

Sehres v York 80 LLC
2011 NY Slip Op 32805(U)
September 14, 2011
Sup Ct, NY County
Docket Number: 108936/2010
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT:

PART 5

Index Number : 108936/2010

SEHRES, CAROLE

INDEX NO. 103114107

vs

YORK 80 LLC

MOTION DATE 6/28/11

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

MOTION CAL. NO. 91

CAL # 91

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

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

PAPERS NUMBERED

1,3

Answering Affidavits — Exhibits _____

2,4

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, It is ordered that this motion

SEP 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/14/11

SEP 14 2011


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
CAROLE SEHRES,

Plaintiff,

-against-

YORK 80 LLC AND CITY OF NEW YORK,

Defendants.
-----X

Index No. 108936/10

Argued: 6/28/11
Motion Seq. Nos.: 001
Motion Cal. Nos.: 91

DECISION AND ORDER

FILED

SEP 16 2011

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NEW YORK COUNTY CLERK'S OFFICE
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By notice of motion dated January 31, 2011, City moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it. Defendant York 80 LLC (York) opposes.

By notice of cross-motion dated March 9, 2011, plaintiff moves: (1) for an order compelling the deposition of York on a date and time certain, or in the alternative, precluding York from offering any evidence at the time of trial for failure to appear at said deposition; and (2) pursuant to CPLR 602 for an order consolidating the action with an action commenced under index number 103497/10. As York partially opposes on the ground that it has already appeared for deposition, the first branch of the cross-motion is moot absent any contention to the contrary.

I. BACKGROUND

On January 11, 2010, plaintiff tripped and fell on a portion of uneven sidewalk abutting a tree well in front of 1510 York Avenue in Manhattan. (Affirmation of Anthony Bila, ACC, dated

Jan. 31, 2011 [Bila Aff.], Exhs. A, B).

On March 17, 2010, plaintiff served City with a notice of claim wherein she described the particulars of her accident as follows:

The claim arose on January 11, 2010 at 1:45 p.m. at the sidewalk in front of 1510 York Avenue, New York County, on the sidewalk at a section of upraised, uneven sidewalk abutting or next to the tree well at said location, claimant was caused to trip and fall at said section at upraised sidewalk due to the negligence, recklessness and carelessness of the City of New York in the ownership, operation, control, repair and maintenance of its sidewalk and in failing to repair same.

(*Id.*, Exh. A)

The same day, plaintiff commenced an action under index number 103497/10 (first action) by filing a summons and complaint, asserting negligence claims against York arising out of her accident. (Affirmation of Thomas P. Markovits, Esq., dated March 9, 2011 [Markovits Aff.]). On April 20, 2010, York joined issue with service of its answer. (*Id.*).

On July 7, 2010, plaintiff commenced the instant action (second action) by filing a summons and complaint, asserting negligence claims against York and City arising out of her accident (Bila Aff., Exh. B), and on July 27, 2010 and February 12, 2011, respectively, City and York joined issue with service of their answers (*id.*, Exh. C; Markovits Aff.).

By affidavit dated December 2, 2010, David C. Atik, an employee of the City of New York Department of Finance (DOF) responsible for responding to information requests, stated that his search of DOF's Real Property Assessment Division database disclosed that City did not own 1510 York Avenue on January 11, 2010 and that the building is an apartment building with 26 units. (*Id.*, Exh. D).

By affidavit dated December 10, 2010, Abraham Lopez, a City of New York Department of Transportation (DOT) employee, stated that he searched DOT's records for "applications for

permits, permits, corrective action requests, notices of violation, inspections, complaints, maintenance/repair orders, sidewalk violations and contracts for the sidewalk located at 1510 York Avenue” for two years before and including January 11, 2010 and found no relevant records. (*Id.*, Exh. E).

At an examination before trial held on December 16, 2010 in connection with the first action, plaintiff testified that she tripped over an “uneven” portion of sidewalk and that she had first noticed this portion of sidewalk three years before her accident. (Affirmation of Elizabeth E. Malang, Esq. in Opposition to Motion for Summary Judgment [Malang Opp. Aff.], Exh. A). When presented with photographs of a raised portion of sidewalk abutting a guarded tree well in front of the subject address, plaintiff confirmed that she tripped over that portion. (*Id.*).

II. CROSS-MOTION TO CONSOLIDATE

A. Contentions

Plaintiff claims that the first and second action should be consolidated, as they involve the same plaintiff and accident, and consolidation will avoid duplication of discovery. (Markovits Aff.).

