

Cohen v Cayre Synergy 73rd LLC

2008 NY Slip Op 32798(U)

October 2, 2008

Supreme Court, New York County

Docket Number: 113387/05

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Justice

Index Number : 113387/2005

COHEN, CAROL H.

vs.

CAYNE SYNERGY 73RD LLC

SEQUENCE NUMBER : # 002

SUMMARY JUDGMENT

INDEX NO. 11338705

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO.

are read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

attached

is decided per

FILED
OCT 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/2/08

[Signature]
EMILY JANE GOODMAN

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 17

-----X
CAROL H. COHEN,

Plaintiff,

-against-

Index No. 113387/05

CAYRE SYNERGY 73RD LLC, FOREMOST
CONTRACTING, LLC, HIGHRISE HOISTING
& SCAFFOLDING, INC., and THE CITY OF
NEW YORK,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

This is an action for personal injuries allegedly sustained by plaintiff when she tripped and fell on April 28, 2005, on the sidewalk adjacent to 206 East 73rd Street in Manhattan. In motion sequence number 002, defendant Highrise Hoisting & Scaffolding, Inc. (Highrise) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. In motion sequence number 003, defendants Foremost Contracting, LLC (Foremost) and Cayre Synergy 73rd LLC (Cayre Synergy) move for an order granting summary judgment dismissing the complaint and all cross claims as against them.

BACKGROUND

Cayre Synergy is the owner of the premises at 206 East 73rd Street. Foremost was hired as a general contractor to perform certain gut rehabilitation work and to erect a new building at the premises. Foremost, in turn, hired Highrise as a subcontractor to construct a sidewalk shed at the premises.

At plaintiff's deposition, she testified that, at about 10:30 P.M. on the date of the accident, she tripped while walking on the sidewalk of the southern side of East 73rd Street, just east of Third Avenue (Plaintiff Dep., at 7, 8, 17). Plaintiff lived on the same block, and was headed to her apartment (*id.* at 9, 11-12). She recalled that it was not raining that evening, and that the street was "not very well lit" (*id.* at 9, 10). Plaintiff was required to walk under scaffolding that covered the sidewalk (*id.* at 34, 35). According to plaintiff, after the left toe of her shoe got caught, she was unable to regain her balance, "went flying," and crashed to the ground (*id.* at 19, 20). Plaintiff landed on her left side facing forward (*id.* at 21). She did not observe what she tripped on, as "there [were] lots of possibilities to trip on there" (*id.* at 19). Plaintiff, however, believed that she tripped on the cracks or unevenness in the sidewalk (*id.* at 123-124). The sidewalk near where she fell was cracked and uneven, and had large pieces of cement missing (*id.* at 36). She estimated that the difference in elevation of the sidewalk was "a little less than an inch" (*id.* at 49). Plaintiff testified that there was a wooden barrier along the street for the length of the construction site (*id.* at 96-97). The cracks first appeared in the sidewalk around when the buildings were taken down, because trucks ran over the sidewalk (*id.* at 99). Plaintiff claims that she suffered a broken hip that required replacement with an artificial hip as a result of the accident.

According to David Malenbaum, a managing member of Cayre Synergy, the owner was redeveloping the property at East 73rd Street (Malenbaum Dep., at 8). When Cayre Synergy bought the property, there were two buildings on the site – one at 204 East 73rd Street and one at 206 East 73rd Street (*id.* at 9-10). The two buildings were to be replaced with a single structure (*id.* at 11, 12).

Foremost's project manager, Kevin Groeninger, testified that Highrise installed a sidewalk bridge at the site during the work (Groeninger Dep., at 13, 23). In addition, Foremost erected a fence around the entire site (*id.* at 15). The construction work required the use of cranes and other heavy construction vehicles, such as excavators and compressors (*id.* at 19-20). The construction equipment typically causes the sidewalk to become cracked (*id.* at 38, 41). Groeninger recalled that there were about 10 cracks in the sidewalk (*id.* at 41). Foremost's employees repaired the cracks with Ardex, a cementitious crack-filling product (*id.* at 41-42). According to Groeninger, the 10 cracks were not present on the sidewalk at the time the sidewalk bridge was first erected (*id.* at 89).

