

Fisher v JRMR Realty Corp.

2008 NY Slip Op 31058(U)

April 7, 2008

Supreme Court, Nassau County

Docket Number: 4380-04/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
LINDA FISHER,

Plaintiff,

-against-

JRMR REALTY CORP., and THE LEMON TREE

Defendant.

-----X
JRMR REALTY CORP.,

Third-Party Plaintiff,

-against-

D.L.I. CONTRACTING, INC.,

Third-Party Defendant.

TRIAL TERM PART: 48

INDEX NO.:14380/04

**MOTION DATE:11-15-07
SUBMIT DATE:3-18-08
SEQ. NUMBER - 003**

**MOTION DATE: 2-13-08
SUBMIT DATE: 3-18-08
SEQ. NUMBER - 004**

Third-Party Index No.

014386/04

The following papers have been read on this motion:

- Notice of Motion, dated 10-4-07..... 1**
- Affidavit in Opposition, dated 3-3-08.....2**
- Cross Motion, dated 2-4-08.....3**
- Affirmation in Opposition to Cross Motion, dated 2-12-08.....4**
- Reply Affirmation, dated 3-14-08.....5**
- Sur-Reply, dated 3-26-08.....6**

Before this court are two applications for summary judgment. Defendant JRMR

Realty Corporation [hereinafter JRMR] moves pursuant to CPLR §3212 for an order

dismissing the plaintiff's complaint in its entirety as well as any and all cross-claims asserted by co-defendant, The Lemon Tree¹ [hereinafter Lemon Tree]. The motion is granted and the complaint is dismissed as to this defendant.

Co-defendant Lemon Tree, similarly moves pursuant to CPLR §3212 and seeks an order granting summary judgment dismissing of all the cross-claims asserted against it by JRMR and third party defendant D.L.I. Contracting, Inc. [hereinafter DLI].² The application is denied as moot.

The underlying action, sounding in negligence, was commenced by the plaintiff to recover damages for personal injuries she allegedly sustained on May 24, 2002, when she tripped and fell on the sidewalk outside of the property located at 4 Merrick Avenue, Merrick, New York. The Lemon Tree hair Salon is the tenant of said premises and the owner thereof is co-defendant, JRMR.

The plaintiff testified that on the day of her accident, she was walking southbound along the east side of Merrick Avenue en route to the Merrick Train Station (Plaintiff's deposition at p. 22). This plaintiff was familiar with this route having repeatedly traveled it since 1999 (*Id.* at pp. 9,26). According to the plaintiff, the weather was "beautiful, sunny and clear" (*Id.* at p.23). She states that as she was traversing the sidewalk area, there were several stores "... a couple of feet" to her left and the curb was "approximately" a few feet to her right (*Id.* at pp.25,29). The plaintiff testified that the sidewalk upon which she was traveling

¹ The action against Lemon Tree was discontinued with prejudice by the plaintiff on October 31, 2006.

² DLI is no longer a party to this action in accordance with this Court's Decision dated September 12, 2007 and which granted DLI's motion for summary judgment and dismissed the plaintiff's complaint.

was comprised of concrete and some pavers (*Id.* at p.27). The plaintiff stated that as she proceeded towards that train station she remained “more towards the right” on the sidewalk, although there was no particular reason for her doing so (*Id.* at p.30). She states that she did not know the width of the sidewalk (*Id.* at p.29).

With particular regard to circumstances attendant to the accident in issue, the plaintiff states that she was located in an area of the sidewalk situated between the Lemon Tree Hair Salon which was a “few feet away” to her left (*Id.* at pp. 28,36) and a tree which was “a few inches away” to her right (*Id.* at p. 35)³. She states as she was walking she “placed her foot on the ground” and thereafter “felt off balance” as a result of “the sidewalk being raised” (*Id.* at p.37). Plaintiff was unable to state how many pavers were raised and could not offer an approximation as to the degree of their elevation (*Id.* at p. 41).

Defendant JRMR now moves for summary judgment contending that no liability can attach inasmuch as any defects which existed at the accident site did not constitute a snare or trap and were too trivial in nature to be actionable.

