

Vazquez v City of New York

2011 NY Slip Op 31118(U)

April 26, 2011

Supreme Court, New York County

Docket Number: 102866/09

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 102866/2009

VAZQUEZ, ROBERT

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

CAL # 121

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	
2, 3, 4, 5	
6	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

MAY 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/26/11
APR 26 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
ROBERT VAZQUEZ AND BERNICE VAZQUEZ,

Index No.: 102866/09

Plaintiffs,

Mot. Date: 2/22/11

Mot. Seq. No.: 001

-against-

DECISION AND ORDER

FILED

THE CITY OF NEW YORK AND 71 CLINTON INC.,

Defendants.

MAY 02 2011

-----x
BARBARA JAFFE, J.S.C.:

**NEW YORK
COUNTY CLERK'S OFFICE**

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For defendant City:
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For defendant 71 Clinton Inc.:
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Law Office of Steven G. Fauth
40 Wall St., 28th Fl.
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By notice of motion dated August 31, 2010, defendant City of New York moves pursuant to CPLR 3212 for an order dismissing the complaint and any cross claims against it. Defendant 71 Clinton Inc. (71 Clinton) opposes.

I. BACKGROUND

On December 10, 2007, plaintiff Robert Vazquez allegedly tripped and fell on a hole on the sidewalk that leads into the building at 71 Clinton Street in Manhattan. (Affirmation of Andrew Lucas, ACC, dated Aug. 31, 2010 [Lucas Aff.]). On or about March 10, 2008, plaintiffs served their notice of claim on City, alleging that the accident occurred on the sidewalk abutting 71 Clinton Street between Stanton and Rivington Streets when the sidewalk collapsed, broke and/or sunk, causing plaintiff to fall into the newly created hole. (*Id.*, Exh. A).

On June 4, 2008, Robert Vazquez testified at a 50-h hearing that, as pertinent here, he

was walking on the sidewalk toward 71 Clinton Street, that the sidewalk ended at a concrete path that was in front of and led into the building at 71 Clinton Street, and that as he stepped on the concrete path, it collapsed underneath him and his leg fell through the ground into the building's basement space. (*Id.*, Exh. B).

By summons and complaint dated February 20, 2009, plaintiffs alleged, among others, that City was liable for their injuries as it failed to design, construct, shore and support the sidewalk properly. (*Id.*, Exh. C).

At an examination before trial held on April 20, 2010, plaintiff Robert Vazquez testified that the sidewalk in front of 71 Clinton Street was composed of brick pavers from the street to the property line, that from the property line to the building there was a concrete path, and that when he stepped on the concrete, it collapsed below him and created a hole into which he fell. When he was pulled out of the hole, plaintiff saw shelves in the space beneath the hole which he believed belonged to the ground floor tenant at 71 Clinton Street. (Affirmation of Gregory Day, Esq., dated Dec. 3, 2010 [Day Aff.], Exh. A).

On April 29, 2010, City's employee, Fatima Rosas, testified that a search of Department of Transportation (DOT) records for the location of plaintiff's accident for two years prior to and including the accident date yielded in one permit, one permit application, and two inspections. (Lucas Aff., Exh. G). The records all relate to sidewalk repairs performed in front of 71 Clinton Street between July 2007 and August 2007 by a company called Everfine Construction Corp. (*Id.*, Exh. H). No records were found relating to maintenance, repair or sidewalk violations, nor were any repair contracts found. (*Id.*, Exh. G).

II. CONTENTIONS

City disclaims liability for plaintiffs' injuries on the ground that the New York City Administrative Code § 7-210 relieves it of responsibility for the sidewalk in front of 71 Clinton Street and it submits, in support, the affirmation of David C. Atik, an attorney in its Department of Finance, whose search of the Property Assessment Roll and Real Property Assessment Division databases reflects that City does not own the property abutting the sidewalk on which plaintiff fell, and that it does not fall within one of the exemptions in the Sidewalk Law as 71 Clinton Street is classified as a Building Class C4 (old law tenement) with seven stories. (Lucas Aff., Exh. I). And based on the DOT records, City denies that it caused or created any defect on the sidewalk, and observes that plaintiffs did not allege that it made special use of the sidewalk.

In opposition, 71 Clinton argues that plaintiff's allegations against City do not arise from its failure to maintain or its creation of a defect on the sidewalk but rather from its negligent design or construction of it, and that section 7-210 is thus inapplicable. As City neither addressed nor showed that it did not negligently construct the sidewalk, 71 Clinton argues that its motion must be denied. (Day Aff.).

In reply, City argues that it may not be held liable for negligent design, that there is no evidence that it negligently designed the sidewalk, and that, in any event, plaintiff's testimony establishes that he did not fall on the sidewalk but on the concrete path in front 71 Clinton Street, and that any negligent construction or maintenance of it was the fault of 71 Clinton. (Reply Affirmation, dated Dec. 20, 2010).

III. ANALYSIS

"The 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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853)

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. (Admin. Code § 7-210[c] [City liable for injury caused by failure to maintain sidewalks abutting “one-, two- or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes . . .”]). Therefore, after September 14, 2003, the effective date of the section 7-210, the abutting property owner, not City, is generally liable for accidents caused by sidewalk defects. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, as City established that it is not the abutting landowner and that the property at 71 Clinton Street is not exempt, it has thus demonstrated, *prima facie*, that it may not be held liable for plaintiff’s injuries. (*Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [City entitled to dismissal of complaint as it did not own property on which plaintiff fell, and as property was vacant lot and thus not exempt pursuant to section 7-210]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [defendant established that property abutting sidewalk owned by corporate entity and not exempt]; *see also Lauray v City of New York*, 62 AD3d 467 [1st Dept 2009] [denying leave to file late notice of claim against City as plaintiff had no viable claim;

plaintiff fell on sidewalk in front of commercial business and not in front of one-, two-, or three-family residence)).

To the extent that City may be held liable if it caused or created a defective condition on, or made special use of, a sidewalk resulting in an injury occurring after September 14, 2003 (*Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [Sup Ct, Kings County 2007] [finding no indication in Sidewalk Law that City may not be held liable if it caused or created defect or made special use]; see also *Adler v City of New York*, 52 AD3d 549 [2d Dept 2008] [although City established that abutting property not exempt under section 7-210, discovery may lead to information showing that it created condition or made special use of sidewalk]), it has also established that it neither caused nor created any condition on, nor made special use of, the sidewalk. City has thus demonstrated its entitlement to summary dismissal of the complaint and, as it may not be held liable to plaintiff here, to dismissal of the cross claims asserted against it as well.

Moreover, as plaintiff's testimony establishes that he fell on the concrete path in front of 71 Clinton Street, and not on the sidewalk, 71 Clinton fails to raise any triable issues as to City's liability here.

IV. CONCLUSION

Accordingly, it is hereby

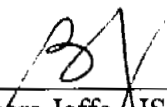
ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint and any cross claims are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

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

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City Part and remove it from the Part 5 inventory. Plaintiffs are directed to serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158 within 20 days of the date of this order; and it is further

ORDERED, that the compliance conference scheduled for May 24, 2011 is cancelled.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 26, 2011
New York, New York

APR 26 2011

FILED

MAY 02 2011

NEW YORK
COUNTY CLERK'S OFFICE