Hawkins v Terence Cardinal Cooke Health Care Ctr.
2022 NY Slip Op 31667(U)
May 23, 2022
Supreme Court, New York County
Docket Number: Index No. 157079/2019
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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DOROTHY HAWKINS,

Plaintiff,

- v -

TERENCE CARDINAL COOKE HEALTH CARE CENTER,

Defendant.

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INDEX NO. 157079/2019

MOTION DATE 04/22/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff commenced this action and alleges damages for personal injury as a result of a trip and fall on a sidewalk. Plaintiff alleges that she was walking on the sidewalk on Fifth Avenue early in the morning and she fell. Initially, plaintiff alleged the fall took place at 1259 Fifth Avenue, later, defendant denied ownership of said premises, plaintiff amended her pleadings to allege the fall took place several blocks away at 1249 Fifth Avenue.

On April 1, 2022, plaintiff moved for summary judgment as to liability, a determination that plaintiff is free from comparative negligence and dismissal of defendants' third affirmative defense which asserts plaintiff's damages were the result of the culpable conduct of plaintiff.

Because liability in this action will largely be determined on the credibility of plaintiff and because plaintiff's own evidence contains inconsistencies the court finds that summary judgment is not warranted in this action.

Plaintiff's own legal documents have created a material issue of fact as to where this alleged fall really occurred. The initial pleadings affirm that the accident of January 15, 2019 occurred at 1259 Fifth Avenue, New York, NY. Terence Cardinal Cooke is 1249 Fifth Avenue.

Plaintiff has gone by numerous aliases over the years for legal purposes. Defendant asserts there is an issue of fact as to who plaintiff really is. Dorothy Hawkins is not the name on the incident report she filed with defendant. The records from Mount Sinai reflect a different name than that given to TCC and note that Dorothy Hawkins presented to the ED on January 15, 2018 at 6:10 am – before the alleged fall at 6:30 am , claiming that she fell while walking and did not make any reference to the fact that it was in front of TCC. X-rays were negative and she was released. No acute injury was found.

Instead of immediately seeking medical attention plaintiff testified that she decided to walk into defendant's building to tell the security guard what happened. Plaintiff did not show the security guard at TCC where she fell. Plaintiff alleges to have fallen, lost consciousness and then come back to consciousness. This contradicts medical records which show plaintiff told medical personnel at Mount Sinai she did not lose consciousness.

After plaintiff talked to the security guard at TCC, she walked approximately six blocks with her girlfriends to the emergency room.

To establish a *prima facie* case of negligence in a slip-and-fall case, "the plaintiff must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition." *Kraemer v. K-Mart Corp*., 226 A.D. 2d 590, 591 [2d Dept. 1996]. Plaintiff acknowledges there is no actual notice in this case.

To constitute constructive notice, "a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Kershner v. Pathmark Stores, Inc.*, 280 A.D.2d 583, 584 [2d Dept 2001].

There are questions of facts as to whether defendant had constructive notice that a condition regarding uneven pavement was present which caused plaintiff's injury, and whether the defect existed for a sufficient length of time prior to the incident, to have been visible and apparent to defendant, and allow defendant to remedy the situation. Defendant alleges that the google map relied upon by plaintiff and its expert was never confirmed to be that of TCC. Furthermore, some of the photographs relied upon by plaintiff's expert show scaffolding, which is not otherwise addressed by the parties.

Summary judgment is a drastic remedy which deprives litigants of their day in court, and therefore should not be granted where there is any doubt as to the existence of triable issues of fact. *See, Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 [2012]; *Sillman v. Twentieth Century-Fox*, 3 N.Y.2d 395, 404 [1957]; *Kebbeh v. City of New York*, 113 A.D.3d 512 (1st Dept. 2014); *Birnbaum v. Hyman*, 43 A.D.3d 374, 375 (1st Dept. 2007); *O'Sullivan v. Presbyterian Hosp.*, 217 A.D.2d 98, 100-01 (1st Dept. 1995); *Masucci v. Feder*, 196 A.D.2d 416, 420 (1st Dept. 1993).

