Sander v Green

2011 NY Slip Op 31614(U)

May 26, 2011

Sup Ct, Richmond County

Docket Number: 101165/05

Judge: Thomas P. Aliotta

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]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

--x

MARIA SANDER,

Plaintiff,

-against-

DOMINIQUE GREEN and CITY OF NEW YORK,

Defendants,

--x

DOMINIQUE GREEN,

Third-Party Plaintiff,

-against-

GIODEAN DEVELOPMENT CORP., DANA HOMEOWNER'S ASSOC., INC., SERGIO MALDONADO, VALERI BRITO, FIRST RATE HOLDINGS CORP., ROBERT PHANG, GEORGE W. PUENTES, DEMMIE WILKINS, JOSEPH ROSS, INC., UCALDIE FORD, JOEDENNYS MALAVE and GABRIEL PEREZ,

Third-Party Defendants.

--x

PART C-2

Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 101165/05
Motion No. 4057-005

Index No. A101165/05

The following papers numbered 1 to 5 were fully submitted on the 23rd day of March, 2011:

Pages Numbered

Notice of Motion for Summary Judgment and/or Dismissal by Defendant the City of New York, with Supporting Papers and Exhibits (dated December 23, 2010)....................1

Affirmation in Opposition by Defendant Dominique Green (dated January 31, 2011)....................2

Affirmation in Opposition by Plaintiff Maria Sander, with Exhibit (dated March 1, 2011)....................3

Reply Affirmation by Defendant
City of New York
(dated March 23, 2011)..4

Reply Affirmation by Defendant
City of New York
(dated March 23, 2011)..5

Upon the foregoing papers, the motion of defendant THE CITY OF NEW YORK pursuant to CPLR 3211 and 3212 for dismissal of the complaint and all cross claims against it is denied.

Plaintiff commenced this action to recover damages for injuries allegedly sustained on January 23, 2004, when she tripped and fell while stepping onto a sidewalk from the street in front of 5 Emeric Court on Staten Island. It has been alleged that her foot became caught in a hole purportedly left after defendant THE CITY OF NEW YORK (hereinafter THE CITY) removed a fire hydrant from that location, and purportedly never filled the remaining hole or resurfaced the sidewalk in that area.

On a prior motion for summary judgment, THE CITY asserted that it did not create the condition which caused plaintiff to fall. On November 13, 2009, this Court denied THE CITY's motion on the ground that an issue of fact had been raised by the affidavit of a non-party witness, Dominic Piscopo, which stated, *inter alia*, that a fire hydrant was previously present at the location where plaintiff allegedly fell, but that it had been removed and relocated when the adjacent property was residentially developed and a driveway installed. It was further claimed that the remaining hole had never been refilled or the area properly resurfaced. That same Order allowed plaintiff to inspect the records of THE CITY's Department of Design and Construction (hereinafter "DDC") with regard to the replacement of water main lines along Richmond Terrace at Emeric Court which occurred during 1999 and 2000.

THE CITY now moves for a second time for dismissal of the complaint against it and/or summary judgment, claiming that it is not liable for plaintiff's injuries because Administrative Code §7-210 legislatively shifted liability arising from a defective sidewalk from THE CITY to the owner of the abutting real property except in the case of one, two and three-family houses that are both owner-occupied (in whole or in part) and used exclusively for residential purposes (*see* New York City Administrative Code §7-210). According to THE CITY, the property in question is not owner-occupied since the owner, codefendant, DOMINIQUE GREEN, lives in Massachusetts and rents the property to a tenant. As a result of these facts, THE CITY now claims that it cannot be held liable for any condition existing on the sidewalk in front of 5 Emeric Court. For purposes of clarification, THE CITY also notes that since plaintiff fell when she stepped onto the sidewalk from the roadway, the defect which allegedly caused her to fall was not located along the curbline but rather the sidewalk itself, which is the sole responsibility of the codefendant.

Alternatively, THE CITY also contends that even if the accident occurred on the curbline, there was no prior written notice of the condition as required by §7-201 of the Administrative Code. In this respect, THE CITY has introduced evidence of a search of Department of Environmental Protection ("DEP") and Department of Transportation ("DOT") records, as well as a copy of the Big Apple Map. It is alleged that none reveal the presence of the claimed defect. Neither do they indicate that any work was performed at the subject location by THE CITY or any of its agencies which could have caused the claimed defect. Accordingly, THE CITY maintains that it cannot be held responsible for plaintiff's accident.

To the extent that THE CITY may be claimed to be liable for negligence in either causing or creating the defect in question, it asserts that any such claim can only be based on pure speculation. In support, THE CITY has introduced proof of a 10-year search of DEP records for that

particular location, none of which contain any record of the removal of a fire hydrant from the site in question. In fact, the only record found was that of a repair order for a fire hydrant located across the street from where plaintiff claims to have fallen. According to THE CITY, these records prove that a fire hydrant had never been installed at the site of plaintiff's accident, and that the contrary EBT testimony of the non-party witness (Piscopo), is insufficient to raise a triable issue. In this regard, THE CITY notes that the witness conceded that he never saw the alleged fire hydrant being removed, and is ignorant of who may have done so.

Similarly, THE CITY maintains that a search of the records of its DOT for the two years prior to the date of plaintiff's accident contained no reference to any work performed by THE CITY at the subject location. In addition, a search of the records of THE CITY's DDC (Department of Design and Construction) relating to the 1999-2000 water main project on Richmond Terrace ("RED-352") failed to indicate that the work relating thereto involved any such activity. In fact, pictures of the location found in the DDC's file are said to confirm THE CITY's position that there was never a fire hydrant at the subject location at any time relevant to this lawsuit. Thus, there is claimed to be a total lack of evidence indicating that the allegedly defective sidewalk was the immediate result of any work done by THE CITY as a result of the water main repair project, which was, in any event, completed approximately four years prior to the date of plaintiff's fall. In opposition, plaintiff argues that this Court already denied a CITY's motion for summary judgment in 2009 based on the existence of factual issues. According to plaintiff, THE CITY should not be permitted to submit a second motion for summary judgment based on the same set of facts and contentions as those previously presented in its attempt to prove that it neither caused or created the purported defect. Plaintiff contends that none of the proof submitted by THE CITY on the current motion is materially different from the proof submitted in its prior motion, which was denied following this

Court's determination of the existence of triable factual issues with regard to the prior existence of a fire hydrant at the location where plaintiff fell. According to plaintiff, the current motion is also based on the same legal arguments, *i.e.,* that THE CITY did not cause or create the condition; that it lacked prior written notice of any claimed defective condition existing on the sidewalk; and that the inconsistencies between the affidavit of the non-party witness and his subsequent EBT testimony renders his account unreliable and devoid of probative value.

Proceeding to the merits of THE CITY's motion, plaintiff further contends that the DDC records of the replacement of water main along Richmond Terrace in 1999-2000 also includes photographs of the subject location which clearly shows a depression filled with broken-up cement on the eastern edge of the apron leading into Emeric Court, which is precisely the spot where plaintiff fell. According to plaintiff, these photographs positively confirm the existence of a defect, and establish notice to THE CITY.

In addition, plaintiff points to the EBT testimony of non-party witness Dominic Piscopo, who has lived in the neighborhood where the accident occurred since 1979, and testified that he was very familiar with the subject location. According to this witness, a fire hydrant was present at the subject location when he first came to reside in the neighborhood, but it was removed some time later, when the driveway cutout for Emeric Court was being laid and the fire hydrant on the sidewalk was found to present an obstruction. He further stated that an unfilled hole was left in the concrete when the fire hydrant was installed farther down Richmond Terrace. Although admittedly unclear with regard to the specific time periods involved, plaintiff contends that the testimony of this witness on all of the salient issues is firm; to wit: that the removal of the fire hydrant created a hole in the sidewalk that was never filled- in or otherwise remediated.

In her opposition papers, defendant DOMINIQUE GREEN, the homeowner, contends that

THE CITY's motion should be denied because the annexed photographs marked as exhibits during depositions clearly establish that the sidewalk defect depicted therein also encompasses the curb and portions of the street. According to this defendant, such a defect is outside the protection of §§7-201 and 7-210 of the Administrative Code.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of its entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* Alvarez v. Prospect Hosp., 68 NY2d 320, 324). Once such a showing has been made, the burden shifts to the party opposing the motion to tender evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which would require a trial (*see* Zuckerman v. City of New York, 49 NY2d 557). Accordingly, the function of the court on such a motion is issue-finding rather than issue-determination (*see* Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395). Given the drastic nature of the remedy, it has also been stated that summary judgment should not be granted whenever there is any doubt as to the existence of a triable issue (see Rotuba Extruders v. Ceppos, 46 NY2d 223, 231).

On the procedural issue raised by plaintiff, the law is clear that multiple summary judgment motions in the same action are to be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause (*see* 2009 85th Street Corp. v. WHCS Real Estate Ltd. Partnership, 292 AD2d 520). Here, THE CITY has failed to show that the evidence now proffered by it is newly discovered. Neither has it shown sufficient cause why a second motion should be entertained. The DDC records submitted by THE CITY are not "new", as they are maintained by THE CITY and were under its exclusive control when THE CITY first moved for summary judgment. Hence, they should not now be admitted in support of the same arguments previously presented (*cf.* CPLR 2221[d][2];

Pro Brokerage v. Home Ins. Co., 99 AD2d 971). While THE CITY attempts to argue that these records confirm the lack of a fire hydrant at the subject location when the water main project was completed, that fact still does not excuse THE CITY's failure to produce them on the prior motion. Moreover, these records are not only not newly discovered but fail to contain any new facts. Their sole function is to serve as additional proof of THE CITY's main contention, *i.e.*, that there was no fire hydrant at the subject location some four years previous. However, they also confirm the existence of certain defects in the street, curb and sidewalk existing since 1999-2000. Finally, to the extent that the above photographs are purported to contradict the deposition testimony of plaintiff's independent witness, they merely serve to heighten the identical factual dispute which compelled denial of THE CITY's prior motion. In this regard, it must be noted that any alleged inconsistencies in the EBT testimony of plaintiff's non-party witness and his prior affidavit merely raise an issue of credibility which is not properly before the Court on a motion for summary judgment (*see* Missan v. Schoenfeld, 95 AD2d 198, 207).

The Court passes upon no further issue.

Accordingly, it is

ORDERED that the motion is denied.

E N T E R,

/s/
Hon. Thomas P. Aliotta,
J.S.C.

Dated: May 26, 2011

SANDER v. GREEN, et al.