

Morales v City of New York

2010 NY Slip Op 33930(U)

November 19, 2010

Supreme Court, New York County

Docket Number: 117644/09

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

EDWIN MORALES,

Plaintiff,

INDEX NO. 117644/09

-against-

MOTION DATE July 6, 2010

THE CITY OF NEW YORK, et al.,

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO. 4

The following papers, numbered 1 to 4 were read on this motion for summary judgment

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

PAPERS NUMBERED

1-3

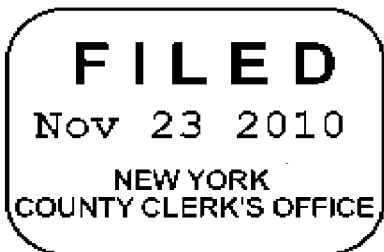
Answering Affidavits — Exhibits _____

4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, the motion of defendant Olson's Creative Landscaping Corp. pursuant to CPLR § 3212, for summary judgment dismissing the complaint and cross claims against it is decided in accordance with the accompanying decision and order.



Dated: 11/19/10

[Signature]
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION(CASE) IS RESPECTFULLY REFERRED TO JUSTICE THE MOTION SUPPORT OFFICE FOR RE-ASSIGNMENT FOR THE FOLLOWING REASON(S): THE CITY OF NEW YORK IS A DEFENDANT TO A CITY PART

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 61

-----X
 EDWIN MORALES,

Plaintiff,

-against-

THE CITY OF NEW YORK, ALL SAINTS
 HOUSING DEVELOPMENT FUND COMPANY, INC.,
 ALL SAINTS HOUSING DEVELOPMENT CORP.
 and OLSON'S CREATIVE LANDSCAPING CORP.,

Defendants.
 -----X

DECISION AND
 ORDER

Index No. 117644/2009

O. PETER SHERWOOD, J.:

This is a personal injury action arising out of a trip and fall accident on a tree well adjacent to a public sidewalk. Defendant Olson's Creative Landscaping Corp. ("Olson") moves pursuant to CPLR § 3212 for an order granting summary judgment in its favor dismissing the complaint and all cross claims against it. Plaintiff opposes the motion. For the reasons that follow, the motion is granted.

Background

On or about December 16, 2009, plaintiff, Edwin Morales ("plaintiff"), commenced the instant action to recover damages for personal injuries he allegedly sustained on March 2, 2009, at approximately 6:30 a.m., when he tripped and fell on a snow covered tree well in front of premises located at 53 East 131st Street, New York, New York (the Premises"). At the time of the accident, the premises were owned by defendant All Saints Housing Development Fund, Inc. ("ASHDF"). In his Notice of Claim dated March 30, 2009, plaintiff stated that he was caused to step into the tree well, which was obscured by snow, due to ice on the sidewalk abutting the Premises and that defendants were responsible for his injuries due to their collective negligence in creating a hazardous condition and failing to properly maintain the sidewalk in a safe condition.

Issue was joined as to Olson by service and filing of its answer on or about January 12, 2010, in which it generally denied the material allegations of the complaint, interposed six affirmative defenses and cross claimed against the co-defendants for contribution and common law and contractual indemnification.

Discussion

Olson contends that it is entitled to summary judgment because it did not own, occupy, maintain, or control the Premises nor did it perform any work on the sidewalk abutting the Premises. In support of its motion, Olson submits an affirmation of its attorney and an affidavit of its President and owner, Donald Olson, to which are annexed the pleadings, the recorded deed to the Premises, the Notice of Claim, and documents concerning a contract between the City of New York and Olson whereby Olson was to plant trees at certain specified locations in Manhattan (the Contract¹). Mr. Olson, in his affidavit, reports that he conducted a diligent search of Olson's records and did not locate any records concerning any work performed at the Premises. Although Olson was hired by the City of New York on April 1, 2009 (after the date of the accident) to plant trees in Manhattan, the contract specified the locations where such tree planting was to occur. He has provided a copy of the page of the Contract which notes the addresses where Olson was to perform work. While a number of addresses on East 131st Street were specified in the Contract, they were all addresses on the even numbered side of the street and did not include No. 53, the Premises address, or any other odd numbered addresses. In addition, Mr. Olson avers that Olson did not perform any work with the City of New York or any other entity, on or before March 2, 2009, in front of the Premises.

In opposition, plaintiff submits an affirmation of his attorney who argues that Olson's motion is premature as depositions have not yet been conducted and no party has taken responsibility for the accident. In addition, plaintiff asserts that a new party, Artec Construction and Development Corp. ("Artec"), a contractor who apparently was hired by ASHDF to perform work at the premises including the planting of trees in front of the Premises, is being added as a party defendant in the action by supplemental summons and amended complaint and has not yet had an opportunity to answer.¹ Plaintiff contends that issues of fact as to liability exist and, therefore, Olson's motion for summary judgment should be denied.

In order to prevail on its summary judgment motion, Olson is required to make a prima facie showing of its entitlement to judgment as a matter of law, by tendering evidentiary proof in admissible form (*see, Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Zuckerman v City of New*

¹While the instant motion was pending, a verified answer was served and filed on or about October 25, 2010, on behalf of ASFDF, All Saints Housing Development Corp. and Artec. which included cross claims against Olsen.

York, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the opposing parties to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204,208 [1997]). In deciding the motion, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]).

As a general rule, “liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property” (*Gover v Mastic Beach Prop. Owners Assoc.*, 57 AD3d 729, 730 [2d Dept 2008]). If the factors of ownership, occupancy or control are not present, a party cannot be held liable for injuries caused by an allegedly defective condition (*Gover v Mastic Beach Prop. Owners Assoc.*, 57 AD3d at 730). Courts have repeatedly held that “New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition” (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *Mizell v Bright Servs., Inc.*, 38 AD3d 267 [1st Dept 2007]). Furthermore, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Aragundi v Tishman Realty & Constr. Co.*, 68 AD3d 1027, 1029 [2d Dept 2009]).

Here, the court finds that Olson has met its burden and summary judgment should be granted dismissing the complaint and the cross claims as against it because the facts essential to establishing Olson’s liability have been negated by the affidavit of its President, an individual with personal knowledge of the facts, as well as by the documentary evidence annexed to the motion papers. In opposition, plaintiff has failed to rebut Olson’s prima facie showing by submitting evidentiary proof sufficient to raise a triable issue of fact as to Olson’s liability.

Conclusion

Accordingly, it is

ORDERED that the motion of defendant Olson’s Creative Landscaping Corp. for summary judgment is granted, and the complaint together with all cross claims are dismissed as against defendant Olson’s Creative Landscaping Corp., with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of said defendant

accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is amended and shall read as follows:

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EDWIN MORALES,

Plaintiff,

Index No. 117644/2009

-against-

**THE CITY OF NEW YORK, ALL SAINTS
HOUSING DEVELOPMENT FUND COMPANY, INC.,
ALL SAINTS HOUSING DEVELOPMENT CORP.
and ARTEC CONSTRUCTION AND DEVELOPMENT
CORP.,**

Defendants.

-----X

and it is further


ORDERED that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this decision and order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that this case is respectfully referred to the Motion Support Office for re-assignment to a City Part.

This shall constitute the decision and order of the Court.

DATED: 11/19/10

ENTER:

O. PETER SHERWOOD
J.S.C.