McCormick v City of New York
2012 NY Slip Op 33635(U)
April 4, 2012
Sup Ct, New York County
Docket Number: 100325/2005
Judge: Barbara Jaffe
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[* 1] SCANNED ON 4/9/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE ~~J.S.C.~~ Justice

PART 5

Index Number : 100325/2005
MCCORMICK, KEVIN F.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS CAL # 8-9

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). ______

Answering Affidavits — Exhibits ______ No(s). ______

Replying Affidavits ______ No(s). ______

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

FILED
APR 0 [illegible] 2012
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 4/5/12
APR 05 2012

______, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .... MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

KEVIN F. MCCORMICK,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

Index No. 100325/05

Argued: 1/3/12
Motion Seq. No.: 001
Motion Cal. No.: 89

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Laurel A. Wedinger, Esq.
Barry, McTiernan & Wedinger
1024 Amboy Avenue
Edison, NJ 08837
732-225-3510

For defendant:
Jessica Wisniewski, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0609

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

By notice of motion dated August 12, 2011, defendant moves pursuant to CPLR 3211(a)(7) and CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On October 14, 2003, plaintiff allegedly slipped and fell on a detectable warning surface embedded in the pedestrian ramp at the northeast corner of Washington and Rector Streets in Manhattan, sustaining personal injuries. (Affirmation of Jessica Wisniewski, ACC, dated Aug. 12, 2011 [Wisniewski Aff.], Exh. A).

On or about January 9, 2004, plaintiff served defendant with a notice of claim. (*Id.*). On or about January 5, 2005, plaintiff served it with a summons and verified complaint, asserting that defendant was negligent in designing and installing the ramp, thereby creating a dangerous condition. (*Id.*, Exh. B). On or about February 4, 2005, defendant joined issue with service of its answer. (*Id.*, Exh. C).

On or about July 20, 2005, plaintiff served defendant with a verified bill of particulars

providing, in pertinent part, that "[d]efendant[] failed to adequately design or insure the adequate design of this curb cut in that the slopping (sic) area consisted of slippery plastic material that was not color coded to alert plaintiff of it." (*Id.*, Exh. D).

At an examination before trial (EBT) held on October 17, 2009, plaintiff testified that the ramp was "hard plastic [and] had raised parts that were round and were plastic" and that his "right foot slid on it as [he] stepped on it . . . ." (*Id.*, Exh. E). When presented with a photograph of the ramp, in which the detectable warning surface appears darker than the surrounding cement, he identified the detectable warning surface as the location of his accident, and according to him, he first noticed it after he fell. (*Id.*).

At an EBT held on June 14, 2010, Ewan T. Chung, engineer in charge for defendant, testified that the ramp was installed by an independent contractor pursuant to a contract with the New York City Department of Design and Construction (DDC) for the reconstruction of Rector Street, that work performed pursuant to the contract commenced on September 16, 2002 and was completed on June 30, 2003, that he was the engineer in charge of this project, that a change order providing the specifications by which the ramp must be installed was issued, that the ramp is either plastic or cement, that it was inspected by two DDC inspectors after it was installed, and that its slipperiness was not tested during the inspections. (*Id.*, Exh. G).

Dated April 30, 2003, the change order for the ramp reflects that "[t]his work shall consist of furnishing and installing a detectable warning surface on sidewalk pedestrian ramps," and the justification for same provides as follows:

> [t]his contract change is an ADA requirement. Sidewalk pedestrian ramps shall be constructed in accordance with the requirements of New York City Department of Transportation standard drawing H-1011-R88(2) except that the surface of the ramp shall have a coarse broom finish running perpendicular to the slope, exclusive of the detectable

> warning fields. The ramp within two feet of the curb shall finish with a detectable warning surface meeting the dimensional details on other requirements as noted on New York City Department of Transportation Metric Sheet M 608-5.

(Affirmation of Laurel A. Wedinger, Esq., in Opposition, dated Oct. 24, 2011 [Wedinger Opp. Aff.], Exh. E). Additionally, a payment form referencing multiple change orders to the Rector Street reconstruction contract, including the pedestrian ramp change order, reflects that Edmond Lartigue, a DDC engineer and inspector, certified that the work had been completed on May 4, 2004. (*Id.*, Exh. G).

At an EBT held on March 17, 2011, Lartigue testified that an "as-built" dated July 25, 2003 reflects that the pedestrian ramps and the detectable warning surfaces thereon had been installed at the subject intersection and that he was satisfied with same, and that although the pedestrian ramps were open to the public after he signed the as-built, the contractor remained on-site until DDC Quality Assurance approved its work. (*Id.*, Exh. H).

