Gantiva v Sky Realty, Inc.

2011 NY Slip Op 30413(U)

February 22, 2011

Supreme Court, Queens County

Docket Number: 24128/2008

Judge: Sidney F. Strauss

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA Part 11
Justice

-- X

RODGER GANTIVA,

plaintiff,

- against -

SKY REALTY, INC., YONG HENG VARIETY, INC., NEW YONG HENG VARIETY INC. and CHI JIE CHEN a/k/a JEICHEN CHI a/k/a JIE C. CHI a/k/a JEI CHEN CHI a/k/a JEI CHI,

defendants.

-- X

Index Number 24128/2008

Motion Date 12/8/10

Motion Cal. No. 13

Seq. No. 5

The following papers numbered 1 to 15 read on the motion of Defendant Sky Realty, Inc. and the cross-motion of Defendants New Yong Heng Variety, Inc. and Chi Jie Chen a/k/a Jeichen Chi a/k/a Jie C. Chi a/k/a Jei Chen Chi a/k/a Jei Chi (hereinafter referred to as "New Yong" and "Chen").

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service-Memorandum of Law	1-5
Notice of Cross-Motion-Affirmation-Exhibits-Service	6-10
Opposition Affirmation to Motion and Cross-Motion-Exhibits-Service	11-13
Reply Affirmation in Support of Motion - Service	14-15

This action arises out of a slip and fall by plaintiff on November 25, 2007, in front of premises located in Queens County, owned and/or leased by defendants. Plaintiff, a New York City police officer, stated that he was running diagonally across the street when his foot got caught, and he tripped and fell in or on a crack in the sidewalk.

Where a party seeks summary judgment pursuant to CPLR § 3212, it is incumbent on the party to "lay bare its proof" in support of its claims. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; Simms v North Shore Univ. Hosp., 192 AD2d 700.) The court finds that defendants have failed to present prima facie proof of their entitlement to judgment and thus their motion and cross-motion must be denied. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; Daniels v Judelson, 215 AD2d 623.)

The defendant's assertion that the plaintiff failed to properly identify the defect that caused him to fall is without merit. The testimony of the plaintiff was sufficiently clear that the plaintiff was caused to fall when he tripped over/on the unsettled pavement. (See, Adams v Autumn Thoughts, Inc., 298 AD2d 945; Alvarez v NYCHA, 295 AD2d 225; Louniakov v MROD Realty Corp., 282 AD2d 657; see also, Polo v New York City Housing Authority, 303 AD2d 238; Hecker v New York City Housing Authority, 245 AD2d 131). The defendants' argument that the crack at issue was not the proximate cause of the plaintiff's fall or that if it was the proximate cause, that said crack was trivial in nature, based upon the opinion of defendant Sky Realty's expert engineer, is without merit. The expert's opinion that the defect "could not possibly pose a tripping hazard" is of no moment under these circumstances. Plaintiff testified that he first observed the raised sidewalk when his foot got caught as fell.

The defendants' argument that the defect the plaintiff claims caused his accident is de minimus is also unavailing. The question of "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury." (Trincere v County of Suffolk, 90 NY2d 976 citing, Guerrieri v Summa, 193 AD2d 647). "However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (Hargrove v Baltic Estates, 278 AD2d 278). In determining whether an alleged defect is actionable, the court should examine a number of factors "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury [citation omitted]" (Trincere v County of Suffolk, supra).

Here, based upon a review of photographs annexed to the moving and opposition papers as well as the plaintiff's deposition testimony, the defect the plaintiff claims caused him to fall are of sufficient size and depth such that it may not be classified as trivial. Defendant Sky Realty relies, to its detriment, on Bruinsma v Simon Property Group, Inc.,902 N.Y.S.2S 649 which affirmed a lower court's ruling denying summary judgment to a defendant in a slip and fall case as to the seriousness of the alleged defect and that regardless

of that issue, the defendant had not had notice of such defect. In the instant action expert testimony as well as photographs submitted by both Defendant Sky Realty and plaintiff, indicate that the condition of the pavement was in existence at the time of the injury. The fact that Defendants New Yong and Chen dispute the condition of the pavement in their depositions (note that Defendant Sky's employee, Mr. Kwok, testified that the photographs submitted were an accurate depiction of the pavement in November 2007) directly contradicts plaintiff's testimony, therefore it is a question of fact to be determined by a jury.

