

Samuel v City of New York

2011 NY Slip Op 32067(U)

July 22, 2011

Supreme Court, New York County

Docket Number: 104903/2003

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 : 104903/2003
SAMUEL, MARIE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
CAL # 91

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for summary judgment

PAPERS NUMBERED

1

2

3

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

JUL 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/22/11
JUL 22/11

[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
MARIE SAMUEL,

Plaintiff,

-against-

Index No.: 104903/03

Mot. Date: 5/24/11

Mot. Seq. Nos.: 001,

DECISION AND ORDER

THE CITY OF NEW YORK, and THE PORT AUTHORITY
OF NEW YORK AND NEW JERSEY,

Defendants.

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

FILED

JUL 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

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By notice of motion dated December 28, 2010, defendant The Port Authority of New York and New Jersey (Port Authority) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes.

By notice of motion dated January 3, 2011, City moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff and Port Authority oppose.

The motions are consolidated for decision.

I. BACKGROUND

On March 28, 2002, plaintiff was allegedly injured when, while walking along the sidewalk in front of the Port Authority Bus Terminal at the corner of West 42nd Street and Eighth Avenue in Manhattan, she tripped and fell as a result of a sidewalk defect. (Affirmation of Cheryl N. Alterman, Esq., dated Dec. 28, 2010 [Alterman Aff.], Exh. A).

On or about May 23 and 28, 2002 respectively, plaintiff served Port Authority and City with notices of claim. (*Id.*; Affirmation of Suzanne K. Colt, ACC, dated Jan. 3, 2011 [Colt Aff.], Exh. A).

On or about January 30, 2003, plaintiff served her summons and complaint on defendants, and on or about June 6, 2003 Port Authority served its answer. (Alterman Aff., Exhs. B, C). On or about April 10, 2003, City served its answer. (Colt Aff., Exh. C).

At an examination before trial (EBT) held on June 21, 2006, plaintiff testified that she fell after her foot became caught in a sidewalk grate. (Alterman Aff., Exh. E).

At an EBT held on January 5, 2007, John Colendenski, a maintenance supervisor employed by Port Authority, testified that the grate on which plaintiff allegedly fell was used to cover the ground around a tree which no longer exists, and that he did not know who was responsible for cleaning the grating or whether any Port Authority employee cleaned the area or was responsible for maintaining the trees in the sidewalk in front of the terminal. While part of his responsibilities included maintaining and repairing the sidewalk, he did not maintain or repair the grating or trees in the sidewalk, and was unaware of any accidents related to the sidewalk during the two years before plaintiff's accident or whether Port Authority performed any repairs to the sidewalk during that time. (*Id.*, Exh. G).

The same day, Cynthia Howard, an employee of the New York City Department of Transportation (DOT), testified at an EBT that DOT's search of its records for any permits, repairs orders, contracts, complaints, and violations related to the accident location for two years before plaintiff's accident yielded no relevant records. (Colt Aff., Exhs. F, G).

At an EBT held on November 14, 2007, Stacey Williams, another DOT employee,

testified that a second DOT search yielded two relevant permits, both issued to DaCosta Landscaping Cont. Corp. to perform work on tree pits, the protective cement pavers surrounding trees, between September 18, 2000 to November 22, 2000 and February 15, 2001 to June 20, 2001. (*Id.*, Exhs. I, J).

On June 23, 2009, William Steyer, an employee of City's Parks Department (Parks), testified at an EBT that a search of Parks' records reflected that no work was performed by Parks or any entity hired by it at the accident location during the two years preceding plaintiff's accident, and that if any complaints had been made about the grating, Parks would have conducted a field inspection. No records of complaints or inspections were found, and absent a complaint, Parks would not routinely inspect or maintain the grating. (*Id.*, Exh. K).

At an EBT held on June 24, 2009, Bernard D'Aleo, a Port Authority contracts administrator, testified that he was in charge of overseeing contractors that performed work at the terminal, that he never saw anyone working on the trees or grating in front of the terminal, and that while Port Authority had a contract with a cleaning company to clean the sidewalk in front of the building, the contractor's duties did not include maintaining the trees or grating. Rather, if there was a problem with the sidewalk, a Port Authority employee would repair it, although D'Aleo did not know if any repairs were made before plaintiff's accident. However, Port Authority would not repair the gratings as they were not part of the sidewalk and not on Port Authority property. D'Aleo also denied that Port Authority repaired the instant grating and had no knowledge as to whether Port Authority received any notice from City about defects associated with or any complaints about the grating. (Alterman Aff., Exh. I).

By affidavit dated December 15, 2010, Paul Gembara, the Principal Property Specialist in

the Property Records/Legal Graphics Group of the Port Authority's Law Department, states that the grating on which plaintiff fell was not owned by Port Authority and was located outside of its property line. (*Id.*, Exh. J).

By affidavit dated December 22, 2010, Jorge Reyes, the General Operations Supervisor for the Port Authority at the bus terminal, states that he performed a fruitless search for complaints, maintenance and repair records, and prior accidents for the accident location for the two years prior to and including the date of the accident. (*Id.*, Exh. K).

