

Nunez v City of New York

2012 NY Slip Op 30187(U)

January 24, 2012

Supreme Court, New York County

Docket Number: 105344/09

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE *Taffe*
J.S.C. Justice

PART 5

Index Number : 105344/2009
NUNEZ, IGDALIA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT
CAL # 83

INDEX NO. 105344/09
MOTION DATE 11/11/11
MOTION SEQ. NO. 005
MOTION CAL. NO. 52

in this motion to/for summary judgment

PAPERS NUMBERED

1
2.3
4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
FACCOMPANYING DECISION / ORDER
FILED

JAN 27 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/24/12
JAN 24 2012

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X
IGDALIA NUNEZ,

Index No. 105344/09

Plaintiff,
-against-

Argued: 11/1/11
Motion Seq. No.: 005
Motion Cal. No.: 52

THE CITY OF NEW YORK, THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
TULLY CONSTRUCTION CO., INC., and CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.

DECISION AND ORDER

Defendants.

BARBARA JAFFE, J.S.C.:

FILED
JAN 27 2012
NEW YORK
COUNTY CLERK'S OFFICE

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By notice of motion dated May 13, 2011, defendant Port Authority of New York and New Jersey (Port Authority) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it. Plaintiff and defendant City oppose.

By notice of cross-motion dated August 10, 2011, defendant City moves pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing the complaint and all cross-claims against it. Plaintiff opposes.

I. BACKGROUND

On April 19, 2008, plaintiff tripped and fell on a raised portion of sidewalk adjacent to George Washington Bridge Park (the Park), owned by Port Authority, and Cabrini Boulevard, south of its intersection with West 180th Street in Manhattan. (Affirmation of Melissa L. Banks,

Esq., dated May 13, 2011 [Banks Aff.], Exhs. A, I). Cobblestone tree wells are located along the sidewalk. (*Id.*, Exh. I).

On April 15, 2009, plaintiff commenced the instant action with the filing of a summons and verified complaint, asserting negligence claims against defendants based on their ownership, operation, and maintenance of the sidewalk. (*Id.*, Exh. B). On May 5 and June 22, 2009, Port Authority and City, respectively, joined issue with service of their answers. (*Id.*, Exh. C; Affirmation of Jessica Wisniewski, ACC, dated Aug. 10, 2011 [Wisniewski Aff.], Exh. C).

On November 12, 2009, a search of New York City Transportation (DOT) records pertaining to the sidewalk adjacent to Cabrini Boulevard between West 180th and West 181st Streets from the two years before and including April 19, 2008 was performed, yielding two permits and a Big Apple Map on which the symbol for “an extended section of raised or uneven sidewalk” appears at the accident site. (*Id.*, Exh. F). One of the permits was issued to defendant Tully Construction Company, Inc. “to open the roadway and/or sidewalk” for “milling” as part of a New York City Department of Design and Construction reconstruction project (Tully permit). (*Id.*).

At an examination before trial (EBT) held on June 9, 2010, Abraham Lopez, a DOT Records Searcher, testified that he does not know whether Tully opened the sidewalk, the roadway, or both, and that “milling” is “the taking up of the roadway, not the digging up of the sidewalk.” (*Id.*, Exh. G).

At an EBT held on December 7, 2010, Frank Minervini, General Maintenance Supervisor for Port Authority at the George Washington Bridge, testified that has held that title since 1999, that he and his staff perform maintenance work inside the Park, including the sidewalks and

cobblestones therein, that Port Authority has not performed any maintenance work on the sidewalk adjacent to the Park since he started working there, and that he cannot remember the last time he walked along the sidewalk on which the accident occurred. (Banks Aff., Exh. H).

II. ANALYSIS

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).

A. Port Authority's motion

1. Contentions

Port Authority disclaims liability for plaintiff's injuries, denying that it is subject to New York City Administrative Code § 7-210 by virtue of being a state agency, and asserting that it neither caused or created the defect nor put the sidewalk to a special use. (Banks Aff.).

