

Fong v City of New York
2011 NY Slip Op 31995(U)
July 7, 2011
Supreme Court, New York County
Docket Number: 109939/2006
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.

PART 5

Index Number : 109939/2006

FONG, PHILIP

vs

CITY OF NEW YORK

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL #43

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

PAPERS NUMBERED

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

_____ 1

Answering Affidavits — Exhibits _____

_____ 2

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, It is ordered that this motion

JUL 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/7/11 _____

JUL 07 2011

3
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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
PHILLIP FONG AND LEE FONG,

Plaintiffs,

-against-

Index No. 109939/06

Argued: 4/26/11
Motion Seq. No.: 003
Calendar No.: 43

DECISION & ORDER

CITY OF NEW YORK, 125 WEST 31ST STREET
ASSOCIATES, INC., SIDNEY FETNER ASSOCIATED,
INC., THE DURST ORGANIZATION INC., GOTHAM
CONSTRUCTION COMPANY, LLC and REGIONAL
SCAFFOLDING & HOISTING CO. INC.,

Defendants.

-----X
125 WEST 31ST STREET ASSOCIATES, INC., SIDNEY
FETNER ASSOCIATED, INC., THE DURST
ORGANIZATION INC., GOTHAM CONSTRUCTION
COMPANY, LLC and REGIONAL SCAFFOLDING
& HOISTING CO. INC.,

Third-Party Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,

Third-Party Defendant.

-----X
BARBARA JAFFE, JSC:

For plaintiff:

Deborah Diorio, Esq.
Jacoby & Meyers, LLP.
1279 Route 300
P.O. Box 1111
Newburgh, NY 12551

For defendant City:

Lynn M. Leopold, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-442-0398

For co-defendants/third-party plaintiffs:

William C. Mahlan, Jr., Esq.
Jones Hirsch Connors & Bull, PC
One Battery Park Plaza, 28th floor
New York, NY 10004
212-527-1000

By notice of motion dated January 11, 2011, defendant City moves pursuant to CPLR
3212 for an order granting it summary judgment on defendants' cross claim against it and/or

FILED

JUL 18 2011

NEW YORK
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Index No. 590210/08

pursuant to CPLR 3211 for an order dismissing the complaint and all cross claims against it.

Co-defendants oppose the motion; plaintiff does not oppose.

I. BACKGROUND

On December 22, 2005, while walking on the sidewalk approximately 350 feet west of the southwest corner of West 32nd Street and Sixth Avenue in New York City, plaintiff allegedly tripped and fell on plywood boards on the sidewalk. (Affirmation of Lynn M. Leopold, ACC, dated Jan. 11, 2011 [Leopold Aff.], Exh. A).

On or about June 21, 2006, plaintiff served a summons and complaint on defendants. (*Id.*, Exh. B). On or about November 16, 2006, issue was joined with service of City's answer, in which City asserts cross-claims against co-defendants. (*Id.*, Exh. D).

On or about December 20, 2006, plaintiff served a bill of particulars specifying that he had fallen in front of a construction site at a building on West 32nd Street between Sixth and Seventh Avenues, known as 25 West 31st Street in Manhattan. (*Id.*, Exh. E).

At an examination before trial (EBT) held on December 18, 2007, plaintiff testified that he had fallen on the sidewalk on West 32nd Street between Sixth and Seventh Avenues. (*Id.*, Exh. I). Pictures of the location were offered as well. (*Id.*, Exh. J).

At an EBT held on August 22, 2008, City record searcher Nalik Ziegler testified that he had conducted a search for any permits, violations, contracts, complaints and repair orders issued during the two years before plaintiff's accident in connection with both sides of the street at West 32nd Street between Sixth and Seventh Avenues and located 45 permits only, none of which was issued to City, its agencies or contractors. (*Id.*, Exhs. K, L).

By affidavit dated April 8, 2010, David C. Atik, an attorney employed by City's Department of Finance, affirmed that his search of the notices of property values for records

relating to 125 West 31st Street revealed that on the date of plaintiff's accident, City did not own the property, and that the property was then classified as a parcel with one non-residential unit on it. (*Id.*, Exh. M).

On July 8, 2010, plaintiff and third-party defendant Con Ed signed a stipulation discontinuing, with prejudice, the action against City, so ordered by this court on October 26, 2010. (*Id.*, Exh F). Co-defendants declined to sign the stipulation and instead offered to sign it without prejudice to enable them to reinstate their cross claims against City in the event plaintiff testifies at trial that he fell on the curb and not the sidewalk, thereby rendering City liable. (Affirmation of William C. Mahlan, Jr., Esq, dated Feb. 23, 2011 [Mahlan Aff.]).