Making particular reference to several photographs, authenticated by the plaintiff at her examination before trial as depicting the site of the subject accident, the defendant argues that said photographs demonstrate that the elevation in the sidewalk is less than one inch and that such an insignificant physical dimension is insufficient to be considered a snare or trap which could have precipitated the plaintiff’s fall. The defendant also relies upon the plaintiff’s description of the happening of the accident which the plaintiff reports as having occurred as a result of her losing her balance due to an uneven sidewalk as opposed to her

³ The Court notes that at a later point in the plaintiff’s deposition, she testifies that the tree was located “a few feet” to her right (p.45).

foot becoming entangled in any identified trap or snare.

As to the trivial nature of the defect, the defendant again relies upon the plaintiff's deposition testimony as evidence of the trivial character of the alleged defective condition. JRMR argues that the plaintiff admitted to continued and frequent usage of the sidewalk in issue and notwithstanding said usage she never noticed any defects in the sidewalk area. Defendant therefore concludes and urges this Court to find that any claimed defect was trivial and thus not actionable.

The plaintiff opposes the motion and contends that defect in the sidewalk area over which she tripped was not trivial and was in fact an elevation measuring between 2 and 2 ½ inches above the surrounding sidewalk.

In support of said contention and to defeat the defendant's application, the plaintiff relies upon the following three portions of the record *sub judice*: her sworn deposition testimony; annexed laser color copies of the photographs depicting the accident site; and an affidavit of Barry Fisher, the plaintiff's ex-husband who took said photographs within a week of the subject accident and who examined the site in question.

Initially, the plaintiff directs this Court's attention to that portion of her testimony wherein she testified that the accident occurred adjacent to the tree and "a few inches away." The plaintiff next makes reference to the photographs upon which she has affirmatively identified the exact area upon which she had her accident. Finally, the plaintiff makes strong references to the annexed affidavit of Barry Fisher and particularly those assertions whereby he states that upon reviewing the site in question he "... found it to be between 2 and 2 ½ inches above the level of the sidewalk at its highest point."

Plaintiff argues that her referenced testimony, coupled with the location she identified on the photograph as the site of her accident, demonstrate that she fell at the highest point of the elevation which was observed by Mr. Fisher to be 2 to 2 ½ in height. She argues that such a defect is a tripping hazzard which far from trivial and thus actionable at law.

In Reply, counsel for JRMR argues, *inter alia*, that the affidavit of Mr. Fisher should be disregarded for two reasons. Firstly, counsel argues that the height of the defect that he reports in his affidavit was not the product of the defect being measured. Rather, Mr. Fisher, “observed” what appeared to be an incline which was between two and two and one half inches above the surrounding sidewalk. Secondly, and in the alternative, counsel argues that even assuming the Court were to consider the Fisher affidavit, the contents thereof are not probative because the measurements provided are for an incline in the pavement as a whole as opposed to the height differential between particular paving stones, which counsel argues is the defect claimed by the plaintiff.

The Court has reviewed both the plaintiff’s complaint, as well as the verified bill of particulars. While the complaint contains allegations, both generic and unspecific, the bill at item 6 particularly describes the claimed defect as the sidewalk which was in “disrepair and elevated”. There is nothing in the bill that alleges the defect to be an elevation existing between particular pavers.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact. *Sillman v Twentieth Century Fox*, 3 NY2d (1957); *Bhatti v Roche*, 140 AD2d 660 (2d Dept 1998). To obtain summary judgment, the moving party must establish its claim or defense by

tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation. CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept 1998). Conclusory allegations are insufficient and to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings. *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept 1993).

With particular respect to the case at bar, the issue of whether a dangerous or defective condition exists on a piece of property is, as a general proposition, a *sui generis* determination, depends upon the particular extant circumstances of each case and is usually a question for the trier of fact. *Trincere v County of Suffolk*, 90 NY2d 976 (1997). However, the imposition of liability may not attach to a landowner for trivial defects which do not constitute a trap or nuisance, over which a pedestrian may stumble or trip. *Ayala v Gutin*, 2008 WL 740756 (2d Dept 2008); see also *Taussig v Luxury Cars of Smithtown*, 31 AD3d 533 (2d Dept 2006).

