Patton v Taszo Coffee LLC
2017 NY Slip Op 32173(U)
October 12, 2017
Supreme Court, New York County
Docket Number: 152184/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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GEORGE PATTON,

Plaintiff,

-against-

TASZO COFFEE LLC,

Defendant.

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Index No. 152184/15

Motion seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendant moves pursuant to CPLR 2221 for an order granting it leave to reargue a decision and order dated March 17, 2017, by which I denied its motion for summary dismissal of the complaint (NYSCEF 47). Plaintiff opposes.

Defendant asserts that in rejecting its argument that it may not be held liable for plaintiff's fall from a bench located on a sidewalk, I overlooked evidence that it owned neither the bench nor the property abutting the sidewalk where the accident occurred, and therefore erred in finding that triable issues exist as to whether it made special use of the area of the sidewalk where the bench was located. (NYSCEF 55). Plaintiff denies that I overlooked or misapprehended the evidence or any legal issues. (NYSCEF 71).

It is irrelevant to defendant's alleged special use of the premises whether it owned the bench or abutting property (*see eg, Suero-Sosa v Cardona*, 112 AD3d 706, 707 [2d Dept 2013] ["as a general rule, liability for a dangerous or defective condition on real property must be

predicated upon ownership, occupancy, control *or* special use of that property"] [emphasis added]; *Petty v Dumont*, 77 AD3d 466, 469–70 [1st Dept 2010] ["in order to be held liable under a special use theory, even partial control of the instrumentality by the special user is sufficient to impose liability"]; *see also Dixon v Corner Table Rest., LLC*, 2012 WL 6707317, 2012 NY Slip Op 33022[U] [Sup Ct, New York County] [motion for summary dismissal denied where plaintiff fell on defect in platform; although platform not part of defendant's leased premises, defendant's use of platform and placement of benches on platform sufficient to render it liable for special use of platform]).

In *Kaufman v Silver*, the plaintiff was injured after tripping and falling on a defective ramp physically located on property owned by a non-party but adjacent to property owned by defendants. Defendants moved for summary dismissal, arguing that they did not own, construct, repair or maintain the ramp, and in response plaintiffs argued that defendants could be held liable for their special use of the ramp to service parking spaces on defendants' property and as defendants' patrons used the ramp. The dispositive issue before the Court was whether the "special use doctrine . . . can apply here, where the special use or structure or instrumentality is located on adjoining private property." The Court held that the "duty to repair or maintain a [special] use located on adjacent property is necessarily premised . . . upon the existence of the abutting land occupier's access to and ability to exercise control over the special use structure or installation," and that, therefore, it was not holding "categorically, that the doctrine or special use is inapplicable to beneficial physical alterations involving adjoining properties which are privately owned," but that the issue had to be decided case-by-case. (90 NY2d 204, 207-9 [1997]).

Similarly, in *Petty v Dumont*, the plaintiff was injured after colliding with concrete barriers installed by the City of New York on a public street as an antiterrorist measure and which had the effect of partitioning the left traffic lane on the street from a public parking lane into a private entry lane controlled by defendant Con Edison and leading into a Con Edison's facility. The Court rejected Con Edison's argument that as a private landowner, it had no duty related to the barriers as they were installed by the City for a public benefit, finding that Con Edison had derived a special benefit from the barriers by the creation of a private entry lane for its facility, and that it was irrelevant whether it had requested or installed the barriers. (77 AD3d 466 [2010]; *see also Capretto v City of Buffalo*, 124 AD3d 1304 [4th Dept 2015] [defendant-lessors of adjacent property failed to establish as matter of law that they lacked access to and ability to control driveway next to property]).

In any event, even if defendant's status as an abutting landowner is relevant, inconsistencies in plaintiff's deposition testimony as to the location of the bench do not eliminate the issue of whether defendant is an abutting landowner (*see Davis v Colon*, 27 AD3d 687 [2d Dept 2006] [inconsistent testimony as to how and where accident occurred presented triable issue of fact]; *see also Johnson v Ann-Gur Realty Corp.*, 117 AD3d 522 [1st Dept 2014] [in trip and fall case, inconsistencies in plaintiff's testimony presented credibility issues for trier of fact]), and whether it may thus be held liable for either creating the defective condition or causing it to occur by special use (*cf. Mitchell v Icolari*, 108 AD3d 600, 602 [2d Dept 2013] [summary judgment granted as, *inter alia*, plaintiff's testimony confirmed abutting landowner's assertion that alleged defect was in front of neighbor's property, thereby establishing that it did not own, occupy, control or put to special use sidewalk where defect was located]).

Moreover, plaintiff's testimony that he heard defendant's manager instruct one of his employees to move or remove the bench is sufficient to controvert defendant's denial of ownership of the bench (*see e.g., Pettersen v Curreri*, 99 AD2d 774 [2d Dept 1984] [conflicting testimony concerning details of accident presented issue of credibility]), and raises a credibility issue that may not be resolved on a motion for summary judgment (*see Redlich v Stone*, 152 AD3d 432 [1st Dept 2017] [plaintiff's testimony that defendant made certain admission created credibility issue that should not be resolved on summary judgment]).

Accordingly, defendant fails to establish that I overlooked or misapprehended any legal or factual issues, and it is hereby

ORDERED, that defendant's motion for leave to reargue is denied.

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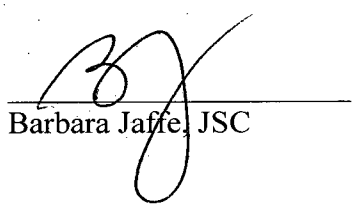

Barbara Jaffe, JSC

DATED: October 12, 2017
New York, New York