

Leary v Dallas BBQ

2011 NY Slip Op 30195(U)

January 20, 2011

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: Lottie E. Wilkins
Justice

PART _____

Index Number : 114242/2007

LEARY, SUSAN

vs

DALLAS BBQ

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

FILED

JAN 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Motion by defendants, Dallas BBQ and 23rd & 8th LLC d/b/a Dallas BBQ, for summary judgment dismissing the complaint and all cross-claims is granted in accordance with the attached decision and order.

Dated: Jan 20, 2011

Lottie E. Wilkins
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 -

DECISION AND ORDER

Index No. 114242/2007

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

Lottie E. Wilkins, J.:

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JAN 27 2011
NEW YORK
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Moition sequence 002 and 003 are decided jointly herein. In sequence 002, defendants Dallas BBQ and 23rd & 8th LLC d/b/a Dallas BBQ (referred to collectively as "Dallas BBQ") move for summary judgment dismissing plaintiff's complaint and all cross-claims. In sequence 003, defendant Mutual Redevelopment Houses, Inc. also moves for summary judgment dismissing the complaint and all cross-claims. Plaintiff opposes the motion, as does defendant City of New York.

BACKGROUND

As recited in the prior decision granting summary judgment to the Transit Authority, this is an action for injuries sustained by plaintiff Susan Leary when she

tripped and fell on a segment of a wooden police barricade laying on the sidewalk near the northwest corner of West 23rd Street and 8th Avenue. Plaintiff testified that she tripped on the barricade after exiting the 23rd Street subway station at that location. The portion of barricade in question was located about “two steps” away from the stairway plaintiff climbed to exit the station. Defendant Mutual Redevelopment Houses owns the property abutting the sidewalk where plaintiff fell. Defendant Dallas BBQ leases the ground floor retail space from defendant Mutual Redevelopment Houses.

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. The Court has already granted summary judgment to defendant New York City Transit Authority.

ANALYSIS

On its motion, Dallas BBQ argues that summary judgment should be granted because it did not owe a duty to maintain the sidewalk in front of its business, that being a duty owed by its lessor and building owner, Mutual Redevelopment Houses. Additionally, Dallas BBQ argues that it did not create the dangerous condition complained of by plaintiff, nor did it have notice of said condition.

For its part defendant Mutual Redevelopment Houses argues that it is

entitled to summary judgment because, assuming that the piece of barricade in question could be considered debris, it did not have actual or constructive notice of its presence on the sidewalk abutting its property. Alternatively, Mutual Redevelopment Houses argues that even if it did have actual or constructive notice, it still cannot be liable because police barricades are not debris but property of a municipal law enforcement agency, *i.e.* the New York City Police Department, which defendant did not have the authority to tamper with.

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]).

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. 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 primary question in the two motions under consideration here is whether either defendant (or both of them) owed a duty to plaintiff. Both moving defendants argue a lack of actual or constructive notice in addition to the absence of a duty, however, plaintiff's deposition testimony to the effect that she observed the condition that caused her to fall in the days prior to her accident would be sufficient to create a triable issue of fact as to notice. Therefore, success for either defendant on summary judgment hinges on the existence of a duty owed to plaintiff. In the absence of a duty, notice of the offending condition does not give rise to liability.

Dallas BBQ points to the fact that it is the lessee – and not the owner – of the premises abutting the sidewalk where the accident occurred. Dallas BBQ further argues that, to the extent any duty arises through the presence of an abutting property, that duty is owed by the owner, not the lessee (see, Administrative Code of the City of New York, § 7-201[b]).

Plaintiff does not speak directly to this argument, however, defendant City of New York argues that summary judgement cannot be granted in this context because, under its lease with Mutual Redevelopment Houses, Dallas BBQ assumed responsibility for maintenance of the sidewalk where plaintiff fell. In making this argument the City refers to Dallas BBQ’s lease, annexed to the moving papers, but does not point to a specific provision of that lease.

A review of the lease in question reveals that there are certainly provisions that shift liability for sidewalk repair to Dallas BBQ when it makes certain uses of the sidewalk, however, nothing therein suggests that the lessee assumed full responsibility for maintenance and repair of the sidewalk (compare, McNeil v 5600 Broadway Realty Corp., 2010 WL 337301, [Sup Ct, NY County 2010]). Thus the City fails to support its argument that Dallas BBQ bore responsibility for general maintenance of the sidewalk, either independently or in conjunction with the property owner and, for that reason, does not demonstrate a duty owed by Dallas BBQ.

The issue with respect to Mutual Redevelopment Houses is somewhat different. As the abutting property owner, Mutual Redevelopment Houses, did owe a duty to maintain the sidewalks in front of its premises in a reasonably safe condition (see, Administrative Code of the City of New York § 7-210[b]). As already discussed, the question of notice cannot be resolved as a matter of law on this motion because plaintiff's testimony concerning the presence of the condition in the days leading up to her accident – not to mention the general state of the condition – raise an issue as to whether Mutual Redevelopment Houses had constructive notice of the condition.

Mutual Redevelopment House has also argued that, since the “condition” in question was actually a police barricade, it did not have the authority to move or remove it from the sidewalk in front of its premises because it was an instrumentality of law enforcement. This argument fails because the Court cannot say, as a matter of law, that the condition plaintiff claims to have caused her accident was a “police barricade” in any functional sense of that term.

Plaintiff testified that the object involved in her fall was a piece of wood laying on the sidewalk approximately eight feet long, painted blue, with the words “Police Department – Do Not Cross” printed on it. Obviously, there are ample grounds for a jury in this case to conclude that the piece of wood plaintiff identified was once part of a police barricade. To say, however, that a plank of wood laying on the sidewalk

– even one that is painted blue and says “Police Department” – is functioning as a official police barricade is quite another assertion entirely, and one that this Court cannot accept. It remains to be seen whether the piece of wood identified by plaintiff was a dangerous condition and, if so, which party or parties bear responsibility for its presence on the sidewalk. For purposes of this motion, however, the Court rejects the argument that the condition in question was a police barricade which Mutual Redevelopment Houses was without authority to disturb.

Mutual Redevelopment Houses has a statutory duty to maintain the sidewalks adjacent to its property in a reasonably safe condition. An issue of fact exists as to whether defendant should have known of the condition and, if so, whether it breached that duty by allowing the condition which plaintiff claims caused her accident to remain. For these reasons summary judgment for Mutual Redevelopment Houses is denied. Accordingly, it is

ORDERED that the motion by defendants Dallas BBQ and 23rd & 8th LLC d/b/a Dallas BBQ for summary judgment is granted and the complaint and all cross-claims are dismissed as to those defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion for summary judgment by defendant Mutual

Redevelopment Houses is denied.

This constitutes the decision and order of the Court.

Dated: 1/20/11



Lottie E. Wilkins, J.S.C.

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JAN 27 2011
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