

Sewer v City of New York

2012 NY Slip Op 31001(U)

April 11, 2012

Sup Ct, New York County

Docket Number: 104416/09

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 5

Index Number : 104416/2009
SEWER, AMELIA C.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT CAL #124

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). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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

DETERMINED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/11/12
APR 11 2012

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

-----X
AMELIA SEWER,

Plaintiff,

-against-

Index No. 104416/09

Motion Subm.: 1/3/12

Motion Seq. Nos.: 003,

DECISION & ORDER

THE CITY OF NEW YORK, NEW YORK CITY
BOARD OF EDUCATION, NEW YORK CITY
SCHOOL CONSTRUCTION AUTHORITY,
DACOSTA LANDSCAPING CONTRACTORS
CORP.,

Defendant.
-----X

FILED

APR 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

For plaintiff:

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Elliot Iffrimoff & Assocs., P.C.
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For NYCHA:

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Ledy-Gurren *et al.*
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New York, NY 10016
212-447-1111

For SCA:

Lorraine McKay, Esq.
Cozen O'Connor
45 Broadway, 16th Fl.
New York, NY 10006
212-509-9400

By notice of motion dated October 12, 2011, plaintiff moves pursuant to CPLR 3212 for an order granting her summary judgment on liability only to the extent of finding that on the date of her accident, defendant New York City Housing Authority (NYCHA) owned the premises where the accident occurred. NYCHA opposes.

By notice of motion dated October 17, 2011 and submitted without opposition, defendant New York City School Construction Authority (SCA) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims and counterclaims against it.

I. PERTINENT BACKGROUND

On April 7, 2008, plaintiff was injured when she allegedly tripped and fell on a defect

located on the premises located at 232 East 103rd Street in Manhattan (premises) and/or the adjoining sidewalk, driveway, or highway located in front of the premises. (Affirmation of Dmitriy Shulman, Esq., dated Oct. 12, 2011 [Shulman Aff.], Exh. A).

By summons and complaint dated March 25, 2009, plaintiff sued defendants City, New York City Board of Education (Board), SCA, and DaCosta Landscaping Contractors Corp. (DaCosta). (*Id.*, Exh. A).

By summons and complaint dated September 18, 2009, plaintiff commenced a separate action against NYCHA, and by decision and order dated January 26, 2010, the actions were consolidated for all purposes. (*Id.*, Exhs. C, D).

At an examination before trial (EBT) held on January 18, 2011, plaintiff testified that on the day of her accident, she walked along 103rd Street, which leads into and ends within a NYCHA development called the Washington Houses, until she reached a public school within the development, which had a driveway or pickup area in front of it. She stepped off the curb into the driveway and, after walking beside the school, she stepped back onto the curb, next to the sidewalk in front of the school, when her right foot became caught in a gap or missing part of the curb and twisted, causing her to fall. Pictures identified by plaintiff reflect a missing piece of the curb in front of the sidewalk. (*Id.*, Exhs. E, F).

By notice to admit dated March 9, 2011, plaintiff asked NYCHA to admit to the genuineness of a deed dated February 26, 1953 between City and NYCHA by which City conveyed to NYCHA title to certain property. (*Id.*, Exh. G). By response dated March 22, 2011, NYCHA admitted to the genuineness of the deed. (*Id.*, Exh. H).

By affidavit dated October 1, 2011, Gerald T. O'Buckley, a professional land surveyor,

states that on March 27, 2009, he conducted a survey of the area where plaintiff fell to determine who owned it, and that according to the 1953 deed, title to the lot containing the area was given to NYCHA from City and no further deeds or conveyances related to the lot were found. He thus concludes, based on his survey and the deed, that NYCHA owns the property on which plaintiff fell. (*Id.*, Exh. K).

II. PLAINTIFF'S MOTION

A. Contentions

Plaintiff contends that there remains no triable issue as to whether NYCHA owns the property where she fell. (Shulman Aff.).

NYCHA argues that summary judgment is inappropriate for resolution of a single factual issue, and that even if it is determined that it owned the premises, it does not resolve plaintiff's negligence claim against it. It also contends that O'Buckley's affidavit is insufficient proof of its ownership of the premises absent a description of his survey and because the 1953 deed contains no description of the premises at the lot number stated by him. (Affirmation of Deborah Bass, Esq., dated Dec. 1, 2011).

In reply, plaintiff denies seeking a declaration as to NYCHA's overall liability but only its ownership of the accident location, or that O'Buckley's affidavit is insufficient. (Reply Affirmation, dated Dec. 12, 2011).

B. Analysis

Pursuant to CPLR 3212(g), on a motion for summary judgment, the court may determine what facts are not in dispute and may render an order specifying such facts which are then deemed established for all purposes in the action. Consequently, NYCHA's claim that the sole

factual issue of whether it owns the property at issue may not be resolved here is misplaced.

Moreover, as O'Buckley's survey was accompanied by his affidavit explaining how he conducted the survey and arrived at his conclusion, it is sufficient to establish that NYCHA owns the property at issue. (*See eg Raab v Lefkowitz*, 76 AD3d 619 [2d Dept 2010] ["[I]n order to prove a boundary by a survey, there should be proof of the identity, competency and the authority of the surveyor in the particular case, and of the purpose of the survey"], *quoting* 1 NY Jur 2d, Adjoining Landowners § 143 [2012]; *Zehnick v Meadowbrook II Assocs.*, 20 AD3d 793 [3d Dept 2005], *lv denied* 5 NY3d 873 [defendant submitted survey map and surveyor's affidavit to establish that plaintiff's fall did not occur on its property, thereby shifting burden of proof to plaintiff to raise triable issue]; *Grullon v City of New York*, 297 AD2d 261 [1st Dept 2002] [NYCHA's submissions, including affidavit and survey by licensed land surveyor, established *prima facie* that it did not own or control staircase at issue]; *Schwartzberg v Eisenson*, 260 AD2d 854 [3d Dept 1999], *lv denied* 93 NY2d 815 [defendant met burden of showing that area where plaintiff fell was public sidewalk owned by town by submitting survey and surveyor's opinion]).

Plaintiff has thus established, *prima facie*, that there is no triable issue as to NYCHA's ownership of the property, and NYCHA has failed to submit proof in opposition thereto.

Moreover, as conceded by plaintiff, as NYCHA is the owner of the property, there is no ground upon which to hold defendants City and BOE liable, and thus, a search of the record (CPLR 3212[b]) leads to their entitlement to a summary dismissal of the complaint against them (*see Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519 [1st Dept 2011] [liability for dangerous condition generally depends on ownership, control, or special use of property]; *Gross v Hertz Local Edition Corp.*, 72 AD3d 1518 [4th Dept 2010] [as defendant did not own, occupy, or have

right to control or maintain parking lot where plaintiff fell, it owed plaintiff no duty of care]).

III. SCA'S MOTION

As SCA has established that it neither owned the property on which plaintiff fell, nor that it performed any work at the property that may have caused the defect, it has demonstrated *prima facie* entitlement to dismissal of the complaint and any cross claims or counterclaims against it.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted to the extent of finding that defendant New York City Housing Authority is the owner of the property where plaintiff was injured; it is further

ORDERED, that upon searching the records, the complaint and any cross claims are dismissed against defendants City of New York and New York City Board of Education with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that defendant New York City School Construction Authority's motion for summary judgment is granted, and the complaint and any cross claims or counterclaims are dismissed against said defendant with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue; and 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 is directed to serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: April 11, 2011
New York, New York

APR 11 2012

FILED

APR 16 2012

NEW YORK
COUNTY CLERK'S OFFICE