

Hernandez v Montedeoca

2020 NY Slip Op 35669(U)

August 28, 2020

Supreme Court, Bronx County

Docket Number: Index No. 26038/2018

Judge: Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 07

HERNANDEZ, EDWIN

Index No. 0026083/2018

-against-

Hon. WILMA GUZMAN,

MONTEDEOCA, RAFAEL

Justice Supreme Court

The following papers numbered 1 to _____ Read on this motion, (Seq. No. 2) for
SUMMARY JUDGEMENT DEFENDANT, noticed on **February 24 2020**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

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

decided in accordance with the decision & order annexed hereto.

Motion is Respectfully Referred to Justice:

Dated:

Dated:

8/28/20

Hon.

WILMA GUZMAN, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7

Index No. 26038/2018
Motion Date: 3/23/2020
Motion Sequence No. 1

EDWIN HERNANDEZ,

Plaintiff,

-against-

RAFAEL MONTEDEOCA, and GIANCARLO RACHIELE
Defendant(s).

DECISION/ ORDER
Present:
Hon. Wilma Guzman

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

Papers	Numbered
Notice of Motion and Exhibits Annexed	1
Affirmation in Opposition and Exhibits Annexed.....	2
Affirmation in Opposition	3
Affirmation in Reply	4

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

Defendant GIANCARLO RACHIELE (hereinafter referred to as "Rachiele") moves this Court for an Order pursuant to CPLR § 3212 granting summary judgement dismissing the plaintiff EDWIN HERNANDEZ's (hereinafter referred to as "plaintiff") complaint and all other claims against Rachiele. Co-defendant RAFAEL MONTEDEOCA (hereinafter referred to as "Montedeoca") and plaintiff have both submitted opposition. A reply has been submitted thereto. Upon due deliberation, the decision of this Court is as follows.

Standard of Review

The proponent of a motion for summary judgement must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgement as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and Winegrad v New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985). Summary judgement is a drastic remedy that deprives a litigant of his or her day in court. The party opposing a motion for summary judgement is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding is the key to summary judgement. Rose v DaEcib USA, 259 A.D. 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgement will only be granted if there are no material triable issues of fact. Sillman v Twentieth Century-Fox Film Corp. 3 N.Y.2d 385, 144 N.E.2d 498 (NY 1957).

Plaintiff seeks damages for injuries sustained as a result of a slip and fall accident which occurred on or about March 8, 2018 when, plaintiff alleges, he slipped and fell on ice and snow at 610 Edison Avenue and 2951 Schley Avenue, Bronx New York. Plaintiff alleges that he fell on the public sidewalk adjacent to both of these properties and that Rachiele and Montedeoca had the duty to maintain, control and upkeep their properties to ensure that the sidewalk adjacent to their properties was safe for pedestrians. “That plaintiff could not [precisely] identify the location of his accident...is not dispositive”, therefore, it is not an issue if plaintiff did not correctly identify exactly where he had fallen. Taveras v 1149 Webster Realty Corp., 134 A.D.3d 495 (1st Department, 2015). Plaintiff further alleges that Rachiele and Montedeoca were aware of the dangerous, icy condition along their respective sidewalks and failed to maintain the area in safe condition, thus causing or creating the condition which caused plaintiff’s accident.

Rachiele now moves for summary judgement, claiming that the evidence on the record shows that he did not own, control or maintain the portion of the sidewalk upon which plaintiff fell and, therefore, cannot be held liable for the icy condition and does not have a statutory duty to remove the snow or ice on the portion of the sidewalk upon which plaintiff’s accident occurred. Rachiele, in support of his motion, cites to one of plaintiff’s exhibits, a photo of the sidewalk adjacent to both his and Montedeoca’s property, upon which plaintiff had marked with an “X” the area of the sidewalk upon which he had fallen. The “X” in the image is to the left of a grey fence, which, as per Rachiele’s deposition, is the fence belonging property at 2951 Schley Avenue, Bronx, which was owned and maintained by Rachiele. Rachiele’s property, as per his deposition, ended with the end of the grey fence. Rachiele testified as to having the responsibility to remove any snow and ice on the sidewalk adjacent to his property, which would be any part of the sidewalk to the right of the grey fence. Rachiele cites the deposition of Montedeoca, in which he testified that the property to the left of the grey fence was 610 Edison Avenue, Bronx, the property owned and maintained by Montedeoca. Montedeoca also testified to owning and maintaining the alley located between the grey fence and 610 Edison Avenue. Montedeoca testified that he was responsible for the removal of snow and ice from the sidewalk adjacent to his property. Rachiele alleges that the “x” marked on the image, by plaintiff, is to the left of the grey fence, which is the property owned and maintained by co-defendant. Rachiele also cites to the deposition of Montedeoca, who testified that he did not have enough information about the incident to refute the location which plaintiff had marked off on the image as the location of the accident. For these reasons, Rachiele alleges that he is not responsible for the accident as he did not

