

Gahr v T.L.S. New York Real Estate, LLC

2012 NY Slip Op 30613(U)

March 12, 2012

Sup Ct, NY County

Docket Number: 104532/08

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 : 104532/2008
GAHR, HERBERT M.
vs.
T.L.S. NEW YORK REAL ESTATE
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2, 3</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOUNTING LAW SECTION / ORDER
FILED
MAR 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/12/12
MAR 12 2012

Barbara Jaffe J.S.C.

1. CHECK ONE: CASE DISPOSED BARBARA JAFFE NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
HERBERT GAHR,

Index No. 104532/08

Plaintiff,

Motion Date: 11/29/11
Motion Seq. Nos.: 004,

-against-

DECISION AND ORDER

T.L.S. NEW YORK REAL ESTATE, LLC and 128
EAST 86th STREET ASSOCIATES, LLC,

Defendants.

-----X
T.L.S. NYC REAL ESTATE LLC,

Third-Party Index No. 590098/09

Third-Party Plaintiff,

-against-

FILED
MAR 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

THE CITY OF NEW YORK, B&T PIZZA,
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY and NEW YORK CITY
TRANSIT,

Third-Party Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiff:
David A. Kapelman, Esq.
3 W. 35th St.
New York, NY 10001
212-563-2010

For City:
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Michael A. Cardozo
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100 Church St., 4th Fl.
New York, NY 10007
212-442-6851

For T.L.S.:
Gregory D.V. Holmes, Esq.
Harris, King & Fodera
One Battery Park Plaza, 30th Fl.
New York, NY 10004
212-487-9701

For Associates:
Angela Lurie Milch, Esq.
Smith Mazure *et al.*
111 John St., 20th Fl.
New York, NY 10038-3198
212-964-7400

By notice of motion dated August 1, 2011, defendant City moves pursuant to CPLR 3212

and/or CPLR 3211(a)(7) for an order summarily dismissing the third-party complaint and all cross claims against it.

By notice of motion dated August 1, 2011, defendant/third-party plaintiff T.L.S NYC Real Estate, LLC (T.L.S.) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff and City oppose.

By notice of cross motion dated August 5, 2011, defendant 128 East 86th Street Associates, L.L.C. (Associates) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiff and City oppose the cross motion.

The motions are consolidated for decision.

I. BACKGROUND

On September 9, 2007, plaintiff was injured when he allegedly tripped and fell on a hole or depression or crack in the sidewalk and/or an uneven or raised part of the sidewalk located in front of premises located at 126 East 86th Street and 130 East 86th Street in Manhattan, 44 feet and 10 inches from the curb on Lexington Avenue, eight feet, three inches from the front of the newsstand located there, and two feet, five inches from the 86th Street curb. (Affirmation of Andrew Lucas, ACC, dated Aug. 1, 2011 [Lucas Aff.], Exh. A).

On or about March 28, 2008, plaintiff served defendants with his summons and complaint, and defendants thereafter served their answers. (*Id.*, Exh. A). Associates asserted a cross claim against T.L.S. for indemnification and/or contribution, while T.L.S. asserted a cross claim for indemnification against Associates. (Affirmation of Angela Lurie Milch, Esq., dated Aug. 16, 2011 [Milch Aug. Aff.], Exh. B).

On or about January 30, 2009, T.L.S. commenced the third-party action, and asserted a negligence claim against City based on City's alleged special use of the sidewalk. (Lucas Aff., Exh. B).

On January 9, 2009, plaintiff testified at an examination before trial (EBT) that his accident occurred in front of the newsstand when he tripped in a hole and/or crack in the sidewalk, causing him to fall. (Lucas Aff., Exh. E).

By response dated April 9, 2009, City produced the results of a sidewalk search for the location of East 86th Street between Lexington and Park Avenues for the two years before and including the date of plaintiff's accident, which yielded 12 permits, four inspections, and a Big Apple Map; none of the permits was issued to City or any City agencies. (*Id.*, Exh. G).

By decision and order dated November 16, 2009, the third-party complaint was dismissed against third-party defendants Manhattan and Bronx Surface Transit Operating Authority and the New York City Transit Authority. (Milch Aug. Aff., Exh. E).

On January 4, 2011, Marke Stemple testified at an EBT that in 2007 he managed T.L.S.'s property including the premises at 130 East 86th Street, that his duties included inspecting property and maintaining certain areas, and that he would inspect the premises every week or every other week by walking inside the building and observing the store-fronts located on the first floor of the building. He recalled no complaints about the sidewalk in front of the premises and never saw the hole or crack in the sidewalk in front of the newsstand, and he was unsure if the building superintendent ever received any complaints. (Milch Aug. Aff., Exh. I).

At an EBT held on January 7, 2011, Sergio A. Spodek, the managing agent for the premises located at 128 East 86th Street, testified that he did not remember noticing any problems

* 5]
with, nor did he receive any complaints about, the sidewalk in front of the premises. He did not recall if any repairs were made to the sidewalk before plaintiff's accident. (*Id.*, Exh. J).

By affidavit dated August 1, 2011, David Atik attests that a search of City's records for the owner of the premises located at 128 East 86th Street reflects that City was not the owner and that the property is classified as a Building Class C7 (walk-up apartments, over six families, with stores), and not a one-, two-, or three-family residential property. (*Id.*, Exh. H).

By affidavit dated August 1, 2011, Stemple states that the newsstand straddles the property lines of the premises at 128 and 130 East 86th Street, that T.L.S. hired no contractors to perform work on the sidewalk where plaintiff fell before his accident, nor did anyone employed by T.L.S. perform such work or make repairs or modifications to the sidewalk. He also denies that T.L.S. received any complaints about the sidewalk condition. (Affirmation of Gregory D.V. Holmes, Esq., dated Aug. 1, 2011 [Holmes Aug. Aff.], Exh. I.).

