

Mumford-Fraser v Jewish Rehab. Ctr.

2014 NY Slip Op 32374(U)

August 11, 2014

Supreme Court, Bronx County

Docket Number: 304813/09

Judge: Mark Friedlander

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**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

PATRICIA MUMFORD-FRASER and
HAROLD FRASER,

Plaintiffs,

-against-

THE JEWISH REHABILITATION CENTER and
APA RESTORATION CORP., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC. and
HALLEN CONSTRUCTION CO., INC.

Defendants.

**MEMORANDUM
DECISION/ORDER**
Index No.: 304813/09

APA RESTORATION CORP.,

Third-Party Plaintiff,

Index No.: 83906/10

-against-

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Third-Party Defendant.

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Fourth-Party Plaintiff,

Index No.: 84224/10

-against-

HALLEN CONSTRUCTION CO., INC.,

Fourth-Party Defendant.

HALLEN CONSTRUCTION CO., INC., s/h/a
THE HALLEN CONSTRUCTION COMPANY, INC.,

Fifth-Party Plaintiff,

Index No.: 84000/11

-against-

NEW YORK PAVING, INC.

Fifth-Party Defendant.

HON. MARK FRIEDLANDER

Defendant/third-party plaintiff, APA Restoration Corp. ("APA"), moves for an order, pursuant to CPLR§3212, granting APA summary judgment dismissing all claims and cross-claims against it. Defendant, The Jewish Rehabilitation Center ("JRC"), moves for an order, pursuant to CPLR§3212, granting summary judgment dismissing plaintiff's complaint as well as any cross-claims against it on the ground that there is no genuine issue of material fact for resolution at trial. The motions are consolidated for disposition and decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on June 16, 2006, sometime between 7:15 P.M. and 8:10 P.M., as a result of her tripping and falling on the sidewalk in front of a building owned by defendant JRC, located at 100 West Kingsbridge Road, Bronx, New York (the "building").

Sometime in October, 2005, defendant APA entered into a contract with co-defendant JRC to conduct exterior facade restoration work on the building, entailing brick removal and replacement with new brick, new waterproofing, caulking, pointing, roofing and metal work. A sidewalk bridge was erected, but it is unclear by whom. APA was responsible for maintaining the top of the sidewalk

bridge, while another company was responsible for anything below. The work performed by APA was done entirely above the sidewalk bridge. APA did not perform any construction or work on the sidewalk where plaintiff alleges she tripped and fell. APA was responsible for maintaining the light bulbs on the sidewalk bridge. At the time of her accident it was still light outside, and plaintiff has claimed no difficulty in seeing.

Based upon the foregoing, APA has established a *prima facie* entitlement to summary judgment which has not been rebutted. Accordingly, APA's motion for summary judgment is granted, and plaintiff's complaint against APA is dismissed together with all cross-claims against APA.

Section 7-210 of the Administrative Code of the City of New York provides, as relevant herein, as follows:

"Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

- a. It shall be the duty of the owner of real property abutting any sidewalk, including but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
- b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two-or-three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

Pursuant to Administrative Code Section 7-210, a non-delegable duty is imposed upon the owner of the abutting premises, to maintain and repair the sidewalk. *Collado v. Cruz*, 81 A.D.3d 542 (1st Dept. 2011).

Defendant JRC asserts that it did not create or cause the alleged hazardous condition or have actual or constructive notice thereof. While JRC established that it did not cause or create the alleged hazardous condition, it failed to meet its *prima facie* burden of eliminating the issue of constructive notice. *Chan v. Young T. Lee & Son Realty Corp.*, 110 A.D.3d 637 (1st Dept. 2013). Although Eugene Holland, JRC's Director of Plant Operations, testified that he conducted weekly inspections of the sidewalk, he did not state when he last inspected the sidewalk prior to plaintiff's fall and never checked to see whether the blacktop on which plaintiff claims she tripped was level or not.

Accordingly, the branch of JRC's motion for summary judgment seeking dismissal of plaintiff's complaint against it is denied. The branch of JRC's motion for dismissal of all cross-claims against it is granted, and the cross-claims against it are dismissed.

In JRC's papers, it requests conditional, if not unconditional, indemnification from co-defendants Consolidated Edison Company of New York, Inc. ("Con Ed") and Hallen Construction Co., Inc. ("Hallen"). JRC has established herein that it was not an active tortfeasor. However, the relief requested against Con Ed and Hallen cannot be granted, by reason of lack of proper notice. Neither JRC's notice of motion nor the "wherefore" paragraph of the supporting affirmation refers to the request for any relief relating to Con Ed and Hallen. It is not even mentioned in the initial paragraphs of such affirmation. Relief cannot be obtained by stealth. There is a reason for the word "notice" in "notice of motion." It is also noted that neither Con Ed nor Hallen has responded to JRC's application. Under the circumstances, this aspect of JRC's motion papers must be discounted, and the

relief denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: 8/11/14



MARK FRIEDLANDER, J.S.C.