

Iniguez v Sarikas

2021 NY Slip Op 30595(U)

January 15, 2021

Supreme Court, Queens County

Docket Number: 705097/14

Judge: Kevin J. Kerrigan

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Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

1/20/2021
03:17 PM

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

COUNTY CLERK
QUEENS COUNTY

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James Iniguez,

Index
Number: 705097/14

Plaintiff,

- against -

Motion
Date: 1/4/21

Constantinos Sarikas, Astor Realty Corp.,
Power Concrete Company, Inc., Liberty
Water and Sewer LLC, Consolidated Edison
Company of New York, Restani Construction
Corp. And The City of New York,

Motion Seq. No.: 4

Defendants.

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The following papers numbered E85-E104, E107-E131 & E140-E157 read on this motion by defendant, Astor Realty Corp., for summary judgment, and cross-motion by defendant Constantinos Sarikas, for summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E85-104
Notice of Cross-Motion-Affirmation-Affidavit-Exhibits	E107-130
Affirmation in Opposition.....	E131
Affirmation in Opposition-Exhibits.....	E140-143
Affirmation in Opposition-Exhibits.....	E144-147
Affirmation in Opposition.....	E148
Affirmation in Opposition.....	E149
Reply.....	E150
Reply-Affidavit.....	E155-157

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by Astor for summary judgment dismissing the complaint and all cross-claims against it is granted. Cross-motion by Sarikas for summary judgment dismissing the complaint and all cross-claims against him is denied.

Plaintiff allegedly sustained injuries as a result of losing his balance and falling upon the sloped concrete transition between the different elevations of two sidewalk flags in front of 14-19 and 14-27 27th Avenue in Queens County on October 10, 2013. The 14-19 property is a private residential home owned by Sarikas. The 14-27 property is a commercial property that was, on the date of the accident, used as a parking lot and is owned by Astor. The photographic evidence on this record shows that Astor's 14-27 property is to the right of Sarikas' 14-19 property, when viewed from the street. It also shows an elevation differential between the sidewalk area in front of Sarikas' driveway and the sidewalk area in front of Astor's driveway, which driveways abut each other. The sidewalk in front of Sarikas' demonstrably slopes downward to the right so that the right side of it is lower than the level of the sidewalk in front of Astor's driveway. There is a concrete patch on Sarikas' sidewalk forming a transition ramp to the level of Astor's sidewalk. Plaintiff testified that he was walking at approximately midnight along the sidewalk and had passed the lot when he stepped on the slope and lost his balance and fell in front of a private house (i.e. Sarikas'). Astor moves for summary judgment upon the grounds that it did not owe plaintiff any duty of care because he did not fall in front of its property but in front of Sarikas', and that even if plaintiff did fall in front of its property, the sloped transition that plaintiff identified as the condition that caused him to fall was trivial and non-actionable. Astor also contends that even if a portion of the condition did cross onto Astor's property line, Sarikas had taken adverse possession of it. Sarikas cross-moves for summary judgment also upon the ground that the condition was trivial.

Plaintiff's unequivocal and unrebutted deposition testimony is that he lost his balance when he stepped on this sloped transition and that it was in front of Sarikas' property. Moreover, Sarikas admitted in his deposition that the sloped transition patch was entirely in front of his property. In addition, Sarikas does not dispute plaintiff's deposition testimony that the sidewalk area in front of Sarikas' driveway was sunken. Therefore, the evidence on this record establishes that plaintiff fell entirely in front of Sarikas' property as a result of a condition of the sidewalk entirely abutting Sarikas' property. Since the condition that allegedly caused plaintiff to lose his balance and fall did not abut Astor's property, Astor has demonstrated that it was not responsible to maintain that area of sidewalk pursuant to §19-152 of the Administrative Code and thus did not owe plaintiff any statutory duty of care under §7-210 of the Administrative Code. Consequently, since the condition in question did not abut Astor's property, it was not Astor's prima facie burden also to show evidence that it did not create the condition. Rather, it was

plaintiff's burden in opposition to show that Astor created the sloped condition, which he has failed to do. Nevertheless, Astor has proffered undisputed evidence that it did not create the sloped condition via the deposition testimony of Claudia Grzic, co-"owner" of Astor, in which she testified that neither she nor her husband had ever performed any repairs or maintenance to the sidewalk.

Since Astor is entitled to summary judgment upon an unrebutted showing that the defective sloped area of sidewalk that caused plaintiff to fall did not abut its property, this Court need not reach, and will not determine, Astor's alternative basis for summary judgment that Sarikas had acquired title by adverse possession to that portion of the sidewalk defect that may have been within its property line.

Cross-motion by Sarikas for summary judgment is denied. Sarikas contends, in agreement with Astor's second alternative ground for summary judgment, that the sloped transition was too trivial a condition to be actionable.

The issue of whether a defect is too trivial to be actionable depends upon the particular facts of each case and is generally a question for the jury (see Trincere v. County of Suffolk, 90 NY 2d 976 [1997]). Although a property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance, and the Court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to defendant (see Hymanson v. A.L.L. Assocs., 300 AD 2d 358, 358 [2nd Dept 2002]), the determination of whether a condition is trivial must be made upon an examination of all of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury (Trincere v. County of Suffolk, supra).

The evidence on this record, including the photographic evidence and the competing affidavits of Astor's expert professional engineer, Rudi Sherbansky, and plaintiff's expert professional engineer, William Marletta, raise a triable issue of fact as to whether the condition was dangerous and not trivial.

Finally, this Court notes, in perusing the record, that the action was discontinued with prejudice against Consolidated Edison Company of New York with prejudice, pursuant to the stipulation of discontinuance executed by respective counsel on May 19, 2020.

Accordingly, the caption of the action is amended to read as follows:

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James Iniguez,

Index
Number: 705097/14

Plaintiff,

- against -

Constantinos Sarikas,
Power Concrete Company, Inc., Liberty
Water and Sewer LLC, Restani Construction
Corp. and The City of New York,

Defendants.

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Dated: January 15, 2021



KEVIN J. KERRIGAN, J.S.C.

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**COUNTY CLERK
QUEENS COUNTY**