

**Padob v 127 E. 23rd St., LLC**

2006 NY Slip Op 30665(U)

December 8, 2006

Sup Ct, NY County

Docket Number: 109629/04

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PART 35

Index Number : 109629/2004

PADOB, WENDY

vs

127 EAST 23RD ST.

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. 109629/04

MOTION DATE 12/1/06

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of plaintiff Wendy Padob for an order pursuant to CPLR 3212, granting partial summary judgment as against defendants Absolute Concepts, Inc., 127 East 23rd Street, L.L.C. and Delmar Realty Co., Inc., on the ground that constructive notice of the sidewalk defect in this action is deemed to exist, is denied. It is further

ORDERED that the counsel and parties shall report for trial in Part 40 Room 242, 60 Centre Street, Room 242, on Monday, January 8, 2007 at 9:30 a.m. no adjournments. It is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

Dated: 12/18/06

[Signature] HON. CAROL EDMEAD

FILED DEC 11 2006 NEW YORK COUNTY CLERK'S OFFICE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_ x  
WENDY PADOB,

Plaintiff,

-against-

127 EAST 23<sup>rd</sup> STREET, L.L.C., ABSOLUTE  
CONCEPTS, INC., NORTH AMERICAN  
VENTURES @ 23<sup>rd</sup> LEXINGTON, INC.,  
DELMAR REALTY CO., INC.  
JOHN DOES 1-10 inclusive,

Defendants.

\_\_\_\_\_ x  
EDMEAD, J.S.C.

Index No. 109629/04

**DECISION/ORDER**

**FILED**  
DEC 11 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

**MEMORANDUM DECISION**

Plaintiff Wendy Padob ("plaintiff") moves for an order pursuant to CPLR 3212, granting partial summary judgment as against defendants Absolute Concepts, Inc. ("Absolute"), 127 East 23<sup>rd</sup> Street, L.L.C. ("127") and Delmar Realty Co., Inc. ("Delmar"), on the ground that constructive notice of the sidewalk defect in this action is deemed to exist.

This action seeks recovery for personal injuries caused on April 30, 2004 when she tripped and fell on a broken and defective public sidewalk plate in front of the commercial premises at 127 East 23<sup>rd</sup> Street, New York, New York (the "subject premises").

The subject premises is owned by defendant 127 and is managed by defendant Delmar. The sidewalk is adjacent to the entrance of a storefront retail space on 23<sup>rd</sup> Street just off of Third Avenue, New York, New York, in the building that was leased to defendant Absolute, a cell phone technology store.

Prior to April 30, 2004, the lease was assigned to North American Ventures @ 23<sup>rd</sup>

Lexington Inc. ("North American"), a company controlled by the principals of Absolute. It now operates a Dunkin Donuts franchise in the space.

*Plaintiff's Contentions*

The lease contains a provision that the tenant was responsible for the maintenance of the sidewalk. Discovery has shown that despite the lease assignment to North American, Absolute continued to do business at the location on the day the plaintiff fell. Apparently, the lease provision is the basis for the owner/manager's claim for indemnity against Absolute. It appears that the sidewalk was repaired and re-paved in the Summer of 2004. However, neither the owner, manager nor tenant have any documents or knowledge about the repair. No one seems to know who made the arrangements, did the work or paid for it. The witness who testified for Absolute, Mr. Singh, is also a principal of the lease assignee, North American.

Defendant 127, as owner of the subject premises, is liable for the maintenance and/or repair of the public sidewalk abutting its building under Administrative Code section 7-210. It is a non delegable duty.

Plaintiff's notice witnesses, Murray Franck, Marc Kaplan, Joseph Alai and Sheri Lane, establish that the defect that caused the plaintiff to fall was observed by them and existed for at least months before the accident. This is a sufficient period of time for the defendant owner/managing agent to have repaired it before the accident occurred, thereby establishing constructive notice.

Further, the photographs attached in support of this motion show a long standing and significant defect in the sidewalk thereby demonstrating constructive notice at a minimum.

*Defendant 127's Contentions*

Plaintiff failed to give notice of the "notice witnesses" prior to the filing of her Note of Issue. In response to earlier discovery demands, plaintiff stated: "plaintiff is presently unaware of the names of constructive notice witnesses."

And, the affidavits do not sufficiently establish that defendant 127 actually had constructive notice. Merely arguing that the landlord or tenant *should have* observed the defect upon reasonable inspection and had an opportunity to repair same, is not enough.

Further, the submission of mere photographs without the testimony of an expert to establish the size and depth of the defect and that the defect existed for such a period of time that defendant 127 had constructive notice is pure speculation and cannot be the basis of plaintiff establishing her *prima facie* case.

*Defendant Absolute's Contentions*

Inasmuch as the plaintiff's motion seeks to resolve such a limited issue - constructive notice - and since a significant number of significant liability issues would remain to be tried, it is submitted that the court should exercise its discretion by denying the motion and requiring the plaintiff to try the entire liability case at the same time and before the same jury.

Further, the names and addresses of affiants Murray Franck and Joseph Alai were never provided by plaintiff prior to the filing of the Note of Issue, and until this motion was filed, and since the addresses of these affiant witnesses are still unknown, their affidavits should be rejected.

Further, the affidavits are vague in their claimed constructive notice. Each affidavit contains the identical language: "for several months prior to April 30, 2004....I personally

observed that the sidewalk in front of the store was continually raised, broken and defective.” These affidavits do not explain how the affiants knew, more than two years after plaintiff’s alleged accident, that there was a defect in the sidewalk at the exact location where the plaintiff claims to have fallen.

*Plaintiff’s Reply*

Plaintiff has met her burden for entitlement to partial summary judgment on the limited issue that constructive notice of the sidewalk defect exists. The affidavits and photographs, together with deposition excerpts, are sufficient to decide this limited issue.

Neither defendant can provide testimony that the defect did not exist prior to the day of the fall. Neither the managing agent (Mr. Green) nor the officer of Absolute who testified, ever noticed the alleged defect. And, since plaintiff and these defense witnesses never noticed the defect before plaintiff fell, plaintiff cannot establish constructive notice. That is not the standard for establishing constructive notice.

Further, plaintiff provided defense counsel with notice of plaintiff’s intention to call Mr. Franck as a notice witness prior to the filing of plaintiff’s Note of Issue.

[\* 6]

Analysis

*Constructive Notice*

“ ‘Constructive notice ordinarily means that a person should be held to have knowledge of a certain fact because he knows other facts from which it is concluded that he actually knew, or ought to have known, the fact in question. Constructive notice also exists whenever it is shown that reasonable diligence would have produced actual notice.’ (42 N.Y.Jur., Notice and Notices, § 3.)” *Bierzynski v N.Y.C.R.R. Co.*, 31 A.D.2d 294, 297, 297 N.Y.S.2d 457.

“The question is not only whether an inquiry would have revealed the fact, but also whether, acting as an ordinarily prudent person would have done, the person to be charged was called upon, under the circumstances, to make inquiry.” (42 N.Y.Jur., Notice and Notices, § 17); see *Anderson v Blood*, 152 N.Y. 285, 46 N.E. 493.

In the instant case, triable issues of fact exist regarding whether the alleged defective condition is actionable ( see *Trincere v County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615, 688 N.E.2d 489 [1997] ). Questions of fact were also raised, from the photographs and the deposition testimony, as to whether defendants had constructive notice of the defect ( see *Taylor v New York City Tr. Auth.*, 48 N.Y.2d 903, 424 N.Y.S.2d 888, 400 N.E.2d 1340 [1979]; see also *Batton v Elghanayan*, 43 N.Y.2d 898, 403 N.Y.S.2d 717, 374 N.E.2d 611 [1978] ).

Plaintiff misconstrues her initial burden. It is not for the defendants to prove that the defect did not exist prior to the day of the fall. Plaintiff must establish that there was a defect, it existed at the time of her accident and defendants had constructive notice of this defect. Plaintiff has not met her burden sufficiently in this motion to shift the burden of proof onto defendants.

In fairness to defendants, plaintiff should not be afforded summary judgment based on the

[\* 7]  
affidavits of plaintiff's late noticed "notice witnesses." These witnesses shall be subject to cross examination at trial.

Further, because there are factual questions inherent in the affidavits submitted by plaintiff, the affidavits are insufficient to establish plaintiff's entitlement to summary judgment. Again, these witnesses should be called at trial and subject to cross examination.

Further the photographs of the alleged defect without more is insufficient to establish that it existed for a sufficient time to afford constructive notice. And, the photographs do not overcome the defendants' argument that the defect, based on the photographs, could be "trivial."

Conclusion

Based on the foregoing, it is hereby

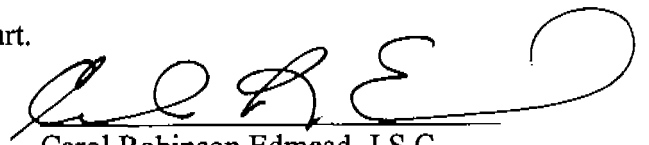
ORDERED that the motion of plaintiff Wendy Padob for an order pursuant to CPLR 3212, granting partial summary judgment as against defendants Absolute Concepts, Inc., 127 East 23<sup>rd</sup> Street, L.L.C. and Delmar Realty Co., Inc., on the ground that constructive notice of the sidewalk defect in this action is deemed to exist, is denied. It is further

ORDERED that the counsel and parties shall report for trial in Part 40 Room 242, 60 Centre Street, Room 242, on Monday, January 8, 2007 at 9:30 a.m. no adjournments. It is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

This constitutes the decision and order of this court.

Dated: New York, New York  
December 8, 2006

  
Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
DEC 11 2006  
NEW YORK  
COUNTY CLERK'S OFFICE