

Murphy v Ames Assoc. LLC

2017 NY Slip Op 33294(U)

August 3, 2017

Supreme Court, New York County

Docket Number: 115421-09/NY

Judge: Lisa A. Sokoloff

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MONIQUE MURPHY and PEGGY RUSS, as
ADMINISTRATORS of the ESTATE OF JOYCE A.
HOBBS,

Plaintiff(s),

-against-

DECISION AND ORDER

Index No.: 115421-09/NY

AMES ASSOCIATES LLC and ADVANCED
MANAGEMENT SERVICE, INC.,

Defendant(s).

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FILED
AUG 07 2017
COUNTY CLERK'S OFFICE
NEW YORK

AMES ASSOCIATES LLC and ADVANCED
MANAGEMENT SERVICE, INC.,

Third-Party
Plaintiffs,

Index No.: 590198/2011

-against-

METROPOLITIAN TRANSIT AUTHORITY,

Third Party Defendant.

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AMES ASSOCIATES LLC and ADVANCED
MANAGEMENT SERVICE, INC.,

Third-Party
Plaintiffs,

Index No.: 590348/2011

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Third Party Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavit/Affirmation	<u>1</u>
Affirmation in Opposition	<u>2</u>
Affirmation in Reply	<u>3</u>

In this action by Plaintiffs, Monique Murphy and Peggy Russ as Administrators of the Estate of Joyce A. Hobbs, against Defendants, AMES Associates LLC and Advanced Management Service, Inc. (A&A), Defendants A&A move for summary judgment, pursuant to CPLR § 3212, and request relief in the form of dismissal of the complaint and all cross claims against them by the Third-Party Defendants, Metropolitan Transit Authority and New York City Transit Authority (TA). The court denies Defendants' motion for the reasons set forth.

Plaintiffs allege that while walking home at 5 p.m. on April 17, 2009, Joyce Hobbs (Hobbs) tripped and fell on a broken and cracked sidewalk on 14th Street, adjacent to 80 5th Avenue and abutting a subway emergency door. Hobbs testified that she was "looking straight ahead and did not see the broken sidewalk condition," which caused her to trip and fall. Hobbs then looked to see what caused her accident and observed the broken and cracked sidewalk. Defendants A&A seek summary judgment on the grounds that the TA maintained the area in question.

The proponent of a motion for summary judgment must establish *prima facie* entitlement to judgment as a matter of law in its moving papers. CPLR 3212[b]; *Zuckerman v City*, 49 NY2d 557, 562 (1980). Failure to do so requires denial of the motion. Moreover, if the movant fails to establish entitlement to judgment as a matter of law, the burden never shifts to the other side to oppose and the sufficiency of their papers need not be considered. *Winegrad v NYU Med Ctr.*, 64 NY2d 851, 853 (1985).

Defendants A&A established *prima facie* entitlement to judgment through the excerpted deposition testimony of various witnesses. Their witness, Angel Miranda, testified that the area where Hobbs allegedly fell was maintained by the TA. TA witness Robert Shultz testified that the TA was responsible for the emergency exit door, the top of the exit retaining wall and the 8-12-inch cement border around the exit. TA witness Vincent Moschello also testified that the TA inspected, maintained and repaired the 12 inches around the exit.

Since A&A established its burden, the burden shifts to the opposing parties to produce information in admissible form sufficient to establish the existence of a triable issue of material fact. *Zuckerman v City*, 49 NY2d 557, 562 (1980). Mere unsubstantiated allegations or assertions are insufficient to overcome the moving papers. *Id.*

In opposition to A&A's motion, both plaintiff and the TA raised significant issues. Plaintiff noted that 34 RCNY 2-07 imposes a duty on an owner of a roadway cover or grating to maintain it and the 12-inch border around it. TA witness Shultz testified that rulers were used by the TA to determine the distance an alleged defect is from TA property, yet none were used in any of the photographs. There was no evidence presented by A&A that alleged defect is within 12-inches of the inground emergency exit door. Shultz could not tell from the photographs whether the defect Hobbs circled is within the 12-inches the TA maintains.

Moreover, plaintiff noted that the TA inspected the area on March 29, 2009, less than three weeks pre-accident, and no masonry defect was noted, suggesting that the defect was either very recently created (calling notice into question), or that the defect was outside the border of cement for which the TA was responsible and, therefore, the responsibility of A&A.

Finally, the TA noted that A&A repaired a similarly located defect on the other side of the door, suggesting that A&A was responsible for the one which allegedly caused Hobbs to fall.

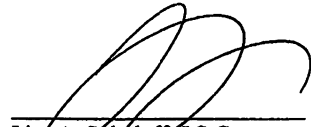
When presented with a motion for summary judgment, the court's function is issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). If triable issues of fact exist, summary judgment is not warranted. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986).

The plaintiff and TA raised a question of material fact as to whether the defective condition was within eight to twelve inches of the NYCTA emergency exit; since this inquiry is essential to determine whether the duty to maintain the defective condition runs to the TA or the adjacent property owner (A&A), summary judgment is not appropriate. Accordingly, Defendant's motion for summary judgment is denied.

This constitutes the decision and order of this court, copies of which shall be provided to all sides.

Dated: August 3, 2017
New York, New York

ENTER:



Lisa A. Sokoloff, J.S.C.

HON. LISA A. SOKOLOFF
J.S.C.

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