Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Derek Lowe,

Plaintiff,

- against -

Pickwal Bay Towers West, Inc., Bay Towers Company, a limited partnership, Bay Towers Limited Partnership, The City of New York, and The City of New York Bureau of Sewers,

Defendant.

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Index Number: 22973/10

Motion Date: 10/9/12

Motion Cal. Number: 7

Motion Seq. No.: 1

The following papers numbered 1 to 11 read on this motion by defendants, Pickwal Bay Towers West, Inc., Bay Towers Company, a limited partnership, Bay Towers Limited Partnership (collectively, Bay Towers), for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Affirmation in Opposition(City).....	8-9
Reply.....	10-11

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Bay Towers for summary judgment dismissing the complaint and all cross-claims against them is denied.

In order to obtain summary judgment, movants must make a prima facie showing that they are entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Bay Towers have failed to meet their burden.

Plaintiff allegedly sustained injuries as a result of stepping into a hole in the sidewalk abutting the premises owned by Bay Towers at 319 Beach 98th Street in Queens County as he exited his parked vehicle on June 13, 2009. The photographs annexed to the

moving papers as Exhibit "E" show a large section of the sidewalk flag abutting the curbside sewer catch basin that is broken and missing, forming a large hole in the sidewalk.

A property owner or lessee is not liable for repairing and maintaining abutting public property unless it actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges it with the responsibility to repair and maintain the public property and specifically imposes liability upon it for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The New York City Administrative Code §19-152 places the duty to repair sidewalks upon the abutting property owners and lessees, and §7-210 specifically imposes liability upon abutting property owners and lessees for any injuries resulting from their breach of that duty. The term "sidewalk" is defined in §19-101(d) of the Administrative Code 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" (emphasis added).

It is undisputed that the hole into which plaintiff allegedly stepped into was on the sidewalk abutting Bay Towers' premises.

Bay Towers move for summary judgment upon the grounds that 1) the subject condition was open and obvious, 2)that Bay Towers did not have actual or constructive notice of the condition, 3)that there is no evidence that Bay Towers created the condition and 4) that plaintiff's own misconduct bars his action as a matter of law.

The question of whether a condition is open and obvious merely goes to the issue of comparative negligence (see Cupo v Karfunkel, 1 AD 3d 48 [2nd Dept 2003]). A defendant would be entitled to summary judgment upon the ground that the condition was open and obvious only if it were also established that the defendant did not have a duty to warn of the condition and that the condition was not inherently dangerous as a matter of law (see id.; Rivas-Chirino v Wildlife Conservation Soc., 64 AD 3d 556 [2nd Dept 2009]; Sclafani v Washington Mut., 36 AD 3d 682 [2nd Dept 2007]). This Court cannot conclude, based upon the record on this motion, that the large gaping hole in the sidewalk was not an inherently dangerous condition as a matter of law. "Whether an asserted hazard is open and obvious is fact-specific, and usually a question of fact for a jury to resolve ... Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances" (Gutman v Todt Hill Plaza, LLC, 81 AD 3d 892, 892-893 [2nd Dept 2011] [citations omitted]). Here, plaintiff testified that he did not see

the hole because it was obscured by darkness (the accident occurred at approximately 8:35 p.m. on June 13, 2009) and plaintiff's view of it was further obstructed by his car door. The Court cannot conclude as a matter of law that the hole in the sidewalk abutting the curb on a City street where there is a probability that persons may alight from motor vehicles was not an inherently dangerous condition or that movants did not have a duty to warn of the condition.

In support of their contention that it was not too dark for plaintiff to have seen and avoided the hole, movants annex to their moving papers a copy of what their counsel describes as an "expert" weather report entitled, "Site Specific Weather Analysis Report" prepared by a company by the name of CompuWeather, Inc. This document is not in admissible form and does not constitute competent evidence to rebut plaintiff's testimony that the hole was obscured by darkness. Therefore, the Court may not consider it.

Therefore, under the facts of this case, whether the condition that allegedly caused plaintiff's injury was open and obvious only serves to raise a question of fact for the jury in apportioning fault.

Movants' counsel also contends that movants are entitled to summary judgment because plaintiff has failed to proffer any evidence that they had either actual or constructive notice of the condition of the sidewalk. Counsel's argument in this regard is without merit.

It was Bay Towers' initial burden, as the movants for summary judgment, to establish the lack of actual or constructive notice of the alleged dangerous condition (see Sagges v. Long Island Railroad, 259 AD 2d 537 2nd Dept 1999]). They have failed to meet their burden.

Movants annex to their moving papers the deposition transcript of Nilda Ortiz, building manager of Bay Towers, wherein she testified that neither she nor any building employees reported any hazardous condition of the sidewalk after she commenced working at the building in April 2009 and prior to plaintiff's accident. She did not know who the property manager was prior to that date. Therefore, movants proffered no evidence as to whether building personnel knew about the condition or reported the condition prior to two months before the accident. Moreover, Ortiz could not remember what the condition of the sidewalk was on the date of the accident. In addition, Ortiz testified that the assistant superintendent and porters inspected the sidewalk abutting the premises twice daily. However, movants fail to annex deposition

transcripts or affidavits from these individuals attesting to what they knew or did not know concerning the condition. There is also a question of fact as to whether a defect of the magnitude depicted in the photographs, admittedly abutting Bay Towers' premises, would go unnoticed by building personnel who inspect the sidewalk on a daily basis.

Therefore, movants have failed to demonstrate that they did not have actual notice of the condition prior to the date of the accident.

