposing summary judgment (see, B-S Industrial Contractors, Inc. v Town of Wells, 173 AD2d 1053 [3d Dept 1990]). For these reasons the standard for summary judgment is high: the movant must present evidence, in admissible form, which is sufficient to warrant the court directing judgment as a matter of law (see, CPLR

3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make the required showing will result in denial of the motion regardless of the sufficiency of the opposing papers (see, Winegard v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

When the required showing is made, however, it is then up to the party opposing summary judgment to adduce facts sufficient to raise an issue requiring trial (see, Zuckerman v City of New York, *supra*). This shifting burden calls upon the summary judgment opponent to “assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist” and that the issues are “real, not feigned, since a sham or frivolous issue will not preclude summary relief” (see, Kornfeld v NRX Technologies, Inc., 93 AD2d 772, 773 [1st Dept. 1983]).

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of plaintiff’s injury. (see, Nappi v Incorporated Vil. of Lynbrook, 19 AD3d 565, 566 [2nd Dept. 2003]). Liability for a dangerous condition on property is “generally predicated upon ownership, occupancy, control or special use of the property” (Turrisi v Ponderosa, Inc., 179 AD2d 956, 957). Liability cannot be imposed if none of these factors are present (see, *supra*). Alternatively, liability may be imposed where a landowner or a lessee creates a defective or dangerous condition on the property (see, Andres v Ames Dept. Store, 186 AD2d 328; McGill v Caldors, Inc., 135

AD2d 1041) or when such party had actual or constructive notice of the allegedly dangerous condition (see Gordon v American Museum of Natural History, 67 NY2d 836; Lowrey v Cumberland Farms, 162 AD2d 777).

The Transit Authority's motion is premised on the contention that it does not own, operate, maintain or control either the sidewalk where plaintiff was injured or the barricade that caused plaintiff's injury. Plaintiff's negligence claim rests on the allegation that the Transit Authority maintained, controlled, and made special use of the sidewalk and therefore had constructive and actual notice of the barricade. According to the Transit Authority's witness, Vincent Moschello, Transit Authority workers cleaned debris three feet around the sidewalk at the exits and entrances leading to the subway station on a daily basis. Plaintiff testified that she took only two steps onto the sidewalk before she tripped and fell. Though it appears that Plaintiff was injured within the area that Transit Authority workers clean as part of their routine, it does not follow that the Transit Authority has a duty to maintain the public sidewalk. Neither Plaintiff nor Dallas BBQ argues that the Transit Authority owns the area where the accident occurred – a public sidewalk. In fact, Plaintiff does not proffer any evidence showing that the Transit Authority has a duty to maintain the public sidewalk. Nor can such a duty be inferred since it well established that the City may not delegate its duty to maintain a public street or sidewalk (see Metzroth v. City of New York, 241 A.D.2d

470 [1926]).

Plaintiff's claim that the Transit Authority made special use of the sidewalk is equally unsupported. Generally, an owner may be held liable where the abutting owner uses the sidewalk for a "special purpose", or where the cause of the injury is the defective condition of a sidewalk appurtenance installed for the special use or benefit of the owner or occupier of the abutting premises (see, Curtis v New York, 179 A.D.2d 432 [1st Dept. 1992]). Plaintiff does not provide any supporting evidence beyond its mere assertion that the Transit Authority made a special use of the accident area. The sidewalk surrounding the entrance to the subway station was neither specially constructed for the benefit of the Transit Authority (see, Kiernan v Thompson, 137 A.D.2d 957, 958 [3rd Dept. 1988]), nor did it derive any use from the sidewalk that was not otherwise available to the general public.


Accordingly; it is

ORDERED that the motion by defendants Metropolitan Transit Authority and New York City Transit Authority for summary judgment is granted and the complaint and all cross-claims are dismissed as to those defendants and severed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 10/19/10



Lottie E. Wilkins, J.S.C.

Lottie E. Wilkins

FILED
OCT 27 2010
NEW YORK
COUNTY CLERKS OFFICE