At a compliance conference held on October 26, 2010, plaintiff and defendants agreed that the only claims remaining against City are co-defendants' cross claims for indemnification by, or apportionment of, responsibility against City (*Id.*, Exh. H).

II. CONTENTIONS

City disclaims liability for plaintiff's alleged injuries on the ground that it has demonstrated that it does not own the property in issue, and asks that sanctions in the forms of costs and disbursements be paid by co-defendants in light of their frivolous reason for refusing to sign the stipulation of discontinuance. (Leopold Aff.).

In opposition to City's application for sanctions, co-defendants justify their refusal to discontinue their cross claim against City with prejudice, relying on plaintiff's failure to specify where and why he fell and observing that the plywood boards which appear in the photographs admitted in evidence at plaintiff's EBT run across the sidewalk and curb line, thereby permitting an inference that he fell on the boards on the curb, for which City is liable. They also seek an order dismissing the complaint, claiming that plaintiff has not set forth a *prima facie* case of

negligence. (Mahlan Aff.). Absent the filing of a cross-motion for a dismissal, I do not consider this request.

III. ANALYSIS

A. Summary judgment

The party seeking summary judgment must show *prima facie* entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

Pursuant to New York City Administrative Code § 7-201(c)(2), no civil action may be maintained against City arising from a dangerous or defective condition on a sidewalk unless the plaintiff demonstrates that City received written notice. Whereas the plaintiff bears the burden of establishing at trial that City had written notice (*Katz v City of New York*, 87 NY2d 241, 243 [1995]), he bears no such burden at the pleading stage. Rather, City, as movant, must establish an absence of written notice. (*McNeill v City of New York*, 40 AD3d 823, 824 [2d Dept 2007]). “[P]rior written notice of a defect is a condition precedent which [a party] is required to plead and prove to maintain an action against the City.” (*Katz*, 87 NY2d 241, 243).

Where City establishes an absence of prior written notice of a defect, the burden shifts to the plaintiff to demonstrate that an exception applies, either that City affirmatively created the defect through an act of negligence, which requires a showing that work performed by City

immediately resulted in the existence of the defect, or that it made a special use of the place where the defect was located. (*Yarborough v City of New York*, 10 NY3d 726 [2008]).

Here, co-defendants oppose dismissal solely on the ground that the accident may not have occurred on the sidewalk but offer no evidence in support beyond instances in plaintiff's EBT where he expressed confusion over how he fell. As plaintiff testified that he fell on the sidewalk, the presence of plywood boards on both the sidewalk and the curb does not constitute evidence that he fell at the curb and not the sidewalk.

Moreover, co-defendants offer no evidence that City may have created the defect by negligently permitting plywood to lie across the curb on West 32nd Street, again relying on the mere possibility that facts might emerge at trial establishing that plaintiff fell on the curb. (*See Pena v City of Yonkers*, 82 AD3d 728 [2d Dept 2011] [plaintiff, who fell on piece of metal protruding from sidewalk, failed to raise triable issue as she only offered speculation that defendant created defect]; *Regan v City of New York*, 8 AD3d 462 [2d Dept 2004] [plaintiff's speculative and conclusory allegation insufficient to establish triable issue related to his allegation that City created hole in sidewalk]).

B. Costs and sanctions

A court may award costs or impose sanctions upon a party or attorney if the party or attorney engages in frivolous conduct, which is defined as conduct completely without merit in law or in fact and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, conduct undertaken primarily to delay or prolong the case, to harass or maliciously injure another, or asserting material facts that are false. (22 NYCRR 130-1.1[c][2]).

In the instant case, City has established, *prima facie*, that it is not liable for plaintiff's

injuries and it successfully negotiated a stipulation of discontinuance with plaintiff and third-party defendant Con Ed and co-defendants offer only conjecture in opposition. That plaintiff does not recall everything leading to his fall does not justify co-defendants' refusal to discontinue against City with prejudice. Consequently, absent a good faith basis for their opposition to City's motion, it is appropriate to award costs.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint is hereby dismissed as against defendant City of New York, and the Clerk is directed to enter judgment in favor of said defendant; it is further

ORDERED, that defendant City of New York's request that the court award it costs and disbursements pursuant to 22 NYCRR 130-1.1 is granted to the extent that co-defendants shall pay the costs incurred by defendant City's in filing the instant motion to dismiss; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City trial waiting list and remove it from the Part 5 inventory.

ENTER:

FILED



Barbara Jaffe, JSC

JUL 18 2011

DATED: July 7, 2011
New York, New York

NEW YORK
COUNTY CLERK'S OFFICE
BARBARA JAFFE
J.S.C.

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