

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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NELLY BRUM,

Index No.: 18848/07
Motion Date: 4/1/09
Motion Cal. No.: 4
Motion Seq. No.: 1

Plaintiff,

-against-

DOGWOOD REALTY OF N.Y., INC., and NEW
MIAN GROCERY & HALAL MEAT, INC.,

Defendants.

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DOGWOOD REALTY OF N.Y., INC.,

Index No: 350126/08

Third-party Plaintiff,

-against-

NEW MIAN GROCERY & HALAL MEAT, INC.,

Third-party Defendant.

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The following papers numbered 1 to 9 read on this motion for an order, pursuant to CPLR § 3212, granting summary judgment in favor of defendant/third-party plaintiff Dogwood Realty, dismissing plaintiff's complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Reply Affirmations-Exhibits.....	8 - 9

Upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on June 7, 2007, as the result of a trip and fall on the sidewalk in front of the premises owned by defendant/third party plaintiff Dogwood Realty (“defendant”), located at 83-21 Broadway, East Elmhurst, New York, while she was traversing the sidewalk with her daughter, Marcela Brum. Plaintiff alleges that she fell due to, inter alia, the defective, uneven and cracked condition of the sidewalk. Plaintiff commenced this action against defendant on July 30, 2007, which thereafter impleaded defendant/third-party defendant New Mian Grocery & Halal Meat, Inc. (“New Mian”), the first floor tenant, which plaintiff made a direct defendant thereafter by service of supplemental pleadings on April 16, 2008. Defendant now moves for summary judgment dismissing the complaint on the grounds that it had no notice of the allegedly defective condition, and any defect was trivial in nature and open and obvious.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

As a general proposition, “liability may be imposed on the abutting landowner where the landowner either affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk.” James v. Blackmon, 58 A.D.3d 808 (2nd Dept. 2009). See, also, Klotz v. City of New York, 9 A.D.3d 392, 393-394 (2nd Dept. 2004); Negron v. G.R.A. Realty, Inc., 307 A.D.2d 282 (2nd Dept. 2003); Archer v. City of New York, 300 A.D.2d 518 (2nd Dept. 2002); Shivers v. Price Bottom Stores, Inc., 289 A.D.2d 389 (2nd Dept. 2001); Booth v. City of New York, 272 A.D.2d 357 (2nd Dept. 2000). It is well recognized that a “defendant who moves for summary judgment in a [trip] and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (citations omitted).” Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Gregg v. Key Food Supermarket, 50 A.D.3d 1093 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept. 2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept. 1999). “Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice.” Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2nd Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2nd Dept.

2003); O'Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2nd Dept. 2002). “To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant’s to discover and remedy it.” Green v. City of New York, 34 A.D.3d 528, 529 (2nd Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept.1996).

Defendant established its prima facie entitlement to summary judgment through the submission of deposition testimony, including its deposition testimony, as well as the testimonies of plaintiff and Taraq Mohammed (“Mohammed”) on behalf of New Mian. Howard Jang (“Jang”), who testified on behalf of defendant, testified that he is at the property regularly and he had never received any complaints about the raised or uneven condition of the sidewalk, and there had not been any accidents in front of the premises prior to plaintiff’s accident. He stated that although he has done some patch work at the premises, most of the tenants do their own repairs, and he had never made any repairs to the public sidewalk upon which plaintiff fell. Jang further stated that the first floor tenant, New Mian, never made any complaints to him about a cracked or uneven condition of the sidewalk prior to the incident. Plaintiff testified, inter alia, that she had walked through the area many times prior to her accident. She further testified that she did not notice the condition of the sidewalk flagstone that resulted in her fall prior to the happening of the accident. She stated that she did not make any complaints to defendant about the sidewalk defect prior to her accident and does not know of anyone who lodged such complaints with defendant. Lastly, Mohammed testified that he owned New Mian since 1995 and Jang visited the property once a month for inspection. He stated that he never saw anyone trip and/or fall in the area where plaintiff’s accident occurred, and he did not witness plaintiff’s fall. Based upon this evidence, defendant contends that it is entitled to summary judgment on the grounds that it had no notice of the allegedly defective condition, and any defect was trivial in nature and open and obvious.

Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasanani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). In opposition to the motion, plaintiff also refers to deposition testimony and asserts that there are issues of fact with regard to creation and notice which preclude summary dismissal of the complaint. Plaintiff further asserts that defendant is not entitled to summary judgment as its failure to make repairs to the sidewalk, despite its contentions to the contrary, violates its non-delegable duty under the Administrative Code.

