Spencer v City of New York
2013 NY Slip Op 33979(U)
October 31, 2013
Supreme Court, New York County
Docket Number: 117844/2009
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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DERRICK SPENCER,

Plaintiff,

-against-

THE CITY OF NEW YORK, LUELLEN JAEGER d/b/a ALT JAY REALTY CO

Defendants.

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LUELLEN JAEGER, d/b/a ALT JAY REALTY CO.

Third-Party Plaintiff,

-against-

STARBUCKS CORPORATION,

Third-Party Defendant.

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DECISION/ORDER
Index No. 117844/2009
Seq. No. 004

KATHRYN E. FREED, JSC:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2 (Exhs. A-D
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant Luellen Jaeger d/b/a Alt Jay Realty Company, ("Jaeger"), moves for an Order pursuant to CPLR 3212, dismissing the complaint and all cross claims against her together with all

attorneys fees and defense costs. The City of New York ("the City"), opposes.

After a review of the papers presented, all relevant statutes and case law, **the Court denies motion.**

Factual and procedural background:

Plaintiff Derrick Spencer ("Spencer") seeks monetary damages for injuries he allegedly sustained on September 23, 2009, when at approximately 2:00 or 2:15 am, he tripped and fell on the southwest corner of 81st Street and Second Avenue, at or near 1559 Second Avenue in New York County. Plaintiff alleges that he had left a bar located at 73rd Street and Second Avenue with his girlfriend and was walking home when as he was approaching the intersection of 81st Street and Second Avenue, his right foot "went into something," causing his knee to buckle, propelling him to the ground. Spencer observed a "crack crater type thing" on the sidewalk. Plaintiff alleges that as a result, he sustained a right patella tendon rupture necessitating surgery.

Thereafter, Spencer commenced the instant action via the filing of a Summons and Complaint on or about December 21, 2009. On January 20, 2009, the City served its Answer. On December 29, 2010, Spencer commenced an action against co-defendant Starbucks Coffee Company ("Starbucks"). Starbucks served its Answer on February 3, 2011. On April 11, 2011, co-defendant Jaeger served her Answer with cross-claims. On June 30, 2011, Jaeger commenced a third-party action against Starbucks. Starbucks appeared in the third-party action via the service of an Answer and counter-claim on August 17, 2011. Jaeger served her Answer to said counter-claim on August 30, 2011.

Positions of the parties:

Jaeger argues that plaintiff's accident occurred on a portion of the public sidewalk which she

was under no duty or obligation to maintain. She argues that pursuant to New York City Administrative Code§ 3-508, the City is vested with continuing and exclusive control of sidewalks within a radius of three feet of landmarks.

Section 3-508 provides:

> It shall be unlawful for any person to make any excavation or embankment or bolt, which has been set by proper authority, or designated on any official map as a landmark to denote street lines with the city, unless a permit therefor has been obtained from the president of the borough in which such monument bolt is situated.

Jaeger argues that the photographs of the sidewalk clearly depict that the metal cover (BPM) which marks the location of the monument is directly next to the defect that plaintiff alleges caused him to trip. She also argues that said photographs make it patently clear that the cracked portion of the sidewalk is well within three feet of the monument marker. Jaeger further argues that in 2005, Borough President Scott Stringer issued the "Procedure For The Restoration Of Monuments On Capital Projects." The documents contained therein, inter alia, outline the procedure for the locating and inventorying or all monuments and for the installation of missing monuments, repair of damaged monuments and the maintenance of existing monuments. Thus, Jaeger argues that the City via the Borough President's Office has exclusive control over monuments and bolts and is thus responsible for repairing the subject portion of the sidewalk causing the accident.

The City points out that Jaeger admits to owning the adjacent property, 1559 Second Avenue. (See Jaeger's Answer, annexed to her motion as Exh. E). The City asserts that she also concedes that the claimed condition is broken concrete that is composed of a different material from the

surrounding concrete flagstones. (See Aff. in Support, ¶ 20). Lastly, the City argues that pursuant to § 7-210 of the Administrative Code of the City of New York, liability for injuries arising from defective sidewalk conditions in front of certain properties, such as the instant one, shifted liability from the City to the abutting landowner, which is Jaeger.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.2d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

In the case at bar, the Court finds that defendant Jaeger has failed to establish a prima facie entitlement to summary judgment. Indeed, questions of **material fact exist, like** whether or not the covers used to mark the location of monuments throughout the City are utility covers and whether or not the location of the subject defect is a surveyor's **monument, which is the responsibility of the Office of the Borough President, which are more appropriately reserved for a jury's**

determination.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant Luellen Jaeger d/b/a Alt Jay Realty Co.'s motion for summary judgment is denied; and it is further

ORDERED that the parties are appear for a compliance conference on November 12, 2012 at 2:00 pm, 80 Centre Street, Room 103; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 31, 2013

ENTER:

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Hon. Kathryn E. Freed
J.S.C.