Gumpel v City of New York
2016 NY Slip Op 30577(U)
April 7, 2016
Supreme Court, New York County
Docket Number: 157896/2013
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

JOEL GUMPEL

INDEX NO. 157896/13

MOT. DATE

- v -

MOT. SEQ. NO. 001, 002

THE CITY OF NEW YORK et al.

The following papers, numbered 1 to 9 were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). 1, 3
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). 2, 4, 5
Replying Affidavits	No(s). 6, 7, 8, 9

This personal injury action arises from a slip and fall. In motion sequence number 001, defendants VAP Union Square LLC ("VUS"), Vapiano Franchise LLC ("VF1"), Vapiano Franchising LLC ("VF2" and collectively "Vapiano") and Christophe Scherman move for summary judgment in their favor, dismissing plaintiff's complaint and all cross-claims (CPLR § 3212). Defendant Amalithone Realty Corp. ("Amalithone") has cross-moved for summary judgment in its favor. In motion sequence number 002, defendants The City of New York, the City of New York s/h/a Department of Transportation and The NYC Department of Sanitation (collectively the "City") move for summary judgment in their favor. Plaintiff opposes the motions and cross-motion. Since they are interrelated, the motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined and the motions were timely brought after note of issue was filed. The court's decision follows.

According to plaintiff's notice of claim, on December 28, 2010, at or about 2:30 p.m. he allegedly slipped, tripped and fell over "snow and ice and loose/raised paving brick" located at or near the southeast corner of the intersection of East 13th Street and University Place, New York, New York. In his bill of particulars, plaintiff explains that the accident occurred while plaintiff "was traversing the crosswalk, onto the sidewalk" abutting the property located at 113 University Place, New York, New York. Plaintiff testified as follows at his deposition. Plaintiff explained that due to a heavy snowstorm which occurred on December 26 and 27, there was approximately two feet of snow on sidewalks on the date of his accident. That day, plaintiff was walking with his wife from his daughter's apartment to a local bakery located on University Place between 13th and 14th Streets in Manhattan. After plaintiff left the bakery, he was crossed University Place. Plaintiff stated as follows:

Q. So, what happened next, as you were crossing University Place?

Dated: April 5, 2016

HON. LYNN R. KOTLER, J.S.C.

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

A. As I was crossing University Place, as I was approaching the southeast corner, uh, corner, the southeast street, sidewalk over there, I, uh, as I got closer to the sidewalk, I was walking, my left foot felt like it hit a metal grate and it started sliding. So, I started falling, I went to steady myself with my right foot on the sidewalk and my foot felt some loose, uneven pavers, brick pavers, and then I fell backwards.

...

Q. I assume you couldn't see the crosswalk at this point; is that right?

A. I didn't see anything under the snow, but I was walking in a – in a path that was in the crosswalk.

...

Q. Where in University Place did you fall?

A. I – when I approached the sidewalk on 13th, southeast corner of 13th, I'd say about a foot to two feet, approximately, is where my foot – my left foot went down on the metal grate. It started slipping and then my right foot went onto the sidewalk –

Q. Okay.

A. – and that's when I felt the loose brick pavers that was uneven and that's when I fell backward.

...

Q. And when you tried to stabilize yourself with your right foot, what happened?

A. I went – I put my right foot on the – on the sidewalk and when I put my right foot on the sidewalk I felt these uneven brick pavers or whatever they are, they're loose, and that's when I fell backwards. It didn't stabilize me very well.

...

Q. At any point before you fell, were you able to see what caused your left foot to slip?

A. No.

Q. And at any point before you fell, were you able to see what you presumed to be the loose brick pavers that your right foot eventually landed on?

A. No.

...

Q. As you were lying there, were you able to see any of the conditions that caused you to fall?

A. Yes.

Q. What did you see?

A. Well, I saw the, uh, the metal grate and I saw the sidewalk in front of me. I was eye level at that point.

Q. Where was the metal grate that you saw?

A. The metal grate was approximately a foot off the – off the, uh, off the side walk of 13th, southeast corner of 13th.

As a result, plaintiff suffered injury to his right hand and wrist. Plaintiff has provided an affidavit to the court, wherein he further explains how the accident occurred:

> At the time that I put my right foot on the aforesaid sidewalk, the brick paver sidewalk was covered with snow and had not yet been shoveled, plowed or salted, even though it had stopped snowing almost two (2) days before. When I put my right foot on the aforesaid sidewalk that was covered with snow, I slipped due to the uneven and loose brick pavers and fell backwards…

Plaintiff clarifies the defective condition which caused his accident in his affidavit: "… the dangerous condition which [caused plaintiff's accident] consisted of loose, uneven and un-tipped brick pavers covered by unplowed snow…" Plaintiff theorizes that "… had the sidewalk been shoveled of snow and the brick paver sidewalk been properly repaired so that the pavers created an even and flat surface, I would not have fallen on the date of the accident..."

Mr. Scherman appeared for a deposition, whereat he testified that VUS owned and operated a restaurant called Vapiano located at 113 University Place at the time of plaintiff's accident. Mr. Scherman was a managing partner of VUS at the time of plaintiff's accident, along with another individual and a non-party corporate entity. As a managing partner, Mr. Scherman stated that his duties included "[o]verseeing the operation of the restaurant on the ground..." Mr. Scherman was asked at his deposition about who was responsible for the repair and maintenance of the sidewalk adjacent to the restaurant. He responded that "[a]s far as I was aware of, that was the building and the City."

Mr. Scherman testified that when he opened the restaurant, the sidewalk adjacent to the building was made of red brick. He further stated that the only change in condition of the sidewalk from the time he leased the premises up until the date of plaintiff's accident was that a red brick ramp was installed at the start of Vapiano's lease on the back entrance of the restaurant to serve as an emergency exit. Mr. Scherman denied doing any other work to the sidewalk.

Mr. Scherman further testified that based upon the lease, it was his understanding that the restaurant was "responsible for cleaning the sidewalk" from the edge of the restaurant to the street curb. "In the morning, the morning dishwasher would clean the sidewalk[]" by "sweep[ing]" and/or "scrub[bing]" the sidewalk at approximately 8-9 am. Further, Mr. Scherman stated that "[i]f there would be snow, we would shovel it or throw down salt." Specifically, the restaurant would "send out a dishwasher, usually,

or other employees to shovel the snow and put down salt." Mr. Scherman also stated that the superintendents of the building, would remove snow from the sidewalk adjacent to the restaurant.

Amalithone owns the building abutting the sidewalk/roadway where plaintiff's accident occurred. Amalithone produced Ruslan M. Glukhoy for a deposition. Mr. Glukhoy is employed by Amalithone as a building engineer for the building located at 113 University Place. He testified that he was responsible for maintaining the building and performing visual inspections. He inspected the sidewalk every day. When Mr. Glukhoy saw that a brick was "a little bit loose, shaky, [he] just pull[ed] it out, put the cement, and just fill it, wait until it's dried up, and make sure it's walkable again."

As for snow removal, Mr. Glukhoy testified that he would "clean up the snow" but the "responsibility was more for the restaurant."

Parties arguments

Vapiano argues that VF1 and VF2 should be dismissed because they have no connection with the subject property. Further, Vapiano argues that there are no allegations to support a claim based upon individual liability against Mr. Scherman, so the claims against him should be dismissed as well. Finally, Vapiano maintains that VUS cannot be liable for plaintiff's accident because it owed no duty to plaintiff.

Amalithone argues that since plaintiff was already falling prior to reaching the corner, he cannot establish that any condition on the sidewalk was a cause of his accident. Amalithone cites *Cotter v. Pal & Lee Inc.*, 86 AD3d 463 [1st Dept 2011], arguing that plaintiff's claim that "he would have regained his balance on the sidewalk is utterly speculative." Further, Amalithone contends that there was no actual notice of the defective condition nor can plaintiff demonstrate constructive notice. Finally, Amalithone relies on the "storm in progress" doctrine, maintaining that a reasonable period of time had not passed following the cessation of the snow storm prior to plaintiff's accident. The City also argues that the weather conditions on the days before and day of plaintiff's accident obviated the City's obligation to clear the sidewalks and roadways at issue. There is no dispute that there was a snowstorm in New York City on December 26, 2010 and more than a foot of snow fell during the course of that storm. Snow stopped on or about 4:00 a.m. on December 27, 2010. The City alternatively argues that it cannot be held liable for plaintiff's accident pursuant to Administrative Code § 7-210.

In turn, plaintiff contends that motions and cross-motion are procedurally defective because they do not contain an affidavit from someone with personal knowledge of the conditions of the sidewalk on the date of plaintiff's accident. Otherwise, plaintiff maintains that there are triable issues of fact as to Vapiano and Amalithone's they failed to remove snow from the sidewalk within four hours after snowfall had ended, they failed to properly maintain the sidewalk; and made negligent repairs. Plaintiff also relies on the lease between VUS and Amalithone in support of his claim that Vapiano had a duty to maintain the sidewalk. As for the City, plaintiff contends that it is liable for incompletely removing snow from the crosswalk.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy

that should not be granted where there is any doubt as to the existence of a triable issue *(Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the court rejects plaintiff's argument that the defendants cannot meet their burden of establishing entitlement to summary judgment because they have not provided an affidavit by someone with personal knowledge of the condition of the sidewalk on the date of plaintiff's accident (see i.e. *Bender v. Gross*, 33 AD3d 417 [1st Dept 2006]). A motion for summary judgment can properly be based upon deposition testimony.

A primary issue in this case, as defendants correctly point out, is that plaintiff's theory of liability is unclear. Plaintiff's theory has shifted from the time that the notice of claim was filed, during his deposition, and now in opposition to the instant motions and cross-motion. In his notice of claim, plaintiff alleged that the defective condition was "snow and ice and loose/raised paving brick." At his deposition, plaintiff claimed that "[his] left foot felt like it hit a metal grate[,] it started sliding [and he] started falling. Then, plaintiff ultimately fell backwards because he "went to steady [himself] with [his] right foot on the sidewalk [but his] foot felt some loose, uneven ... brick pavers..." Finally, in his affidavit, he asserts two defective conditions: "the brick paver sidewalk was covered with snow" and he "slipped due to the uneven and loose brick pavers and fell backwards".

Under Administrative Code § 7-210, property owners have an affirmative duty to maintain any sidewalk abutting their property "in a reasonably safe condition." The Administrative Code does not impose any duty on a commercial tenant in connection with sidewalk liability. However, the property owner may impose certain obligations in a lease with the tenant. However, the duties that Vapiano may owe to Amalithone do not run in favor of plaintiff (see *Collado v. Cruz*, 81 AD3d 542 [1st Dept 2011]). Here, Vapiano has established that it did not cause or create the alleged defect which caused plaintiff's accident, whether that be failing to repair the loose pavers, negligently repairing the loose pavers, or failing to remove snow from the sidewalk. Nor did Vapiano owe a duty to plaintiff. Therefore, Vapiano's motion must be granted in its entirety.

The court now turns to Amalithone's cross-motion. Pursuant to Admin Code § 7-210, liability for an accident on a sidewalk abutting real property will arise when it is established that the property owner created the condition alleged or had actual or constructive notice of the defective condition. First, there is no proof from which a reasonable fact-finder could conclude that Amalithone caused and/or created the allegedly loose paver. Further, Amalithone has established that it did not have either actual or constructive notice of the alleged loose paver that caused plaintiff's accident and plaintiff has failed to raise a triable issue of fact on this point. There is no dispute that Amalithone did not have actual notice of the loose paver.

As for constructive notice, 'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' " (*Ferrigno v. County of Suffolk*, 60 AD3d 726, 727 [2d Dept 2009] quoting *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, there are simply no facts which would raise a triable issue of fact as to how long the subject paver was loose (see i.e. *Gordon, supra*).

As for plaintiff's claim of negligent snow removal, his own deposition testimony belies this theory of liability. Plaintiff very clearly stated during his deposition that his right foot slipped due to "loose brick pavers that [were] uneven and that's when [he] fell backward." Nor can plaintiff's affidavit submitted in opposition to the motion save this claim. "A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment (*Harty v. Lenci*, 294 AD2d 296 [1st Dept 2002]; see also *Weinberger v. 52 Duane*

Assoc., LLC, 102 AD3d 618 [1st Dept 2013]). Accordingly, Amalithone's motion is granted in its entirety.

As for the City's motion, there is no dispute that the City is correct that it cannot be liable for the defective sidewalk condition pursuant to Admin Code § 7-210. As for the defective condition in the crosswalk, plaintiff's theory of liability presented in opposition to the City's motion for summary judgment again contradicts his deposition testimony. Plaintiff testified that he was walking in a path that was in the crosswalk and that "[his] left foot went down on the metal grate." Meanwhile, plaintiff now argues that the City's liability is premised upon its "incomplete removal of snow that resulted in an even more dangerous condition on the crosswalk." The inconsistency between plaintiff's deposition testimony and his claim that the City negligently plowed the crosswalk mandates summary judgment in favor of the City.

Accordingly, Vapiano and the City's motions for summary judgment and Amalithone's cross-motion for summary judgment are hereby granted and plaintiff's complaint and all cross-claims are dismissed.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that Vapiano and the City's motions for summary judgment and Amalithone's cross-motion for summary judgment are hereby granted; and it is further

ORDERED that plaintiff's complaint and all cross-claims are dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: April 7, 2016
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.