

Shapiro v City of New York

2011 NY Slip Op 30731(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 104058/05

Judge: Barbara Jaffe

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

PRESENT:

J.S.C.

PART 5

Index Number : 104058/2005

SHAPIRO, FRED

vs
CITY OF NEW YORK

Sequence Number : 004

DISMISS

CALL # 154

INDEX NO. _____
MOTION DATE 2/1/11
MOTION SEQ. NO. 004
MOTION CAL. NO. 154

The following papers, numbered 1 to 4 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/25/11

MAR 25 2011

[Signature]
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

FRED SHAPIRO,

Plaintiff,

-against-

Index No. 104058/05

Motion Date: 2/1/11

Motion Seq. No.: 004

Calendar No.: 154

DECISION & ORDER

THE CITY OF NEW YORK; 61 WEST 62 OWNERS
CORP., COOPER SQUARE REALITY, INC., and
ALLBORO PIPING CORP.,

Defendants.

-----X

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FILED
MAR 30 2011
NEW YORK
COUNTY CLERK'S OFFICE

By notice of motion dated July 29, 2010, defendants 61 West 62 Owners Corp. and Cooper Square Realty, Inc. (collectively, 61 West) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and City's cross-claims. Plaintiff and co-defendant City oppose. By notice of cross-motion dated August 9, 2010, City moves pursuant to CPLR 3211 for an order dismissing the complaint, or pursuant to CPLR 3212 summarily dismissing the complaint and 61 West's cross-claims. Plaintiff and 61 West oppose. For the reasons that follow, 61 West's motion is granted and City's motion is denied.

I. FACTS

Plaintiff alleges that on January 7, 2004, he tripped and fell on an uneven and raised sidewalk on Broadway between 62nd and 63rd Streets, abutting property owned by 61 West. (Affirmation of Beth J. Schlossman, Esq., dated Oct. 13, 2010 [Schlossman Oct. 13, 2010 Aff.], Exhs. 1, 2). It is undisputed that the alleged defect is within 12 inches of a gate box cover owned by City.

Plaintiff testified at a deposition held on October 3, 2007, that he was looking straight ahead when he fell, and that after he fell, he saw that his foot had caught on the raised sidewalk. (*Id.*, Exh. 1). As he was helped up, he observed a square metal plate. (*Id.*). Photographs of the location depict a metal plate bearing the letters "DWS," close to the edge of the sidewalk flag. (*Id.*, Exh. 2). Plaintiff testified that the sidewalk flag was three inches higher than the adjacent flag. (*Id.*, Exh. 1).

Kevin Walsh, resident manager for 61 West, testified at a deposition held on June 25, 2008, that he was aware of no complaints about the sidewalk abutting the building, that he had not seen documents relating to complaints about the sidewalks, and that he was unaware of repairs or restoration of the sidewalk. (Lechleitner Aff., Exh. I).

Cynthia Howard, record searcher for City's Department of Transportation (DOT) testified at a deposition held on October 22, 2008, as to results conducted by another individual from DOT, for Broadway between 61st and 62nd Streets, for a period of two years prior to and including the date of plaintiff's accident. (Affirmation of Karen Duong, ACC, dated Aug. 9, 2010 [Duong Aff.], Exh. C]). DEP records, however, were not searched. (*Id.*). Howard was unable to identify or explain a document titled "Corrective Action Report," except to state that it came from the

database of Highway Inspection Quality Assurance (HIQA), another city agency. (*Id.*). Upon being told that Howard was unable to interpret the document, counsel for plaintiff and 61 West requested that City produce another witness with knowledge. (*Id.*). The search yielded no notices of violations, and four permits issued to DEP contractors to conduct a “major installation” of sewers, involving opening the roadway and sidewalk. (*Id.*). Howard could not confirm whether DEP stood for the Department of Environmental Protection, and she did not know whether any work was actually performed on the sidewalk. (*Id.*). Upon being shown a photograph of the metal plate where plaintiff fell, she was unable to identify the acronym DWS, nor could she testify as to the Department of Water Supply’s responsibilities. (*Id.*). Upon being informed that Howard could not testify as to the DEP, counsel for plaintiff and 61 West requested the production of a witness with sufficient knowledge. (*Id.*). Other permits were shown to Howard, for contractors authorized by Department of Design and Construction (DDC), but she was unable to testify as to the work that had been performed. (*Id.*). The search also yielded a Big Apple Map. No search was conducted for notices of claim filed with the comptroller’s office. (*Id.*).

Joseph Pando, a construction laborer for City’s Department of Environmental Protection (DEP) who maintains the water mains throughout Manhattan, testified at a deposition held on May 18, 2010. (Puang Aff., Exh. E). Upon being shown a photograph of the metal plate where plaintiff fell, Pando identified it as a gate box cover used by DEP to hold fire hydrant valves which must be flush with the surrounding sidewalk. (*Id.*).

Upon plaintiff and co-defendant’s requests following Howard’s deposition, City produced Gregory Tolwinski, construction supervisor for DEP, who testified at a deposition held on April 7, 2009 as to the results of a DEP search. (Puang Aff., Exh. D). Tolwinski testified that his

duties involve oversight of repairs of water and sewer mains, as well as “anything having to do with casting, fire hydrants.” (*Id.*) He identified documents as service request inspection details that would be filled out when the department receives complaints and testified that on two occasions, DEP repaired a fire hydrant at the block where plaintiff fell, and that when his department or a contractor removes DWS castings and reinstalls them, the concrete is removed. (*Id.*) Tolwinski was unfamiliar with DDC, and provided no testimony concerning HIQA. (*Id.*)

II. PERTINENT PROCEDURAL BACKGROUND

On March 22, 2005, plaintiff commenced this action by serving a summons and complaint on City and 61 West. (Lechleitner Aff., Exh. A). On or about June 6, 2006, City served its answer. (Duong Aff.). On or about June 10, 2005, 61 West served its answer with cross-claims against City. (Lechleitner Aff., Exh. B). By order dated December 18, 2006 another justice of this court granted plaintiff leave to amend his complaint to include Allboro Piping Corp (*id.*, Exh.C), and by order dated July 3, 2007, a default judgment was granted against it (*id.*, Exh. F).

On or about March 24, 2010, 61 West served a notice to admit on City, requesting written admission that City owns the metal cover marked “DWS.” (*Id.*, Exh. K). City did not respond. (*Id.*)

Plaintiff filed his note of issue and certificate of readiness on June 8, 2010.

III. ANALYSIS

It is well-settled that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). Accordingly, it is City's burden here, as movant, to demonstrate its entitlement to judgment, and it must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff to establish a triable issue of fact.

Absent any dispute that the area where plaintiff fell is defective or that it constitutes a tripping hazard, liability turns on which party is legally responsible for its maintenance, or as plaintiff maintains, both parties may be.

A. 61 West's motion

1. Contentions

61 West argues that City, and not the abutting property owner, is liable for the area within 12 inches of the DWS cover pursuant to 34 RCNY § 2-07(b). (*Lechleitner Aff.*). In addition to its reliance on 34 RCNY § 2-07(b), it annexes in support the deposition testimony of plaintiff, Walsh, and Pando, photographs of the defect, the unanswered notice to admit, and the affidavit of its expert Stanley H. Fein, an engineer who states that he inspected the sidewalk and concluded that the defect is ten and one-half inches from a DWS valve cover used to shut off the adjacent fire hydrant. (*Id.*, Exhs. A-L).

In opposition, City argues that it may not be held liable as, pursuant to New York City Administrative Code § 7-210, only the abutting property owner has a legal obligation to maintain

the uneven flagstones that caused plaintiff's fall. (Duong Aff.). In addition to its reliance on the Code provision, City annexes in support the deposition testimony of plaintiff, Howard, Towlinski, and Pando. (*Id.*, Exhs. A-E).

