

Castillo v Hurston Place Hous. Dev. Fund Corp.

2011 NY Slip Op 32707(U)

October 14, 2011

Supreme Court, New York County

Docket Number: 105840/10

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 : 105840/2010
CASTILLO, MAYRA
VS.
HURSTON PLACE HOUSING
SEQUENCE NUMBER : 001
DISMISS

CAL #27

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for dismiss

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

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/14/11
OCT 14 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
MAYRA CASTILLO,

Plaintiff,

-against-

Index No. 105840/10

Motion Subm.: 8/2/11
Motion Seq. No.: 001

DECISION & ORDER

HURSTON PLACE HOUSING DEVELOPMENT
FUND CORPORATION, NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION
& DEVELOPMENT AND CITY OF NEW YORK,

Defendants.

-----X
BARBARA JAFFE, JSC:

FILED

OCT 19 2011

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For plaintiff:
Matthew A. Taub, Esq.
The Taub Law Firm, P.C.
14 Penn Plaza, Ste. 2105
225 W. 34th St.
New York, NY 10122
646-484-5020

For City/NYCHPD:
Annica Sunner, Esq.
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007-2601
212-227-3365

By notice of motion dated April 19, 2011, defendants City of New York and New York City Department of Housing Preservation and Development (City, collectively) move pursuant to CPLR 3211(a)(7) and/or 3212 for an order dismissing the complaint and all cross claims against them. Plaintiff opposes and, by notice of cross motion dated May 12, 2011 and submitted without opposition, moves pursuant to CPLR 305 and 3025 for an order granting her leave to file an amended complaint naming A. Aleem Construction Inc. (Aleem) as an additional defendant.

I. BACKGROUND

On February 17, 2010, plaintiff was allegedly injured when she slipped and fell on a layer of ice on the sidewalk in front of 272 West 154th Street, otherwise known as 2906 Frederick Douglass Boulevard, in Manhattan (the premises). (Affirmation of Annica Sunner, ACC, dated

Apr. 19, 2011 [Sunner Aff.], Exh. A).

On or about February 24, 2010, plaintiff served City with her notice of claim, and on or about April 24, 2010 with her summons and complaint. (*Id.*, Exhs. A, B). On or about May 28, 2010, City served its answer. (*Id.*, Exh. C).

At an examination before trial held on May 17, 2010, plaintiff testified that days before her accident, snow had begun to fall and stopped falling one day before the accident, that on the day of her accident, while walking on the sidewalk in front of the premises, she observed that snow was piled up on both sides of the sidewalk and that the ground was apparently clear but when she took a step forward, she slipped and fell. Upon touching the ground, she felt wetness and saw that the sidewalk was covered with a thin layer of shiny, transparent, clean, and smooth ice. She saw no sand or salt on the sidewalk. (*Id.*, Exh. E).

By affidavit dated July 1, 2010, Eddie Colon, an employee of City's Department of Sanitation (DOS), states that he fruitlessly searched DOS records for any removal of snow from the sidewalk on which plaintiff fell from February 3, 2010 to and including February 17, 2010 by any DOS employee or contractor hired by DOS. (*Id.*, Exh. F).

II. CITY'S MOTION TO DISMISS

A. Contentions

City argues that it may not be held liable for the allegedly defective sidewalk on which plaintiff slipped as it did not own the premises abutting the sidewalk, relying on a deed recorded on June 8, 2006 reflecting that as of April 5, 2006, defendant Hurston Place Housing Development Fund Corporation (Hurston) owned the premises, which are classified as a building class C7 apartment building. (Sunner Aff., Exh. G). City denies that it caused or created the icy

condition as it had undertaken no snow or ice removal efforts in the two weeks before plaintiff's accident, and submits certified climatological records which it asserts show that the ice on which plaintiff fell must have formed no earlier than February 15 or 16, 2010. (*Id.*, Exh. J).

Plaintiff maintains that City's motion is premature as depositions of all of the parties have not been completed, and that Hurston's ownership of the premises is not dispositive of whether City owed her a duty, relying on a Home Written Agreement between Hurston and City which, she claims, reflects that City was significantly involved with or controlled the premises. (Affirmation of Matthew A. Taub, Esq., dated May 12, 2011 [Taub Aff.], Exh. A). She thus contends that discovery is necessary to determine the nature and extent of City's involvement with the premises, as well as discovery from the proposed additional defendant, Aleem, which may reveal a connection between City and Aleem. (*Id.*).

In reply, City observes that it is undisputed that it did not own the premises, and that plaintiff failed to submit any evidence showing that City caused or created the icy condition and did not address its argument in that regard. It also denies that the Home Written Agreement gave it any control over the management or maintenance of the premises, or that it may be held liable even if it controlled the premises. (Reply Affirmation, dated July 14, 2011; Affidavit of Andrew Linder, dated July 14, 2011).

B. Analysis

1. Ownership

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 . . .”]). The failure to maintain a sidewalk includes the negligent failure to remove snow and ice from the sidewalk. (*Id.*). Therefore, after September 14, 2003, the effective date of the Sidewalk Law, the abutting property owner, not City, is generally liable for accidents caused by the failure to maintain a sidewalk. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, as City has established that it is not the abutting landowner and that the premises is not exempt, it has demonstrated, *prima facie*, that it may not be held liable for plaintiff’s injuries. (*See Nicoletti v City of New York*, 77 AD3d 715 [2d Dept 2010] [City established *prima facie* entitlement to dismissal by showing that plaintiff fell on snow and ice on sidewalk abutting property owned by another entity]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [dismissing action against City as plaintiff fell on icy sidewalk abutting property owned by corporate entity and not exempt]; *see also Forbes v Aaron*, 81 AD3d 876 [2d Dept 2011] [as premises was four-family multiple dwelling, liability for defective sidewalk shifted from City to abutting premises owner]; *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]).

Plaintiff cites no authority for the proposition that City’s alleged control over the premises pursuant to the Home Written Agreement is sufficient to hold it liable here notwithstanding that it is not the premises owner, and in any event, nothing in the Agreement demonstrates that City retained control over the maintenance or management of the premises or

had any duty to remove snow or ice from the sidewalk abutting the premises.

Nor did plaintiff specify the discovery she seeks from defendants or Aleem. (CPLR 3212[f]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189 [1st Dept 2011] [defendant failed to set forth basis for claim that further discovery would lead to additional relevant evidence]; *IRB-Brasil Resseguros S.A. v Portobello Intern. Ltd.*, 84 AD3d 637 [1st Dept 2011] [“defendants did not demonstrate, however, that there was a likelihood that there is relevant evidence in [plaintiff’s] exclusive knowledge, that further discovery might reveal the existence of such evidence, or that they made a reasonable attempt, prior to the motion, to pursue other means of discovering the information now claimed to be necessary”]).

2. Cause or create

As City submits evidence showing that it undertook no snow or ice removal efforts in the two weeks preceding plaintiff’s accident, it has established, *prima facie*, that it did not cause or create the icy condition on the sidewalk. (See *Gumbs v Friedman & Simon*, 35 AD3d 362 [2d Dept 2006] [absent evidence that City had performed snow removal, plaintiff’s claim that City caused or created dangerous condition was speculative]; *Paula v City of New York*, 249 AD2d 100 [1st Dept 1998] [defendant had no duty to remove ice and snow from sidewalk and no evidence that defendant undertook snow removal efforts]).

Plaintiff neither argues nor proffers any evidence demonstrating that City had created the condition, thereby failing to show the existence of any triable issues as to City’s liability.

III. PLAINTIFF’S MOTION TO AMEND

Absent any opposition to plaintiff’s motion to add Aleem as an additional defendant, and as the motion is meritorious, it is granted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants City of New York and New York Department of Housing Preservation and Development's motion for summary judgment is granted and the complaint and any cross claims against them are dismissed with costs and disbursements to defendants 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. Plaintiff shall serve, within 20 days of the date of this order, a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; it is further

ORDERED, that plaintiff's cross motion to amend is granted, and the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; it is further

ORDERED, that a supplemental summons and amended complaint in the form annexed to the moving papers shall be served in accordance with the Civil Practice Law and Rules upon the proposed additional parties in this action within 30 days after service of a copy of this order with notice of entry; it is further

ORDERED, that upon said service, the action shall bear the following caption:

MAYRA CASTILLO,

Plaintiff,

- against -

HURSTON PLACE HOUSING DEVELOPMENT
FUND CORPORATION, NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION
& DEVELOPMENT, CITY OF NEW YORK, and
A. ALEEM CONSTRUCTION INC.,

Defendants.

And it is further

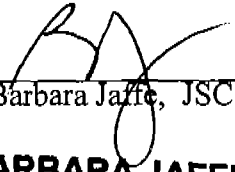
ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional parties.

FILED

ENTER:

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: October 14, 2011
New York, New York

OCT 14 2011