own, maintain, manage or control the portion of the public sidewalk upon which plaintiff's accident occurred. Furthermore, Rachiele alleges that the record is devoid of any evidence to show that Rachiele created the alleged snow and ice condition on the public sidewalk, that he caused the snow and ice condition on the sidewalk, or that he was under a statutory duty to remove the snow and ice from the public sidewalk. Rachiele alleges that, since he did not own, maintain or control the property upon which plaintiff's accident occurred, as displayed by the image that plaintiff marked with an "x" and the aforementioned depositions, that Rachiele did not have a duty to remove the ice and snow from that portion of the public sidewalk. Therefore, Rachiele alleges, he could not have created nor caused the snow and ice condition which allegedly caused plaintiff's accident. Due to the forgoing, Rachiele asserts that he cannot be held liable for the occurrence of plaintiff's accident.

Co-defendant Montedeoca, in opposition, argues that questions of fact exist as to the location of plaintiff's accident and, therefore, questions of fact exist as to who was responsible for removal of snow and ice from the location of plaintiff's accident. In support of his opposition, Montedeoca cites to the deposition of non-party witness Ana Acevedo (hereinafter referred to as "Acevedo"), Montedeoca's mother, who resides at 610 Edison Avenue, Apt. 1, Bronx New York, the property owned by Montedeoca where the accident allegedly occurred. She testified that she had not actually seen the plaintiff fall. However, she also testified that she was woken up by the flashing lights coming from the ambulance, and observed the plaintiff laying on the ground prior to any EMTs exiting the ambulance. Acevedo testified to seeing the plaintiff laying down on the sidewalk directly in front of the section of the grey fence which was connected to the sidewalk. Montedeoca attaches to its opposition a photograph of Acevedo standing in the same spot where she observed plaintiff laying after the fall. Said photo demonstrates where Acevedo testified, she observed plaintiff laying on the morning of the accident on Rachiele's property, to the right of the grey fence. Acevedo further testified that, looking at a picture of the spot where Rachiele's property and Montedeoca's property met, she saw the plaintiff lying to the right of the starting point of grey fence. This location, Acevedo testified, would be within Rachiele's property. This, Montedeoca asserts, is in direct contradiction with the argument raised by Rachiele, who stated that Plaintiff had fallen to the left of the grey fence, which would constitute Montedeoca's property. Furthermore, Montedeoca cites to the deposition of Acevedo, who testified that the snow and ice had been removed in front of "her house", which would be Montedeoca's property, but that the sidewalk adjacent to the house with the grey fence, Rachiele's property, had not been cleaned. This, Montedeoca argues, raises an issue of fact as to whether or not Rachiele had contributed to or created

the snow and ice condition which caused plaintiff's fall. Plaintiff, in opposition, asserts that Montedeoca's opposition raises triable issues of fact sufficient to deny Rachiele's motion for summary judgement.

The Court finds that, through the deposition of non-party witness Acevedo, co-defendant Montedeoca has raised issues of fact sufficient to deny defendant Rachiele's motion for summary judgment. An issue of fact exists as to the location of plaintiff's fall. Plaintiff marked one area on documentary evidence as the location of his fall, which lies within the parameters of Montedeoca's property, but Acevedo's testimony places the site of the fall on Rachiele's property. This question over whether plaintiff fell in front of Rachiele's or Montedeoca's property also raises a question as to who was responsible for the removal of snow and ice on the public sidewalk which plaintiff had been walking on. Acevedo's deposition also raises a question as to who created or contributed to the snow and ice condition on the public sidewalk. Therefore, issues of fact exist as to the location of plaintiff's fall, as to who is liable for the removal of snow and ice from the public sidewalk at the location of plaintiff's fall and whether or not the snow had been removed from the sidewalk. Due to the foregoing, defendant Rachiele's motion for summary judgement is denied.

Accordingly, it is,

ORDERED and ADJUDGED that defendant GIANCARLO RACHIELE's motion pursuant to CPLR § 3212 granting summary judgement dismissing all claims made against him by plaintiff EDWIN HERNANDEZ is hereby denied in its entirety. And it is further,

ORDERED and ADJUDGED that defendant GIANCARLO RACHIELE serve a copy of this Order with Notice of Entry within thirty (30) days from the date of entry, upon all parties herein and upon the clerk of the Court.

This constitutes the decision and order of the Court.

8/28/20
DATE



Hon. Wilma Guzman, J.S.C.