

Katz v Kim

2006 NY Slip Op 30791(U)

October 25, 2006

Supreme Court, New York County

Docket Number: 112747/05

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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MICHAEL KATZ and TANYA KATZ,

Plaintiffs,

Index No. 112747/05

-against-

JAE MOON KIM, ATLANTIC-HEYDT CORP., THE
CITY OF NEW YORK, PAVARINI MCGOVERN LLC,
and RC DOLNER, INC.,

Defendants.

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MARILYN SHAFER, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition. This action arises out of a trip and fall which took place on March 30, 2005, wherein plaintiff Michael Katz (Katz) tripped and fell while walking through a temporary pedestrian passageway adjacent to property located at 795 Sixth Avenue, New York, New York.

In motion sequence 001, defendant Atlantic-Heydt Corp. (Atlantic-Heydt) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross-claims against it. Atlantic-Heydt is a company which builds temporary pedestrian walkways. Atlantic-Heydt argues that it did not perform any work at the location where Katz fell, including construction or erection of a construction wall and/or barriers.

In motion sequence 002, defendant the City of New York (the City) moves, pursuant to CPLR 3211, dismissing the complaint and all cross claims, or in the alternative, pursuant to CPLR 3212, for summary judgment. The City contends that it is not liable for Katz's injuries as

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it is not the owner of the property where the accident took place.

Defendant Pavarini McGovern, LLC (Pavarini) cross-moves for summary judgment. Pavarini is a general contractor which performs work in Manhattan. Pavarini contends that it was issued permits to work in the subject area on November 28, 2005, several months after Katz's accident. Pavarini further argues that it conducted no work at the subject location before or at the time of the accident.

BACKGROUND

On March 30, 2005, at approximately 5:30 P.M., Katz was walking north on Sixth Avenue. After crossing 27th Street, Katz walked through a pedestrian passageway on the west side of Sixth Avenue. Katz described the passageway as being located in the street. Katz stated that the passageway consisted of a construction wall on the west side and a barrier which was about five feet high located on the east side. While walking through the passageway, Katz tripped and fell to the ground. Katz observed that he tripped on a piece of slate which was sticking out from underneath the barricade. The slate was about six inches long and an inch and a half thick. Katz suffered injuries including a fractured femur and back pain. Co-plaintiff Tanya Katz, Katz' wife, argues that due to her husbands accident, she is entitled to damages for loss of consortium.

DISCUSSION

Summary judgment is a drastic remedy which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361 (1974). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate

any material issues of fact... .” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). In its analysis of a motion for summary judgment, “a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court.” *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3d Dept 1989).

Atlantic-Heydt’s motion for summary judgment

Defendant Atlantic-Heydt argues that it had no role in the creation of the defective passageway which caused Katz to trip and fall. Atlantic-Heydt contends that it submitted a proposal to RC Dolner Inc. (RC Dolner) for a temporary passageway.¹ The proposal was dated February 20, 2004. Notice of motion, ex. H. John Breslin (Breslin), president of Atlantic-Heydt states in his affidavit that the proposal was for Atlantic-Heydt to construct two sidewalk bridges and a dual rack pinion hoist at 101 West 28th Street. Notice of motion, ex. J, affidavit of John Breslin, ¶ 3. Breslin states that the proposal was never signed. *Id.* Breslin also states that although Atlantic-Heydt applied for permits with the City to install a sidewalk shed and a dual hoist system at the subject location, it did not install either project. *Id.*, ¶ 4.

Breslin testifies that Atlantic-Heydt never performed any work at the accident location and never owned, controlled, supervised or exercised control at the site on or before March 30, 2005. *Id.*, ¶ 6. An invoice was sent to RC Dolner in connection with Atlantic-Heydt’s obtaining

¹ RC Dolner is a construction company which entered into a contract with defendant Jae Moon Kim, owner of the property at 795 6th Avenue, to perform work at this location.

permits in anticipation of installing the aforementioned hoist and sidewalk bridge system, however Breslin states that no installation work was performed at the site and RC Dolner did not make any payments for the invoice. *Id.*, ¶ 7.

Plaintiffs argue that permits were filed for and obtained by Atlantic-Heydt to erect a shed in the area where Katz sustained his injury. Plaintiffs contend that a sign was placed on a construction wall bordering the subject walkway which identifies Atlantic-Heydt and a construction permit number. Plaintiffs aver that by placing its sign on the construction wall, Atlantic-Heydt asserted control over the premises.

Plaintiffs further argue that they have not had the opportunity to depose defendants RC Dolner, Jae Moon Kim, or Pavarini, a construction management company hired to provide services for a proposed new apartment building located at 815 Sixth Avenue. Plaintiffs also argue that discovery remains to be completed.

Atlantic-Heydt argues in reply that plaintiffs made material misrepresentations when they stated that the “defendant admits that it filed for and obtained permits to erect a shed in the very area where plaintiff sustained his injury.” Plaintiff’s affirmation in opposition, ¶ 3. Atlantic-Heydt argues that its proposal and permits submitted to RC Dolner pertain to proposed work at 101 West 28th Street, which is located at the northwest corner of 28th Street, while Katz’s accident occurred on a temporary sidewalk adjacent to 795 Sixth Avenue which is located at the northwest corner of 27th Street and Sixth Avenue. Atlantic-Heydt avers that it never performed any work at either the 795 Sixth Avenue or 101 West 28th Street premises, nor owned, supervised or exercised control at either premises.

As Katz filed a notice of claim against the City, a hearing was conducted pursuant to

section 50-h of the General Municipal Law. Atlantic-Heydt contends that although Katz stated at the 50-h hearing that he saw Atlantic-Heydt's permit located on the construction area wall near the accident location, plaintiffs fail to identify when and by whom the photographs of the permit were taken. Atlantic-Heydt also contends that it remains unclear if the photographed permit was actually located on the construction wall adjacent to where Katz fell.

The purpose of Atlantic-Heydt's posted permit remains disputed. It is unclear why this permit was allegedly on the construction wall adjacent to the location of the accident if Atlantic-Heydt was not performing work in the area. It is also unclear who owned the materials utilized in the temporary passageway including the slate which Katz tripped on. Because of these disputed issues of fact, Atlantic-Heydt's motion for summary judgment must be denied.

The City's motion for summary judgment

The City argues that it is not liable for plaintiff's injuries. The City contends that pursuant to the Administrative Code of the City of New York, liability for injuries arising from a defective sidewalk is placed on the owner of real property abutting a defective sidewalk. Section 7-210 (b) and (c) state:

(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.

(c) Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting 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) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

The City avers that the property where Katz's accident took place does not fall within any of the exceptions set forth in Section 7-210. The City contends that the property is neither a one-, two-, or three- family residential property that is in whole or in part owner occupied and used exclusively for residential purposes, nor is the property owned by the City. The City argues that it therefore has no liability for the location where Katz fell.

Plaintiffs argue that Section 7-210 is inapplicable as the accident did not occur on a sidewalk, but rather in the street on Sixth Avenue. Plaintiffs cite to the 50-h hearing of Katz.

Katz's testimony states:

Q. Was there a sidewalk where pedestrians could walk in the area where your accident happened?

A. No.

Q. Would you be able to describe what was there that would allow pedestrians to walk?

A. It was a passageway on the west side of the street, which would have been the street -- it's actually out of the street, it's a little bit into the gutter. Actually there's construction -- there's a construction wall on the west side of it and on the east side of it there's a barrier that's about five feet high and it's about room enough for two people, generally people going east or people going north or people going south, and I guess that lasts for about -- I don't know how far exactly.

Plaintiffs' affirmation in opposition, ex. A, at 11-12.

Plaintiffs also argue that the photographs submitted of the subject walkway also depict that the location where plaintiff fell was located in the street and not on the sidewalk. Plaintiffs'

affirmation in opposition, ex. B.

The City fails to present any evidence that the walkway which Katz utilized was located on the sidewalk and not in the street as the photographs and the testimony of Katz indicate.

As Katz allegedly tripped in the street on the barrier and not on the sidewalk, the City's request for a motion to dismiss or a motion for summary judgment must be denied.

Pavarini's cross motion for summary judgment

Defendant Pavarini argues that it conducted no work prior to or during the time of Katz's injury at the subject location. Pavarini relies on the testimony of Warren Cathers (Cathers), vice president of Pavarini's operations, who states that Pavarini submitted a proposal dated July 19, 2005 in which it would be the construction management company hired to provide services for a proposed new apartment building located at 815 Sixth Avenue. Affidavit of Cathers, ¶ 4.

Cathers states that Pavarini had not begun performing work at the subject location during the time of Katz's accident which occurred on March 30, 2005. *Id.*, ¶ 6. According to Cathers, Pavarini's work was tentatively scheduled to begin on September 7, 2006. *Id.*

Pavarini argues that it cannot be found to be negligent as it did not occupy, own, control, or have a special use of the subject premises. Pavarini avers that it was issued permits to work in the area on November 28, 2005, several months after plaintiff's accident and states that it conducted no work at the subject location. *Id.*

Plaintiffs contend that further discovery must be conducted to determine who erected the walkway where plaintiff tripped. However, Pavarini avers that it served a response to plaintiffs' discovery demands on July 26, 2006 making plaintiffs' request for discovery moot.

Plaintiffs fail to raise a triable issue of fact to defeat summary judgment. Plaintiffs do

not present any evidence to prove that Pavarini conducted work prior to or during the time of Katz's accident. Although plaintiffs state that several permits were taken out by Pavarini, plaintiffs fail to specify when and for what purpose the permits were issued. As the plaintiffs have failed to raise an issue of fact as to whether Pavarini contributed to Katz's injury, Pavarini's motion for summary judgment must be granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by the defendant Atlantic-Heydt Corp. is denied; and it is further

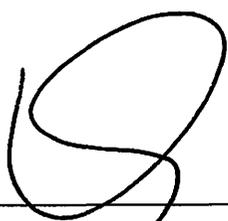
ORDERED that the motion for summary judgment by the defendant City of New York is denied; and it is further

ORDERED that the cross motion for summary judgment by defendant Pavarini McGovern, LLC is granted and the complaint is severed and dismissed as against this defendant and the clerk is directed to enter judgment in favor of this defendant with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the remainder of the action shall continue.

DATED: 10/25/06

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HON. MARILYN SHAFER, JSC