By affidavit dated December 29, 2010, Maria Fiorella Trimble, a Parks Department employee, states that a two-year search for Parks' records of the planting of trees reflects that one tree was planted in front of 349 West 42nd Street pursuant to a contract between Parks and DaCosta Landscaping Corp. (Colt Aff., Exh. L).

II. PORT AUTHORITY'S MOTION

A. Contentions

Port Authority denies owning, operating, maintaining or controlling the grating on which plaintiff allegedly fell, or that it created any defective condition related to the grating or made a special use of it. It thus argues that it owed no duty to plaintiff and may not be held liable here. (Alterman Aff.).

Plaintiff maintains that triable issues remain as to whether Port Authority created the defective condition of the grating or negligently repaired it. (Affirmation of George D. Silva, Esq., dated Mar. 22, 2011 [Silva Aff.]).

In reply, Port Authority contends that plaintiff fails to offer any evidence showing that it owned, operated, maintained and/or controlled the grating or created any defect associated with

it, and denies that it made any repairs to the grating or had actual or constructive notice of any defect. (Reply Affirmation, dated Apr. 5, 2011).

B. Analysis

It is undisputed that City has the duty of maintaining public streets and roadways in a reasonably safe condition. (*Kiernan v Thompson*, 73 NY2d 840 [1988]). Moreover, generally and at a common law, only a municipality is responsible for maintaining public sidewalks. (*D'Ambrosio v City of New York*, 55 NY2d 454 [1982]; *Montalvo v Western Estates, Ltd.*, 240 AD2d 45 [1st Dept 1998]). Although the New York City Administrative Code was amended by shifting tort liability for a failure to maintain a sidewalk from City to abutting landowners, it became effective after the accident in issue here. (Administrative Code § 7-210 [the Sidewalk Law], eff. Sept. 14, 2003]).

As plaintiff's accident occurred in 2002, Port Authority may be held liable only if it created the defect which allegedly caused the accident or made special use of the sidewalk. (*Rodriguez v City of New York*, 48 AD3d 298 [1st Dept 2008]; *Weiskopf v City of New York*, 5 AD3d 202 [1st Dept 2004]).

Here, Port Authority established through the deposition testimony and affidavits of its employees that it neither created the defect nor made special use of the grating in the sidewalk. In response, plaintiff only speculates that Port Authority created the defect or negligently repaired the grating, which is insufficient to defeat Port Authority's *prima facie* showing. (*See Nuesi v City of New York*, 205 AD2d 370 [1st Dept 1994] [owner submitted proof that it made no pre-accident repairs to sidewalk, and plaintiff's mere speculation insufficient to defeat summary judgment]).

III. CITY'S MOTION

A. Contentions

City denies having had prior written notice of any defect related to the grating, or having caused or created any defective condition. (Colt Aff.). In opposition, plaintiff contends that triable issues remain as to whether City created the defect. (Silva Aff.).

Port Authority argues that City may be held liable for any defects in a sidewalk, including the grating at issue, and that there exist triable issues as to whether City created the defect, although it concedes that City had no prior written notice of the defective condition. (Affirmation of Cheryl N. Alterman, Esq., dated Feb. 14, 2011).

In reply, City asserts that there is no evidence that it created the defect absent proof that City or its contractors performed any work on the grating prior to plaintiff's accident. (Reply Affirmation, dated Mar. 31, 2011).

B. Analysis

Where City establishes a lack 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, as plaintiff concedes that City had no prior written notice of the defect and absent any evidence that City or any contractor hired by it performed any work on the grating before plaintiff's accident, City has established, *prima facie*, that it may not be held liable here. In opposition, plaintiff fails to submit any proof, beyond counsel's speculation, that City performed

any work at the location, or that its work was defective or immediately resulted in the defect. (See *Kiszenik v Town of Huntington*, 70 AD3d 1007 [2d Dept 2010] [plaintiff submitted no evidence that defendant's work was performed defectively or that it resulted immediately in creation of defect]; *Ghin v City of New York*, 76 AD3d 409 [1st Dept 2010] [dismissing claim as jury could only by speculation find that dangerous sidewalk condition resulted immediately from City's actions]; *Kruszka v City of New York*, 29 AD3d 742 [2d Dept 2006] [plaintiff's speculation that City's work caused defect insufficient to raise triable issue]; *Regan v City of New York*, 8 AD3d 462 [2d Dept 2004] [plaintiff's speculative and conclusory allegations failed to raise triable issue as to whether City created hole in sidewalk]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant The Port Authority of New York and New Jersey's motion to dismiss the complaint against it is granted and the complaint is hereby dismissed, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

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

FILED

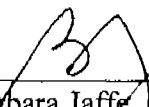
JUL 27 2011

NEW YORK
COUNTY CLERK'S OFFICE
New York, New York

DATED:

July 22, 2011

ENTER:


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

JUL 22 2011