Fouad v Henri
2014 NY Slip Op 31562(U)
June 19, 2014
Supreme Court, New York County
Docket Number: 156192/12
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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NOHA AHMED FOUAD,

Plaintiff,

Index No. 156192/12

-against-

THOMAS HENRI,

Defendant.

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Joan A. Madden, J.

Defendant Thomas Henri("Henri") moves for summary judgment dismissing the complaint against him. Plaintiff opposes the motion, which is denied for the reasons below.

Background

Plaintiff sues for injuries she allegedly sustained on May 28, 2012, when he tripped and fell on a walkway outside Henri's residence located at 68 North Mada Street, Staten Island, New York ("the property"). The accident occurred as plaintiff was leaving the property to a waiting car service cab parked outside the property. Plaintiff testified at her deposition that as she was walking down the walkway towards the car service, she twisted her foot because of a "broken part" of the walkway which caused her foot to go into "something deep," which she described as "a broken part of the walkway."

Henri argues that he is entitled as the property is a single family, owner-occupied residence and, as such, is exempt from § 7-210 of Administrative Code of the City of New York, and thus he owes no duty to the plaintiff. Moreover, he argues that he did not cause or create the condition, and did not have a "special

use" of the area where the fall occurred.

In opposition, plaintiff argues that the walkway, which was installed by a previous owner of the property, constitutes a special use of the area in front of the property. In support of this position, plaintiff submits an affidavit of Roy Commer an assistant Civil Engineer in the New York City Department of Transportation, Sidewalk Management Unit.[1] Mr. Commer, who inspected the subject walkway and reviewed photographs of it, states that "[b]ased on my experience with the DOT Sidewalk and Inspection Division, I can say with complete certainty that [the walkway] was not designed, constructed, installed or maintained, repaired or inspected by the New York City Department of Transportation prior to the alleged accident." Commer Affidavit, ¶ 4. Plaintiff also submits affidavits from Michael and Geraldine Matthews, who sold the property to Henri. The Matthews state in their affidavits that, to the best of their knowledge, the walkway was not installed by the City of New York but by the owners who sold the property to them.

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.

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[1]. The submitted by the City of New York in a separate action arising out of this incident which was commenced by plaintiff against the City.

Center, 64 N.Y.2d 851, 852 (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 to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

It is well established that an owner or occupier of property which abuts a defective public sidewalk does not owe a duty to the public to keep the sidewalk in reasonably good repair, unless the owner or occupier creates the defective condition or uses the sidewalk for a special use or purpose, or unless a statute or ordinance places an obligation to maintain the sidewalk on the owner. Acosta v. City of New York, 24 AD3d 291, 292 (1st Dept 2005); Montalvo v. Western Estates, Ltd., 240 AD2d 45, 47 (1st Dept 1998).

Section 7-210 is entitled "[l]iability of real property owner for failure to maintain sidewalk in a reasonably safe condition," imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk. Collado v. Cruz, 81 A.D.3d 542 (1st Dept 2011). However, as Henri argues, as the owner of a single family home, he is exempt from the statute. Moreover, there is no evidence that Henri caused or created the condition of the walkway.

The remaining issue, then, is whether Henri used the area for a special use or purpose. "Special use cases usually involve the installation of some object in the sidewalk or street, or some variation in construction thereof." See, Balsam v Delma

Engineering Corp., 139 AD2d 292, 298, appeal dismissed in part, denied in part, 73 NY2d 783 (1988). When an abutting property owner makes special use of a portion of the sidewalk "[its] obligation is to maintain the part so used in a reasonably safe condition to avoid injury to others." Granville v City of New York, 211 AD2d 195, 197 (1st Dept 1995). Moreover, "[t]he duty to maintain the area of special use runs with the land and is not dependent on finding that the owner had installed the sidewalk or repaired it." Id.

Here, even assuming *arguendo* that Henri made a prima facie showing that he did not make special use of the walkway, plaintiff has controverted this showing by submitting evidence that the walkway was constructed for use by a prior owner of the property and not by the City of New York. Moreover, the record contains evidence that Henri had actual and or constructive notice of the condition prior to the accident. Specifically, Henri testified that he had lived at the property for 13 years and the photographs of walkway show that a gap where plaintiff fell.

Conclusion

In view of the above, it is

ORDERED that Henri's motion for summary judgment is denied.

DATED: June 19, 2014

J.S.C.

HON. JOAN A. MADDEN
J.S.C.