B. Analysis

Pursuant to CPLR 602(a), “[w]hen actions involving common questions of law or fact are pending before a court, the court, upon motion, may . . . order the actions consolidated.” Here, as both actions arose from the same accident and involve the same parties, they involve common questions of both law and fact.

III. MOTION FOR SUMMARY JUDGMENT

A. Contentions

City disclaims liability for plaintiff’s injuries, as she tripped and fell on a sidewalk

adjacent to property it does not own, the property is not an owner occupied one-, two-, or three-family home, there is no evidence that it caused or created the defect, and plaintiff does not allege that the sidewalk was being put to a special use. (Bila Aff.).

In opposition, York concedes that plaintiff fell on the sidewalk and argues that genuine issues of material fact exist as to whether City caused or created the defect, as the sidewalk defect could have been caused by the installation of the nearby tree well, and City offers evidence neither demonstrating that it did not repair the sidewalk during the third year preceding the accident nor establishing when the tree well was installed. (Malang Opp. Aff.). It also claims that City's motion is premature, as discovery has yet to be conducted and is necessary to determine whether installation of the tree well caused the defect. (*Id.*).

B. Analysis

A party seeking summary judgment must demonstrate, *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 that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A summary judgment motion may be denied as premature when "facts essential to justify opposition may exist but cannot then be stated." (CPLR 3212[f]). "This is especially so when the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." (*Gardner v Cason, Inc.*, 82 AD3d 930 [2d Dept 2011]; *James v Aircraft Serv. Intl.*

Group, 2011 NY Slip Op 4206 [2d Dept 2011]; *Nicholson v Bader*, 83 AD3d 802 [2d Dept 2011]; *see also Bartee v D & S Fire Protection Corp.*, 79 AD3d 508 [1st Dept 2010]).

Pursuant to New York City Administrative Code § 7-210(c), “notwithstanding any other provision of law, the city shall not be liable for any . . . personal injury . . . proximately caused by the failure to maintain sidewalks (other than 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) in a reasonably safe condition.” However, City may be held liable for such injuries if it caused or created the defect 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.]). As section 7-210 is strictly construed against City, tree wells are not considered part of the sidewalk for its purposes, and City may be held liable for injuries resulting from its failure to maintain them. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]).

Here, City offers admissible evidence demonstrating that it neither owned the subject property at the time of the accident nor that the property is an owner occupied one-, two-, or three-family residence. Absent dispute that plaintiff fell on the sidewalk, and not the tree well, City has demonstrated, *prima facie*, entitlement to summary judgment. (*See Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [City established *prima facie* entitlement to summary judgment by demonstrating that it neither owned property abutting sidewalk nor that property fell under exception to section 7-210]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [same]).

However, plaintiff offers admissible evidence demonstrating that the defect existed three years before the accident occurred. Although City provides evidence as to records related to the

subject sidewalk for the two years preceding the accident, as it has yet to be deposed, and as information regarding installation of the tree well and its repair work on the sidewalk three or more years before the accident is within its exclusive knowledge, its motion is premature. (See *Evangelista v Kambanis*, 74 AD3d 1278 [2d Dept 2010] [defendant’s summary judgment motion denied as premature where it had yet to be deposed and information regarding whether it had put sidewalk to special use or caused or created the defect within its exclusive knowledge]; *Adler*, 52 AD3d 549 [although City demonstrated prima facie entitlement to summary judgment, summary judgment premature, as “information may be within [] City’s exclusive knowledge as to whether it created the dangerous condition”]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s cross-motion to consolidate is granted and the above-captioned action is consolidated in this Court with Carole Sehres vs. York 80 LLC, Index No. 103497/10 under Index No. 103497/10, and the consolidated action shall bear the following caption:

CAROLE SEHRES,

Plaintiff,

- against -

YORK 80 LLC AND CITY OF NEW YORK,

Defendants.

And it is further

ORDERED, that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

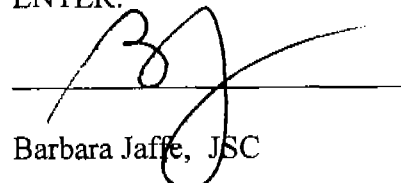
ORDERED, that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED, that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED, that plaintiff's motion for an order compelling the deposition of York on a date and time certain, or in the alternative, precluding York from offering any evidence at the time of trial for failure to appear at said deposition is denied as moot, and it is further

ORDERED, that defendant City of New York's motion for summary judgment is denied.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 14, 2011
New York, New York

SEP 14 2011

FILED

SEP 16 2011

NEW YORK
COUNTY CLERK'S OFFICE