

Gera v 500 E. 76th St. LLC

2012 NY Slip Op 32450(U)

September 20, 2012

Supreme Court, New York County

Docket Number: 115856/2009

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE ^{BARBARA JAFFE}
J.S.C.
Justice

PART 5

Index Number : 115856/2009
GERA, RUCHIKA
vs.
500 EAST 76TH STREET
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CAL # 35

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, 3</u>
Replying Affidavits _____	No(s) <u>4, 5</u>

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

FILED
SEP 24 2012
NEW YORK
COUNTY CLERKS OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 9/20/12
SEP 20 2012

BJ, 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

-----X
RUCHIKA GERA and RAJIV GROVER,

Index No. 115856/09

Plaintiffs,

Argued.: 5/15/12
Motion seq. no.: 001

-against-

DECISION AND ORDER

500 EAST 76th STREET LLC, MAUTNER GLICK
CORP., and THE CITY OF NEW YORK,

Defendants.

FILED
SEP 24 2012
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated January 27, 2012, defendants 500 East 76th Street LLC (500 East) and Mautner Glick Corp. (Mautner) (LLC, collectively) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims against them. Plaintiffs and defendant City oppose.

On October 16, 2008, at approximately 8:15 pm, while plaintiff Ruchika Gera was walking on the sidewalk in front of premises located at 500 East 76th Street in Manhattan (premises), she tripped and fell when her foot became caught in an ornamental metal tree grate covering a tree well that no longer contained a tree. (Affirmation of A. Jeffrey Spiro, Esq., dated Jan. 27, 2012 [Spiro Aff.], Exhs. E, F). It is undisputed that 500 East owns the premises and that Mautner is the management company responsible for maintaining the premises. (*Id.*).

At an examination before trial (EBT) held on December 10, 2010, Gera testified, as pertinent here, that she fell when her foot became caught in the hole in the center of the grate covering the tree well. Pictures taken of the location reflect a circular tree well covered almost entirely by a metal grate, except for a hole in the center where apparently a tree should have stood. (*Id.*, Exh. F, G).

On December 10, 2010, Lydia Azzopardi, the superintendent of the premises at the time of Gera's accident, testified at an EBT that she did not know who placed the grate and that she did not maintain it or perform any work on it. Sometime in 2005 to 2006, a tree that was in the tree well fell due to bad weather. Azzopardi reported the incident to her supervisor, and thereafter called City to report that the tree had fallen. The fallen tree was removed and never replaced. (*Id.*, Exh. I).

At an EBT held on August 26, 2011, William Steyer, the Director of Forestry for Manhattan in City's Department of Parks and Recreation (Parks), testified that Parks requires a property owner to obtain a permit before removing or planting a tree in the sidewalk, that City received a phone call about a dead tree in front of the premises in July 2008, and that a Parks employee inspected the location and recommended that a new tree be planted. A work order was generated in 2009 for the tree planting, but there is no indication that a tree was ever planted. (*Id.*, Exhs. L, M).

LLC argues that it may not be held liable as it did not cause or create the defective condition, the condition was open and obvious, and City is liable as a matter of law for maintaining tree wells, grates surrounding tree wells, and trees within wells located in sidewalks. (Spiro Aff.; Exh. I).

Plaintiffs argue that as LLC has submitted no evidence showing that the grate was purchased, installed or maintained by any entity other than it, triable issues remain as to its liability. They also observe that the defect was not open and obvious given that the accident occurred at night, and that, in any event, whether it was open and obvious is a triable issue. (Affirmation of Howard Essner, Esq., dated Apr. 23, 2012).

City similarly contends that there exist factual issues as to whether LLC installed the grate and failed to maintain it, thereby creating a dangerous condition which caused Gera's accident. (Affirmation of Michael Nacchio, Esq., dated Mar. 29, 2012).

In reply, LLC asserts that plaintiffs have not alleged that there was a defect in the grate, and that, as City is responsible for maintaining tree wells, it is also responsible for maintaining tree well grates. (Reply Affirmation, dated May 7, 2012).

Pursuant to New York City Administrative Code § 7-210(c), "notwithstanding any other provision of law, the city shall not be liable for any . . . personal injury . . . proximately caused by the failure to maintain sidewalks (other than 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) in a reasonably safe condition."

As section 7-210 is strictly construed against City, tree wells are not considered part of the sidewalk for its purposes, and City may be held liable for injuries resulting from its failure to maintain them. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]). However, an abutting property owner may be held liable for a defect in a tree well if "it affirmatively created the dangerous condition, negligently made repairs to the area, or caused the dangerous condition to occur through a special use of the area." (*Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011];

Teitelbaum v Crown Heights Assn. for Betterment, 84 AD3d 935 [2d Dept 2011]; *Grier v 35-63 Realty, Inc.*, 70 AD3d 772 [2d Dept 2010]).


Here, even if LLC installed or maintained the grate, plaintiffs have not alleged that the grate was defective. Moreover, it is undisputed that City was responsible for removing the dead tree and planting a new one, and that it knew that a new tree was needed but failed to plant one before plaintiff's accident. Thus, to the extent that the hole constitutes a dangerous condition, it was neither caused nor created by LLC. LLC also established that it did not perform any work on the grate or tree well. (See eg *Vellios v Green Apple*, 84 AD3d 1356 [2d Dept 2011] [owners demonstrated they had no duty to maintain tree well owned by City]; *Grier.*, 70 AD3d at 772 [dismissing complaint against abutting property owner as area where plaintiff fell was unpaved patch of ground on sidewalk which was actually City-owned tree well which had once contained tree, and owner showed it did not create defective condition, negligently repair it, or cause it through special use]).

Accordingly, it is hereby

FILED

ORDERED, that defendants 500 East 76th Street LLC and Mautner Glick Corp.'s motion for summary judgment is granted and the complaint is ~~dismissed~~ and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants.

ENTER:



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

DATED: September 20, 2012
New York, New York

SEP 20 2012