

Taulo v City of New York

2011 NY Slip Op 32939(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 111238/08

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C. *Justice*

PART 5

Index Number : 111238/2008
TAULO, MICHAEL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT
CAL # 105

INDEX NO. 111238/08
MOTION DATE 8/16/11
MOTION SEQ. NO. 003
MOTION CAL. NO. 138

this motion to/for summary judgment

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

PAPERS NUMBERED
1
2
3

FILED

NOV 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

Dated: 11/3/11
NOV 03 2011

[Signature]
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.

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
MICHAEL TAULO,

Plaintiff,

- against -

Index No. 111238/08

Argued: 8/16/11
Motion Seq. No.: 003
Motion Cal. No.: 138

DECISION AND ORDER

THE CITY OF NEW YORK, 16 DUTCH HOUSING
DEVELOPMENT FUND CORP., and COASTAL
BUILDERS CORP.,

Defendants.
-----x

FILED

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BARBARA JAFFE, JSC:

For plaintiff:

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For 16 Dutch and Coastal:
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By notice of motion dated March 24, 2011, defendants 16 Dutch Housing Development Fund Corporation (16 Dutch) and Coastal Builders Corporation (Coastal) move pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against them. Plaintiff opposes.

I. BACKGROUND

On November 22, 2006, Fulton and Dutch Limited Partnership (Partnership) and Coastal executed an agreement whereby Coastal agreed to perform interior renovation work on a building owned by Partnership and located at 110 Fulton Street, New York, New York. (Affidavit of Sol Arker, dated March 23, 2011 [Arker Affid.], Exh. H).

On March 28, 2007, Partnership and 16 Dutch executed an agreement whereby they agreed that 16 Dutch would hold "legal or record title to the [building] on behalf of and as nominee of

[Partnership], and [Partnership] shall possess the entire equitable and beneficial ownership interest in interest to [the building]” (*Id.*, Exh. G).

On May 23, 2007, plaintiff was walking on the sidewalk adjacent to 110 Fulton Street when he tripped and fell, sustaining physical injuries. (*Id.*, Exh. A). On August 4, 2008, he served defendants City and 16 Dutch with a summons and verified complaint, alleging that they were negligent in their ownership, management, maintenance, repair, and control of the sidewalk adjacent to 110 Fulton Street. (*Id.*). On December 22, 2008, 16 Dutch joined issue with service of its answer. (*Id.*, Exh. B).

On October 10, 2008, plaintiff was examined pursuant to General Municipal Law (GML) § 50-h, testifying that he was walking on Fulton Street toward a subway station on Rector Street, intending to cross the street, when he tripped on “a piece of metal that was sticking out right on the curb” and fell toward the street. (*Id.*, Exh. D). He described the accident as follows: “there was a liquor store and that hole was right there [t]here was an – in the corner where I fell where the hole was, there was a dead end,” and when asked how he described the accident location to paramedics who treated him, he testified that he told them he “had fallen in a hole.” (*Id.*).

On May 6, 2010, plaintiff served defendants with an amended summons and verified complaint, adding Coastal as a defendant and alleging that it had caused or created the defect while performing work on the sidewalk adjacent to the building. (*Id.*, Exh. E). On July 15, 2010, Coastal joined issue with service of its answer. (*Id.*, Exh. F).

At a deposition held on September 17, 2010, plaintiff testified that the accident occurred after he “was caught with a piece of metal right on the corner,” and responded affirmatively when

asked whether it would be “accurate to say that the metal was in the sidewalk.” (*Id.*, Exh. J).

Plaintiff also described his accident as follows:

I was walking and I noticed that the location was like it had been hit with a hammer or something and then as I did walk, I didn't think there was going to be any problem. What I did not expect was that I was going to trip with metal that was coming out and I cut my foot and fall down.

(*Id.*). And, when presented of photographs of the corner on which he fell and asked to identify the “general area where the accident occurred,” which depict a sidewalk with an uneven, broken surface and an adjacent metal curb that, at points, extends vertically beyond the surface of the sidewalk, he drew a circle on the photograph encompassing a portion of the sidewalk, the metal curb, and the adjacent street. (*Id.*; Affirmation of Jeffrey T. Miller, Esq., in Reply, dated July 11, 2011 [Miller Reply Aff.], Exh. C).

