Fajardo v New York City Tr. Auth.

2013 NY Slip Op 32078(U)

September 3, 2013

Supreme Court, New York County

Docket Number: 104035/2010

Judge: Michael Stallman

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SCANNED ON 9/6/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

AURORA FAJARDO,

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK and MARVIN POCKER, LLC,

Defendants.

INDEX NO. 104035/10

MOTION DATE 5/9/13

MOTION SEQ. NO. 002

The following papers, numbered 1 to 6 were read on this motion for summary judgment

Notice of Motion —Affirmation of Service; Affirmation — Exhibits A-K, L [Affidavit], M, N [Affidavit]; Affidavit of Service | No(s). 1-5 ; 6

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant City of New York is decided in accordance with the annexed memorandum decision and order.

FILED
SEP 06 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 9/3/13
New York, New York

, J.S.C.

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if 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: IAS PART 21

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AURORA FAJARDO,

Plaintiff,

Index No. 104035/2010

- against -

NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK and MARVIN POCKER, LLC,

Decision and Order

Defendants.

----------X

FILED
SEP 06 2013
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on March 10, 2009, at approximately 7:00 P.M., she tripped and fell on the sidewalk in front of the entrance to the subway station for the F train at East 63rd Street and Lexington Avenue in Manhattan. (Knight Affirm., Ex A.) More specifically, the notice of claim states that the location of plaintiff's alleged trip and fall was "[o]n the west side of Lexington Avenue, approximately 31'6" north of East 63rd Street and 6'2" west of the Lexington Avenue curb . . ." (*Id.*) Plaintiff claims to have tripped over a raised sidewalk flag. (*Id.*)

Each defendant separately moves for summary judgment dismissing the complaint as against it. This decision address all three motions.

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].) "The moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case." (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009].)

The City's Motion for Summary Judgment (Motion Seq. No. 002)

The City has demonstrated prima facie entitlement to summary judgment dismissing the complaint as against it as a matter of law. It is undisputed that plaintiff allegedly tripped and fell on a public sidewalk on Lexington Avenue. Neither does plaintiff dispute that the City is not the abutting property owner. The City has submitted an affirmation stating that search results show that the property was not a one-, two- , or three-family residential property. (Knight Affirm., Ex N [Atik Affirm.] ¶ 6.) Therefore, under Administrative Code of the City of New York § 7-210, the City

is not liable for the alleged defective condition in such a sidewalk. (*See e.g. Johnson v City of New York*, 106 AD3d 664 [1st Dept 2013]; *Cohen v City of New York*, 101 AD3d 426 [1st Dept 2012].)

The City's motion for summary judgment is granted without opposition. The complaint and all cross claims against the City are dismissed. Dismissal of the complaint as against the City necessarily results in dismissal of the City's own cross claim against its co-defendant Marvin Pocker, LLC for common-law indemnification and contribution.

Marvin Pocker, LLC's Motion for Summary Judgment (Motion Seq. No. 003)

Defendant Marvin Pocker, LLC moves for summary judgment dismissing the complaint and all cross claims on the ground that the alleged defect is a trivial defect. For the purposes of this motion, plaintiff does not dispute that the height differential of the raised sidewalk flag at issue is one inch.[1]

Plaintiff argues that defendant Marvin Pocker, LLC's motion should be denied because a one-inch height differential constitutes a "substantial defect" under 34

[1] At her deposition, plaintiff was shown photographs marked as Defendant's Exhibit B at the deposition. (Malang Affirm., Ex G [Fajardo EBT], at 55.) Plaintiff testified that, in one of the photographs, a ruler indicates that the elevation differential is approximately an inch. (*Id.* at 56.) Defendant's Exhibit B was also submitted with defendant Marvin Pocker, LLC's motion. (Malang Affirm., Ex I.) Defendant Marvin Pocker, LLC does not indicate when the photographs marked as Defendant's Exhibit B were taken.

RCNY 2-09, citing *D'Amico v Archdiocese of New York* (95 AD3d 601 [1st Dept 2012].)