In opposition, plaintiff asserts that Port Authority may be held liable pursuant to section 7-210, as New York Unconsolidated Laws § 7106 provides that New York and New Jersey waived Port Authority's sovereign immunity, and in any event, it put the sidewalk to a special use by maintaining the cobblestone tree wells for its own benefit. (Affirmation of Constantine D. Fotopoulos, Esq., in Opposition, dated Aug. 10, 2011 [Fotopoulos Opp. Aff.]).

In opposition, City also maintains that Port Authority is subject to Administrative Code § 7-210, as it was performing a pecuniary function as landlord of the Park and thus does not enjoy governmental immunity from suit, and section 7-210 regards public health and safety, and that triable issues of fact exist as to whether Port Authority had actual or constructive notice of the defect. (Wisniewski Aff.).

In reply, Port Authority maintains that it cannot be held liable pursuant to section 7-210, as it enjoys governmental, as opposed to sovereign, immunity, and the statute does not pertain to public health and safety. (Affirmation of Melissa L. Banks, Esq., in Reply, dated Oct. 10, 2011). It also denies that it put the sidewalk to a special use, as it maintains only those sidewalks and cobblestones inside of the Park, and no evidence has been offered reflecting that it constructed or repaired the tree wells on the subject sidewalk. (*Id.*).

2. Analysis

a. Administrative Code § 7-210

Pursuant to section 7-210 of the New York City Administrative Code, and subject to certain exceptions not pertinent here, the owner of real property abutting a sidewalk, not City, has the duty to “maintain such sidewalk in a reasonably safe condition” and is liable for injuries arising from its failure to do so. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]). Where an abutting landowner does not dispute the existence of the dangerous condition, it must demonstrate that it neither caused or created the condition nor that it had actual or constructive notice thereof in order to escape liability. (*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422 [1st Dept 2011]). To demonstrate the absence of constructive notice, the landowner must offer testimony, based on personal knowledge, regarding the sidewalk’s last inspection or its condition before the accident. (*Id.* at 423).

As it is undisputed that Port Authority owns the Park and that plaintiff tripped and fell on a defect in the adjacent sidewalk, and as it does not dispute the existence of the defect, absent any testimony based on personal knowledge regarding the sidewalk's last inspection or its condition before the accident, Port Authority may be held liable for plaintiff's injuries.

In light of this determination, the parties' contentions with respect to whether Port Authority put the sidewalk to a special use or caused or created the defect need not be considered.

b. Sovereign immunity

Port Authority is a State agency. (*Matter of World Trade Ctr. Bombing Litig. Steering Comm.*, 17 NY3d 428, 432-33 [2011]). New York Unconsolidated Laws § 7106 provides, in pertinent part, that:

although [] [P]ort [A]uthority is engaged in the performance of governmental functions, [New York and New Jersey] consent to liability on the part of the [P]ort [A]uthority in such suits, actions, or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

Exceptions to the waiver are set forth in New York Unconsolidated Laws §§ 7102 to 7105. None of them relates to tort liability under the local law.

Similarly, Court of Claims Act § 8 provides that:

[t]he [S]tate hereby waives its immunity from liability and action and hereby assumes liability and consents to have same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein shall be construed to affect, alter, or repeal any provision of the [Worker's] [C]ompensation [L]aw.

In *Locario v State of New York*, 90 AD3d 547 [1st Dept 2011], the First Department held that the two exceptions to the waiver contained within section 8 are exclusive, and thus, that the State may be held liable as an abutting landowner pursuant to Administrative Code § 7-210. (*See*

id. [there exists no “exception to the [S]tate’s waiver of sovereign immunity on the basis of tort liability created by local law”).