In determining whether issues of fact exist, the court must examine the evidence in the light most favorable to the party opposing the motion, who is then entitled to the benefit of every reasonable inference from the evidence. *See, Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 [2012]; *Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 82 (1st Dept. 2013); *Sharon v. American Health Providers*, 105 A.D.3d 508, 509 (1st Dept. 2013); *Haseley v. Abels*, 84 A.D.3d 480, 482 (1st Dept. 2011); *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 308 (1st Dept. 2007);

Garcia v. Bronx Lebanon Hosp., 287 A.D.2d 381, 383 (1st Dept.2001); *Morris v. Lenox Hill Hosp.*, 232 A.D.2d 184, 185 (1st Dept. 1996); *O'Sullivan v. Presbyterian Hosp.*, 217 A.D.2d 98, 100-01 (1st Dept. 1995).

It is the burden of a party moving for summary judgment to tender sufficient evidence to demonstrate the absence of any material issues of fact, and the failure to do so requires denial of the motion irrespective of the sufficiency of the opposing papers. *See, Pullman v. Silverman*, 28 N.Y.3d 1060, 1062 [2016]; *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Applewhite v. Accuhealth, Inc.*, 81 A.D.3d 94 (1st Dept. 2010); *Cregan v.Sachs,* 65 A.D.3d 101, 107-108 (1st Dept. 2009); *Santiago v. Filstein*, 35 A.D.3d 184, 185-86 (1st Dept. 2006); *Wasserman v. Carella*, 307 A.D.2d 225, 226 (1st Dept. 2003).

Even where a movant satisfies its burden in seeking summary judgment, the motion is defeated by an opponent upon the submission of evidence demonstrating the existence of issues of fact. *See, Alvarez*, 68 N.Y.2d at 324; *Menzel*, 202 A.D.2d at 559. To satisfy this burden, the opponent need only submit evidence rebutting the *prima facie* showing made by the movant. *See, Alvarez*, 68 N.Y.2d at 324; *Lindsay-Thompson v. Montefiore Medical Center*, 147 A.D.3d 638, 639 (1st Dept. 2017); *Kimberlee M. v Jaffe*, 139 A.D.3d 508, 509 (1st Dept. 2016).

The Administrative Code of the City of New York § 7-210 ("the statute" or "7-210" or "Section 7- 210") shifts liability for injuries resulting from defective sidewalks from the City of New York to the abutting landowner. *Vucetovic v. Epsom Downs*, 10 N.Y.3d 517 (2008); *Sangaray v. West River Associates, LLC*, 26 N.Y.3d 793 (2016); *Torres v. N.Y. City Hous. Auth.*, 988 N.Y.S.2d 162 (1st Dept., 2014).

Section 7-210 requires the owner of real property abutting a sidewalk to maintain same in a "reasonably safe condition" and renders that owner liable for "any injury to property or personal injury" which is proximately caused by the failure to reasonably maintain the sidewalk. See, New York City Admin. Code § 7-210(a) and (b). The duty proscribed by 7-210 is nondelegable. *Xiang Fu He v. Troon Mgmt*., 34 N.Y.3d 167 (2019).

The Court finds that when viewed in the light most favorable to defendant there are questions of fact regarding the time and location of the accident as well as the issue of constructive notice. Additionally, defendants are entitled to have the credibility of plaintiff and her witnesses assessed by a jury.

Based on the foregoing, plaintiff's motion for summary judgment as to liability is denied.

Plaintiff's motion to dismiss the defense of contributory negligence is also denied. Whether the alleged defect is something that plaintiff could have and should have noticed is a question of fact for the jury.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion is denied in its entirety; and it is further

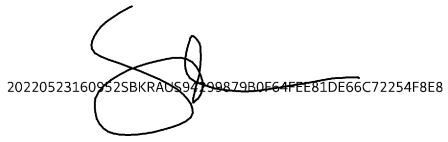
ORDERED that as it is alleged that discovery is not completed, and no note of issue has been filed the parties shall appear for a virtual status conference on June 23, 2022 at 11:30 AM; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



5/23/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE