Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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William Carnera and Rosa Carnera,

Plaintiffs,

- against -

82-01 Roosevelt Avenue, LLC, Broadway Bakery, Inc., Junction Management and City of New York,

Defendants.

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Index Number: 6716/09

Motion Date: 3/1/11

Motion Cal. Number: 3

Motion Seq. No.: 3

The following papers numbered 1 to 29 read on this motion by defendant, Broadway Bakery, Inc. (Broadway) for summary judgment; cross-motion by defendant 82-01 Roosevelt Avenue, LLC and Junction Management LLC (s/h/a Junction Management) for summary judgment; and cross-motion by plaintiffs for leave to amend and/or supplement the bill of particulars.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Memorandum of Law	5
Notice of Cross-Motion(82-01)-Affirmation-Exhibits.	6-9
Notice of Cross-Motion(Pltf)-Affirmation-Exhibits..	10-13
Affirmation in Opposition(Pltf)-Exhibits	14-16
Affirmation in Opposition(City)-Exhibits	17-19
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Reply(82-01)	22-23
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As a preliminary matter, the notice of "cross-motion" by 82-01 Roosevelt Avenue, LLC and Junction Management LLC (collectively 82-01) is deemed a notice of motion, since plaintiff was not a moving party (see CPLR 2215).

Upon the foregoing papers it is ordered that the motions and cross-motion are decided as follows:

Motion by Broadway Bakery for summary judgment dismissing the complaint and all cross-claims as against it is granted. Motion by 82-01 for summary judgment dismissing the complaint and all cross-claims as against them is also granted. Cross-motion by plaintiff to supplement and/or amend his bill of particulars is denied.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Broadway and 82-01 have met their burden.

Plaintiff allegedly sustained injuries as a result of tripping and falling on a raised street curb adjacent to the premises located at 82-01 Roosevelt Avenue in Queens County on February 25, 2009 as he was proceeding to cross the street. Said premises is owned by 82-01 Roosevelt Avenue, LLC and managed by Junction Management LLC.

A property owner is not liable for repairing and maintaining abutting public property unless the owner actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges the abutting owner with the responsibility to repair and maintain the public property and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The New York City Administrative Code §§19-152 and 7-210 place the duty to repair sidewalks upon the abutting property owners, and §7-210 specifically imposes liability upon abutting property owners for any injuries resulting from their breach of that duty. However, in the instant case, the defective area upon which plaintiff allegedly tripped was not the sidewalk but the curb. Section 7-201 (c) of the Administrative Code states, in relevant portion, "The term 'street' shall include the curbstone." Conversely, "sidewalk" is defined in §19-101 as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." Thus, it is clear that neither §19-152 nor §7-210 imposes upon a property owner a duty to repair and maintain curbs (see Irizarry v. The Rose Bloch 107 University Place Partnership, 12 Misc 3d 733 [Supreme Court, Kings County 2006]).

Plaintiff specifically stated in his deposition that he tripped on the curb. When thereupon asked again, in terms of clarification, if he tripped on the curb or on the sidewalk, he

reiterated that he tripped on the curb and pointed to a location depicted in photographs marked as exhibits for the deposition. He circled in pen and initialed the spot depicted in the photographs where he fell. The marked photographs that most clearly depict the condition are two photographs annexed to plaintiff's cross-moving papers as Exhibit "D". These photographs depict a portion of curb several feet in length that is very slightly raised from the abutting sidewalk, which is composed of bricks. When asked if he noticed anything wrong with the sidewalk, he responded in the negative. Plaintiff alleges that he tripped on the raised edge of the curb as he was attempting to cross the street.

The essential argument presented by plaintiff's counsel in his cross-moving papers is that the difference in height between the sidewalk and the curb was not because the curb was raised but because the sidewalk was depressed and, therefore, the defect that caused plaintiff to trip included the sidewalk and not just the curb. In support of this theory, counsel annexes a copy of a report in the form of a letter addressed to plaintiff's counsel from one William Marletta, a safety consultant, who notes that there is a 7/8 to 1-inch height differential between the sidewalk and curb running a distance of 7 feet and opines, inter alia, that the sidewalk bricks were depressed and sunken and that such condition was the result of several years of settlement. This letter is not in affidavit form, is unsworn and is therefore not in admissible form and may not be considered. Even were it in admissible form, it fails to raise an issue of fact.

