

Hernandez v Pellegrino
2013 NY Slip Op 30894(U)
April 23, 2013
Sup Ct, New York County
Docket Number: 107416/2010
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Jose A. M. de
Justice

PART 11

Index Number : 107416/2010
HERNANDEZ, MARTIN
vs.
PELLEGRINO, THOMAS
SEQUENCE NUMBER : 002
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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum DECISIVE ORDER.

FILED
APR 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: April 23, 2013

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED 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 : IAS PART 11

-----X

MARTIN HERNANDEZ,

Plaintiff,

Index Number:

-against-

107416/2010

THOMAS PELLEGRINO,

Defendant.

-----X

THOMAS PELLEGRINO,

Third-Party Plaintiff,

-against-

BATIA REALTY CORP.,

Third-Party Defendant.

-----X

Joan A. Madden, J.:

In this personal injury action, Defendant Thomas Pellegrino ("Pellegrino") moves for summary judgment dismissing the complaint against Plaintiff Martin Hernandez ("Hernandez") opposes the motion, which is denied.

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Hernandez alleges that he sustained personal injuries on February 24, 2008, between 9:00 and 9:30 p.m., when he tripped and fell in a hole on the sidewalk in front of a building, located at 302 East 112th Street, New York, New York (plaintiff EBT, at 9-11, 19, 21). Specifically, Hernandez alleges that there was snow in the hole and that the hole was the result of an uneven, raised condition on the sidewalk (*id.* at 17-18). Hernandez subsequently amended his bill of particulars to state that the accident occurred in front of 300 East 112th Street, which is owned by Pellegrino.

Hernandez testified that he fell in front of a residential building, although there was a bodega next door to the residential house (*id.* at 17-18). Hernandez has submitted photographs that he contends accurately represent the condition of the location of his accident—aside from the lack of snow—and has marked the location of his fall in the photograph with his initials (*id.* at 32-33). Hernandez testified that he had previously observed the purportedly defective condition of the uneven sidewalk in front of the building where the accident occurred many times prior to his fall (*id.* at 26).

Pellegrino maintains that there is no such address as 302 East 112th Street. However, there is a building located at 300 East 112th Street, New York, New York—which he owns—and an adjacent property, located at 304 East 112th Street, New York, New York (“the Adjacent Property”) (defendant EBT, at 10, 12, 15, 24, 29-31). Pellegrino testified that the location of Hernandez’s fall and the defective uneven sidewalk is located on the Adjacent Property which is owned by the third-party defendant Batia Realty Corp¹ (*id.* at 24, 29-31). Specifically, Pellegrino testified that the allegedly defective condition shown in the photographs presented at Hernandez’s deposition is actually on the Adjacent Property, rather than the sidewalk in front of his property (*id.* at 17-18, 27). He also testified that following the accident, he replaced some of the sidewalk flags abutting the Adjacent Property because the flags were cracked (*id.* at 20).

In support of Pellegrino’s argument that the defect on which Hernandez fell is on the Adjacent Property, Pellegrino submits a survey of East 112th Street (“the Survey”), which purports to identify a depressed concrete area 1 foot, 2 inches into the Adjacent Property side of the property line (motion, Exhibit I). Notably, Pellegrino has not presented an affidavit of a surveyor in support of the Survey. Pellegrino further argues that Hernandez could not have

¹By decision and order dated May 14, 2012, the court granted Pellegrino’s motion for a default judgment against Batia Realty Corp.

fallen on his property since Hernandez claims he fell in front of a residential building and Pellegrino's property has two bodegas on the ground floor, in addition to the eight residential apartments in his three-story apartment building (*id.* at 10, 14, 22).

In opposition, Hernandez argues that the motion for summary judgment should be denied because there is a factual dispute as to the location of his fall. Hernandez maintains that he fell on Pellegrino's property i.e. in front of 300 or 302 East 112th Street. In particular, Hernandez points to his testimony that at the time of the accident he was walking from the area depicted in the bottom of the photographs, which was in front of Pellegrino's property, towards the Adjacent Property, and that the area circled by him at deposition included a depressed sidewalk slab on Pellegrino's property. Hernandez also submits the property profile overview from the Department of Buildings of the City of New York which indicates that the tax lot for 2176 Second Avenue encompasses 300-302 East 112th Street (Davis affirmation, Exhibit B).

In addition, Hernandez points out that the survey on which Pellegrino relies was done more than three years after the accident, and after the time that Pellegrino testified that the sidewalk in front of his property was repaired.

In reply, Pellegrino notes that he is not relying solely on the survey and that the other evidence including Pellegrino's testimony establishes that Hernandez fell in front of the adjacent property.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once the proponent has made this showing, the burden of proof shifts to the party

opposing the motion to produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. Branham v. Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 (2007); Dauman Displays v. Masturzo, 168 AD2d 204, 205 (1st Dept 1990), lv dismissed 77 NY2d 939 (1991). Here, Pellegrino has not provided sufficient evidence to demonstrate that he is entitled to judgment as a matter of law.

Generally, a “defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff’s injury.” Ross v. Betty G. Reader Revocable Trust, 86 AD3d 419, 421 (1st Dept 2011); see also Amendola v. City of New York, 89 AD3d 775, 775 (2d Dept 2011). However, such defendant is also entitled to summary judgment when he demonstrates that he is not the owner of the property where the plaintiff alleges he fell. See Thompson v. 793-97 Garden St. Hous. Dev. Fund Corp., 101 AD3d 642 (1st Dept 2012); Cohen v. City of New York, 101 AD3d 426 (1st Dept 2012). “[A]n affidavit of a surveyor showing that [defendant] neither owned, controlled nor maintained the [property] upon which plaintiff is alleged to have fallen and sustained injury” is sufficient to establish a defendant’s entitlement to summary judgment. Smith v. New York City Hous. Auth., 84 AD3d 669, 670 (1st Dept 2011).

Here, Pellegrino fails to submit an affidavit from a surveyor but, instead, relies solely on the survey which was done three years after the accident and after Pellegrino admitted that he repaired the sidewalk in front of his building. Moreover, even if Pellegrino’s testimony was sufficient to meet his burden of demonstrating that Hernandez fell in front of the Adjacent Property, the evidence submitted by Hernandez is sufficient to raise a triable issue of fact. In

* 6]

particular, Hernandez testified that he fell on an uneven and raised sidewalk in front of 302 East 112th Street (plaintiff EBT, at 17). In addition, Hernandez has presented proof that the location of his fall, 302 East 112th Street, exists. Moreover, the area that Hernandez circled on the photograph includes the sidewalk area towards the bottom of the photograph which the record shows is part of Pellegrino's property. See Smith, 84 AD3d at 670. Furthermore, while the crack in the sidewalk appears to be on the Adjacent Property, as Hernandez described the condition as not only a crack but the sidewalk flag "being raised up." (plaintiff EBT, at 17). Finally, that Hernandez testified that he fell in front of a residential property while Pellegrino's property has commercial tenants on the first floor is not dispositive.

Accordingly, as there are triable issues of fact as to whether Hernandez fell as the result of an allegedly defective sidewalk condition on Pellegrino's property, summary judgment must be denied.

CONCLUSION

In view of the above, it is

ORDERED that Pellegrino's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties shall appear for a previously scheduled medication on June 10, 2013 at 3:00 pm.

Dated: April 23, 2013

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J.S.C.