

Savastana v Roache

2008 NY Slip Op 30337(U)

January 30, 2008

Supreme Court, Suffolk County

Docket Number: 0028995/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-27-07
ADJ. DATE 11-27-07
Mot. Seq. # 001 - MG *CASEDISP*
002 - XMD

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THERESA SAVASTANA,	:		:	FERRO, KUBA, MANGANO, et al.
	:		:	Attorneys for Plaintiff
Plaintiff,	:		:	350 Motor Parkway, Suite 200
	:		:	Hauppauge, New York 11788
- against -	:		:	
	:		:	VINCENT D. McNAMARA, ESQ.
WILLIAM E. ROACHE,	:		:	Attorneys for Defendant
	:		:	Tower Square, 1045 Oyster Bay Road, Suite 1
Defendant.	:		:	East Norwich, New York 11732
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Upon the following papers numbered 1 to 41 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers 27 - 38; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 39 - 41; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant’s motion for summary judgment dismissing plaintiff’s complaint is granted; and it is

ORDERED that the cross motion by plaintiff for appropriate sanctions against defendant is denied, as moot.

Plaintiff Theresa Savastana, commenced this action to recover damages for injuries allegedly sustained as a result of a trip and fall accident that occurred on premises owned by defendant William Roache and known as 30 Overlook Drive, Mastic Beach, New York. Plaintiff, a tenant at the premises under a Section 8 lease, allegedly fell while walking on a concrete walkway that leads from the front of the house to the street. By her bill of particulars, plaintiff alleges that defendant failed to maintain the front walkway in a reasonably safe condition by allowing a dangerous and defective condition to exist. More specifically, she alleges that the walkway consisted of “highly irregular and uneven sections owing to cracking and displacement as well as incorporation of a wood member atop bricks.”

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Defendant now moves for summary judgment dismissing the complaint on the grounds that defendant does not own the property where plaintiff's alleged accident occurred. Defendant further argues that plaintiff's account of the events is so inconsistent that the complaint should be dismissed as a matter of law. In support of his motion, defendant submitted copies of the pleadings, transcripts of the parties' deposition testimony, and inspection reports from the Suffolk County Housing and Development Corporation. Defendant also submitted photographs depicting the walkway where plaintiff's accident occurred and an affidavit from a land surveyor, Kenneth Woychuck.

In opposition, plaintiff contends that defendant's summary judgment motion should be denied because plaintiff has sufficiently specified the place and cause of her trip and fall. Plaintiff also cross-moves for an order pursuant to CPLR 3126 sanctioning defendant for failing to provide a copy of Mr. Woychuck's affidavit and survey until the motion for summary judgment was made. In support of the motion, plaintiff submits, among other things, the notice of discovery and inspection and combined demand dated August 22, 2005; the notice of discovery and inspection dated June 19, 2006; and defendant's response to plaintiff's disclosure demands dated September 29, 2005.

At her examination before trial, plaintiff testified that she has been living at the subject premises for six years. She testified that under the lease agreement it was the tenant's responsibility to maintain the property by mowing the lawn, raking the leaves and shoveling the snow. She testified that she began receiving Section 8 benefits more than two years ago, and that an inspector for Section 8 housing inspects the premises each year. She testified that prior to her accident a friend who was visiting her tripped on the walkway, and that she informed defendant and the Section 8 inspector about the incident. She further testified that she and her husband complained to defendant about the condition of the walkway before the accident. Plaintiff testified that on the day of the accident, as she was walking to the mailbox in the front of the premises, she tripped and fell as she stepped down from the walkway towards the mailbox. Plaintiff testified that she assumed that either the wood or the crack caused her to trip, because of the location of her fall. She later testified that she does not know what caused her to trip and did not know whether the wood or the cement caused the fall.

