Kupfer v City of New York
2012 NY Slip Op 30513(U)
March 2, 2012
Sup Ct, NY County
Docket Number: 109152/08
Judge: Barbara Jaffe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 3/5/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 5

Index Number : 109152/2008

KUPFER, DANIEL

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

DISMISS

CAL # 71

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

...tion to/for _____

No(s). 1

No(s). 2, 3

No(s). 4, 5

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

FILED

MAR 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 3/2/12

MAR 02 2012

_____, 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

----------x

DANIEL KUPFER,

Plaintiff,

-against-

THE CITY OF NEW YORK and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendants.

----------x

Index No. 109152/08

Motion Subm.: 11/22/11
Motion Seq. Nos.: 002,

DECISION & ORDER

FILED
MAR 05 2012
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA JAFFE, JSC:

For plaintiff:
Kathleen Higgins, Esq.
Law Office of Kathleen Higgins, PLLC
270 Jay St., Ste. One
Brooklyn, NY 11201
718-422-0053

For City:
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007
212-442-6851

For PANY/NJ:
Benjamin S. Noren, Esq.
James M. Begley, Esq.
225 Park Ave., 13th Fl.
New York, NY 10003
212-435-3488

By notice of motion dated July 13, 2011, defendant City moves pursuant to CPLR 3211(a)(7) and/or 3212 for an order dismissing the complaint and all cross claims against it. Plaintiff and defendant Port Authority of New York and New Jersey (PA) oppose the motion.

By notice of motion dated July 12, 2011, PA moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes the motion.

The motions are consolidated for decision.

I. BACKGROUND

On October 18, 2007, plaintiff was injured when he allegedly tripped and fell on a broken and mis-leveled portion of the sidewalk outside the Port Authority Bus Terminal (Terminal) and on the east side of Ninth Avenue in the area surrounding a fire hydrant, approximately 28 feet

north of West 40th Street and two feet east of the curb at Ninth Avenue in Manhattan. (Affirmation of Peter C. Lucas, ACC, dated July 13, 2011 [Lucas Aff.], Exh. A).

On November 21, 2007, plaintiff served City with his notice of claim, and on or about April 24, 2008, he served defendants with his summons and complaint. (*Id.*, Exhs. A, B). Defendants thereafter served their answers. (*Id.*, Exh. C, D). On January 8, 2008, plaintiff testified at a 50-h hearing that, as pertinent here, he tripped on a depression in the ground surrounding the fire hydrant which was approximately one-inch or greater in depth. (*Id.*, Exh. F).

On January 13, 2010, Paul Gembara, a principal property specialist employed by PA, testified at an examination before trial (EBT) that the area where plaintiff fell is not owned by PA, that PA's property line ends near or abuts the Terminal, and that the sidewalk outside of the Terminal is not part of PA's property. He had no knowledge regarding any work or repairs done at the location, or permits or permit requests. (Affirmation of Benjamin S. Noren, Esq., dated July 12, 2011 [Noren July 12 Aff.], Exh. I).

At an EBT held on September 3, 2010, Anthony Williams, an inspector employed by City's Department of Transportation (DOT), testified that on September 24, 2007, he was assigned to inspect the area around the Terminal in connection with a permit that City had issued to Authority for the purpose of erecting a temporary security structure in front of the Terminal. He did not inspect the area around the hydrant, and did not recall if he had noticed any depressions, cracks, debris or crumbled concrete around it, or other details of his inspection. (Affirmation of Kathleen Higgins, Esq., dated Sept. 6, 2011 [Higgins Aff.], Exh. D).

By affidavit dated June 6, 2011, David Schloss, a Senior Law Examiner with City's Law Department, states that a title search for the owner of the Terminal reflects that PA holds title to

it. (*Id.*, Exh. G).

By affidavit dated June 14, 2011, Nalik Zeigler, a DOT employee, states that a search of DOT's records for violations, permit applications, permits, complaints, repair orders, contracts, milling/resurfacing records, HIQA records (including notices of violation), inspection records, Corrective Action Requests, and Big Apple Maps (Maps) for the sidewalk on both sides of the roadway on Ninth Avenue between 40th and 41st Street for the two years prior to and including the date of plaintiff's accident yielded two permits, seven inspection records, and four Maps. The permits were issued to PA and a contractor. (*Id.*, Exhs. H, I).

By affidavit dated July 11, 2011, Bruce Robinson, an employee of City's Department of Environmental Protection (DEP), states that a two-year search of DEP's records for the location of plaintiff's accident reflects that it performed no work there. (*Id.*, Exh. L).

II. CITY'S MOTION

As City has demonstrated good cause for having filed the instant motion two days beyond this Part's 60-day deadline, I consider it on the merits. (*See eg Smith v Nameth*, 25 AD3d 599 [2d Dept 2006] [good cause shown as defendants had difficulty obtaining affidavit that was necessary to motion]; *Perkins v AAA Cleaning*, 30 AD3d 790 [3d Dept 2006] [court properly accepted as good cause movant's excuse that delay caused by difficulty in obtaining deposition transcripts and expert opinion]).

A. Contentions

City denies any duty to maintain the sidewalk in front of the Terminal as it was not the abutting landowner, or that it either caused or created any dangerous condition on the sidewalk. (Lucas Aff.).

Plaintiff asserts that City may be held liable as its installation of the fire hydrant in the sidewalk constitutes a special use, or based on its negligent inspection of the sidewalk preceding the accident, thereby negating the need to demonstrate that it had prior written notice of the defect. (Affidavit of Kathleen Higgins, Esq., dated Sept. 6, 2011 [Higgins Aff.]).

PA does not dispute City's denial of a duty or of having created a dangerous condition on the sidewalk. PA's denial of liability and assertion of immunity are addressed *infra* at III.B.1. (Affirmation of Benjamin S. Noren, Esq., dated July 25, 2011).

