

Spencer v City of New York

2015 NY Slip Op 32108(U)

April 30, 2015

Supreme Court, New York County

Docket Number: 117844/2009

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA 5/14/15
E
C-5

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 117844/2009
SPENCER, DERRICK
vs
CITY OF NEW YORK
Sequence Number : 008
SUMMARY JUDGMENT

AMENDED
ORDER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 008

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

FILED

MAY 04 2015


NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is

Defendant Jaeger's
cross motion for summary
judgment is decided in
accordance with the accompanying
decision and order ^{dated} 4/30/15. By
order dated April 21, 2015 (also mot.
seq. 008), this court granted
defendant Starbucks' ^{main} motion
for summary judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4-30-15
APR 30 2015


HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
DERRICK SPENCER,

Plaintiff,

-against-

DECISION/ORDER
Index No. 117844/2009
Seq. Nos. 007 & 008

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

Defendants.

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

Third-Party Plaintiff,

-against-

STARBUCKS CORPORATION,

Third-Party Defendant.

-----X
KATHRYN E. FREED, J.S.C.

FILED
MAY 04 2015
NEW YORK
COUNTY CLERKS OFFICE

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

Mot. Seq. 007

PAPERS	NUMBERED
CITY'S NOTICE OF MOTION AND AFF. IN SUPPORT	1,2 (Exs. A-U)
JAEGER'S AFF. IN OPP.	3 (Exs. A-C)
JAEGER'S MEMO. OF LAW IN OPP.	4
PLAINTIFF'S AFF. IN OPP.	5 (Exs. A-C)
CITY'S REPLY AFF.	6

Mot. Seq. 008

PAPERS	NUMBERED
JAEGER'S NOT. OF CROSS-MOT. AND AFF. IN SUPP.	1,2 (Exs. A-P)
JAEGER'S MEMO. OF LAW IN SUPPORT	3
CITY'S AFF. IN OPP.	4 (Exs. A-B)
JAEGER'S REPLY AFF.	5 (Exs. A-D)

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

Motion Sequences 007 and 008 are consolidated for disposition.

In this personal injury action arising from a trip and fall accident, defendant the City of New York moves, pursuant to CPLR 3212 (motion sequence 007), for summary judgment dismissing the complaint. Defendant Luellen Jaeger d/b/a Alt Jay Realty Co. (“Jaeger”) cross moves (motion sequence 008), pursuant to CPLR 2221, for renewal of her prior motion for summary judgment, and upon renewal, for granting of the motion pursuant to CPLR 3212.¹ After oral argument and a review of the parties’ papers and the applicable case law and statutes, this Court **denies** the City’s motion and **grants** the cross motion by Jaeger.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about December 21, 2009, plaintiff commenced this action against the City and Jaeger alleging that, on November 2, 2009, he fell, inter alia, on “hardware, metal caps, access caps [and] manholes]” located on the sidewalk and curb in front of 1559 Second Avenue in Manhattan. Ex. B.² Plaintiff asserted that the City and Jaeger, which occupied the premises adjacent to the sidewalk, were negligent in their ownership and maintenance of the sidewalk. Ex. B.

In his bill of particulars and supplemental bill of particulars, plaintiff alleged that defendants

¹The main motion under motion sequence 008, third party defendant Starbucks Corporation’s motion for summary judgment, was granted after oral argument on April 21, 2015.

²Unless otherwise noted, all references are to the exhibits to the City’s motion for summary judgment.

were negligent, inter alia, in failing to maintain and repair sidewalk hardware. Ex. H, at par. 17; Ex. I, at par. 1. At his deposition on February 17, 2010, plaintiff circled a crack on the sidewalk on which he claimed he fell. Ex. K, at 25-27.

Brian Cook, the City's Director of Land Planning and Development, testified at his deposition that the monument depicted in the photographs of the accident scene was owned by the City. Ex. R at 6, 14-15, 20, 40. The monuments were used by surveyors to determine the locations of streets and property lines. Ex. R, at 13. Cook was unable to state for certain whether the City was responsible for maintaining surveyor's monuments. *Id.*, at 31. He stated, however, that anyone repairing a sidewalk located within 3 feet of such a monument was required to apply to the borough president for a permit pursuant to Admin. Code § 3-508. *Id.*, at 16-17, 28, 63.