By affidavit dated October 24, 2011, Irvin S. Loewenstein states, in pertinent part, that he possesses expertise in sidewalk hazard assessment; that, based on his examination of "deposition summaries, the contract change form, the change order justification forms, The State of New York Metric Standard for detectable warning fields, photographs of [the] site, and change order payment forms," the "required perpendicular broom strokes were [not] applied leading to the detectable warning surface;" and that "the risk of slipping while stepping onto the detectable warning surface was greatly enhanced" without the broom strokes. (Wedinger Opp. Aff., Exh. I).

On or about August 12, 2011, defendant served plaintiff with the instant motion, annexing thereto, *inter alia*, plaintiff's complaint; transcripts of plaintiff's, Chung's, and Lartigue's EBTs; a photograph of the pedestrian ramp; the as-built pertaining to the pedestrian

ramps at the subject intersection; a memorandum reflecting that DDC approved Transpo Industries, Inc. (Transpo) as the independent contractor's choice of vendor for the detectable warning surfaces; a price breakdown sheet for the detectable warning surfaces reflecting that Transpo products were used; and a print-out from Transpo's website reflecting that its detectable warning surface tiles comply with the Americans with Disabilities Act. (Wisniewski Aff., Exhs. B, E, F, G, H, I, J). On or about October 24, 2011, plaintiff served defendant with his opposition, annexing thereto, *inter alia*, the change order form, the change order justification, the May 4 payment form, and Loewenstein's affidavit. (Wedinger Opp. Aff., Exhs. D, E, G, I).

II. CONTENTIONS

Defendant asserts that, inasmuch as plaintiff asserts a claim for negligent maintenance of the pedestrian ramp, he has failed to state a cause of action for same, as he did not testify that he slipped as a result of the ramp being broken or otherwise defective. (Wisniewski Aff.). It also maintains that he fails to state a cause of action for negligent design insofar as the detectable warning surface's color is concerned, as photographs show that it is darker than the surrounding cement, and in any event, plaintiff did not testify that he could not differentiate between the detectable warning surface and the cement. (*Id.*). And, defendant maintains that it is entitled to summary judgment on plaintiff's negligent design claim, as Transpo designed the detectable warning surface, and it was installed pursuant to state and federal law, not City guidelines. (*Id.*).

In opposition, plaintiff asserts that there exist triable factual issues as to the installation and design of the detectable warning surface precluding summary judgment, as Chung testified that he could not determine whether the surface is plastic or cement, the change order form reflects that the ramp was to be constructed in compliance with City drawings, Loewenstein

opined that the ramp was not installed with perpendicular broom strokes as required by the change order, Chung's and Lartigue's testimony is inconsistent as to when work on the contract ended, and the payment form indicates that work on the pedestrian ramps may have been ongoing when the accident occurred. (Wedinger Opp. Aff.).

III. ANALYSIS

A. Plaintiff's negligent installation claim

Defendant does not address this claim. In any event, Loewenstein's affidavit demonstrates that there exist triable issues as to whether defendant was negligent in approving the ramp's installation without the perpendicular broom strokes, as he stated that the absence of same increases the risk of slipping on the detectable warning surface.

B. Plaintiff's negligent design claim

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as

true, and accord the non-moving party "the benefit of every possible favorable inference." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588, 590 [1st Dept 2010]).

Here, although defendant did not design the detectable warning surface itself, the change order justification reflects that the surface was to be installed on the pedestrian ramp pursuant to defendant's design specifications. Absent evidence demonstrating that plaintiff's accident occurred solely because of the design of the detectable warning surface itself, and not because of the overall design of the ramp, defendant has failed to establish *prima facie* entitlement to summary judgment on this claim.

And, notwithstanding that the detectable warning surface appears darker than the surrounding cement in the photographs, as plaintiff testified that he first noticed the detectable warning surface after he fell, it may be inferred that its design, insofar as its color is concerned, caused his accident. Therefore, defendant is not entitled to dismissal of this claim pursuant to CPLR 3211(a)(7).

As the complaint contains no claim for negligent maintenance of the pedestrian ramp, defendant's contentions as to same need not be considered.

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NEW YORK

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for an order dismissing the complaint is denied.

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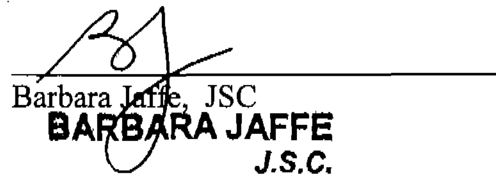

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 4, 2012
New York, New York
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