Given that section 7106 and Court of Claims Act § 8 are nearly identical, and that exceptions to the waiver of Port Authority’s immunity are specifically enumerated as are exceptions to the State’s waiver, and utilizing the same rule of statutory construction as in *Locario* (McKinney’s Cons Laws of NY, Book 1, Statutes § 240), there is no exception to the waiver of Port Authority’s sovereign immunity for tort liability pursuant to local law, and thus, Port Authority may be held liable as an abutting landowner pursuant to Administrative Code § 7-210.

c. Governmental immunity

Section 7106 contains a waiver of sovereign immunity only, and Port Authority may still invoke the common-law defense of governmental immunity (*Matter of World Trade Ctr.*, 17 NY3d at 445), which “shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions (*Valdez v City of New York*, 18 NY3d 69, 76 [2011]).

As a public entity acting as a landlord does so in its proprietary capacity in repairing and maintaining the premises, when its failure to do so causes injury, it may be held liable therefore just as a private entity would. (*Miller v State of N.Y.*, 62 NY2d 506, 511-12 [1984]; *McGowan v State of N.Y.*, 41 AD3d 670 [2d Dept 2007]).

Here, as Port Authority was obligated, pursuant to section 7-210, to maintain and repair the sidewalk on which plaintiff fell, and as its failure to do so allegedly caused plaintiff’s injuries, it is not entitled to governmental immunity.

Given this result, the parties’ arguments as to whether Administrative Code § 7-210

relates to public health and safety need not be considered.

B. City's motion

1. Contentions

City asserts that, pursuant to Administrative Code § 7-210, it cannot be held liable for plaintiff's injuries as it does not own the Park and did not cause or create the defect. (*Wisniewski Aff.*).

In opposition, plaintiff claims that, as the Big Apple Map provided City with prior written notice of the defect before section 7-210 became effective, it may be held liable for her injuries. (*Fotopoulos Opp. Aff.*).

2. Analysis

Administrative Code § 7-210 applies to all claims arising after September 14, 2003. (*Vucetovic*, 10 NY3d at 520-21). That City received the Big Apple Map before September 14, 2003 is irrelevant, and as it is undisputed that City did not own the Park when the accident happened, it has demonstrated *prima facie* entitlement to summary judgment pursuant to section 7-210. (*See supra*, II.A.2.a.; *see e.g. Nicoletti v City of New York*, 77 AD3d 715 [2d Dept 2010] [City demonstrated *prima facie* entitlement to summary judgment where plaintiff tripped and fell on sidewalk adjacent to property owned by another entity]; *Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [same]).

However, to the extent that City may still be held liable if it caused or created the defect (*Harakidas v City of New York*, 86 AD3d 624 [2d Dept 2011]; *Adler v City of New York*, 52 AD3d 549 [2d Dept 2008]; *Faulk v City of New York*, 2007 NY Slip Op 51346[U], 16 Misc 3d 1108[A] [Sup Ct, Kings County July 10, 2007]), it has failed to demonstrate that it did not do so, as it offers search results for records pertaining to the sidewalk along Cabrini Boulevard between

West 180th and West 181st Streets, not between West 179th and West 180th Streets, the block in which the accident occurred. Moreover, even if the Tully permit pertained to the correct block, as it reflects that it was authorized to perform work on a City agency's behalf, and as no evidence has been offered demonstrating that it worked only on the roadway, triable issues of fact exist as to whether City caused or created the defect. (*See Perez v El Mundo Dept. Store, Inc.*, 2011 NY Slip Op 32720[U] [Sup Ct, New York County, Jaffe, J.] [although City demonstrated that it did not own property abutting sidewalk on which plaintiff fell, motion for summary judgment denied, as it issued permit to private entity to perform work on its behalf at accident site and thus failed to demonstrate that it neither caused nor created defect]).

In light of this result, the parties' contentions as to the notice provided by the Big Apple Map need not be considered.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Port Authority of New York and New Jersey's motion for summary judgment is denied; and it is further

ORDERED, that defendant City of New York's cross-motion for summary judgment is denied..

DATED: January 24, 2012
 New York, New York
 JAN 24 2012

FILED
 ENTER: JAN 27 2012
 NEW YORK COUNTY CLERKS OFFICE
 Barbara Jaffe JSC
 BARBARA JAFFE J.S.C.
 BARBARA JAFFE J.S.C.