Michael Eggers testified on behalf of Highrise (Eggers Dep., at 5). Highrise was hired to construct a sidewalk shed on the sidewalk in front of the premises (*id.* at 9-10). Pursuant to code requirements, when performing construction work over an active pedestrian walkway, the walkway must be protected with a heavy-duty or light-duty sidewalk shed, which allows pedestrians to walk safely below the work (*id.*). Generally, sidewalk sheds are built from the edge of the building to within two feet of the curb edge (*id.* at 12). The design of the shed on this project was approved by the Board of Standards and Appeals (*id.* at 11). The shed was 8 feet high (*id.* at 13). At some point during the project, Foremost requested that Highrise remove the shed so that it could perform foundation work (*id.* at 20-22). Highrise later reinstalled the shed on the sidewalk (*id.* at 22). Highrise never made any repairs to the sidewalk (*id.* at 48).

The procedural history of this action is as follows: on September 23, 2005, plaintiff commenced this negligence action against Cayre Synergy, Foremost, Highrise, and the City of New York. More specifically, plaintiff's bill of particulars alleges that "scaffolding and fencing

installed on the sidewalk fronting 206 East 73rd Street made ordinary passage difficult and dangerous, partially obstructing the sidewalk and forcing pedestrians to walk around the scaffolding and through a narrow passageway directly over hazardous and defective paving” (Verified Bill of Particulars, ¶ 5). Additionally, plaintiff claims therein that the sidewalk was “broken, cracked, raised, uneven and in a general condition of disrepair” (*id.*). In their answers, Cayre Synergy, Foremost, and Highrise asserted cross claims for contribution and indemnification against each other. On September 19, 2006, the court granted the City’s motion for summary judgment, and dismissed it from the action.

Highrise argues that it owed no duty to plaintiff, since it did not own, occupy, or control the premises or the area where plaintiff’s accident occurred. In addition, Highrise did not supply or place the plywood fence over the sidewalk, which forced her to walk over the cracked sidewalk.

Foremost and Cayre Synergy contend that plaintiff cannot make out a prima facie case in negligence because she can only speculate as to the cause of her fall. She does not know the specific defect that caused her to fall; she only knows that her left shoe got caught on something, which made her fall to the ground. These defendants further claim that the difference in elevation of the sidewalk is trivial as a matter of law. Plaintiff testified that the difference in elevation of the defective sidewalk was less than one inch. Foremost and Cayre Synergy also submit copies of photographs of the sidewalk taken by plaintiff’s counsel, which purportedly reflect that the defects are non-actionable.

In opposing these motions, plaintiff maintains that she has established a prima facie case of negligence against all of the defendants. Plaintiff submits color photographs of the sidewalk,

showing that nearby scaffolding and fencing narrowed the sidewalk, requiring pedestrians to walk over a jagged, cracked and uneven portion of the sidewalk (Plaintiff Aff., Exhs. A, B, C, D). Plaintiff also offers an affidavit, in which she states that, at the time of her accident, there were wooden barriers at the curb preventing pedestrians from walking into the street (Plaintiff Aff., ¶ 2). According to plaintiff, her injury was the result of her left toe becoming caught in a crack, depression, elevation or unevenness in the sidewalk (*id.*). Indeed, the toe of her left shoe, which she still owns, has deep abrasions that resulted from being caught in concrete or cement (*id.*). Plaintiff does not recall seeing any debris on the sidewalk on the night of her accident (*id.*, ¶ 3).

DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). “[T]he court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues” (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *rearg denied* 3 NY2d 941 [1957]).

To establish a prima facie case of negligence, the plaintiff must show: (1) the existence of a duty of care owed by defendant to the plaintiff; (2) breach of that duty; (3) that such breach was

the proximate cause of the resulting injury; and (4) actual loss, harm, or damage (*see Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006]; *Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept], *affd* 89 NY2d 824 [1996]; *Febesh v Elcejay Inn Corp.*, 157 AD2d 102, 104 [1st Dept 1990], *lv denied* 77 NY2d 801 [1991]).

