

Ryan v City of New York
2011 NY Slip Op 32785(U)
October 24, 2011
Supreme Court, New York County
Docket Number: 105620/07
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jaffe

PART 5

10/26/11
ee

Index Number : 105620/2007
RYAN, KATHLEEN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
VACATE

BARBARA JAFFE
J.S.C.

INDEX NO. 105620/07
MOTION DATE 8/2/11
MOTION SEQ. NO. 001
MOTION CAL. NO. 102

this motion to/for vacate / restore

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

OCT 26 2011

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Dated: 10/24/11

BARBARA JAFFE J.S.C.
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
KATHLEEN RYAN,

Plaintiff,

-against-

Index No. 105620/07

Argued: 8/2/11
Motion Seq. Nos.: 001
Motion Cal. Nos.: 102

DECISION AND ORDER

THE CITY OF NEW YORK,

Defendant.

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

For plaintiff:
Scott A. Wolinetz, Esq.
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212-962-1133

FILED
OCT 26 2011

For defendant:
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By notice of motion dated April 12, 2011, plaintiff moves for an order vacating the dismissal of her complaint and restoring the matter to the trial calendar pursuant to CPLR 3404 or, in the alternative, pursuant to CPLR 5015(a)(1). Defendant opposes.

I. BACKGROUND

On April 11, 2006, plaintiff tripped and fell on a defect in the sidewalk adjacent to 573-577 Third Avenue in Manhattan. (Affirmation of Scott A. Wolinetz, Esq., dated April 12, 2011 [Wolinetz Aff.], Exhs. A, B). On May 2, 2006, she served defendant with a notice of claim (*id.*, Exh. A), and on April 26, 2007, a summons and verified complaint, alleging that defendant was negligent in owning, maintaining, operating, and controlling the sidewalk on which she tripped and fell (*id.*, Exh. B). On June 11, 2007, City joined issue with service of its answer. (*Id.*, Exh. C).

At a deposition held on November 7, 2008, Michael Borio, a New York City Department of Transportation (DOT) Principal Administrative Assistant, testified that on July 31, 2007, he conducted a fruitless search of DOT records for the sidewalk and curb adjacent to 573-577 Third Avenue from April 11, 2004 to April 11, 2006. (Affirmation of Annette Bertulfo, ACC, in Opposition, dated May 13, 2011 [Bertulfo Opp. Aff.], Exh. C).

On December 10, 2008, plaintiff filed her note of issue, and on January 7, 2010, the parties signed a stipulation whereby they agreed that a last clear chance conference would be held on March 22, 2011, that absent a settlement, jury selection would commence on April 12, 2010, and that no adjournments would be granted. (*Id.*, Exh. B).

On July 9, 2009, as part of its response to a case scheduling order, defendant served plaintiff with a Big Apple Map which reflects that on the sidewalk in front of 573 and 575 Third Avenue there appears the symbol for an "extended section of raised or uneven sidewalk." (*Id.*, Exh. C).

On April 12, 2010, the parties appeared before a judicial hearing officer (JHO), and defendant informed plaintiff that it planned to move for dismissal of her complaint on the ground that it did not own the property on the date of the accident. (*Id.*). Plaintiff then sought an adjournment of the trial, which the JHO denied, and as plaintiff stated that she was not ready to proceed with jury selection, the JHO dismissed the complaint. (*Id.*).

On May 4, 2011, plaintiff served defendant with the instant motion, annexing thereto, *inter alia*, a copy of the Big Apple Map, a copy of a deed reflecting that the Socialist Republic of Romania obtained title to 573-577 Third Avenue on November 24, 1975, and a New York City Department of Finance (DOF) Recording and Endorsement Cover Page indicating same. (Wolinetz Aff., Exhs. E, F).

By affirmation dated May 9, 2011, David Atik, an attorney employed by the DOF, states that he conducted a search of the Real Property Assessment database, which includes ownership and building classification information, and determined that defendant did not own 573-577 Third Avenue on the date of the accident and that the building is classified as an elevator apartment building with 58 units. (Bertulfo Opp. Aff., Exh. A).

On May 16, 2011, defendant served plaintiff with its opposition, annexing thereto Atik's affirmation, the January 7, 2010 stipulation, Borio's deposition transcript, and a copy of the Big Apple Map. (*Id.*, Exhs. A, B, C).

On June 7, 2011, plaintiff served defendant with her reply. (Affirmation of Scott A. Wolinetz, Esq., in Reply, dated June 7, 2011 [Wolinetz Reply Aff.]).

II. CONTENTIONS

Plaintiff contends that the JHO wrongly dismissed her complaint pursuant to 22 NYCRR 202.27(b), and that the case should have instead been marked off the trial calendar pursuant to CPLR 3404. In any event, she maintains that the case should be restored pursuant to CPLR 5015(a), as she moved for same within a year and has both a meritorious claim and a reasonable excuse for failing to proceed. (Wolinetz Aff.). She also argues that the Big Apple Map demonstrates that defendant had prior written notice of the defect, and thus, may be held liable for her injuries, that it may also be held liable by virtue of the fact that Romania may be cloaked with immunity from suit pursuant to 28 USC § 1605(a)(5), and that she sought an adjournment of the trial date in order to permit defendant to move for dismissal, thereby attempting to preserve judicial resources. (*Id.*).

In opposition, defendant denies that plaintiff has a meritorious claim, as Atik's affirmation reflects that it did not own the property on the date of the accident and that it is not a

one-, two-, or three-family, owner-occupied building. It also relies on Borio's fruitless search of DOT's records which establish that it did not cause or create the defect, and the absence of authority for the proposition that City may be held liable where a property is owned by a foreign government. (Bertulfo Opp. Aff.). It claims that plaintiff sought its consent to an adjournment before informing him that it planned to move for dismissal, and thus, that plaintiff has failed to establish a reasonable excuse for her failure to proceed. (*Id.*) It moreover asserts that plaintiff has failed to demonstrate a lack of prejudice, as it has spent time and money preparing for trial, and it must do so again if her complaint is restored, and that plaintiff's refusal to proceed to jury selection despite the JHO's warning evidences an intent to abandon the matter. (*Id.*)

In reply, plaintiff notes that defendant does not address her arguments with respect to 22 NYCRR 202.27(b) or to the Big Apple Map, and she maintains that she sought an adjournment to promote judicial efficiency and that restoration of her complaint will not prejudice defendant. (Wolinetz Reply Aff.).

III. ANALYSIS

A. Propriety of dismissal

Pursuant to 22 NYCRR 202.27:

[a]t any scheduled call of calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

. . .

(b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or crossclaims. . . .

In *Community Network Service, Inc. v Verizon New York, Inc.*, the court held that dismissal pursuant to this section is "proper where, on the scheduled date of trial, plaintiff's counsel refused to select a jury." (48 AD3d 249, 250 [1st Dept 2008]). However, in *Vorontsova v*

Priolo, the trial court was held to have “improvidently exercised its discretion in sua sponte dismissing the action for failure to proceed to trial rather than marking it off the trial calendar[, as] . . . defendants had not moved for dismissal of the action, [] this was the first time plaintiff had sought an adjournment, which the parties had agreed to due to the unavailability of plaintiff’s expert, and [] both parties appeared at the calendar call,” and plaintiff demonstrated both a meritorious cause of action and a reasonable excuse for her failure to proceed. (61 AD3d 556 [1st Dept 2009]).

Here, while the parties appeared at the calendar call and defendant has not moved for an order dismissing the complaint, it did not agree to adjourn the matter and plaintiff has not demonstrated a meritorious cause of action. (*See infra*, III.B.1). Therefore, as in *Community Network Service*, plaintiff’s refusal to proceed with jury selection justifies the dismissal of her complaint.

B. Vacatur of dismissal

As a motion to vacate a dismissal pursuant to 22 NYCRR 202.27(b) is governed by CPLR 5015(a), the movant must demonstrate both a meritorious cause of action and a reasonable excuse for her failure to proceed to trial. (*Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]; *Acevedo v Navarro*, 22 AD3d 391 [1st Dept 2005]).

1. Meritorious cause of action

New York City Administrative Code § 7-210(b) provides that:

the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition[, which] . . . shall include, but not be limited to, . . . the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, tow- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

And, section 7-210(c) provides that City may not be held liable for injuries caused by failure to maintain a sidewalk unless the property falls within the exception described in subsection b. However, City may be held liable for injuries caused by a sidewalk defect if it caused or created it through an affirmative act of negligence or put the sidewalk to special use. (*Adler v City of New York*, 52 AD3d 549 [2d Dept 2008]; *Faulk v City of New York*, 2007 NY Slip Op 51346[U], 16 Misc 3d 1108[A] [Sup Ct, Kings County July 10, 2007, Battaglia, J.]).

And, pursuant to 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 plaintiff demonstrates that it received written notice of the condition. The Big Apple Map, provided by the New York State Trial Lawyer's Association for the purpose of providing City with the written notice required by the Administrative Code, is admissible to prove prior written notice so long as the precise defect appears on the map. (*D'Onofrio v City of New York*, 11 NY3d 581 [2008]).

Pursuant to 28 USC §§ 1604 and 1605(a)(5), a foreign country is immune from suit in the United States unless, *inter alia*, the claim does not arise out of its performance of or failure to perform a discretionary function and is for money damages for personal injury, death, or damage to or loss of property.

Here, Atik's affirmation demonstrates that defendant did not own 573-577 Third Avenue on the date of the accident and that the building is not a one-, two-, or three-family, owner-occupied residence, thereby satisfying defendant's burden of proving, *prima facie*, that it may not be held liable for plaintiff's injuries, notwithstanding the existence of prior written notice rule. Moreover, to the extent that defendant may be held liable for causing or creating the defect through an affirmative act of negligence or by putting the sidewalk to a special use, the DOT

records reflect that defendant performed no repair work on the sidewalk during the two years prior to the accident, and plaintiff neither provides evidence to the contrary nor alleges that defendant put the sidewalk to a special use. And, as Administrative Code § 7-210 does not exempt defendant from its liability-shifting provisions where the building owner enjoys sovereign immunity, and absent authority to the contrary, plaintiff has failed to demonstrate a meritorious cause of action.

2. Reasonable excuse

Absent the demonstration of a meritorious cause of action, I need not consider whether plaintiff has set forth a reasonable excuse for her failure to proceed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to vacate the dismissal of her complaint and to restore it is denied.

ENTER:



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

DATED: October 24, 2011
New York, New York

FILED
OCT 26 2011
NEW YORK
COUNTY CLERK'S OFFICE