

Herman v Urstadt

2004 NY Slip Op 30148(U)

September 21, 2004

Supreme Court, New York County

Docket Number: 0105925/2005

Judge: Jane S. Solomon

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

PRESENT: SOLOMON

PART 55

Justice

JANICE HERMAN

INDEX NO. 106926/2005

- v -

MOTION DATE 6 - 25 - 2007

JEFFREY URSTADT

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED
1 - 4
5 - 7
8 - 9

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. Pre-trial conference is scheduled for Monday, October 29, 2007 at 2:00 PM in Part 55, 60 Centre St.

FILED
SEP 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/21/07


JANE S. SOLOMON *v.s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

JANICE HERMAN,

Plaintiff,

-against-

JEFFREY URSTADT and SUSAN P. URSTADT

Defendants.

FILED
SEP 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

INDEX NO. 105925/2005

DECISION and ORDER

-----X

JANE S. SOLOMON, J.

In this personal injury action, defendants Jeffrey Urstadt and Susan P. Urstadt (collectively, "Defendants") move for summary judgment. For the reasons described herein, the motion is denied.

Defendants own the residential apartment building located at 243 East 71st Street in Manhattan (the "Building"). Plaintiff Janice Herman ("Plaintiff") lives nearby and has been confined to a wheelchair since 1973 due to an automobile accident, resulting in paralysis in her legs. On October 1, 2004 at approximately 3:00 PM on a "vibrant sunny day," Plaintiff's longtime friend, Leah Sutton ("Sutton"), was pushing Plaintiff's wheelchair when it suddenly tipped forward and catapulted Plaintiff onto the sidewalk, injuring her legs.

Plaintiff alleges that the accident was caused by a trap-like condition, specifically eroded sidewalk concrete located in front of the Building that she claims caused a depressed and irregular rut or hole between Defendants' sidewalk and the abutting and smooth one of the adjoining property owner. Plaintiff states that she did not see the alleged defect prior to her accident, but that she did notice the sidewalk's condition as she lay in front of it immediately afterward.

Sutton claims that although she observed the condition of the sidewalk from a distance of 30 feet away and had no difficulty seeing the sidewalk as she moved closer, she did not change her pace or steer the wheelchair differently at any point because she did not believe the condition to be dangerous. Sutton contends, however, that she could not observe the sidewalk at the time of the accident because she could not see over Plaintiff's head. At her deposition, Sutton described the condition as a depression in the sidewalk measuring "one or two inches," and then identified the area in a photograph. On this motion, both Plaintiff and Defendants have submitted photographs of the sidewalk in question. A photograph with a ruler in it appears to show depth of less than 1/2 inch.

Plaintiff commenced this action on April 4, 2005 and the Note of Issue was filed on December 14, 2006. Defendants

[* 4]

now move for summary judgment on the ground that the evidence demonstrates that the condition of the sidewalk is trivial as a matter of law based on its depth, elevation, and appearance along with the time, place and circumstance of the incident.

Discussion

Plaintiff correctly argues that NYC Administrative Code § 7-210 imposes a duty on Defendants to maintain the sidewalk abutting the Building in a reasonably safe condition for pedestrians, and that Defendants may be held liable for even trivial defects if they constitute a snare or trap. See Hagood v. City of New York, 13 A.D.3d 413 (2nd Dep't 2004); Menendez v. Dobra, 301 A.D.2d 453 (1st Dep't 2003). Thus, the issue on this summary judgment motion is whether Plaintiff has sufficiently raised facts to question whether the sidewalk's condition could be characterized as such.

There is no *per se* rule that a sidewalk defect must be of a certain minimum elevation or width differential in order to be actionable; rather a liability determination depends on the facts and circumstances of each case. See Argenio v. Metropolitan Transp. Auth., 277 A.D.2d 165 (1st Dep't 2000); Herrera v. City of New York, 262 A.D.2d 120 (1st Dep't 1999). Relevant factors to consider include "the width, depth, elevation, irregularity and appearance of the defect along with

the time, place and circumstance of the injury." Trincere v. County of Suffolk, 90 N.Y.2d 976, 978 (1997); see also Hawkins v. Carter Cmty. Hous. Dev. Fund Corp., 40 A.D.3d 812, 813 (2nd Dep't 2007); Bekritsky v. TACS-4, Inc., 27 A.D.3d 680, (2nd Dep't 2006). While "in some instances, the trivial nature of the defect may loom larger than another element, ... a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable." Trincere v. County of Suffolk, 90 N.Y.2d at 977-78.

The alleged defect here is not only an elevation difference but one of a contrasting condition to the good condition of the adjoining sidewalk. Although the incident occurred on a clear autumn day during daylight hours, and Sutton claims to have observed the sidewalk condition from as far as 30 feet away, the photographs show a sidewalk that is severely eroded. This Court is unable to rule as a matter of law that the defect does not constitute a trap, or is too trivial to be actionable, and the matter must be left for a jury to decide.

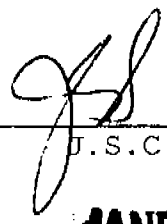
Accordingly, it hereby is

ORDERED that Defendants' motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear in Part 55, 60
Centre Street, Room 432, New York, NY on October 29, 2007 at 2:00
PM for a pre-trial conference.

Dated: September 21, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
SEP 25 2007
NEW YORK
COUNTY CLERK'S OFFICE