At an examination before trial (EBT) held on December 8, 2010, Sol Arker, principal of Coastal, testified that Coastal subcontracted with AMK Contracting for the interior renovation work on 110 Fulton Street, that the work was performed over the course of seven or eight months “several years ago,” that no exterior work was performed, and that neither the curb nor the sidewalk adjacent to the building were repaired or replaced. (Arker Affid., Exh. I).

At an EBT held on June 6, 2011, Victor Green, a New York City Department of Transportation (DOT) Highway Inspection Quality Assurance (HIQA) Training Coordinator, testified that the HIQA inspects work performed on City sidewalks and streets “to maintain quality assurance” and that DOT is responsible for maintaining City curbs. (Miller Reply Aff., Exh. B). When presented with a permit issued to Coastal for work to be performed between May 2, 2007 and July 26, 2007, he testified that the permit reflects that the work was to be performed

in front of 110 Fulton Street, that the work was inspected twice, and that he cannot determine whether Coastal performed work on the street or the sidewalk. (*Id.*). When asked whether it may be determined from the permit whether work was being performed on the street at the time of inspection, he testified that “[i]n order for an inspector to have the result being pas[ed], they had to have seen something, some work that was pertaining to the permit.” (*Id.*). And, according to him, the defect in the sidewalk and/or the curb depicted in the photograph on which plaintiff circled the accident location resulted from “wear and tear,” not construction work. (*Id.*).

II. CONTENTIONS

Defendants 16 Dutch and Coastal disclaim liability for plaintiff’s injuries pursuant to New York City Administrative Code § 7-210, as he tripped and fell on a piece of metal protruding from the curb, not the sidewalk, and there is no evidence that they caused or created the defect on which he tripped or put the sidewalk to a special use. (Defs.’ Mem. of Law).

In opposition, plaintiff asserts that there are triable factual issues as to whether plaintiff tripped on the sidewalk or on the curb, as he testified during his GML § 50-h hearing that he tripped and fell after his right foot went into a hole in the sidewalk and came into contact with a piece of metal protruding from the sidewalk, and thus, that defendants may be liable for his injuries pursuant to Administrative Code § 7-210. (Affirmation of Claudia Behmoiram, Esq., in Opposition, dated June 3, 2011).

In reply, defendants maintain that there is no evidence that Coastal performed work on the subject sidewalk, as Green could not determine from the permit whether it performed work on the street or on the sidewalk, and he opined that the defect resulted from “wear and tear,” not construction work. (Miller Reply Aff.). Moreover, they claim that Green’s testimony that the

[* 6]

DOT is responsible for maintaining curbs demonstrates that 16 Dutch HDFC cannot be held liable for plaintiff's injuries pursuant to Administrative Code § 7-210. (*Id.*).

III. 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).

Pursuant to section Administrative Code § 7-210(b), the owner of real property abutting a sidewalk has the duty to “maintain such sidewalk in a reasonably safe condition” and is liable for injuries arising from its failure to do so. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]). However, as Administrative Code § 19-101(d) defines sidewalk as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians,” abutting real property owners are not obligated to maintain them. (*Ascencio v New York City Hous. Auth.*, 77 AD3d 592 [1st Dept 2010]; *Garris v City of New York*, 65 AD3d 953 [1st Dept 2009]).

Here, plaintiff's testimony regarding his accident is inconsistent. At his GML § 50-h hearing, he described his accident as occurring both after he had “fallen into a hole” and after he had tripped on a piece of metal protruding from the curb, whereas during his deposition he stated

that the piece of metal on which he tripped was in the sidewalk. Moreover, when asked to identify the location of his accident on the photograph of the street corner at issue, he circled both a portion of the sidewalk and the adjacent metal curb. Thus, triable factual issues exist as to whether plaintiff tripped on the sidewalk or on the curb, and defendants have failed to make a *prima facie* showing of entitlement to summary judgment pursuant to Administrative Code § 7-210(b).

As there are triable factual issues as to the location of plaintiff's accident, whether defendants caused or created the defect need not be determined.

IV. CONCLUSION

Accordingly, it is hereby


ORDERED, that defendants 16 Dutch Housing Development Fund Corporation and Coastal Builders Corporation's motion for summary judgment is denied.

FILED

ENTER:

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

DATED: November 3, 2011
New York, New York
NOV 03 2011