In opposition to the motion, plaintiff states that she fell as a result of the uneven condition of the sidewalk, which “looked like it had been repaired and some section of it had been broken off

and was not fixed to the sidewalk.” Plaintiff, in her deposition testimony, described the repair and testified that it looked like a ramp. She further testified that although she could not recall the last time that she traversed the subject sidewalk, or the condition thereof prior to her accident, she stated that her daughter would be more familiar with the area. In support of this contention, plaintiff proffers the affidavit of her daughter, Marcela Brum (“Brum”), who was walking next to plaintiff at the time of the accident and witnessed plaintiff’s fall. Brum states, inter alia, the following:

As we were walking along the sidewalk, I saw my mother trip and fall to the ground because of a large area of raised, uneven and defective sidewalk. I saw my mother trip and fall to the ground right on the sidewalk in front of the New Mian grocery store. The sidewalk had a large area of raised, uneven and defective sidewalk. The edge and surface of one of the sidewalk flags was raised up above the edge and surface of an adjacent sidewalk flag for a height of approximately 2 inches at the area where my mother tripped and fell, creating a dangerous tripping hazard.

The area of the tripping hazard ran directly across the entire width of the sidewalk area that my mother was walking on. There was also an area of a defective patchwork repair at the location of the accident. It looked like someone had placed some concrete near the raised edge in an attempt to make the height differential more even. The repair and the location of the accident looked old, dirty and broken, like they had been out there in the elements for a long time before the accident.[]

I had previously seen the same raised, uneven and defective sidewalk long before the day of the accident. [] Long before my mother’s accident, I had observed the same raised, uneven and defective sidewalk condition sticking up several inches out of the ground in front of New Mian, just as it was on the day of the accident. []

Further, plaintiff relies upon the deposition testimony of Jang, defendant’s owner, whereby he asserts that although he made patchwork repairs in the area of the entrance to New Mian by using ready-mix concrete, he never performed any maintenance or repair work on the public sidewalk. Jang stated that it was his belief that the sidewalks belong to the City, and he did not pay attention to the condition of the sidewalk. Lastly, plaintiff relies upon the deposition testimony of Mohammed, New Mian’s owner, who testified that he never undertook to make any renovations or alterations to the premises, prior to the instant accident, he made complaints to Jang about the condition of the sidewalk as he “tripped so many times,” and he observed Jang inspect the sidewalk but take no action. Mohammed further testified that he saw many people trip on the sidewalk, and when they came to complain to him, he would give them Jang’s number, as well as tell Jang about the incident. He stated:

When I saw so many people there; every day, every second day somebody fell on that spot. Everybody comes to me, they start fighting with me. They think I'm the landlord so they start fighting with me. I tell them that this is the number for the landlord, call me and I tell him also.

He also stated that he witnessed about ten to fifteen accidents in front of the premises, but none occurred in the area in question. When asked about the location of the falls, and if these locations were contained within the "blue circle area" referred to at the deposition as "Defendant's A1," which is attached to the motion papers as "Exhibit J," Mohammed further testified accordingly in the following exchange:

Q. I would like to show you Defendant's A1 from today's date. Do you see the blue circle area?

A. Yes.

Q. Is that the spot you are talking about?

A. No. We have this spot right here also (indicating). It's the same thing. We have the same thing here also.

Q. So including this spot where the blue dot is, over to the right of the photo where there is a white border?

A. The both sides is higher and this side is low. Whoever is walks [sic], the heel hits here and here (indicating).

Q. Indicating the blue spot?

A. Yeah

Q. And you're saying the sidewalk slabs of concrete are uneven from one side to the other?

A. This one is not so much, but this side we have too high. When we told [Jang], he calls so many contractors to fix it but he never gives it to anybody. After that, he bought a little bit of cement and he put it himself and he said that will fix it.

Ms. Trupia: Where are you indicating? Are you indicating where the blue circle is or somewhere else?

A. We have both sides

Q. Including the blue circle?

A. Yes

Q. When you said that you see many people have accidents before June '07, how many in total would you say?

A. Actually, if you want the truth, nobody falls here (indicating), they all fall here.

In light of the foregoing, plaintiff asserts that defendant is not entitled to summary judgment as there are issues of fact as to whether plaintiff not only had notice, but whether it created the dangerous

condition, as well as whether its failure to make repairs to the sidewalk violated its non-delegable duty under the Administrative Code of the City of New York.

From the outset, this Court determines that the record is replete with factual issues with regard to notice and creation, precluding summary disposition. Here, although Jang, on behalf of defendant, testified that he had never received any complaints about the raised or uneven condition of the sidewalk, and there had not been any accidents in front of the premises prior to plaintiff's accident, plaintiff proffered the deposition of Mohammed, New Mian's owner, who testified that he made complaints to Jang about the condition of the sidewalk as he "tripped so many times," and he observed Jang inspect the sidewalk but take no action. Further, Jang stated that although he has done some patch work at the premises, he had never made any repairs to the public sidewalk upon which plaintiff fell. However, Mohammed asserted that Jang purchased cement and made the repairs to the sidewalk himself, an allegation bolstered by plaintiff's testimony that she fell as a result of the uneven condition of the sidewalk, which she described the appearance of as a ramp and it "looked like it had been repaired and some section of it had been broken off and was not fixed to the sidewalk." Thus, although defendant met its initial burden by proffering evidence that it neither created, nor had actual notice or constructive notice of the existence of a defective condition for a sufficient length of time to discover and remedy it, plaintiff sufficiently raised triable issues of fact with regard to notice and creation, thereby foreclosing the grant of summary judgment in defendant's favor. Thus, those branches of the motion seeking dismissal based upon creation, as well as actual and constructive notice of the allegedly defective condition, must be denied.