B. Analysis

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. (Admin. Code § 7-210[c] [City liable for injury caused by failure to maintain 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 . . ."]). Therefore, after September 14, 2003, the effective date of section 7-210, the abutting property owner, not City, is generally liable for accidents caused by the failure to maintain a sidewalk. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, City has established, *prima facie*, that it is not the abutting landowner, and that it neither created nor contributed to causing the alleged defect. Consequently, whether City made special use of the accident location or failed to or negligently inspected it is irrelevant. Moreover, the duty to repair a defect in an area surrounding a fire hydrant in a sidewalk rests with the abutting landowner. (*Harakidas v City of New York*, 86 AD3d 624 [2d Dept 2011]

[alleged sidewalk defect described as "rectangular depression with irregular asphalt surface approximately the size of sidewalk flag in which fire hydrant was situated close to one edge next to curb"]).

III. PA'S MOTION

A. Contentions

PA contends that it is immune from liability here as it is exempted from any municipal regulations, and that it did not own the sidewalk on which plaintiff allegedly tripped, relying on Gembara's affidavit. Even if it was the abutting landowner, PA denies having created the alleged defect, having made special use of the area where plaintiff fell, and having had actual or constructive notice of the defect before plaintiff's accident. It further asserts that the defect was trivial and thus not actionable. (Noren July 12 Aff.).

Plaintiff argues that there remain triable issues as to whether PA made special use of the area or created the defect, and denies that the defect was trivial. (Higgins Aff.).

In reply, PA reiterates its prior arguments. (Reply Affirmation, dated Oct. 12, 2011).

City maintains that PA is not immune from liability (Reply Affirmation, dated Oct. 18, 2011 [Reply Aff.]), which PA disputes by letter dated October 26, 2011.

B. Analysis

Whether PA's property line extended to the area where plaintiff fell is irrelevant absent any dispute that PA owns the abutting property, the Terminal, and as section 7-210 of the Administrative Code renders a landowner liable for any defective condition in the abutting sidewalk.

1. Immunity

Section 7106 of the New York Unconsolidated Laws 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 address 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 set forth in Court of Claims Act § 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 of the New York Unconsolidated Laws and Court of Claims Act § 8 are nearly identical, and that exceptions to the waiver of PA's immunity are specifically enumerated, as are exceptions to the State's waiver, and utilizing the rule of statutory construction employed by the court in *Locario* (McKinney's Cons Laws of NY, Book 1, Statutes § 240 [where law expressly describes particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be

omitted and excluded]), PA is not exempted from the waiver of sovereign immunity for tort liability pursuant to local law. Consequently, it may be held liable as an abutting landowner. (*See also Japan Airlines Co., Ltd. v Port Auth. of New York and New Jersey*, 178 F3d 103 [2d Cir 1999] [PA not immune from liability for negligent maintenance of airport as airport operator]).

2. Notice

Absent any evidence based on personal knowledge submitted by PA as to the defect on which plaintiff tripped, it has not established, *prima facie*, that it neither created nor had actual or constructive notice of it. (*See Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422 [1st Dept 2011] [abutting landowner failed to show lack of actual or constructive notice of dangerous condition on abutting sidewalk absent affidavit or testimony based on personal knowledge as to when sidewalk or sidewalk's condition inspected before accident]; *Lebron v Napa Realty Corp.*, 65 AD3d 436 [1st Dept 2009] [defendant did not establish that it neither created dangerous condition nor had actual or constructive notice of it as employee's testimony was not probative absent personal knowledge of condition of sidewalk at time of or before accident]).

3. Trivial defect

It is well-settled that "[t]he owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection." (*Morales v Riverbay Corp.*, 226 AD2d 271 [1st Dept 1996]). Whether a defect in a sidewalk is trivial does not depend solely on its dimensions. Rather, "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact

for the jury." (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *quoting Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]). "[E]ven a trivial defect may constitute a snare or trap." (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]; *see also Nin v Bernard*, 257 AD2d 417 [1st Dept 1999] [precise dimensions of defect not dispositive as to whether defect was trivial]).

Thus, sidewalk defects measuring at least one inch have been found to be not trivial. (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361 [4th Dept 2008] [sidewalk slabs with height differential of one inch insufficient to satisfy defendant's burden of showing defect was trivial]; *Boxer v Metro. Transp. Auth.*, 52 AD3d 447 [2d Dept 2008] [where plaintiff alleged defect was one inch in height and defendant alleged it was one-half inch, triable issues of fact existed]; *Mishaan v Tobias*, 32 AD3d 1000 [2d Dept 2006] [photographs showing broken and cracked sidewalk elevated at least one inch raised triable issue]).

Here, as the gap into which plaintiff allegedly fell is approximately one inch high, it is not trivial as a matter of law. (*See DeLaRosa v City of New York*, 61 AD3d 813 [2d Dept 2009] [defendant failed to establish that defect consisting of height differential between two concrete slabs on sidewalk was trivial]; *Cuebas*, 55 AD3d at 1361 [same]; *Herrera v City of New York*, 262 AD2d 120 [1st Dept 1999] [elevation differential of between 3/8th to one inch between sidewalk sections, sloping downward in direction plaintiff had been walking, with gap of up to one and 1/2 inches in width not trivial]). PA has thus failed to establish, *prima facie*, that the defect was trivial and thus not actionable.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint and any cross claims against it is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City Part and remove it from the Part 5 inventory. Plaintiff shall serve, within 20 days of the date of this order, a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; it is further

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

ENTER:

FILED
MAR 05 2012
COUNTY CLERK'S OFFICE
NEW YORK

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.
MAR 02 2012

DATED: March 2, 2012
New York, New York