[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 117265/2006
CAPATO, DAVID
vs.
125TH & LENOX, LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 6/20/08
MOTION SEQ. NO. 001
MOTION CAL. NO.

on this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... PAPERS NUMBERED
Answering Affidavits — Exhibits
Replying Affidavits

FILED
JUL 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendants 125th & Lenox LLC and Wharton Realty Management Corp., for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff David Capato in its entirety; **is granted and this case is dismissed.** The Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/1/08

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

x

DAVID CAPATO,

Plaintiff

-against-

125TH & LENOX LLC and WHARTON REALTY MANAGEMENT CORP.,

Defendants.

x

Index No. 117265/06

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants 125th & Lenox LLC (the LLC") and Wharton Realty Management Corp. ("Wharton") (collectively "defendants") move for an order pursuant to CPLR 3212: (1) granting summary judgment dismissing the complaint of plaintiff David Capato ("plaintiff") in its entirety; or, in the alternative, (2) granting summary judgment dismissing the complaint of plaintiff as to defendant Wharton.[1]

This action seeks to recover for personal injuries which plaintiff alleges he sustained on December 29, 2005 on the sidewalk in front of the premises known as 25 Lenox Avenue and/or 100 West 125th Street, New York, New York (the "subject property"). The complaint alleges that plaintiff was working as a police officer when the alleged incident took place. Plaintiff's first cause of action is for negligence, and the second cause of action is premised upon General Municipal Law ("GML") §205-e.

Plaintiff alleges that the LLC owned the subject property, and that Wharton was the managing agent for the property. In support of plaintiff's GML claim, plaintiff alleges that

[1] Plaintiff does not oppose dismissal of defendant Wharton.

defendants violated NYC Admin. Code §§7-210, 7-211 and 7-212 and New York City Administrative Code ("NYC Admin. Code") §19-152.

Plaintiff's Deposition

On December 29, 2005, plaintiff was working as a NYPD officer (p. 29). Police Officer Janna Borzell was present at the time of plaintiff's accident (p. 30). The accident took place in the vicinity of the corner of 125th Street and Lenox Avenue, on the sidewalk in front of the building (pp. 31-32). It was twilight, around 5:30 p.m. (p. 33). The accident occurred anywhere from 25 to 30 -35 feet from the corner of Lenox Avenue (p. 33). Plaintiff was jogging when the accident occurred (p. 34). Plaintiff was traveling westbound on the sidewalk along 125th Street (p. 35). Plaintiff was on the south side sidewalk of 125th Street (p. 36) Plaintiff did not "trip" (p. 36). Plaintiff "stepped in some form of a defect" that was on the sidewalk. Plaintiff does not know how far from the street the defect was. Plaintiff could not approximate how far in from the street the defect was. As clear an idea as to the approximate location of the defect as plaintiff could give was that noted above (p. 37). When asked: "As you sit here today, do you specifically recall seeing the claimed sidewalk defect that you're claiming caused your accident?" Plaintiff answered: "No." (p. 38) At no time before or after his accident did plaintiff ever see the defect that caused his accident (p. 38). Plaintiff was focused on the west portion of 125th Street where a suspect allegedly had fled, and plaintiff was moving in that direction, attempting to make an apprehension. Plaintiff was jogging in that direction. (pp. 39-40). Less than one minute before his accident, plaintiff exited an unmarked police vehicle (p. 40). Plaintiff could not describe the defect in the sidewalk that caused his accident (p. 41). Plaintiff returned to the area of the incident to look for what might have caused his accident a variety of times. The first time was

within 24 hours of his accident (p. 41). He has been back to the area of his accident about 20 times, maybe more. He returned to the scene of the accident with the purpose of looking for where he fell once (p. 46). On his visits to the area, he observed numerous defects in the sidewalk (p. 37). When he fell, the defect felt as if he had stepped in a hole. Like the sidewalk disappeared out from under him (p. 48). He could not say how deep the hole was (p. 48). At the corner where the accident occurred was the subject property address (p. 42). Plaintiff believes the building at the corner where his accident occurred was vacant (p. 49-50). Plaintiff took photographs of the incident location about one month before his deposition which was held on October 26, 2007 (p. 52). The location had not changed (p. 55).

When plaintiff returned to the scene 24 hours after his accident, he observed numerous defects. There were pieces of the sidewalk itself missing, broken, damaged in another way. There were portions of the sidewalk made of mislaid bricks, creating gaps. The biggest gap he observed was over twelve inches in length, and several inches in width (p. 56).

Plaintiff never saw the specific condition of the sidewalk which caused his accident before the accident occurred (p. 72). There was a pay phone near the area where plaintiff fell (p. 124). Plaintiff does not recall if the pay phone was behind or in front of him; it was close to the corner, about 25-30 feet from Lenox Avenue (p. 124).