34 RCNY 2-09 (f) (4) (viii) states, "All flags containing substantial defects shall be fully replaced. Patching of individual flags is not permitted." 34 RCNY 2-09 (f) (5) (iv) states, in pertinent part:

> "(5) Substantial defects. Any of the following conditions shall be considered a substantial defect.
>
> * * *
>
> (iv) A trip hazard where the vertical differential between adjacent flags is greater than or equal to 1/2in. or where a flag contains one or more surface defects of one inch or greater in all horizontal directions and is 1/2in. or more in depth."

In *D'Amico*, certain defendants moved for summary judgment in their favor on the ground that the sidewalk defect was a trivial defect. In opposition, the plaintiff submitted the affidavit of an engineer who measured the sidewalk defect at 11/16 of an inch, and who opined that it constituted a "substantial defect" under 34 RCNY 2-09 (f) (5) (iv). On appeal, the Appellate Division, First Department ruled that "we cannot find, as a matter of law, that the defect was trivial." (*D'Amico*, 95 AD3d at 601.)

In *Gomez v Congregation K'Hal Adath Jeshurun, Inc.* (104 AD3d 456 [1st Dept 2013]), the Appellate Division cited *D'Amico* with approval, when it unanimously affirmed denial of the defendant's motion for summary judgment on the ground of

trivial defect. The Appellate Division stated, "Plaintiff's papers in opposition, however, raised triable issues of fact as to whether the one-half-inch differential between two sidewalk flags was a 'substantial defect' under 34 RCNY 2-09 (f) (5) (iv). . . ." (*Gomez*, 104 AD3d at 456-457.)

D'Amico and *Gomez* are controlling here. The vertical differential of the raised sidewalk flag in photographs marked as Defendants' Exhibit B appears to be over a half inch. (*See* Malang Affirm., Ex I.) Because 34 RCNY 2-09 (f) (4) (viii) requires full replacement of a sidewalk flag containing substantial defects, this sidewalk specification is not a specification that is solely applicable to when the sidewalk flag was constructed. (*See Fayolle v East W.Manhattan Portfolio L.P.*, 108 AD3d 476 [1st Dept 2013] [DOT specification as to expansion joint not applicable].)

Contrary to defendant Marvin Pocker, LLC's argument, an expert affidavit was not required to raise a triable issue of fact. The one-inch measurement of the sidewalk flag depicted in the photographs marked as Defendant's Exhibit B is not disputed. Neither is a measurement a matter which requires an expert opinion.

The cases that defendant Marvin Pocker, LLC cites are distinguishable. In several cases, the alleged trip and fall did not occur on a public sidewalk within the City of New York, and therefore 34 RCNY 2-09 would not apply. (*See Morris Greenburgh Cent. School Dist. No. 7*, 5 AD3d 567 [2d Dept 2007]; *Nathan v City of*

New Rochelle, 282 AD2d 585 [2d Dept 2001]; *Mascaro v State of New York*, 46 AD2d 941 [3rd Dept 1974] [Village of Babylon, Suffolk County]; *Allen v Carr*, 28 AD2d 155 [4th Dept 1967], *affd* 22 NY2d 924 [1968] [City of Corning].) *Spiegel v Vanguard Construction & Development Co.* (50 AD3d 387 [1st Dept 2008]) involved a height differential of one inch between a carpeted area of a floor and an adjacent cement floor.

As defendant Marvin Pocker, LLC indicates, in *Morales v Riverbay Corp.* (226 AD2d 271 [1st Dept 1996]), the Appellate Division, First Department, held that "differences in elevation of about one inch, without more, have been held to be non-actionable." (*Id.*) There, the plaintiff was allegedly injured when she tripped on a sidewalk in Coop City, which was owned and operated by the defendant Riverbay Corporation. It is not apparent from the decision itself whether the plaintiff ever argued that the one-inch defect was in violation of 34 RCNY 2-09. The decision itself makes no mention of it. Because *Morales v Riverbay Corp.* did not squarely address this issue, whereas the issue was squarely addressed in *D'Amico* and *Gomez*, *D'Amico* and *Gomez* control here.