In opposition to 61 West's motion, plaintiff argues that City's potential liability under 34 RCNY § 2-07(b) does not relieve 61 West of liability under the Code, and that 61 West had constructive knowledge of the dangerous condition. (Schlossman Oct. 13, 2010 Aff.). In support, he submits his deposition testimony and photographs of the accident location. (*Id.*, Exhs., 1, 2, 3).

2. Analysis

Pursuant to Administrative Code § 7-210, the owner of real property abutting any sidewalk, and not City, has the duty of maintaining it in a reasonably safe condition, and is liable for injury proximately caused by its failure to maintain the sidewalk. (*Vucetovic v Epson Downs, Inc.*, 10 NY3d 517 [2008]). Pursuant to 34 RCNY § 2-07(b), owners of gratings are responsible for the "area extending twelve-inches outward from the perimeter." In *Storper v Kobe Club*, the First Department held that where the grating in question is located on a sidewalk for which the abutting property owner is responsible under the Code, only the owner of the grating is liable for defects within 12 inches of it. (76 AD3d 426 [1st Dept 2010]; *see also Hurley v Related Mgmt. Co.*, 74 AD3d 648 [1st Dept 2010] [property under not liable for sidewalk grate under the Code]). Thus, City and 61 West may not be held concurrently liable for the defect. (*Id.* at 545).

As the Code does not supplant City's liability under 34 RCNY § 2-07(b), there is no support for City's argument that a different result is required where plaintiff has fallen as a result of a raised sidewalk flag. Moreover, photographs submitted by all parties depict a sidewalk

defect located almost exclusively in the area adjacent to City's gate box cover, and City's witness testified that concrete would often be removed when City repaired the covers. To shift liability to the abutting property owner in this circumstance would be "in derogation of the common law" (*Storper*, 76 AD3d at 545), and would negate the certainty of 34 RCNY § 2-07(b)'s twelve-inch rule. Thus, 61 West has established, as a matter of law, that it is not liable for plaintiff's fall.

B. City's motion

1. Contentions

City argues that, notwithstanding its liability for the area surrounding the gate box cover, it cannot be liable for a defect absent written notice pursuant to New York City Administrative Code § 7-201, and that it neither caused nor created the defective condition. (*Duong Aff.*). In support, it relies on the deposition testimony of plaintiff, Howard, Towlinski, and Pando. (*Id.*, Exhs. A-E). In addressing the Big Apple Map, City argues that a mark reflecting an "extended section of raised or uneven sidewalk" in the area where plaintiff fell is inapplicable, because the mark is parallel to the curb whereas the defect is adjacent to the sidewalk flag and perpendicular to the curb. (*Id.*).

In opposition, plaintiff argues there exist triable issues of fact as to whether City received written notice of the defect in the form of the Big Apple Map, and as to whether City breached its duty to monitor and repair defects adjacent to the metal plate. (Affidavit of Beth J. Schlossman, Esq., dated Oct. 14, 2010 [Schlossman Oct. 14, 2010 Aff.], Exh. 3). In addition to the Big Apple Map and photographs of the defect, plaintiff annexes the affidavit of Ralph Gentiles, an associate production manager for the Sanborn Map Company, whose duties include surveying, measuring, and designating defective conditions on City sidewalks and crosswalks for use in Big Apple

Maps. (*Id.*, Exh. 4). Gentiles has reviewed the Big Apple Map and its accompanying key, and has concluded that a mark resembling a capital “I” with the stem drawn parallel to Broadway connotes an “extended section of raised or uneven sidewalk,” and that, based on his knowledge and work experience, this symbol generally does not reflect the direction of the raised or uneven sidewalk defects. (*Id.*).

2. Analysis

Pursuant to Administrative Code § 7-201 “no civil action shall be maintained against the city” arising from a dangerous condition on a sidewalk unless plaintiff demonstrates that City received written notice of the dangerous condition. The Big Apple map, provided by the New York State Trial Lawyers Association for the purpose of providing the written notice required under the Administrative Code, is acceptable for establishing prior written notice so long as the precise defect appears on the map. (*D’Onofrio v City of New York*, 11 NY3d 581 [2008]). If City establishes that it received no written notice, the burden shifts to plaintiff to establish that it caused or created the defect. (*Yarborough v City of New York*, 10 NY3d 726, 728) [2008]).

Plaintiff’s argument that City may be liable for its alleged breach of duty to inspect the area surrounding the gate box cover would essentially abrogate the Code’s written notice requirement. Moreover, the Code does not impose a duty to inspect (*Colon v City of New York*, 29 AD3d 724, 725 [2d Dept 2006]), and plaintiff is not relieved of establishing written notice where City is otherwise responsible under another statutory provision (*see D’Onofrio*, 11 NY3d 11 NY3d at 585 [determining whether written notice exists for defect on grating]; *cf Pounds v City of New York*, 2010 NY Slip Op 32494[U] [Sup Ct, New York County 2010] [Jaffe, J.] [written notice required where City is abutting property owner under section 7-210]; *Rivera-Irby*

v City of New York, 26 Misc 3d 1216(A), 2009 NY Slip Op 52727(U) [Sup Ct, Bronx County 2009] [claim based on defect in park owned by City requires written notice).

Nevertheless, evidence submitted by City does not establish that it performed a comprehensive search of its records. The three depositions, taken together, reveal that numerous documents produced are unexplained by City's own witnesses, and no witness testified that the search results were comprehensive or concluded with sufficient knowledge that City had no written notice of a defect. (*Cf McNeill*, 40 AD3d 823 [DOT employee's testimony not based on personal knowledge]; *Mancilla v City of New York*, 2010 NY Slip Op 32748[U] [Sup Ct, New York County 2010] [Jaffe, J.]; *Wesley v City of New York*, 2010 NY Slip Op 33102[U] [Sup Ct, New York County 2010] [Jaffe, J.]). Given the paucity of answers from City's record searchers regarding the records on which City relies in support of its motion, City has not established as a matter of law that written notice was not received. (*See Wesley*, 2010 NY Slip Op 33102[U]).

Even if City had met its *prima facie* burden, plaintiff, through his expert affidavit, has established an issue of fact that the "I" shaped symbol on the Big Apple Map references the defect where plaintiff fell. (*Reyes v City of New York*, 20 Misc3d 1134[A], 2008 NY Slip Op 51726[U] [Sup Ct, Bronx County 2008], *aff'd* 63 AD3d 615 [1st Dept 2009] [expert affidavit established triable issue that Big Apple Map reflected defect]; *cf D'Onofrio*, 11 NY3d at 585 [no evidence of written notice where symbol on Big Apple Map could not be interpreted]). City provides no factual support, through an expert or otherwise, for its counsel's affirmation that this symbol must correspond only to a sidewalk defect parallel to the curb, an argument refuted by plaintiff's expert. (*See Belmonte v Metropolitan Life Ins. Co.*, 304 AD2d 471, 474 [1st Dept 2003] [putative opinion of expert as to written notice, set forth in attorney's affirmation, has no

probative value)).

IV. CONCLUSION

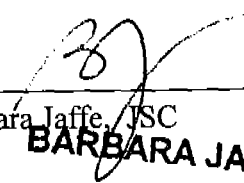
Accordingly, it is hereby

ORDERED, that defendants 61 West 62nd Street and Cooper Square Realty, Inc.'s motion for summary judgment is granted, and the claims dismissed against them with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that City of New York's motion for summary judgment is denied; and it is further

ORDERED, that the remainder of this action shall continue

This constitutes the decision and order of the court.



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

DATED: March 25, 2011
New York, New York

MAR 25 2011

FILED

MAR 30 2011

NEW YORK
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