Lebron v City of New York
2016 NY Slip Op 30676(U)
March 22, 2016
Supreme Court, Bronx County
Docket Number: 307049/11
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

X

EDWIN LEBRON,

Index No.: 307049/11

Plaintiff,

-against-

MEMORANDUM DECISION/ORDER

THE CITY OF NEW YORK and BRONX LEBANON MEDICAL CENTER,

Defendants.

X

HON. RUBEN FRANCO

This is an action to recover monetary damages for personal injuries allegedly sustained on April 26, 2011, when plaintiff fell on the sidewalk/curb area situated in front of the premises known as Bronx Special Care ("BSC"), located at 1265 Fulton Avenue, in Bronx County. Defendant Bronx Lebanon Medical Center ("Bronx Lebanon") moves for summary judgment, seeking dismissal on grounds that: Bronx Lebanon did not own, operate or control the premises in question; it had no notice, actual or constructive, of any alleged hazardous condition; and, it did not cause or create the alleged hazardous condition. More specifically, Bronx Lebanon asserts that it had no duty to maintain the curb cut where plaintiff allegedly fell. Plaintiff alleges that the subject curb cut was installed for Bronx Lebanon's benefit, thereby placing a duty upon Bronx Lebanon to repair and maintain it under the "special use" doctrine.

The documents submitted by Bronx Lebanon with its motion, did not include defendant City of New York's ("City") Answer to plaintiff's Complaint (see CPLR § 3212 [b]). However, the parties executed a stipulation, dated March 14, 2016, pursuant to which a copy of the City's Answer was furnished to the court, and is deemed an exhibit to the motion.

The facts pertaining to plaintiff's accident are not in dispute. On April 26, 2011, at

approximately 10:15 P.M., plaintiff, while employed as an EMT, and his partner, received a call to respond to BSC, where a patient was in cardiac arrest and needed an immediate transfer to a hospital. They arrived approximately 15 minutes later, and parked their ambulance in front of BSC. Plaintiff exited the driver's side of the ambulance, walked toward the rear of the ambulance, and as he stepped toward the sidewalk, his left foot became caught in a crack in the curb at the top of a handicapped ramp or "curb cut." This caused his body to twist, and he fell onto the ambulance, then to the ground, landing on his buttock, with his foot still stuck in the corner and/or crack of the curb cut.

The moving party in a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hospital et.al., 68 NY2d 320 [1986]; Winegard v. New York Univ. Med Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition Winegard v. New York Univ. Med. Center, *supra*, at 853. Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Gaddy v. Eyler, 79 NY2d 955 [1992]; Alvarez v. Prospect Hospital, et al., *supra*; Zuckerman v. City of New York, *supra*.

Section 7-210 of the Administrative Code of the City of New York, provides in relevant part, 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.

Section 19-101(d) of the Administrative Code of the City of New York provides as follows:

(d). "Sidewalk" shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for use of pedestrians.

Plaintiff avers that the curb cut constitutes a special use, rendering Bronx Lebanon liable for his accident. The special use doctrine is applied where a landowner, whose property abuts a street or sidewalk, derives a special use from that property unrelated to the public use (see Petty v. Dumont, 77 AD3d 466, 910 NYS2d 46 [App Div 1st Dept 2010]), in which case, the property owner is required to maintain the property in a reasonably safe condition to avoid injury to others (Kaufman v. Silver, 90 NY2d 204 [1997]). However, plaintiff has not shown that the curb cut was created, constructed, or installed by Bronx Lebanon for its exclusive benefit, or at its behest, or at the direction of its predecessors in interest (see Kaufman v. Silver, *supra*). Assuming, arguendo, that the curb cut is deemed a special use, plaintiff presents no basis upon which Bronx Lebanon can be held liable, as the photographs submitted by both plaintiff and Bronx Lebanon, which indicate the precise location where plaintiff fell, clearly show that he fell outside of the

curb cut (see Noto v. Mermaid Rest., 156 A.D.2d 435, 548 NYS2d 553 [2nd Dept. 1989]).

Accordingly, Bronx Lebanon's motion for summary judgment is granted, and plaintiff's Complaint against Bronx Lebanon only, is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: March 22, 2016

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO