

Portuhondo v Hallen Constr. Co., Inc.
2014 NY Slip Op 31865(U)
July 17, 2014
Supreme Court, New York County
Docket Number: 157910/2013
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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JUAN PORTUHONDO,

Plaintiff,

DECISION AND
ORDER

-against-

Index No. 157910/2013

THE HALLEN CONSTRUCTION CO., INC.,
ALVIN NEDERLANDER ASSOCIATES, INC.,
HELLINGER/NEDERLANDER 46th ST. CORP.,
ROSE NEDERALNDER ASSOCIATES, INC., J. NED INC.,
WORLD CHALLENGE, INC., TOM & TOON, INC., and
THE CITY OF NEW YORK,

Defendants.

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HON. ANIL C. SINGH, J.:

In this action for personal injuries sustained in the public sidewalk, street and curb, defendants, Alvin Nederlander Associates, Inc., Hellinger/Nederlander 46th St. Corp., Rose Nederlander Associates, Inc. and J. Ned, Inc., Abselet Contracting Corp., (together "Nederlander defendants") move for an order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing plaintiff Juan Portuhondo's ("plaintiff") amended complaint on the basis of documentary evidence and that plaintiff's amended complaint fails to state a cause of action. Plaintiff, defendant Hallen Construction Co., Inc., and defendant 245 West 51 Street, LLC oppose the motion by the Nederlander defendants.

In resolving a motion to dismiss “on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law”. (Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]).

As a general rule, “[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises.” (Gibbs v Port Auth. of New York, 17 AD3d 252, 254 [1st Dept 2005]). Specifically, “the owner of real property abutting any sidewalk. . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” (New York City, N.Y., Code § 7-210 [2013]).

In plaintiff’s complaint, he alleges that he slip and fell on the “sidewalk, street, and curb” of “233-239 and 241-249 West 51 Street New York, NY.” A deed recorded in the office of the New York City Clerk establishes legal ownership of real property. (N.Y. Real Prop. Law § 291 (McKinney). The Nederlander defendants have conclusively proven through documentary evidence that they are not owners of the properties “241-249 West 51 Street New York, NY” designated in plaintiff’s complaint which could impose liability for plaintiff’s injuries

sustained on the 51st Street sidewalk. (See NYC Dept. of Finance Office of the City Register Deed for block 1023. Lot 6 at 1; 3) (establishing block 1023 lot 6 corresponds with address 241-249 West 51st Street)).

The Nederlander defendants have also proffered the most recent deed for “233-239. . . West 51 Street New York, NY” the other address listed in plaintiff’s complaint which conveys the property from one of the Nederlander defendants to another defendant in this matter, World Challenge Inc. on December 5, 1991, the recording date. (See Indenture Reel 1830-820 at 19). In an attempt to impute ownership onto the Nederlander defendants, plaintiff proffers a printout from the New York City Department of Finance which associates the Nederlander defendants with the property. However, a review of the printout shows that on the date of plaintiff’s incident on August 8, 2012 the document in effect is a financial statement termination form filed by the Nederlander defendants which does not establish ownership. Thus, the Nederlander defendants have established through documentary evidence that they do not have legal title to either of the buildings adjacent to the site where plaintiff sustained his injuries. (Forbes v Aaron, 81 AD3d 876, 877 [2d Dept 2011] (finding on a motion to dismiss no personal injury liability where there is no ownership)).

For the first time in his opposition papers, plaintiff alleges that he fell on the sidewalk adjacent to the area *between* the two buildings which correspond with the above addresses. The area between the two buildings is an alleyway blocked off by a gate on the north side of 51st Street in the middle of the block. Plaintiff alleges that this alleyway “actually extends back through to West 52nd Street . . . [to the premises] owned by [the Nederlander defendants]” thereby imposing liability onto the Nederlander defendants as adjacent landowners to the place of plaintiff’s incident.

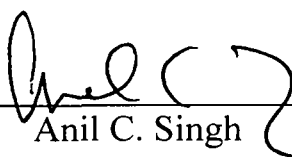
Plaintiff’s factual allegations are refuted by the Nederlander defendants’ documentary evidence. The survey of the Nederlander defendants’ property at 244-254 West 52nd Street made in the regular course of business by the land surveyor business, Earl B Lovell & SP and dated July 27, 1989 and May 29, 2001 establishes that the alleyway in question is separated by an independent wall and chain and chain link fence. A survey may be considered on a motion to dismiss based on a defense in documentary evidence. (Daly v Kochanowicz, 67 AD3d 78, 84 [2d Dept 2009] (considering a land survey in the determination).

According to the survey, the alleyway only allows access to 51st street which is adjacent to the location of plaintiff’s injury. However, the Nederlander defendants did not have access to that alley abutting the area where plaintiff fell nor do they own any property adjacent to 51st Street where the injury occurred.

Therefore liability cannot be imposed upon the Nederlander defendants based upon the survey. (Forbes v Aaron, 81 AD3d 876, 877 [2d Dept 2011]). The Nederlander defendants motion to dismiss pursuant to 3211(a)(1) based on the ground that the action is barred by documentary evidence is granted.

The foregoing constitutes the decision and order of the court.

Date: July 17, 2014
New York, New York


Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**

JUL 17 2014