The issue of that which constitutes a trivial defect has been examined by the Court of Appeals in *Trincere v County of Suffolk*, *supra*. In analyzing these types of defective

conditions, the *Trincere* Court expressly rejected a “minimal dimension test” or bright line rule mandating that an alleged defect be of a particular depth or height to be a sufficient factual predicate upon which an action at law may be sustained. *Id.* Rather, when entertaining a summary judgment motion to dismiss a plaintiff’s claim, the Court must engage in an inquiry which requires consideration of totality of the attendant circumstances including the “width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury.” *Id.* at 978.

In the instant matter, the Court finds that the defendant has made its *prima facie* showing to entitlement to judgment as a matter of law. The defendant has demonstrated that the alleged defect did not, by reason of its situs, any attendant adverse weather or lighting conditions, or other relevant surrounding circumstances, possess the characteristics of a trap or snare and was indeed too trivial in nature to be actionable. *See Berkritsky v Tacs-4 Inc.*, 27 AD3d 680 (2d Dept 2006); *Hawkins v Carter Community Housing Development Fund Corporation*, 40 AD3d 812 (2d Dept 2007).

The photographs authenticated by the plaintiff at her examination before trial depict a gradual but apparent elevation in the relevant sidewalk area. The alleged defect is situated in an area which immediately abuts a tree planted into the ground but in an otherwise unobstructed and well maintained walkway. Additionally, poor weather conditions were not in issue as the accident occurred at 7:30 in the morning and as the plaintiff testified, the weather was sunny and clear. In opposition, the plaintiff has failed to raise a triable issue of fact. As stated above the photographs do not show the existence of a defect to sustain a cause of action. *Berkritsky v Tacs-4 Inc.*, *supra*; *Hawkins v Carter Community Housing*

Development Fund Corporation, supra. Moreover, the affidavit of Mr. Fisher and the dimensions reported therein are insufficient to raise and issue of fact regarding the existence of a trap or snare for the unwary, as they are not based on measurements and are not borne out by the photographs authenticated by the plaintiff. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *see also City of New York v Grosfeld Realty*, 173 AD2d 436 (2d Dept 1991).

Based upon the foregoing, the motion interposed by JRMR pursuant to CPLR §3212 seeking dismissal of the plaintiff's complaint is hereby granted.

The Court now turns to the cross motion interposed by Lemon Tree, which seeks summary judgment dismissing the cross-claims asserted against it by both co-defendant JRMR, plaintiff's landlord, and third-party defendant DLI. The Court will consider the cross motion notwithstanding JRMR's objection that it is untimely. The grounds for dismissal discussed above apply equally to Lemon Tree, and given the record before it the Court would have granted summary judgment to Lemon Tree even as a non-moving party. The foregoing constitutes grounds to consider the application. *See, Ellman v Village of Rhinebeck*, 41 AD3d 635 (2d Dept. 2007).

Part of the record is the Court's prior order dated September 12, 2007 granting summary judgment to DLI (rendering its cross claims academic as well). This decision makes it clear that Lemon Tree had nothing to do with the installation of the offending pavers, nor with the later renovation affecting the subject area where the plaintiff alleges she fell. Indeed, Lemon Tree was the recipient of a discontinuance of action by the plaintiff. Under these circumstances, the Court would find that a basis for judgment dismissing cross

claims against Lemon Tree existed, and JRMR would have to raise some factual basis for holding its tenant responsible. It did not. While the lease upon which JRMR relies to hold Lemon Tree in the case provides for indemnification, that is only where the injury to a third party is "occasioned wholly or in part" by the Tenant or those it allowed on the property. No such evidence is presented, and existence of such evidence is not even suggested. Thus, even if JRMR's motion had been denied, the Court still would have granted summary judgment to Lemon Tree.

However, because JRMR is entitled to summary judgment and the action as against it is dismissed by this present order, Lemon Tree's motion has been rendered moot and is denied on that basis.

This shall constitute the Decision and Order of this Court.

DATED: April 7, 2008

ENTER



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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**NASSAU COUNTY
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