The report is devoted entirely to the exposition of safety standards and requirements as set forth in statutes, rules and regulations relating to trip hazards from height differentials between adjacent walking surfaces. It is supported by citations to statutes, rules, regulations and safety standards, a description of the location and extent of the defect, measurements of the slope of the sidewalk and height differential where it meets the curb and photographs of the subject area, some of which include a ruler and a digital level as demonstrative proof of Marletta's measurements. Nothing therein is relevant to the inquiry of whether the height differential was the result of a sidewalk depression as opposed to a raised curb.

The Court notes that although Marletta measured the "forward" slope of the sidewalk and the curb, i.e., their slope perpendicular towards the street, he does not explain why these "forward" slope measurements are in any way relevant. He does not proffer any conclusion based upon these measurements as to whether the height differential that caused plaintiff to trip and fall was a defect of the sidewalk or of the curb. No measurements of the slope of the

curb running parallel to the street or of the sidewalk parallel to the street were taken so as to determine whether the slight height differential at that location for a length of 7 feet was the result of a change in the grade of the curb relative to the sidewalk, or of the sidewalk relative to the curb, for that particular length. Although one of his photographs annexed to his report does appear to show his level placed on the sidewalk parallel to the curb, the reading on the level is not visible and Marletta makes no mention of it. In any event, there is no indication that any measurement of the slope of curb parallel to the street and sidewalk was made. Therefore, Marletta fails to raise an issue of fact as to whether the height differential was caused by the sidewalk and not the curb, or even as a result of the combination of both.

In addition, Marletta's only statement in his report as to the condition of the sidewalk and the cause of the height differential is his aforementioned conclusory remark that the sidewalk was "depressed" or sunken", a characterization that is neither obvious from the photographs nor backed up by any measurements or analysis whatsoever. His only other mention of the condition of the sidewalk was a conclusory paragraph opining as to the length of time the alleged sidewalk "depression" existed and its cause. He states, "It is my professional opinion within a reasonable degree of certainty as a certified safety professional that this condition had occurred over a long period of time based upon the extent of the condition, degree of settlement, and lack of external damage. In my opinion this condition was the result of several years of settlement, at a minimum." His report, however, nowhere discusses or makes any mention of the "extent of the condition", its "degree of settlement" or "lack of external damage" or proffers any evidence or explanation to support his perfunctory conclusion that the condition was caused by "settlement".

Moreover, even had he discussed the bases for his foregoing conclusion that the sidewalk became depressed as a result of settlement, he fails to set forth a proper foundation as an expert to render such opinion. His CV, annexed to his report, does not indicate the he has an engineering degree, Civil, Structural or otherwise, and nothing therein establishes any level of expertise in determining the causes of a sidewalk structural condition. Even if Marletta had shown by measurements or other objective findings that the sidewalk was depressed and that such depression accounted for the higher level of the curb, which he has failed to do, he has also failed to demonstrate, by education or experience, that he was qualified to opine that the sidewalk depression was caused by long-term settlement as opposed to having been constructed that way. In this regard, the Court notes that the undisputed evidence presented on this record is that the brick sidewalk and curb were

both constructed by the City and not movants and that no work was done to the subject area of sidewalk by movants. Although John Rapp, a principal of Junction Management, testified in his deposition that he had plumbing work done to the premises which necessitated removing and restoring some of the bricks of the sidewalk, he also testified that such work was not done in the area depicted in the photographs where plaintiff allegedly tripped, which was on the Roosevelt Avenue side of the building, but on the 82nd Street side. Therefore, even if Marletta had proffered sufficient competent evidence that the sidewalk was depressed and that such condition caused the elevation differential with the curb, which he has failed to do, he has also failed to proffer any evidence that this depression was caused by long-term settling and not by the installer of the sidewalk, which was the City and not movants.

In the absence of any admissible or probative evidence that the condition that caused plaintiff to trip and fall was the sidewalk, and in light of plaintiff's own emphatic testimony that his trip and fall was caused by the curb alone and that nothing was wrong with the sidewalk, movants are entitled to summary judgment as a matter of law.

Accordingly, the motions are granted and the complaint and all cross-claims are dismissed as against Broadway Bakery and the 82-01 defendants. Plaintiff's cross-motion for leave to supplement/amend his bill of particulars to include an allegation that the condition that caused plaintiff's injury was a depressed sidewalk is, accordingly, denied.

Since the evidence, on this record, is that plaintiff tripped and fell on the curb and not the sidewalk and, therefore, movants are not liable as a matter of law, the Court does not reach, and will not decide, the remaining contentions of the parties.

Dated: March 22, 2011

KEVIN J. KERRIGAN, J.S.C.