Movants have also failed to establish their freedom from liability as a matter of law by reason of their claimed lack of constructive notice. It was incumbent upon movants to establish their lack of constructive notice by showing that the alleged dangerous condition was not open and obvious for a sufficient period of time to have reasonably allowed them, in the exercise of reasonable care, to remedy the condition (see Park v. Caesar Chemists, Inc., 245 AD 2d 425 [2nd Dept 1997]; Scala v. Port Jefferson Free Library, 255 AD 2d 574 [2nd Dept 1998]; see also Danielson v. Jameco Operating Corp., 20 AD 3d 446 [2nd Dept 2005]). Movants have failed to do so. In the first instance, movants not only admit, but contend that the condition was open and obvious. Furthermore, they have failed to proffer any evidence as to how long the condition existed. As heretofore stated, it was not plaintiff's burden in opposition to summary judgment to proffer evidence establishing movants constructive notice, but movants' initial burden as the proponents of summary judgment, to proffer evidence that they did not have constructive notice. They have failed to do so.

Likewise, with respect to his contention that plaintiff has failed to demonstrate that movants created the broken condition of the sidewalk, it was movants' burden, as the proponents of summary judgment, to proffer evidence that they did not create the condition. They have offered no such evidence. In any event, even had they annexed evidence in admissible form to their moving papers that they did not create the subject sidewalk condition, since they have failed to demonstrate that they are not statutorily liable pursuant to §7-210 of the Administrative Code, they are not entitled to summary judgment.

Finally movants' counsel argues that plaintiff's misconduct in violating the New York City parking regulations by parking in a no-parking zone and by blocking a marked crosswalk and pedestrian ramp in violation of the New York City parking regulations, 34 RCNY §4-08(e)(5) and (f)(7), was the proximate cause of his accident and bars his suit under the established rule in New York that a

plaintiff will not be permitted to recover damages if his own misconduct was a substantial factor in causing his injuries, citing Mischalski v Ford Motor Company (935 F Supp 203 [EDNY 1996])and Barker v Kallash (63 NY 2d 19 [1984]). Counsel's argument is without merit and the cases cited by him are inapposite to the facts of this case.

In the first instance, counsel has proffered no evidence that the area of the street by the curb where the subject defect was located was a no-parking zone or that plaintiff's vehicle was parked in such a manner at said location that it blocked a marked crosswalk or pedestrian ramp. Counsel merely annexes photographs of the area showing a "no parking anytime" street sign on the ground by the curb at some distance from the subject location. These photographs do not of themselves show, and no other evidence is proffered, that the sign governs the area where the defect is located. Moreover, no parked vehicle is shown in the photographs and the Court cannot ascertain merely by looking at the photographs whether the rear end of plaintiff's vehicle would have extended into the crosswalk.

Even if, arguendo, plaintiff had parked illegally, such act does not constitute the type of misconduct required to bar the instant action under the rule invoked by plaintiff's counsel.

In Barker v Kallash (supra) (cited in and relied upon by Mischalski v Ford Motor Company) (supra), the 15-year-old plaintiff, who sustained serious injuries to his hands when a pipe bomb he was making exploded, sued the parents of the 9-year-old who supplied him with illegal firecrackers from which plaintiff extracted gunpowder to make the bomb, alleging a cause of action for negligent supervision. The Court of Appeals affirmed the order of the Appellate Division, Second Department, which affirmed the trial court's order granting summary judgment to the defendants based upon the established rule that a plaintiff will not be allowed to maintain an action based upon his own wrongful conduct.

The Court of Appeals explained the parameters of this rule. "[W]hen the plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff's conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation. In this latter instance recovery is denied, not because the plaintiff contributed to his injury, but because the public policy of this State generally denies judicial relief to those injured in the course of committing a serious criminal act...As indicated the rule is grounded in public policy and holds that a claimant whose injuries are the direct result of

his commission of what is judged to be serious criminal or illegal conduct is not entitled to recover" (63 NY 2d at 24, 26)(internal citation omitted). Thus, the rule is limited to the situation where the misconduct involved was a serious criminal or illegal act which was a proximate cause of the plaintiff's injuries. Here, the alleged parking of his vehicle in a no-parking zone was not a serious criminal or illegal act on the part of plaintiff so as to implicate public policy and was not a substantial factor in causing his injuries. "In deciding such cases, this court has consistently examined the plaintiff's wrongdoing to determine'whether *** recovery *** should be denied for the sake of public interests' ...and has held that the aid of the courts should be barred only when plaintiff's actions were 'so far against the public good' – e.g., clearly inimical to the 'health, welfare and safety of the people of the state'...or 'gravely immoral or illegal'...This requirement is dictated by fundamental public policy that the courts of this State shall not honor claims founded on wrongdoing that is morally reprehensible, heinous, or gravely injurious to the public interests...plaintiff's violation must be either gravely immoral or grievously injurious to the public interests" (63 AD 2d, at 31,32 [concurring opinion, Jasen, J.).

The violation of the City's parking regulations by parking in a no-parking zone and blocking a crosswalk does not constitute such a serious criminal, illegal or gravely immoral or reprehensible act as to bar plaintiff's action. Moreover, such "misconduct" was not a proximate cause of plaintiff's injuries. The no-parking zone, if one existed at the subject location, and the blocking of the crosswalk or pedestrian ramp, if such occurred, had nothing to do with plaintiff's stepping into a hole in the sidewalk. Plaintiff's counsel's "but for" argument, i.e., that if plaintiff had not parked where he did he would not have been there to step into the hole in the sidewalk, does not set forth the proper standard for proximate causation. Liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes (see Iqbal v Thai, 83 AD 3d 897 [2nd Dept 2011]).

Accordingly, the motion is denied.

Dated: October 18, 2012

KEVIN J. KERRIGAN, J.S.C.