Defendant Marvin Pocker, LLC also cites *Hecht v City of New York* (89 AD2d 524 [1st Dept 1982], *mod on other grounds* 60 NY2d 57 [1983]). There, the Appellate Division, First Department set aside a jury verdict involving a fall on a sidewalk

within Manhattan, in front of a garage. The majority ruled "there was no showing that an actionable defect in the sidewalk existed." (*Id.* at 524.) Like *Morales*, it is not apparent from the decision in *Hecht* whether the plaintiff ever asserted that the defect constituted a "substantial defect" under 34 RCNY 2-09.

Finally, defendant Marvin Pocker, LLC argues that plaintiff is not entitled to rely on 34 RCNY 2-09 because plaintiff did not plead it in her pleadings. Under the circumstances, the Court rejects this argument. Plaintiff invoked 34 RCNY 2-09 to counter defendant Marvin Pocker LLC's argument that the alleged defect was a trivial defect as a matter of law, which appears to have been raised for the first time on this motion, because it was not a defense that was affirmatively pleaded in its answer. (*See* Malang Affirm., Ex D.) Moreover, plaintiff's reliance upon 34 RCNY 2-09 neither raises new factual allegations or theories of liability nor results in any discernible prejudice to defendant Marvin Pocker, LLC. (*See e.g. Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011].)

Therefore, the motion for summary judgment by defendant Marvin Pocker, LLC is denied.

The New York City Transit Authority's Motion for Summary Judgment (Motion Seq. No. 004)

Defendant New York City Transit Authority (NYCTA) argues that it is entitled to summary judgment dismissing the complaint and all cross claims against it because it does not own or control the area where plaintiff allegedly tripped and fell.

The NYCTA has established prima facie entitlement to summary judgment as a matter of law, because it has no duty to maintain the area of the public sidewalk where plaintiff allegedly tripped and fell. (*See e.g. Malkhan v City of New York*, 44 AD3d 1013, 1013 [2d Dept 2007].)

Plaintiff fails to raise a triable issue of fact as to whether the NYCTA undertook a duty to maintain the area where plaintiff allegedly tripped and fell. The deposition testimony of Sotirios Zontanos, the property manager for the managing agent for defendant Marvin Pocker LLC, was not sufficient to establish that the NYCTA had such a duty. Zontanos testified that "I've always been told that the Transit Authority is responsible for the Lexington side." (Malang Affirm., Ex H [Zontanos EBT], at 13.) However, Zontanos also testified that he was told this by the owner of the managing agent, Paula Rivera. (*Id.* at 14.) This hearsay statement is not attributable to the NYCTA.

Plaintiff points out that Zontanos testified at his deposition that he observed

NYCTA workers shoveling snow on the Lexington side, and argues that evidence of clearing snow and ice would raise a triable issue of fact of the NYCTA's control, citing *Ellers v Horwitz Family Ltd. Partnership* (36 AD3d 849 [2d Dept 2007]).

The NYCTA has submitted documentary evidence that it cleans and sweeps "all stairways and outside areas within three feet of system property." (Coffey Affirm., Ex L.) At her deposition, Sabrina Greenwood, a NYCTA station supervisor, testified as follows:

> "Q. You had said earlier that part of your job as a supervisor was to oversee the maintenance and the cleanliness of your zone. Would that just be on the platform and the tracks or would that be someplace else?
>
> MR. GREENSTEIN: Again, note my objection to the form of the question.
>
> A. It would be the platform, the stairways, the whole entire station, the booth, the whole station.
> Q. When you're talking about the entire station, does that include the entry area to the station?
> A. Three feet.
> Q. Three feet?
> A. From the entrance of the station, three feet around the area of the station."

(Coffey Affirm., Ex J, at 15.)

Given NYCTA's own evidence that it cleans the area three feet around the entrance to the subway station, the fact that Zontanos observed NYCTA workers performing snow removal does not, in itself, establish more likely than not that

NYCTA workers cleaned in the area where plaintiff allegedly fell. Plaintiff does not claim that she fell within three feet of the entrance to the subway station. In any event, *Ellers* does not stand for the proposition it is reasonable to infer that a defendant that either cleans or removes snow from an area thereby was under a duty to perform structural repairs to that area. *Ellers* involved an alleged icy condition in a parking lot; evidence that a lessee was contractually required under the lease to keep the parking lot free of ice, snow and debris therefore raised a triable issue of fact as to whether that lessee exercised "control over the maintenance" of the parking lot. (*Ellers*, 36 AD3d at 851.)