By affidavit dated August 8, 2011, Spodek attests that he fruitlessly searched Associates's records for sidewalk any repairs made by it or any complaints about it before plaintiff's accident, that he was not aware of the defect which caused plaintiff's fall as he never personally observed it, and that no tenants complained about it. (Affirmation of Angela Lurie Milch, Esq., dated Aug. 5, 2011 [Milch Aug. 5 Aff.], Exh. B).

II. CITY'S MOTION

A. Contentions

City argues that it may not be held liable to plaintiff pursuant to the Administrative Code of the City of New York § 7-210 of as it did not own the premises abutting the sidewalk where plaintiff fell, and as it neither caused not contributing to causing the dangerous condition on

which plaintiff tripped absent evidence that it performed any work at the location before plaintiff's accident. (Lucas Aff.).

Associates claims that City may be held liable as it made special use of the sidewalk by leasing space on the sidewalk to the newsstand at the location, and/or that triable issues remain as to City's special use. (Milch Aug. Aff.).

T.L.S. contends that City made special use of the sidewalk by permitting the erection of the newsstand on the sidewalk, retaining control of the newsstand by enforcing specific rules and regulations related to it, and leasing it to a third party to operate. (Affirmation of Gregory D.V. Holmes, Esq., dated Aug. 26, 2011).

In reply, City denies that it made special use of the sidewalk, asserts that even if it did, the leasing of the newsstand bears no relation to the hole and/or crack in the sidewalk on which plaintiff fell, and observes that Administrative Code § 7-210 does not exempt an abutting property owner from maintaining the area around a newsstand located in the sidewalk abutting its property. (Reply Affirmation, dated Oct. 13, 2011).

B. Analysis

Pursuant to 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 . . ."]). 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, City has established that it is not the abutting landowner and that the premises is not exempt. (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 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 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]).

In opposition, neither T.L.S. nor Associates cite any authority to support their arguments that City may be held liable if it made special use of the sidewalk in these circumstances, that City made special use of the sidewalk by leasing the newsstand or enforcing regulations related to newsstands, or that City's issuance of the lease made it responsible for any defects in the sidewalk located anywhere in the vicinity of the newsstand.

III. T.L.S.'S MOTION

A. Contentions

T.L.S. denies having caused or created the defect, or having made special use of the sidewalk, relying on Stemple's EBT testimony and affidavit, and also argues that it did not have to maintain the sidewalk as City made special use of it. (Holmes Aug. Aff.).

Plaintiff argues that T.L.S. failed to establish, *prima facie*, that it neither caused the defect, nor had actual or constructive notice of it. (Affirmation of David A. Kapelman, Esq., dated Oct. 18, 2011).

In reply, T.L.S. reiterates its prior arguments. (Reply Affirmation, dated Oct. 18, 2011).

B. Analysis

A defendant moving for summary judgment in a slip and fall case has the initial burden of establishing, *prima facie*, that it neither created the defective condition, nor had actual or constructive notice of it. (*Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]).

City's alleged special use of the sidewalk is addressed above (II.B), and it is not disputed that T.L.S.'s property abuts the sidewalk at issue and therefore may be held liable if it created the defect or had actual or constructive notice of it.

While T.L.S. may not have created or had actual notice of the defect (*see Early v Hilton Hotels Corp.*, 73 AD3d 559 [1st Dept 2010] [defendants established lack of actual notice through testimony of employee that he never saw dangerous condition on sidewalk prior to plaintiff's accident and no complaints were received]; *Burko v Friedland*, 62 AD3d 462 [1st Dept 2009] [defendants testified they had no knowledge of prior accidents, never saw defective condition on sidewalk, and made no alterations to sidewalk]), it has not established, *prima facie*, that it lacked constructive notice of it absent proof of when it last inspected the sidewalk or its regular inspection procedures (*see Jackson v Jamaica First Parking, LLC*, 91 AD3d 602 [2d Dept 2012] [defendant provided no evidence as to when it inspected sidewalk before accident]; *Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422 [1st Dept 2011] [abutting landowner failed to show

lack of actual or constructive notice of dangerous condition on abutting sidewalk absent affidavit or testimony based on personal knowledge as to when sidewalk or sidewalk's condition inspected before accident).

IV. ASSOCIATES'S MOTION

A. Contentions

Associates also contends that City made special use of the sidewalk by leasing the newsstand, thereby eliminating any duty Associates had to maintain it, and that it did not cause the defect as it made no repairs to the sidewalk before plaintiff's accident, relying on Spodek's testimony and affidavit. (Milch Aug. 5 Aff.).

Plaintiff denies that City made special use of the sidewalk, and asserts that Associates failed to demonstrate, *prima facie*, that it may not be held liable absent proof that it did not have constructive notice of the defect. (Affirmation of David A. Kapelman, Esq., dated Sept. 22, 2011).

B. Analysis

Based on the same analysis above (III.B), even if Associates demonstrated that it did not create or have actual notice of the defect, it failed to show, *prima facie*, that it lacked constructive notice of it.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the third-party complaint and cross claims against it are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of

costs, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that defendant/third-party plaintiff T.L.S NYC Real Estate, LLC's motion for summary judgment is denied; and it is further

ORDERED, that defendant 128 East 86th Street Associates, L.L.C.'s motion for summary judgment is denied.

ENTER:


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 12, 2012
New York, New York

MAR 12 2012

FILED

MAR 13 2012

NEW YORK
COUNTY CLERK'S OFFICE