Deposition of Police Officer Janna Borzell

In December 2005, Officer Borzell was assigned to the 28th Precinct located in Harlem (p. 8). She knew plaintiff as a Sergeant in the same precinct, she worked under him, and he directly supervised her. (p. 9). She was present when plaintiff's accident occurred. It happened on the southwest corner of 125th Street and Lenox Avenue (p. 12). After the shooting incident, the

officers, including plaintiff, were looking for ballistics evidence. They saw a kid running, and they all took off after him (p. 18). At the time of plaintiff's accident, they were no longer chasing or going after any perpetrator (p. 18).

Officer Borzell was looking right at plaintiff when he fell (p. 18). He was about 5 feet to her left side. The incident occurred on the curb; the east side of 125th Street on the south curb. Plaintiff fell into the street (p. 19). At the time of plaintiff's accident, he was standing there and went to step off the curb or lost his footing. She saw him actually fall. She did not see him trip or stumble on anything. He just fell (p. 20). She does not know what caused plaintiff to fall (p. 21).

Plaintiff fell approximately at the curb line of the sidewalk in the street (p. 22). Plaintiff's fall was about 15 feet from the corner of Lenox Avenue, right by the phone booths. She could specifically identify the location of plaintiff's accident. She does not recall if there were any cracks or holes in the sidewalk or the curb in the area where plaintiff fell (p. 26). Plaintiff's foot was more on the curb at the time he fell; he was on the curb (p. 38). When asked whether any part of plaintiff's foot was on the sidewalk at the time he fell, she responded: "It may have been. Because the sidewalk meets the curb, so he may have had one foot on the sidewalk. But I know he was at the edge. That's why he fell directly in the street." (p. 41)

Deposition of Eliot Tawil

Mr. Tawil is a member/shareholder of the LLC (p. 14). To his knowledge, the LLC did not inspect the sidewalks for defects on a regular basis in 2005 (p. 17). He never noticed any defects in the sidewalks in front of the subject property (p. 18).

Defendants' Contentions

When the incident occurred, plaintiff denied that he tripped. He claimed that he was caused to fall when he stepped in some sort of unidentified and unspecified defect. Plaintiff could not provide even a rough approximation as to where his accident occurred or where the claimed defect was. Further, plaintiff could not approximate how far from the street line the claimed defect was. In fact, plaintiff never saw the claimed defect which he claims caused his accident before, during or after the accident. Not surprisingly, since plaintiff never saw the claimed defect, he could not provide any description of the claimed defect in the sidewalk. The eyewitness to plaintiff's accident, Police Officer Janna Borzell, did not see plaintiff stumble or trip on anything. Plaintiff's description of his incident is most consistent with simply misstepping off of a curb.

Plaintiff's Opposition

Both in his deposition and in the affidavit accompanying the opposition to this motion, plaintiff has clearly delineated the location of his accident, and the details of the defect. Further, in response to defendants' argument that plaintiff has not sufficiently described the defect that caused his accident at his deposition, plaintiff visited the accident site on June 12, 2008 and visually inspected the sidewalk in the area where he fell to locate the defect that caused his accident. He has now further identified the location and described the defect adjacent to the easternmost of the three phone booths near the curb.

Defendants' conjecture that the "most likely" manner in which the accident occurred is that plaintiff stepped or fell off the curb is flatly contradicted by plaintiff's deposition testimony. Further, the witness on whose testimony defendants rely, Officer Borzell, testified that she could

not be certain whether plaintiff's feet were on the sidewalk or the curb at the time of his accident.

On his re-visit to the accident scene, plaintiff now states in his affidavit that the defect that caused him to fall is approximately five inches in width, six inches in length, and 1 ½ inches in depth, and is located adjacent to the easternmost of the three phone booths near the curb.

Defendants' Reply

Plaintiff's affidavit submitted in opposition to the instant motion is in direct contradiction to his deposition testimony. Cases in the first department hold that one cannot raise a material issue of fact in opposition to a motion that is at odds with his deposition. At his deposition, plaintiff was afforded every reasonable opportunity to specify the nature of the condition which he claimed caused his fall, and failed to do so. Now, in opposition to the instant motion for summary judgment, plaintiff seeks to avoid the consequences of that testimony, which is clearly improper. Thus, plaintiff's affidavit should not be considered in opposition to this motion.

To oppose the instant motion, plaintiff returned to the scene of the alleged accident on June 12, 2008, two and one half years after the accident, after the instant motion was filed, and makes "observations" which allegedly form the basis for the affidavit plaintiff submits in opposition to the instant motion. Rendering plaintiff's affidavit meaningless and conclusory, plaintiff fails to state in his affidavit that the sidewalk he observed is the same as it was at the time of his accident and does not discount the possibility that the sidewalk had been altered, replaced or changed in the 2 ½ years between the time of the accident and his recent visit. This deficiency is exacerbated by the fact that, since the accident, the abutting building that occupied the corner where the accident had taken place had been completely removed. Thus, there is no evidence in the record that the sidewalk observed by the plaintiff on June 12, 2008 represents the

sidewalk as it appeared on the date of plaintiff's accident, rendering the affidavit inadmissible.

It is absurd to think that plaintiff can suddenly identify the claimed sidewalk defect 2 ½ years later which he denied ever having seen, could not describe, and whose specific location he could not describe with any specificity in his deposition. At his deposition, plaintiff testified that he returned to the scene of the accident many times between the time of the accident and the time of his deposition for purposes of determining the cause of his accident, including one trip within 24 hours of his accident, and another trip about one month before his deposition, to look at the area where he had fallen. Plaintiff does not offer any explanation in his affidavit of how he could now, years later, identify a claimed sidewalk condition which he had never previously seen despite those earlier visits.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433,

434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d 251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v. Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept. 2000]; *Guttierez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept. 1996]; *Colt*, 209 AD2d 294,

supra). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

A relatively recent decision by the First Department provides clear guidance to this court. In *Fernandez v VLA Realty*, 45 AD3d 391, 845 NYS2d 304 (1st Dept 2007), the court stated as follows:

> [Plaintiff's] failure to identify the cause of his fall at his deposition was fatal to his case under the circumstances presented (*see Pena v. Women's Outreach Network, Inc.*, 35 A.D.3d 104, 109, 824 N.Y.S.2d 3 [2006]; *D'Ambra v. New York City Tr. Auth.*, 16 A.D.3d 101, 790 N.Y.S.2d 120 [2005]). Issues of fact and credibility are not ordinarily determined on a motion for summary judgment. But where self-serving statements are submitted by plaintiff in opposition that "clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of h[is] earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment" (*see Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320, 701 N.Y.S.2d 403 [2000]).

In the instant case, added to the plaintiff's inability to identify the cause of his accident is the deposition of his fellow officer and eyewitness, Police Officer Borzell, which unequivocally attributed plaintiff's accident to a step off of the curb, not a defect on the sidewalk.

> The incident occurred on the curb; the east side of 125th Street on the south curb. Plaintiff fell into the street At the time of plaintiff's accident, he was standing there and went to step off the curb or lost his footing. She saw him actually fall. She did not see him trip or stumble on anything. He just fell

This case is not sufficiently like the case of *Cherry v. Daytop Village, Inc.*, 41 A.D.3d 130, 837 N.Y.S.2d 109 (AD 1st Dept.,2007) to overcome summary judgment. In

Cherry, plaintiff was asked during her deposition whether she knew what caused her to fall and she testified that "[w]hen I stepped down, my ankle, because the blacktop was uneven where it was cracking, my ankle twisted and I fell forward and to the left." The First Department found that this testimony as well as other statements made by plaintiff during her deposition, if believed, would provide a sufficient nexus between the condition of the roadway and the circumstances of her fall to establish causation (*see Jackson v Fenton,* 38 A.D.3d 495, 831 N.Y.S.2d 260 [2007]; *Cuevas v City of New York,* 32 A.D.3d 372, 373, 821 N.Y.S.2d 37 [2006]). That nexus is absent in the instant case.

And, since plaintiff did not claim at his deposition that he knew what caused him to fall, it would be speculative to assume that these alleged statutory violations of NYC Admin. Code §§7-210, 7-211 and 7-212 and New York City Administrative Code ("NYC Admin. Code") §19-152, proximately caused his fall (*see Guiterrez v Iannacci,* 43 A.D.3d 868, 841 N.Y.S.2d 377 [2d Dept. 2007]; *Lissauer v Shaarei Halacha, Inc.,* 37 A.D.3d 427, 829 N.Y.S.2d 229; *Birman v Birman,* 8 A.D.3d 219, 777 N.Y.S.2d 310; *Bitterman v Grotyohann,* 295 A.D.2d 383, 743 N.Y.S.2d 167).

As to plaintiff's affidavit, this court agrees with defendants that "it strains credulity" that suddenly on another visit to the location of the accident, after having made many prior visits, after defendants' motion for summary judgment is made, and after 2 ½ years lapse from the date of the accident, that plaintiff can suddenly, precisely identify the exact location and the exact condition, where he was unable to do so on the many previous visits closer in time to his accident, and where he was unable to do so throughout his deposition.

It appears that plaintiff's late-day revelation is contrived and tailored to avoid the

consequences of his earlier testimony. This court shall not consider plaintiff's affidavit in deciding this motion.

The court is loathe to foreclose any plaintiff his day in court, but in the instant case, the court is constrained to grant defendants' motion for summary judgment.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants 125th & Lenox LLC and Wharton Realty Management Corp., for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff David Capato in its entirety; **is granted and this case is dismissed**. The Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: July 1, 2008

Carol Robinson Edmead, J.S.C.