Marvin Pocker, LLC argues that summary judgment should be denied because of issues of fact as to whether the NYCTA made special use of the area where plaintiff allegedly tripped and fell. It further asserts that the NYCTA acquired permanent and temporary easements for the purpose of constructing a transit facility located at the northeast corner of Lexington Avenue and East 63rd Street. It therefore argues that, by virtue of the easements, a triable issue of fact arises as to whether the NYCTA is responsible for the maintenance and repair of the sidewalk area at issue.

The "special use" doctrine applies when, among other things,

> "a structure erected on public land has the effect of causing an adjoining private property to derive a special benefit from that land. In such case, 'the person obtaining the benefit is 'required to maintain' the used

> property in a reasonably safe condition to avoid injury to others.' The private landowner thus bears a 'duty to repair and maintain the special structure or instrumentality' creating the benefit, provided that the landowner has 'express or implied access to, and control of' the instrumentality giving rise to the duty. This is so regardless of whether the private landowner installed the structure."

(*Petty v Dumont,* 77 AD3d 466, 468 [1st Dept 2010].) Here, photographs of the sidewalk area where plaintiff allegedly tripped and fell do not depict any structure erected on, or embedded into, the sidewalk. (*See* Malang Affirm., Ex I.)

The public sidewalk around the entrance or exit of a subway station is not, without more, an area of special use by the NYCTA. (*See e.g. Ruffino v New York City Tr. Auth.*, 55 AD3d 817 [2d Dept 2008]["[t]he use by [Sterling's] customer[s] of [a] public [boardwalk] is not a special benefit giving rise to a special use"]; *Arpi v New York City Tr. Auth.*, 42 AD3d 478 [2d Dept 2007] [no evidence that NYCTA benefitted from that portion of the sidewalk in a manner different from that of the general populace so as to impute liability upon it based upon a theory of special use].)

Marvin Pocker, LLC's reliance upon *Ivanov v City of New York* (21 Misc 3d 1148 [A], 2008 WL 5381388 [Sup Ct, NY County 2008]) is misplaced. The court did not find that the portion of the sidewalk in front of the entrance was an area of special use by the NYCTA. Rather, the court did not grant summary judgment to the NYCTA because of "material questions of fact as to precisely where Ivanov fell." (*Id.*)

The documents that Marvin Pocker, LLC submitted regarding the permanent and temporary easements do not raise a triable issue of fact as to whether the NYCTA might have a duty, as the alleged holder of permanent easements, to maintain the area where plaintiff allegedly tripped and fell free of structural sidewalk defects. A diagram indicates that areas of permanent and temporary easements to be acquired by the City of New York were bounded by the building lines along Lexington Avenue and East 63rd Street. (Rogan Opp. Affirm., Ex A.) According to a memorandum, the metes and bounds description for Parcel No. 1 (which is at the corner of Lexington Avenue and East 63rd Street) indicates that, on Lexington Avenue, a horizontal limit runs "southwardly along said building line [of Lexington Avenue]." (*Id.*)

Thus, the area of the easement for Parcel No. 1 clearly does not extend past the building line of Lexington Avenue. Plaintiff does not claim that the sidewalk defect at issue is within the building line of Lexington Avenue (and therefore within the area of one of the easements acquired by the City of New York).

In sum, the NYCTA's motion for summary judgment is granted. The complaint and all cross claims against the NYCTA are dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant City of New

York (Motion Seq. No. 002) is granted; and it is further

ORDERED that the motion for summary judgment by defendant New York City Transit Authority (Motion Seq. No. 004) is granted; and it is further

ORDERED that the complaint is severed and dismissed as against defendants City of New York and New York City Transit Authority, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and all cross claims by and against these defendants are severed and dismissed; and it is further

ORDERED that the motion for summary judgment by defendant Marvin Pocker LLC (Motion Seq. No. 003) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 9/3/13
New York, New York

ENTER:

J.S.C.

FILED
SEP 06 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN