Arvanitis v 2058 Steinway, LLC
2013 NY Slip Op 33702(U)
January 18, 2013
Sup Ct, Queens County
Docket Number: 7797/11
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

KOSTAS ARVANITIS,

Plaintiff,

-against-

2058 STEINWAY, LLC, et al.,

Defendants.

Index No. 7797/11

Motion
Date December 20, 2012

Motion
Cal. No. 15

Motion
Sequence No. 2

2058 STEINWAY, LLC,
Third-Party Plaintiff,

-against-

HWANG & PARK DESIGN AND DEVELOPMENT, INC.,
Third-Party Defendant.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	1-5
Opposition.....	6-11
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Upon the foregoing papers it is ordered that the motion by defendant/third-party defendant, Hwang & Park Design and Development Inc. ("Hwang & Park") for summary judgment and dismissing the plaintiff's Complaint, the defendant/third-party plaintiff, 2058 Steinway, LLC's ("Steinway") third-party Complaint and all cross claims on the grounds that there are no triable issues of fact is granted to the extent as follows:

The action is one for personal injuries allegedly sustained by plaintiff, Kostas Arvanitas, on December 16, 2010, wherein plaintiff alleges that he was caused to be injured when he slipped and fell on the raised sidewalk located in front of the premises of 2058 Steinway Street, Queens, New York, which

premises are undisputedly owned by Steinway. Defendant Steinway commenced a third-party action against Hwang & Park, who was hired to perform construction of the building located at 2058 Steinway Street, Queens, New York, pursuant to a written contract.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendants to discover and remedy it (see id.).

Moving defendant, Hwang & Park has presented sufficient evidence to establish that as a matter of law there is an absence of a triable issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). In support of its motion, defendant/third-party defendant submits, inter alia, plaintiff's own examination before trial transcript testimony wherein he testified inter alia that: his left foot came in contact with the raised sidewalk, causing him to stumble and fall forward onto the sidewalk; the examination before trial transcript testimony of Steinway, by its owner and president, Sharif El-Fouly, who testified, inter alia that: Steinway owns 2058 Steinway Street and has owned it without interruption for about three years, Steinway hired Hwang & Park to perform construction on the building located at 2058 Steinway Street pursuant to a written contract, Mr. El-Fouly never had a conversation with Hwang & Park regarding damage to the sidewalk,

Mr. El-Fouly did not know of any construction or repair work to the subject sidewalk, and he never complained to Hwang & Park regarding the condition of the subject sidewalk; the examination before trial transcript testimony of Hwang & Park, by its owner Zhen Hua Li, wherein he testified inter alia that; Hwang & Park entered into a contract in June or July 2010 to perform construction at 2058 Steinway Street, Hwang & Park was contracted to repair the sidewalk after the construction was complete, prior to the accident, Zhen Hua Li did not have any conversation with Steinway regarding the condition of the subject sidewalk, Hwang & Park did not perform any work on the sidewalk prior to plaintiff's accident, Hwang & Park is not aware of any prior accidents occurring at the subject sidewalk, and Hwang & Park did not receive any violations with respect to the condition of the subject sidewalk. Moving defendant/third-party defendant establishes a prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, Rajgopaul, et. al. v. Toys "R" Us, 297 AD2d 728 [2nd Dept 2002]; Cruz v. Otis Elevator Company, 238 AD2d 540 [2nd Dept 1997]). Moving defendant/third-party defendant proffered sufficient proof in evidentiary form to establish the absence of a triable issue of fact.

In opposition, Steinway raised a triable issue of fact. In opposition, plaintiff submits inter alia: the examination before trial transcript testimony of Hwang & Park, by its owner, Zhen Hua Li, who testified inter alia that: as part of his duties as a General Contractor, he personally visited the subject location prior to commencement of the construction and as apart of the initial site visit, he inspected the subject sidewalk, there was a crack in the sidewalk just before the construction started, he was present during each phase of the construction process, in order to enter the worksite, he would walk past the area where plaintiff alleges the accident occurred, he had his own employees inspect the sidewalk on a daily basis; and a copy of the contract in effect between Steinway and Hwang & Park for construction work to be performed at 2058 Steinway Street.

In opposition, plaintiff raised a triable issue of fact. In opposition, plaintiff submits, inter alia, plaintiff's own examination before trial transcript testimony wherein he testifies inter alia that: he tripped and fell on a broken sidewalk adjacent to 2058 Steinway Street which portion of the sidewalk was raised three or four inches; the examination before trial transcript testimony of Sharif El-Fouly who testified inter alia that: he owns the property in question, when he examined the property at the time of the purchase of the property, he found its condition to be okay, it was his understanding that based on

the contract and his conversations with the contractor, Hwang & Park was not only required to repair or replace the sidewalk but also to keep the sidewalk in good shape during the construction from the beginning to the end, he repeatedly told Mr. Li that it was the contractor's responsibility to take care of the outside of the property and in case it snows to make sure that it'll be perfect, when he purchased the property, the sidewalk did not appear as broken and hazardous as it appears in the photograph which plaintiff testifies that his attorney took the day after the accident; and the examination before trial transcript testimony of Zhen Huia Li, who testified inter alia that: he did not place any pedestrian warnings about the sidewalk's cracked conditions, the sidewalk's condition was cracked, and Hwang & Park would inspect the adjacent sidewalk every day for pedestrian safety.

Plaintiff and defendant/third-party plaintiff Steinway presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. It is well-established law that photographs accurately depicting the area in which a plaintiff fell generally create an issue of fact as to whether a premises owner had constructive notice of a defect which caused a trip and fall which is best submitted to the jury (Zavarro v. Westbury Property Inv. Co., 244 AD2d 547 [2d Dept 1997]). Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (Trincere v. County of Suffolk, 90 NY2d 976 [1997]). Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether defendants had either actual or constructive notice of a defective condition, whether defendants created a defective condition causing plaintiff's accident, and whether defendants acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, the motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: January 18, 2013

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Howard G. Lane, J.S.C.