At his examination before trial, defendant testified that he acquired the subject property in 1992. He testified that the inspector sent pursuant to the Section 8 program did not advise him of any needed renovations or repairs. He also testified that he visited the premises where plaintiff resides approximately once a month to check for problems. Defendant testified that he has never performed any maintenance on the walkway, and does not know whether it is within the property line. He testified that in March of 2004, plaintiff informed him that she had fallen, but did not specify the location of the fall. Defendant further testified that he was not aware of any other incidents where someone had fallen in front of the premises, and that plaintiff never made a complaint about the condition of the walkway.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve

issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

To prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see, Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [1995]). 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 (*see, Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Bykofsky v Waldbaum's Supermarkets, Inc.*, 210 AD2d 280, 619 NYS2d 760 [1994]). Liability can be predicated only on failure of defendant to remedy the danger after actual or constructive notice of the condition (*see, Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]). Furthermore, a defendant with actual knowledge of an ongoing and recurring dangerous condition may be charged with constructive notice of each specific recurrence of the condition (*see, Brown v. Linden Plaza Hous. Co., Inc.*, 36 AD3d 742, 829 NYS2d 571 [2007]; *Fundaro v City of New York*, 272 AD2d 516, 708 NYS2d 149 [2000]).

Defendant has established its entitlement to summary judgment as a matter of law submitting deposition testimony showing that plaintiff is unable to identify what caused her to fall (*see, Pluhar v Town of Southampton*, 29 AD3d 975, 816 NYS2d 176 [2006]; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 814 NYS2d 178 [2006]; *Rodriguez v Cafaro*, 17 AD3d 658, 794 NYS2d 113 [2005]; *LaFemina v Brambell*, 2 AD3d 409, 767 NYS2d 795 [2003]; *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570, 754 NYS2d 31 [2003]; *Bongiorno v Penske Auto. Ctr.*, 289 AD2d 520, 735 NYS2d 617 [2001]). The burden, therefore, shifted to plaintiff to raise a triable issue as to whether defendant's alleged negligence was a proximate cause of plaintiff's accident (*see, Derdiarian v Felix Contr. Corp.*, *supra*; *Hartman v Mountain Val. Brew Pub*, *supra*; *see generally, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, *supra*).

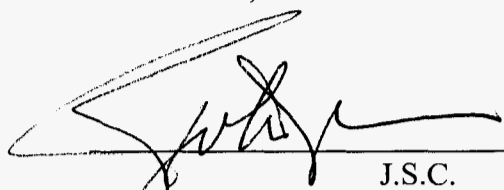
Plaintiff failed to submit evidence showing that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (*see, O'Connor v Lakeview Assocs., LLC*, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 753 NYS2d 470 [1st Dept], *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf., Stanojevic v Scotto Bros. Rest. Enters., Inc.*, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). While plaintiff testified that the walkway was "falling apart" and that the cement was "cracked and broken", she could not state what caused her to fall. Plaintiff testified that she assumed that either the wood or the crack caused her to fall. Later in her testimony, she states that she does not know what caused her to trip and fall. Plaintiff's surmise that the condition of the walkway caused her to fall is insufficient to raise a triable issue of fact, because the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation (*see, Curran v Esposito*, 308 AD2d 428, 764 NYS2d 209 [2003]; *Tejada v Jonas*, 17 AD3d 448, 792 NYS2d 605 [2005]).

Thus, as there is no evidence from which a jury could rationally conclude that plaintiff's fall was

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more likely due to the alleged defective condition of the walkway than to a sudden loss of balance or a misstep, the motion by defendant for summary judgment dismissing the complaint against him is granted (see, *Manning v 6638 18th Ave. Realty Corp.*, supra; *Hennington v Ellington*, 22 AD3d 721, 804 NYS2d 395 [2d Dept 2005]; *Rygel v 8750 Bay Parkway, LLC*, 16 AD3d 572, 792 NYS2d 160 [2d Dept 2005]; *Bitterman v Grotyohann*, 295 AD2d 383, 743 NYS2d 167 [2d Dept 2002]; cf., *DeJesus v City of New York*, 199 AD2d 139, 605 NYS2d 253 [1st Dept 1993]). In view of this determination, the cross-motion by plaintiff for sanctions pursuant to CPLR 3126 is denied, as moot.

Dated: JAN 30 2008



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION