Caraballo v Consolidated Edison Co. of N.Y., Inc.
2015 NY Slip Op 30071(U)
January 5, 2015
Supreme Court, New York County
Docket Number: 157297/2014
Judge: Geoffrey D. Wright
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---x
LEYBI CARABALLO and YESENIA CARABALLO,

Plaintiffs,

Index # 157297/2014

-against-

DECISION/ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY COMPANY, LLC, DAIDONE ELECTRIC INC., OLSON'S CREATIVE LANDSCAPING CORP., ETNA CONTRACTING INC., MOBILITIE, LLC., 10 WEST 66TH STREET CAR PARK, LLC., and XYZ CORP said name being fictitious the true name being unknown for the entity that owed and operated the garage on the 65th Street side of 10 West 66th Street, New York, New York on July 28 2011,

Defendants.

Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court
---x

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order to Dismiss.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed......	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits......................................	2
Replying Affidavits.......................................	3
Exhibits..	
Other.................cross-motion..........................	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The instant action was commenced by Plaintiff for injuries suffered as a result of a trip and fall which occurred on July 28, 2011 as a result of a depressed sidewalk/defective curb located on or near the premises known as 10 West 66th Street, New York, New York. Defendant, 10 West 66th Street Car Park, LLC ("Defendant") moves for dismissal

pursuant to CPLR 3211 (a)(1) and (a)(7). For the reasons discussed below, the motion to dismiss is granted.

Plaintiff had previously filed an action against 10 West 66th Street Corp., and the City of New York (Action 1). During discovery relative to Action No 1, it was learned that 10 West 66th Street Corporation leased the parking garage at their premises to 10 West 66th Street Car Park LLC. Based on this information, the instant action was commenced against Defendant, 10 West 66th Street Car Park, LLC (Action 2) as well as the other defendants in the instant action.

As previously stated, 10 West 66th Parking entered into a lease agreement with 10 West 66th Street Corporation on January 1, 2004 for the purposes of operating a parking garage. Defendant argues that pursuant to the lease, Defendant had no duty to maintain sidewalks and curbs adjacent to the premises. Specifically, Article 5, Section (i) of the lease agreement states in part, *Tenant shall not have any obligation to maintain the sidewalks adjacent to the premises other than that portion of the sidewalks over which automobiles travel for entrance to and egress from the Premises and those areas abutting the Premises for a distance of two (2) feet on either side thereof.*

Further, Defendant contends that the owner of the premises, 10 West 66th Street Corporation, in its Answer, admits that they operated the common areas on the date of the accident and that the premises located at 10 West 66th street contained three (3) residential units and/or was used for commercial purposes. In addition, Defendant argues they are not subject to 7-210 of the New York City Administrative Code, and pursuant to the language of the statute, tort liability for curbs, (the location of Plaintiff's accident) rests upon the City of New York (a Co-Defendant) and tort liability for the sidewalk rests upon 10 West 66th Street Corporation.

In support of their motion they submit photographs where the accident occurred (Plaintiff circled the area which depicted the defect that caused the accident), copies of Plaintiff's testimony at the 50-h hearing and the affidavit of Andrew Grossman,("Grossman") the Vice President of GGMC Parking LLC and 10 West 66th Street Car Park LLC.

In his affidavit Grossman states that neither 10 West 66th Street Car Park, LLC nor GGMC Parking, LLC has ever owned the premises located at 10 West 66th Street, New York at any time and that Plaintiff's 50-h transcript and the photographs marked during the hearing clearly show that Plaintiff was caused to trip and fall on a broken curb located on West 65th Street, New York, which was at least seventeen (17) feet from the entrance of the driveway. Moreover, Grossman contends that 10 West 66th Parking has never maintained, controlled, operated or had a special use of the sidewalks and curbs adjacent

[* 3]

to the premises other than the portion which automobiles travel for ingress and egress. In addition he states that 10 West 66th Parking did not cause or create the defect, that he had no knowledge of the accident until served with the lawsuit and had no prior knowledge of any witnesses to the accident or the dangerous condition on the curb. He further states 10 West 66th Parking is not in possession of any documents relevant to negligence, causing, creating, maintaining and/or repairing a dangerous condition on the subject curb. To this point, Defendant argues that accident occurred on the curbstone and that within the context of the New York City Administrative Code § 7-210, a curbstone is not part of a sidewalk and remains the responsibility of the City.

In opposition to the motion, Plaintiff argues that dismissal is premature as discovery has just commenced and that the affidavit of Grossman is self serving and insufficient. In addition, Plaintiff contends that Defendant may have contracted with an entity to perform repairs, may have modified, altered or managed the sidewalk/curb area where the accident occurred or may have derived a special use of the sidewalk/curb where the accident occurred. Lastly, Defendant argues that in the process of operating the parking garage, Defendant may have parked vehicles or placed other heavy materials/machinery on the sidewalk/curb.

On a motion to dismiss pursuant to CPLR 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 87–88 (1994). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." Fontanetta v. Doe , 73 A.D.3d 78, 86 (2nd Dept 2010), citing, Siegel's Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, at 21-22, CPLR 3211(a)(1), C3211:10; see also Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dep't 2007).

In considering a motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414, 754 NE2d 184, 729 NYS2d 425 [2001]).

In this case, the Affidavit of Grossman, Vice President of Defendant, 10 West 66th Street Car Park, the Lease specifically states Defendant is under no obligation to maintain the sidewalk adjacent to the premises. Further, during the 50-h hearing Plaintiff was shown pictures and circled the sidewalk/curb area where the accident occurred. The picture clearly show the accident occurred on the sidewalk/curb area. To this point, the New York City Administrative Code Section 7-201 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk" (Collado v Cruz, 81

[* 4]

AD3d 542, 542, 917 N.Y.S.2d 178 [1st Dept. 2011]). A landowner may be held liable for injuries caused by a dangerous or defective condition on the public sidewalk abutting its property if it created the defect or caused it to occur because of some special use of the sidewalk, or if there is a statute or ordinance expressly imposing liability on the abutting landowner for failure to maintain the sidewalk. (Smirnova v City of New York, 64 AD3d 641, 882 N.Y.S.2d 513 [2d Dept. 2009]; James v Blackmon, 58 AD3d 808, 872 N.Y.S.2d 179 [2d Dept. 2009]; Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 890 N.E.2d 191, 860 N.Y.S.2d 429 [2008]). A lease provision placing a duty on the tenant to maintain the premises does not affect the landowner's statutory nondelegable duty and does not provide a defense to a claim based upon section 7-210. (Reyderman v Meyer Berfond Trust No. 1, 90 AD3d 633, 935 N.Y.S.2d 28 [2d Dept. 2011]). Moreover, under the statute, curbstones remain the City's responsibility and are not the responsibility of the abutting property owner. See, New York City Administrative Code §7-201 [c][1][a], §19-101[d].

In their opposition Plaintiff attaches a list of street opening permits issued to several entities but non of the permits were issued to 10 West 66th Street Car Park, LLC. Further, to the extent Plaintiff argues Defendant's motion is pr
emature, insofar as discovery has not yet been conducted, this argument too is without merit.

Accordingly, Defendant's motion to dismiss Plaintiff's complaint and all cross-claims against them is granted.

This constitutes the Decision and Order of the Court.

GEOFFREY D. WRIGHT
AJSC

Dated: January 5, 2015

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court