

Torres v Nine-O-Seven Holding Corp.

2015 NY Slip Op 31465(U)

August 3, 2015

Supreme Court, New York County

Docket Number: 155578/12

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ROSEMARIE TORRES,

Plaintiff,

INDEX NO. 155578/12

- against-

MOTION SEQ. NO. 001

NINE-O-SEVEN HOLDING CORP.,

Defendant.

The following papers, numbered 1 to 3, were read on this motion by defendant for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits (Memo) _____	_____
Replying Affidavits (Reply Memo) _____	_____

Cross-Motion: Yes No

This is a personal injury action commenced by Rosemarie Torres (plaintiff) on August 20, 2012 to recover damages for injuries allegedly sustained on November 4, 2011 at approximately 5:00 p.m. when plaintiff tripped and fell on the sidewalk in front of the premises owned by defendant Nine-O-Seven Holding Corp. (defendant) located at 2006 Second Avenue, New York, New York (the premises), purportedly due to an uneven sidewalk . Issue was joined by the filing of an answer by defendant on November 30, 2012. The Note of Issue has been filed and discovery is complete.

Before the Court is a motion by the defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Defendant asserts that it is entitled to such relief because plaintiff cannot show that a dangerous condition existed and that the condition was not trivial or *de minimis*; even if such a condition existed, plaintiff cannot show that defendant created the condition or had actual or constructive notice thereof; defendant does not owe a duty to plaintiff

with respect to an open and obvious condition; and lastly plaintiff cannot identify what caused her to fall.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; see also *Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]; CPLR 3212[b]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court

views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

It is well established that where, as here, a defendant moves for summary judgment in a trip-and-fall case, the defendant “has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition” (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *see also Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). “Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Smith*, 50 AD3d at 500). However, “rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact” (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

“To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it” (*Sermos v Gruppuso*, 95 AD3d 985, 986 [2d Dept 2012], quoting *Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629 [2d Dept 2009]; *Larsen v Congregation B'Nai Jeshurun of Staten Is.*, 29 AD3d 643 [2d Dept 2006]). A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and

corrected (see *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]; *Larsen*, 29 AD3d at 643).

“Whether a dangerous or defective condition exists on the property of another so as to create liability ‘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, 977 [1997], quoting *Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]; see *Aguayo v New York City Hous. Auth.*, 71 AD3d 926, 927 [2d Dept 2010]; *Velez v Institute of Design & Constr., Inc.*, 11 AD3d 453, 453 [2d Dept 2004]; *Pennella v 277 Bronx Riv. Rd. Owners*, 309 AD2d 793, 794 [2d Dept 2003]; *Riser v New York City Hous. Auth.*, 260 AD2d 564, 564 [2d Dept 1999]). However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance (see *Aguayo*, 71 AD3d at 927; *Outlaw v Citibank, N.A.*, 35 AD3d 564 [2d Dept 2006]). In determining whether a defect is trivial, “a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury” (*Pennella*, 309 AD2d at 794; see *Trincere*, 90 NY2d at 978; *Aguayo*, 71 AD3d at 927; *Outlaw*, 35 AD3d at 564).

After examination of the photographs and the other evidence presented in the record, including plaintiff’s deposition testimony, and considering all the relevant factors, this Court finds that as a matter of law the alleged defect in the sidewalk, which plaintiff described as “uneven” did not have the characteristics of a trap or nuisance and was too trivial a defect to be actionable (see *Gaud v Markham*, 307 AD2d 845 [1st Dept 2003]; *Pennella*, 309 AD2d at 794; see *Trincere*, 90 NY2d at 978; *Aguayo*, 71 AD3d at 927; see also *Lansen v SL Green Realty Corp.*, 103 AD3d 521, 522 [1st Dept 2013] [“the pictures of the sidewalk presented by plaintiff did not show any significant height differential or significant defect”]). In opposition, plaintiff fails to raise a triable issue of fact, notwithstanding the affidavit of Stanley Fein, P.E. (Fein), in which he opines that the elevation of the sidewalk was in excess of 5/8 inch across its surface.

Specifically, the Court notes that Fein inspected the site on June 12, 2014, more than two years from the date of plaintiff's accident and after the sidewalk flags had already been replaced, and his opinion regarding any height differential is nothing more than "unsupported and conclusory speculation, which is insufficient to defeat summary judgment" (*Delgado v New York City Hous. Auth.*, 51 AD3d 570, 570 [1st Dept 2008]). Accordingly, defendant's motion for summary judgment dismissing the complaint is granted. In light of same, the Court need not address the parties' remaining contentions.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed with costs and disbursements to said defendant upon submission of an appropriate bill of costs; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 8/3/15

Enter:


PAUL WOOTEN, J.S.C

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