Jordon v Keyspan Corp.
2011 NY Slip Op 33744(U)
July 25, 2011
Sup Ct, Nassau County
Docket Number: 12684/09
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

SHEILA JORDON,

Plaintiff(s),

ORIGINAL RETURN DATE:01/11/11
SUBMISSION DATE: 06/14/11
INDEX No.: 12684/09

-against-

KEYSPAN CORPORATION and FIVE TOWNS COMMUNITY CENTER, INC., and KEYSPAN GAS EAST CORPORATION,

MOTION SEQUENCE #1, 2

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1, 2
Answering Papers.....	3
Reply.....	4, 5

Motion by defendant, Five Towns Community Center ("Five Towns"), for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any and all cross-claims against it on the ground that there is no applicable legal basis for holding a private landowner liable for injuries caused by defects on an adjoining sidewalk is granted. Motion by defendant, KeySpan Gas East Corporation ("KeySpan"), for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any and all cross-claims against it on the ground that plaintiff has not raised a triable issue of fact to be resolved is similarly granted.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weight the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff after falling on a sidewalk, which occurred on November 2, 2006, outside of the premises located at 270 Lawrence Avenue, Lawrence, New York, as a result of defendants' negligence in the maintenance and repair of the subject sidewalk. It is alleged that plaintiff tripped due to a gas valve and the surrounding dilapidated sidewalk which created a hazardous condition.

Generally, liability for injuries sustained as result of the existence of dangerous and defective conditions to public sidewalks or as a result of negligent maintenance is placed on the mmunicipality and not the abutting landowner (citations omitted) (*Hausser v. Giunta*, 88 NY2d 449 [1996]). The only basis for imposing liability on landowners abutting a sidewalk where a plaintiff has allegedly sustained injuries is through four exceptions: (1) where the sidewalk was constructed in a manner for the special benefit of the abutting owner, (2) where the abutting owner affirmatively caused the defect, (3) where the abutting landowner negligently constructed or repaired the sidewalk and (4) where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty (*Hausser v. Giunta,* 88 NY2d at 453; *Lindesay v. City of New York*, 56 AD3d 532 [2008]). In order to prove a prima facie case of entitlement to summary judgment on the ground that a landowner is not liable to a plaintiff for injuries sustained on the abutting sidewalk, defendant must show it does not fall within one of the four exceptions imposing liability to plaintiff.

Five Towns Community Center is located in Lawrence, New York, a village located in the Town of Hempstead. While the Town of Hempstead Code charges abutting landowners with a duty to "at all times keep such sidewalk in good and safe repair and maintain the same clean, free from...obstructions or encumbrances," no liability is imposed on said landowner for noncompliance. Plaintiff has failed to show that defendant Five Towns violated the Town Code in order to impose liability on Five Towns based on local statute or ordinance.

Plaintiff argues that both defendants fall under the "special benefit" exception to the municipal liability standard. A "special benefit" is implied upon the existence of the abutting landowner's access to and ability to exercise control over the special use structure or installation (*Kaufman v. Silver*, 90 NY2d 204 [1997]). As in *Noia v. Maselli* (45 AD3d 746 [2d Dept. 2007]), defendant Five Towns "established [its] prima facie entitlement to judgment as a matter of law by demonstrating that [it] did not have exclusive access to or the ability to exercise control over the gas valve cover on which plaintiff allegedly tripped and fell" (*Noia v. Maselli,*45 AD3d at 747). The sidewalk at issue was not constructed in a special manner for the benefit of Five Towns and a representative affirms Five Towns does not use the sidewalk as a driveway or use it in any way unrelated to the public use (*see* Def. Five Towns' Ex. B), which could otherwise impose liability under the "special benefit" exception (*Joel v. Electrical Research Products*, 94 F2d 588 [2d Cir. 1938]). As evidenced by affidavits and testimony of KeySpan's representatives the gas valve cover belongs to defendant KeySpan. As such, defendant Five Towns is unable to exercise control over the subject installation and is thus absolved from liability under the "special benefit" exception.

Defendant KeySpan is similarly protected from liability to plaintiff. Although the gas valve cover constitutes "special use" and is exclusively accessed by defendant KeySpan, the injured plaintiff does not necessarily conclude that she tripped over the cap. In her deposition, she only points to a general area of the sidewalk where she tripped. In subsequent affidavits, plaintiff and her witness both aver that the accident occurred within a one-foot radius around the cap and could have been from the sidewalk damage and not the gas valve cover. This is insufficient to raise an issue of fact as to whether plaintiff tripped over the gas valve cover (*McGee by McGee v. City of New York*, 252 AD2d 483 [2d Dept. 1998]; *compare with Santorelli v. City of New York*, 77 AD2d 825 [1st Dept. 1980] (where the depressed sidewalk and cracks surrounding a filler cap was caused by improper installation of cap)). After KeySpan had effectively established a prima facie entitlement to summary judgment by providing testimony that no repairs or maintenance work have been conducted on the subject sidewalk in over 10 years, plaintiff did not raise a triable issue of fact in opposition that would call into question whether KeySpan negligently performed repairs or maintained the gas valve cover (*see, Jones v. City of New York*, 45 AD3d 735 [2d Dept.2007]).

Although defendant KeySpan's motion is untimely, defendant has submitted a reasonable excuse for such lateness. KeySpan has shown "good cause" for the delay in filing, a "satisfactory explanation for the untimeliness" (*Brill v. City of New York*, 2 NY3d 648, 652 [2004]), by submitting an affidavit of service showing delay because the prescribed period in which to file motions expired on a Saturday. The motion was not filed until three days after service, because of misunderstanding between defendant's counsel and the process server. This court is "afforded wide latitude with respect to determining good cause exists for permitting late motions [for summary judgment]" and may entertain an untimely motion in the interest of judicial economy (*Samuel v. A.T.P Development Corp.*, 276 AD2d 685, 686-687 [2d Dept. 2000]). Moreover, counsel for plaintiff has not demonstrated that plaintiff will be prejudiced if the court entertains a late motion for summary judgment (*see, Guiracocha v. Weiss*, 1 Misc.3d 904(A) [Sup. Ct. 2003]). As a result, this court is permitting the late summary judgment motions.

Accordingly, defendants' motions to dismiss the complaint are granted and the complaint and any and all claims associated therewith are dismissed.

This decision constitutes the order of the court.

Dated: 7-25-11

HON THOMAS P. PHELAN

J.S.C.

Attorneys of Record

Levine & Wiss, PLLC
Attorneys for Plaintiff
259 Mineola Boulevard
Mineola, NY 11501

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Martyn, Toher, Esposito, Martyn, Adler & Borselli
Attorneys for Defendant Five Towns Community Center, Inc.
330 Old Country Road
Mineola, NY 11501

Cullen and Dykman LLP
Attn: Joseph D. Delfino, Esq.
Attorneys for Defendant Keyspan Gas East Corporation
100 Quentin Roosevelt Blvd.
Garden City, NY 11530