In February of 2013, the City, in response to plaintiff's notice to admit, admitted that, on September 23, 2009, it owned the hardware located on the sidewalk in front of 1559 Second Avenue as depicted in the photographs attached to the notice. Exs. N and O to Aff. In Support of Jaeger's Cross Motion. However, the City denied that it "operated", "maintained", "inspected", or "repaired" the hardware. *Id.*

In March of 2013, Jaeger moved for summary judgment on the ground that she was not responsible for the alleged accident. Specifically, she asserted that the City was responsible for the alleged accident pursuant to Administrative Code of the City of New York § 7-210. Jaeger further claimed that, although the City admitted that "[p]hotographs clearly depict a failed patch job around a surveyor's monument in the sidewalk in front of the premises owned by [Jaeger]", the City did not admit to ownership of the area where the monument was located. Ex. K to Aff. In Support of Jaeger's Cross Motion, at par. 6.

By order dated October 31, 2013, this Court denied Jaeger's motion for summary judgment, holding, inter alia, that a material question of fact existed regarding "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."

On January 16, 2014, after Jaeger's motion for summary judgment was denied, the City produced for deposition Joseph Yacca, Director of Operations for the New York City Department of Transportation ("DOT"). Ex. P to Jaeger's Cross Motion, at 6-7. Yacca testified that it was the solely the responsibility of the borough president's office to maintain surveyor's monuments. *Id.*, at 59-60.

THE PARTIES' CONTENTIONS:

The City's Motion for Summary Judgment

The City argues that it is entitled to summary judgment because it had no prior written notice of the condition which caused the alleged accident. It further asserts that it is entitled to summary judgment because it did not create the alleged condition and did not make special use of the sidewalk.

Jaeger asserts that the City waived its defense of lack of prior written notice by failing to raise it in its answer or by raising it in opposition to Jaeger's initial motion for summary judgment in 2013. She further asserts that a surveyor's monument constitutes a special use which is an exception to the prior written notice requirement of Administrative Code section 7-201(c)(2). She also maintains that Administrative Code § 3-508 requires the City to maintain sidewalks within a radius

of three feet of such monuments.

Jaeger's Cross Motion for Renewal and Summary Judgment

Jaeger argues that her motion to renew should be granted because it was not until after her motion for summary judgment was denied that Yacca testified that it was the sole responsibility of the borough president's office to maintain surveyor's monuments.

The City argues that Jaeger's cross motion must be denied since she failed to establish that it created the allegedly dangerous condition. It further asserts that Jaeger failed to establish that the City had prior written notice of the alleged defect. The City also maintains that its admission that it owned the surveyor's monument did not absolve Jaeger of liability. Additionally, the City urges that, since the monument was for use by surveyors, and thus by the general public, it did not have exclusive use of the monument and it thus did not make special use thereof. Alternatively, the City claims that, even if it did make a special use of the monument, plaintiff still had the burden of establishing prior written notice of a defect.

In her reply affirmation, Jaeger argues that the City was responsible for maintaining the monument on which plaintiff fell and she is thus entitled to summary judgment.

LEGAL CONCLUSIONS:

Jaeger's Motion to Renew

CPLR 2221 (e) (2) provides that a motion for leave to renew:

shall be based on new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.

CPLR 2221 (e) (3) provides that a motion for leave to renew shall contain reasonable justification for the failure to present such facts in a party's initial motion.

Here, Jaeger is clearly entitled to the granting of her motion for renewal. In the City's 2013 response to plaintiff's notice to admit, it admitted that it owned the hardware depicted in the photographs annexed to the notice to admit, which depicted a surveyor's monument. Ex. R, at 14; Exs. N and O to Aff. In Support of Cross Motion. However, the City denied that it maintained the monument. Exs. N and O to Aff. In Support of Cross Motion. It was not until after Jaeger's motion for summary judgment was denied on October 31, 2013 (Ex. M to Aff. In Support of Jaeger's Cross Motion) that Yacca of the DOT testified that such monuments were under the exclusive control of the City and were used to measure property lines. Ex. P to Jaeger's Cross Motion, at 59-60.

Jaeger has satisfied CPLR 2221 (e) (2) by establishing the existence of new facts that would change this Court's prior determination. Additionally, she has established "reasonable justification" pursuant to CPLR 2221 (e) (3) for failing to present Yacca's testimony in her initial motion: his testimony had not yet been given. Thus, that branch of her cross motion seeking renewal of her motion for summary judgment is granted.

Jaeger's Motion for Summary Judgment

Upon renewal, Jaeger's motion for summary judgment is granted.

A municipality such as the City, which has enacted a prior written notice law (see Admin. Code § 7-210) "cannot be held liable for a defect within the scope of the law absent the requisite notice, unless an exception to the requirement applies (*citations omitted*)."
Donadio v City of New

York, ___AD3d ___ (2d Dept March 18, 2015). The Court of Appeals has recognized two exceptions to this rule, one where the municipality created the defect through an affirmative act of negligence and the other where “a special use confers a special benefit upon the locality.” *Amabile v City of Buffalo*, 93 NY2d 471, 474 (1999). Here, as discussed below, the City falls within an exception to the prior written notice law since it derived a special use from the surveyor’s monument.

Admin. Code § 3-508 provides that:

It shall be unlawful for any person to make any excavation or embankment, or to lay or move any pavement or flagging, within three feet of any monument or bolt, which has been set by proper authority, or designated on an official map as a landmark to denote street lines within the city, unless a permit therefor has been obtained from the president of the borough in which such monument or bolt is situated. Applications for such permits shall be in writing, and shall set forth the nature of the work proposed, and the location of all monuments or other landmarks affected thereby. The borough president shall thereupon cause one of the city’s surveyors or an engineer in the borough president’s office to take such measurements and field notes as may be necessary to restore such monuments or bolts to their correct position after the completion of the contemplated work, and, when such measurements and field notes have been taken, the required permit shall be issued.

In light of this statute, the City, and not an abutting owner, is liable for damages where, as here, a plaintiff falls on a surveyor’s monument or the area immediately adjacent thereto. *See Weiser v City of New York*, 5 AD2d 702 (2d Dept 1957), *aff’d* 7 NY2d 811 (1959). In *Weiser*, the Appellate Division held that the existence of a surveyor’s monument constituted a special use by the City which imposed on it a duty to repair the hole or break in the cement next to the monument. In finding that the City had “continuing and exclusive control” of sidewalks within a three foot radius of such monuments, the Appellate Division cited to Admin. Code §§ 82d7-23.0 - 82d7-25.0, the predecessor statute to Admin. Code § 3-508. In light of the holding in *Weiser*, the City’s argument

that it is not liable because it did not have exclusive control of, and thus did not make special use of, the monument is clearly without merit. *See Posner v New York City Trans. Auth.*, 27 AD3d 542, 543 (2d Dept 2006) (liability may be imposed where “special user has exclusive access to and control of the special use structure or appurtenance”). Cook’s testimony that anyone repairing a sidewalk located within 3 feet of such a monument was required to apply to the borough president for a permit pursuant to Admin. Code § 3-508 (Ex. R, at 16-17, 28, 63) further established the City’s control over the area where plaintiff was allegedly injured. Thus, the City falls within the special use exception to Admin. Code § 7-210 and is liable herein.

In opposing Jaeger’s cross motion, the City relies on the case of *Tucker v City of New York*, 84 AD3d 640 (1st Dept 2011) in asserting that “when the City is responsible for maintaining a portion of the sidewalk because it owns/has a duty to maintain the hardware, prior written notice prevails.” *See City’s Aff. In Opp. To Jaeger’s Cross Motion*, at par. 16. However, this is not what *Tucker* held. Rather, the First Department dismissed the complaint based on the applicability of Admin. Code § 7-210, the fact that no prior written notice existed, because there was no proof that the City created the alleged condition, and, unlike here, because there was no proof that the City made special use of the area. Moreover, *Tucker* did not involve hardware, but rather a tree well.

The City further relies on *Flynn v. City of New York*, 84 AD3d 1018 (2d Dept 2011). However, that case undermines its argument. In *Flynn*, the Appellate Division held that “there is nothing in [Admin. Code § 7-210] indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b)³ and to allow a plaintiff to shift the statutory obligation of the owner

³DOT Rule 2-07 (b) provides that owners of covers or gratings on streets are responsible for monitoring the condition of the covers or gratings and the area extending 12 inches outward therefrom, and for ensuring that the hardware is flush with the surrounding street surface.

of the cover or grating to the abutting property owner.” Id., at 1019. Here, the City has failed to identify any provision in Admin. Code § 7-210 supplanting in any way the City’s obligation to maintain a surveyor’s monument pursuant to § 3-508.

The City’s Motion For Summary Judgment

In light of the granting of Jaeger’s motion based on a finding that the City was liable for the maintenance of the monument, the City’s motion for summary judgment is denied.

In light of the foregoing, it is hereby:

ORDERED that Jaeger’s cross motion for renewal of her initial motion for summary judgment (mot. seq. 008) is granted pursuant to CPLR 2221; and it is further,

ORDERED that, upon renewal, Jaeger’s cross motion for summary judgment dismissing the complaint pursuant to CPLR 3212 (mot. seq. 008) is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the City’s motion for summary judgment pursuant to CPLR 3212 (mot. seq. 007) is denied; and it is further,


ORDERED that Jaeger shall, within 20 days of this order, serve a copy of this order with

notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158); and it is further,

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

Dated: April 30, 2015

FILED
MAY 04 2015
NEW YORK
COUNTY CLERK'S OFFICE



KATHRYN E. FREED, J. S. C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**