It has been previously determined that "there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." Trincere v County of Suffolk, 90 N.Y.2d 976, 665 N.Y.S.2D 615. The location of the defect as well as the fact that the accident occurred in the evening, renders it less likely to detection and enhances the danger presented by the defect. See, Smith v ABK Apartments, Inc, 284 AD 2d 323; Wolcott v Forgnone, 277 AD2d 1039. Furthermore, defendants' argument that plaintiff's expert affidavit is barred because it was submitted after the Note of Issue was filed is denied without a sufficient showing that plaintiff's failure to submit the expert information earlier was willful and/or prejudicial to the opposing parties. See Martin v Triborough Bridge and Tunnel Authority, 73 AD3d 481, 901 N.Y.S.2d 2010; St. Hilaire v White, 305 AD2d 209, 759 N.Y.S.2d 74. In Marchione v Greenky, 5 AD3d 1044, 773 N.S.2d 657, it was clear that there was no evidence of a willful failure to disclose by plaintiff and defendants failed to make a compelling show that they were prejudiced by plaintiff's delay in complying with CPLR §3101(d).

Defendants New Yong and Chen make a cross-motion seeking to dismiss plaintiff's Second Supplemental Amended Verified Complaint. The court may permit such addition of defendants within its discretion when it determines upon review of the proposed pleading that the claims are not palpably insufficient or devoid of merit. (Liberty Mutual Ins. Co. v Perfect Knowledge Inc., 299 AD2d 524; Comsewogue Union Free School Dist. v Rovegna, 131 AD2d 534.). In the instant action, a prior motion was granted to amend the caption to add Yong Heng Variety, Inc., without opposition, on June 30, 2009. Subsequently, the Supplemental Summons and Verified Complaint was timely served on defendants Sky Realty, Inc. And Yong Heng Variety, Inc. Subsequent stipulation signed by plaintiff and defendant Sky Realty, Inc. to a Second Supplemental Summons and Verified Complaint to add New Yong and Chen is permissible since defendant Yong Heng Variety, Inc. failed to appear after the first supplemental amended Verified Complaint. It is evident from the various name changes filed with the New York State Department of State that defendant Yong Heng Variety, Inc. and the additional defendants (not including Sky Realty, Inc.) are the same, and for the purposes of this action it is evident that this is an issue of fact, not law, as to whether or not New Yong was operating a business out of the premises in front of which, plaintiff was injured. It is clear that failure to obtain leave of the court is not a fatal defect in all cases. See, Gavigan v. Gavigan, 123 AD2d 823; Micucci v. Franklin Gen. Hosp., 136 AD2d 528.

The defendants' cross-motion also relies upon the "firefighter rule" to prevent plaintiff's action. It is clear that the General Obligations Law § 11-106, statutorily abolished said rule, affirmatively allowing "compensation for injury or death to police officers ... while in the lawful discharge of his official duties and that injury . . . is proximately caused by the neglect, willful omission or intentional, willful or culpable conduct of any person or entity, other than the police officer's . . . employer or co-employee . . . may seek recovery and damages from the person or entity . . ."

Defendants New Yong and Chen request that this action be severed pursuant to CPLR § 603. Where the proof against all defendants is supplied by the same or substantially, all of the same evidence, severance is not warranted. Furthermore, where an action does not present particularly complicated issues rendering it difficult for a jury to resolve, time would be save by a single trial, and question of quantum of damage attributed to each action would be largely obviated thereby. Abrams v. Velya Realty Corp. 17 AD2d 770, 232 N.Y.S.2D 324. See, Kilpatrick v Maya, 14 AD2d 751, 220 N.Y.S.2D 444.

Therefore, as to defendant Sky Realty, Inc.'s motion for summary judgment and dismissing plaintiff's Second Amended Verified Complaint, as well as all cross-claims, against defendant Sky Realty Inc., said motion is DENIED.

As to defendants New Yong Heng Variety, Inc. and Chi Jie Chen a/k/a Jeichen Chi a/k/a Jie C. Chi a/k/a Jei Chen Chi a/k/a Jei Chi's (New Yong and Chen) cross-motion for summary judgment and dismissing plaintiff's Second Amended Verified Complaint as against them, or alternatively, to dismiss on jurisdictional grounds said cross-motion is DENIED. Defendants New Yong and Chen's request to sever this action pursuant to CPLR §603 is also DENIED as well as their request to vacate the Note of Issue.

Defendants New Yong and Chen's request for expedited discovery shall be GRANTED and completed within 45 days of the filing of this Order and said defendants shall have extended time to file a motion for summary judgment within 30 days after completion of said expedited discovery.

Dated: February 22, 2011

SIDNEY F. STRAUSS, J.S.C.

[* 5]