Highrise's Motion (Motion Sequence Number 002)

The court first turns to Highrise's motion, asserting that it did not owe plaintiff a duty of care. The existence and scope of an alleged tortfeasor's duty is a legal issue for the court to resolve in the first instance (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002]). "[I]n the absence of duty, there is no breach and without a breach there is no liability" (*Sheila C. v Povich*, 11 AD3d 120, 125 [1st Dept 2004], quoting *Pulka v Edelman*, 40 NY2d 781, 782 [1976], *rearg denied* 41 NY2d 901 [1977]). A contractor may owe a duty to a plaintiff if it creates or exacerbates a dangerous condition (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Keese v Imperial Gardens Assoc., LLC*, 36 AD3d 666, 668 [2d Dept 2007]).

Here, Foremost's project manager testified that he did not recall the cracks being on the sidewalk when Highrise erected the sidewalk bridge (Groeninger Dep., at 89). However, at some point during the project, Highrise dismantled a portion of the sidewalk shed, and then replaced that portion of the shed (Eggers Dep., at 20-22, 40). No evidence has been presented establishing that Highrise did not create the crack when it removed the shed. Highrise has also not shown that the sidewalk shed was installed pursuant to code requirements.¹ Therefore, there are triable

¹Although Eggers testified, in general, that sidewalk sheds are built from the building edge to within two feet of the curb (Eggers Dep., at 12), he did not testify as to this sidewalk shed in particular.

issues of fact as to whether Highrise created a dangerous condition, including whether it created an unsafe condition by directing plaintiff toward the crack by narrowing the sidewalk (*see McKenzie v Columbus Ctr., LLC*, 40 AD3d 312, 313 [1st Dept 2007] [triable issue of fact as to whether contractor created an unsafe condition by directing the plaintiff toward the defect]; *Coulton v City of New York*, 29 AD3d 301, 302 [1st Dept 2006] [contractor had duty not to create unsafe condition when it narrowed sidewalk by erecting plywood covering around building]).

Therefore, Highrise's motion is denied.

Motion by Cayre Synergy and Foremost (Motion Sequence Number 003)

Cayre Synergy and Foremost argue that the cracks in the sidewalk are trivial as a matter of law. "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Generally, the issue of whether a dangerous or defective condition exists depends on the particular circumstances of each case, and is an issue of fact for the jury (*id.*; *Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 165-166 [1st Dept 2000]).

However, "trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his [or her] toes, or trip over a raised projection," are not actionable (*Morales v Riverbay Corp.*, 226 AD2d 271 [1st Dept 1996], quoting *Liebl v Metropolitan Jockey Club*, 10 AD2d 1006 [2d Dept], *rearg denied* 11 AD2d 946 [1960]). In order to determine whether a defect is trivial as a matter of law, the 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” (*Trincere*, 90 NY2d at 978, quoting *Caldwell v Village of Is. Park*, 304 NY 268, 274 [1952]; see also *Boxer v Metropolitan Transp. Auth.*, 52 AD3d 447, 448 [2d Dept 2008]). The court should also consider whether other conditions exist, such as weather, location, or adverse lighting, which make an otherwise trivial defect an actionable hazard (*Menendez v Dobra*, 301 AD2d 453 [1st Dept 2003]). “[A] mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable” (*Trincere*, 90 NY2d at 977-978).

Although elevation differentials of about one inch have been held to be trivial and non-actionable (see e.g. *Morales*, 226 AD2d at 271), an otherwise trivial defect may have the characteristics of a trap or snare, and may, therefore, be actionable. As stated by the First Department,

“even a trivial defect may constitute a snare or trap. . . . While a gradual, shallow depression is generally regarded as trivial . . . the presence of an edge which poses a tripping hazard renders the defect nontrivial. . . . Furthermore, factors which make the defect difficult to detect present a situation in which an assessment of the hazard in view of ‘the peculiar facts and circumstances’ is appropriate”

(*Glickman v City of New York*, 297 AD2d 220, 221 [1st Dept 2002], quoting *Argenio*, 227 AD2d at 166). For example, in *Cela v Goodyear Tire & Rubber Co.* (286 AD2d 640 [1st Dept 2001]), the Court held that the defendant failed to establish that the defect, an irregular zig-zag-like depression which was less than an inch deep and one to two feet in length, was trivial as a matter of law (*id.* at 641). The Court noted that the defect had sharp rather than gradual edges, and given its dimensions, concluded that the defect was “of sufficient magnitude to raise a jury issue as to whether it suffices as a basis for liability” (*id.*). In *Nin v Bernard* (257 AD2d 417 [1st Dept

1999]), the Court similarly concluded that summary judgment was properly denied, given that the defect (a depression caused by missing tiles) had sharp edges, and was located at the top of a stairwell (*id.* at 417-418). By contrast, in *Morales (supra)*, the Court determined that the defect was trivial as a matter of law, since “the differential between the two slabs was, by plaintiff’s own testimony, about an inch and possessed none of the characteristics of a trap or a snare” (*Morales*, 226 AD2d at 271).

Here, it cannot be concluded that the alleged defects were trivial as a matter of law. Plaintiff testified that her left foot got caught when walking over the sidewalk (Plaintiff Dep., at 19, 20). While plaintiff stated that the difference in elevation of the crack was “a little less than an inch” (*id.* at 49), the photographs submitted by plaintiff show a sharp edge which may constitute a tripping hazard (Plaintiff Aff., Exh. A). The photographs also show that the scaffolding and fence forced pedestrians to walk through an S-shaped curve into a narrowed portion of the sidewalk where the alleged defects were located (*id.*). Thus, this case is more akin to *Cela* and *Nin*, rather than *Morales*. Moreover, plaintiff testified that she tripped at night, and that the area was “not very well lit” when she fell (Plaintiff Dep., at 7, 10). Given the appearance of the alleged defects, the location of the crack near scaffolding and fencing, and plaintiff’s claim of inadequate lighting, this issue is one for the jury (*see Alig v Parkway Parking of N.Y., Inc.*, 36 AD3d 980, 982 [3d Dept 2007] [issues of fact as to whether defect was trivial in view of location and lighting conditions]).

Finally, the court is not persuaded that plaintiff’s claim is based upon mere speculation. Proximate cause requires that the defendant’s act or failure to act be a “substantial cause of the events which produced the injury” (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993],

quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]). A plaintiff's evidence must be sufficient to permit a finding of proximate cause based on logical inferences from the evidence (*Sieling v New York Convention Ctr. Dev. Corp.*, 35 AD3d 227 [1st Dept 2006], *lv denied* 8 NY3d 812 [2007]; *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). The plaintiff's failure to identify the cause of a fall is ordinarily fatal to the complaint, because "the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (*Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007], quoting *Hartman v Mountain Val. Brew Pub.*, 301 AD2d 570 [2d Dept 2003]).

In the instant case, plaintiff testified that her left foot got caught while she was walking over the sidewalk, and that the sidewalk where she fell was cracked and uneven, and had large pieces of cement missing (Plaintiff Dep., at 19, 36). Additionally, plaintiff avers that her left toe became caught in a portion of the sidewalk, which created deep abrasions in the shoe that she was wearing (Plaintiff Aff., ¶ 2). Plaintiff's description of the condition of the sidewalk and the circumstances surrounding her fall present issues of fact as to proximate cause (*see Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]; *Farrar v Teicholz*, 173 AD2d 674, 676 [2d Dept 1991] [plaintiff's evidence adequately described both the location of her fall and the particular defect which allegedly caused her fall]).

Therefore, Foremost and Cayre Synergy are not entitled to summary judgment.

CONCLUSION

Accordingly, for these reasons, it is

ORDERED that the motion (sequence number 002) by defendant Highrise Hoisting &

Scaffolding, Inc. for summary judgment dismissing the complaint and all cross claims as against it is denied; and it is further

ORDERED that the motion (sequence number 003) by defendants Foremost Contracting LLC and Cayre Synergy 73rd LLC for summary judgment dismissing the complaint and all cross claims as against them is denied.

This Constitutes the Decision and Order of the Court.

Dated: October 2, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
OCT 08 2008
COUNTY CLERK'S OFFICE
NEW YORK