

Cruz v City of New York
2012 NY Slip Op 30045(U)
January 9, 2012
Supreme Court, New York County
Docket Number: 102762/09
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
PATRICIO CRUZ, as administrator of the estate of KIM
MURPHY,

Plaintiff,

-against-

Index No. 102762/09
Argued: 10/25/11
Motion seq. nos.: 003,
Cal. nos.: 38, "

DECISION AND ORDER

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF ENVIRONMENTAL PROTECTION, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, METRO
TRANSIT AUTHORITY, NEW YORK CITY HOUSING
AUTHORITY, CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., TRIUMPH CONSTRUCTION
CORP., and TIME WARNER NY CABLE, LLC, d/b/a TIME
WARNER CABLE OF NEW YORK CITY, LLC,

Defendants.

-----X
NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

-against-

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TIME WARNER NY CABLE, LLC, d/b/a TIME WARNER
CABLE OF NEW YORK CITY,

Third-Party Defendant.

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

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By notice of motion dated July 9, 2011, plaintiff moves pursuant to CPLR 3212 for an
order granting him summary judgment on the issue of liability against defendant/third-party

defendant Time Warner NY Cable, LLC (Time Warner). Time Warner opposes.

By notice of motion dated August 5, 2011, defendants City of New York and New York City Housing Authority (NYCHA) move pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiff's claims and all cross-claims against them. Time Warner opposes as to NYCHA.

I. BACKGROUND

On January 7, 2005, an individual who is not a party to the instant action tripped and fell on the sidewalk adjacent to the Polo Grounds Towers, a NYCHA-owned housing complex located at 2931 Eighth Avenue in Manhattan. (Affirmation of Shane M. Biffar, Esq., in Opposition, dated Sept. 16, 2011 [Biffar Opp. Aff.], Exh. D). Sometime thereafter, she commenced an action against NYCHA, and NYCHA commenced a third-party action against Time Warner. (*Id.*).

On April 8, 2008, decedent Kim Murphy tripped and fell on a portion of the same sidewalk adjacent to a Time Warner-owned rectangular metal plate. (Affirmation of Suzanne K. Colt, ACC, dated Aug. 9, 2011 [Colt Aff.], Exh. A).

On May 8, 2008, plaintiff served the municipal defendants with a notice of claim. (*Id.*).

At a General Municipal Law (GML) § 50-h hearing held on October 7, 2008, Murphy testified that her accident occurred when her right foot "fell" into a crevice approximately two inches wide "right next to" the metal plate. (*Id.*, Exh. D).

At a second GML § 50-h hearing held on October 21, 2008, Murphy again testified that her right foot went into a two-inch hole in the sidewalk, and when presented with a photograph of the sidewalk on which she fell, she circled a crack in the sidewalk adjacent to but some unspecified distance from the metal plate. (*Id.*, Exh. G, H).

On February 10, 2009, plaintiff commenced the instant action with the filing of a summons and complaint, asserting negligence claims against all defendants, except Time Warner, arising from their “ownership, operation, management, maintenance, supervision, repair, and control” of the sidewalk and plate. (*Id.*, Exh. B).

On March 24, 2009, NYCHA served Time Warner with a third-party summons and verified complaint, and on June 2, 2009, Time Warner joined issue with service of its answer. (*Id.*, Exh. E).

At a deposition held on November 5, 2010, plaintiff, Murphy’s widower, testified that he was walking in front of Murphy when she tripped and fell, that he did not see her fall, and that, sometime after the accident occurred, Murphy showed him the hole on which she tripped, which was approximately two inches deep and four inches wide. (*Id.*, Exh. I). When presented with a photograph of the subject sidewalk and asked to identify the hole, he circled a portion of the sidewalk immediately adjacent to the metal plate. (*Id.*, Exhs. I, J).

On or about December 13, 2010, plaintiff served Time Warner with a summons and complaint, asserting negligence claims against it on the basis of its ownership and maintenance of the metal plate, and on January 25, 2011, Time Warner joined issue with service of its answer. (Biffar Opp. Aff., Exhs. A, B). By so-ordered stipulation dated April 26, 2011, this action was consolidated with plaintiff’s 2009 action. (Affirmation of Paul G. Vesnaver, Esq., dated July 9, 2011 [Vesnaver Aff.], Exh. A).

II. CONTENTIONS

City disclaims liability on the ground that it does not own Polo Grounds Towers. (Colt Aff.). NYCHA disclaims liability on the ground that the hole in which Murphy tripped was

located within 12 inches of the metal plate, and thus, that Time Warner was responsible for its repair and is liable for plaintiff's injuries. (*Id.*). Plaintiff agrees that Time Warner is liable for his injuries, as the hole in which Murphy tripped was within 12 inches of the plate, and the 2005 accident provided it with actual notice of the defect. (*Vesnaver Aff.*).

In opposition, Time Warner contends that neither NYCHA nor plaintiff is entitled to summary judgment, as triable issues of fact exist as to the location of the hole, and thus, as to whether NYCHA or Time Warner may be held liable for plaintiff's injuries. (*Biffar Opp. Aff.*).

In reply, plaintiff denies that there exist triable factual issues as to whether the hole is within 12 inches of the metal plate. (*Affirmation of Victor A. Carr, Esq., in Reply, dated Sept. 21, 2011.*).

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).

To establish a *prima facie* case of negligence, a plaintiff must show duty, breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control, or

special use.” (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]).

Pursuant to section 7-210 of the New York City Administrative Code, and subject to certain exceptions not pertinent here, 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 34 RCNY 2-07(b)(1) provides that the “[t]he owners of covers or gratings on a street are responsible for monitoring [their] condition . . . and the area extending twelve inches outward from the perimeter of the hardware,” the owners of such hardware, not the abutting landowner, may be held liable for injuries caused by sidewalk defects within this area. (*Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]).

Here, as it is undisputed that NYCHA, not City, owns the Polo Grounds Towers, and absent any evidence of City’s control or special use of the sidewalk, City may not be held liable for plaintiff’s injuries. However, as the distance between the hole and the metal plate cannot be determined from viewing the photograph on which Murphy circled the hole, and plaintiff and Time Warner only speculate as to same, and as Murphy’s photographic identification of the hole differs from plaintiff’s, triable issues of fact exist as to whether it was located within the area of the sidewalk for which Time Warner is responsible. Therefore, neither NYCHA nor plaintiff are entitled to summary judgment.

In light of this determination, plaintiff’s contentions regarding the 2005 accident need not be considered.

IV. CONCLUSION

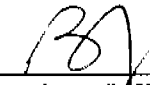
Accordingly, it is hereby

ORDERED, that defendants City of New York and New York City Housing Authority's motion for an order dismissing the complaint and all cross-claims against them is granted as to City of New York, and the complaint is hereby severed and dismissed in its entirety as against defendant City of New York with costs and disbursements to City of New York, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of City of New York; and it is further

ORDERED, that defendants City of New York and New York City Housing Authority's motion for an order dismissing the complaint and all cross-claims against them is denied as to New York City Housing Authority; and it is further

ORDERED, that plaintiff's motion for summary judgment on the issue of liability against Time Warner NY Cable, LLC is denied.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: January 9, 2012
New York, New York

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