The second prong of the motion seeking dismissal based upon an alleged "trivial defect" also must be denied. Despite defendant's misplaced impression, as asserted by Jang in his deposition that the City of New York remained responsible for the maintenance and repair of the subject sidewalk, this action, as claimed by plaintiff, is governed by Administrative Code § 7-210. The relevant section imposes upon owners of commercial property abutting the public sidewalk the affirmative duty to maintain the sidewalk, including repair and replacing defective sidewalk flags, and makes owners liable in tort for injuries arising out of its breach of this duty. However, "an owner of land does not, solely by reason of being an abutting owner, owe a duty to keep the public sidewalk in a safe condition." Flores v. Baroudos, 27 A.D.3d 517 (2nd Dept. 2006); Tiralongo v. City of New York, 41 A.D.3d 700 (2nd Dept. 2007). A property owner may not be held liable for trivial defects, not constituting a trap or a nuisance over which a pedestrian might merely stumble, stub his or her toes, or trip. See, Ayala v. Gutin, 49 A.D.3d 677 (2nd Dept. 2008); Ambroise v New York City Tr. Auth., 33 A.D.3d 573 (2nd Dept. 2006); Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2nd 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 circumstance' of the injury' (citations omitted)." Zalkin v. City of New York, 36 A.D.3d 801, 801-802 (2nd Dept. 2007); see, Ayala v. Gutin, 49 A.D.3d 677 (2nd Dept. 2008); see, Outlaw v. Citibank, N.A., 35 A.D.3d 564 (2nd Dept. 2006); Velez v Inst. of Design & Constr., 11 A.D.3d 453 (2nd Dept. 2004).

Here, other than conjecture and supposition, the record is devoid of any evidence which would remotely demonstrate that the alleged defect is trivial, and therefore, not actionable. Indeed, defendant, in seeking to eliminate all triable issues, failed to set forth the “width, depth, elevation, irregularity and appearance of the defect,” which the Zalkin Court considered in finding a non-actionable defect in that case. Compare, Madero v. Pizzagalli Const. Co., ___ A.D.3d ___, 878 N.Y.S.2d 434 (2nd Dept. 2009); Bernstein v. Parthenon Enterprises, Inc., 60 A.D.3d 883 (2nd Dept. Mar 24, 2009). “Furthermore, the fact that the defect may have been open and obvious did not negate defendant's duty to maintain its premises in a reasonably safe condition, but rather, may raise an issue of fact as to plaintiff's comparative negligence (citations omitted).” Fairchild v. J. Crew Group, Inc., 21 A.D.3d 523 (2nd Dept. 2005); Mooney v. Petro, Inc., 51 A.D.3d 746 (2nd Dept. 2008); Ruiz v. Hart Elm Corp., 44 A.D.3d 842 (2nd Dept. 2007). However, there is no evidence in the record on this application of plaintiff’s comparative negligence in the occurrence of this accident. Accordingly, that branch of the motion seeking summary judgment on the ground that the defect was trivial is likewise denied.

Consequently, as defendant failed to make a prima facie showing that the defect at issue was trivial, this Court holds that defendant had a non-delegable duty to maintain the subject sidewalk pursuant to section 7-210 of the Administrative Code of the City of New York. Therefore, defendant’s failure to make repairs to the subject sidewalk, as conceded by it in the deposition testimony of its owner, Howard Jang, makes it liable to plaintiff for her injuries as a matter of law. Moreover, a court, upon consideration of a motion for summary judgment, has the inherent power to search the record where appropriate and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court. Dunham v. Hilco Const. Co., Inc., 89 N.Y.2d 425, 429-430 (1996); Marrache v. Akron Taxi Corp., 50 A.D.3d 973 (2nd Dept. 2008); Morris v. Edmond, 48 A.D.3d 432 (2nd Dept. 2008); Whitman Realty Group, Inc. v. Galano, 52 A.D.3d 505 (2nd Dept. 2008); see, also, Micciche v. Homes by the Timbers, Inc., 1 A.D.3d 326 (2nd Dept. 2003); Shelter v. MCM Distributors, Inc., 299 A.D.2d 332 (2nd Dept. 2002); Image Clothing v. State Natl. Ins. Co., 291 A.D.2d 377 (2nd Dept. 2002). In light of the aforementioned determinations, this Court, in its inherent authority, hereby searches the record and grants summary judgment in favor of plaintiff Nelly Brum, and against defendant Dogwood Realty on N.Y., Inc., on the issue of liability.

Dated: June 1, 2009

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J.S.C.