

Hunt v 754 Fifth Ave. Assoc., L.P.

2009 NY Slip Op 30146(U)

January 22, 2009

Supreme Court, New York County

Docket Number: 100389/07

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X

Laura Hunt,

Plaintiff (s),

-against-

754 Fifth Avenue Associates, L.P.,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 100389/07

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def 745's n/m (3212) w/ NMC affirm, exhs	1
Pltf's opp w/ NS affirm, LH affid	2
NMC reply	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action by plaintiff Laura Hunt ("plaintiff") based upon claims of premises liability. Defendant 754 Fifth Avenue Associates, L.P. owns the building located at 754 Fifth Avenue ("landlord") which abuts the sidewalk where plaintiff claims she tripped and fell. Issue has been joined and the plaintiff has served and filed her note of issue (June 18, 2008) certifying that all discovery is complete. The court now has before it defendant's motion for summary judgment dismissing the complaint. Plaintiff opposes the motion on the basis that there are issues of fact for trial. Since the motion is timely, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Arguments

Plaintiff was deposed and at her examination before trial ["EBT"] testified that on December 16, 2004, after leaving a hair salon located inside the Bergdorf Goodman store located at 754 Fifth Avenue she proceeded to walk down (south) on Fifth Avenue. As she walked away from Bergdorf Goodman towards the immediately adjacent store (Van Cleef & Arpels), plaintiff tripped on a crack on the sidewalk. According to her EBT testimony, the crack was closer to the Van Cleef & Arpels store than Bergdorf Goodman. LH EBT p. 14.

At her EBT, plaintiff was shown several photographs of the sidewalk where the accident took place and asked questions about them. She testified that the crack was "six, seven, eight inches" in width¹. When asked whether the crack was raised at all, plaintiff responded that "the north side of the crack, it was below grade." LH EBT p. 32. When asked how far below grade, plaintiff responded that "I don't think it's an inch. It's over – more like anywhere from a quarter to a half inch [deep]." LH EBT p. 32.

Plaintiff also testified that she had not noticed the crack before she tripping on it nor did she complain to anyone about it before her accident. According to plaintiff, when she tripped it "felt a jolt, and I remember going up in the air, literally off my feet, and coming down . . . like a bullet." LH EBT p. 18. The weather was clear on the day of plaintiff's accident; it had not snowed nor rained that day or the day before. After her fall, plaintiff went to the hospital and received a number of stitches on her chin, as well as other medical attention.

¹Looking at the photos, the crack runs somewhat east to west or horizontal to the direction in which plaintiff was walking.

The landlord contends that it did not owe plaintiff a duty of reasonable care, and therefore, was not negligent. This argument is based upon its claim that the crack is nothing more than a trivial defect in the sidewalk because it is no more than a ½ inch deep. The landlord argues that, as a matter of law, such a small defect is non-actionable and there is no question of fact for the jury to decide. Thus, according to the landlord the court should dismiss plaintiff's case based upon the plaintiff's own measurements, her testimony and the photographs she was asked questions about at her EBT.

The landlord also claims that it did not create, nor have notice of, the dangerous condition plaintiff contends resulted in her accident. In support of this defense, the landlord provides and relies upon the deposition testimony of Robert Langton, an employee of Bergdorf Goodman, and the Director of Operations for that store.

Langton testified at his EBT that in December 2004 he had a number of daily responsibilities included receiving, shipping, housekeeping and office moves. He also inspected the sidewalk outside Bergdorf Goodman once or twice a week "by walk [ing] it to make sure that everything was fine . . ." RL EBT p. 16. Langton, however, was not the only person responsible for making sidewalk inspections; they were also the responsibility of the of Tony Nicola, VP of operations and a member of the safety committee who was not deposed.

When asked whether he remembered seeing a crack in the sidewalk prior to the date of plaintiff's accident, Langton replied: "I cannot recollect, I would imagine that – no, I would just be – I really can't remember that; I can't speculate." RL EBT p. 20-21. According to Langton he attended monthly safety meetings. He did not recall any

issues being raised at these meetings about the sidewalk in front of Bergdorf Goodman or whether he had received any complaints about it. RL EBT p. 17. He also testified, however, that some complaints might have been logged into the engineer log or safety minutes, but both logs were in storage. Although Langton took notes while doing his "walk throughs" of the sidewalk, it was his practice was to destroy them at the end of the day without keeping any back ups of them.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Since here the moving party is the defendant, to prevail on its motion, the landlord must establish its defenses. Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 (1979). Only if it meets this initial burden does it then shift to the opponent (here, plaintiff) who then must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial, and therefore, the denial of defendant's motion. Zuckerman v. City of New York, 49 NY2d 557 (1980).

This motion is predicated primarily on two defenses. The first defense is that any defect in the sidewalk where plaintiff fell is too trivial to be actionable, and therefore, there is no issue of fact for the jury to decide. Marcus v. Namdor, Inc., 46 A.D.3d 373 (1st Dept. 2007); Corrado v. City of New York, 6 AD3d 380 (2nd dept. 2004). A second defense mounted by defendant is that it did not create, nor have notice of, a dangerous condition on the sidewalk in front of its building. Segretti v. Shorenstein Company East, LP, 256 AD2d 234 (1st dept. 1998).

Trivial defect

While differences in elevation on a sidewalk of approximately one inch have been held by the First Department to be non-actionable (Morales v. Riverbay Corp., 226 AD2d 271 [1st Dept 1996]), there is no minimal dimension test or "per se rule" that would render a hole or defect of a certain size either actionable or inactionable, as a matter of law (Trincere v. County of Suffolk, 90 N.Y.2d 976 [1997]). When deciding whether a sidewalk defect is actionable, the courts have considered the particular facts and circumstances of each case, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury that is alleged. Trincere v. County of Suffolk, 90 N.Y.2d at 977 and 978; Marcus v. Namdor, Inc., 46 A.D.3d at 374. Though photographs of the alleged defect may be insufficient to demonstrate that as a matter of law the defect is too trivial to be actionable, they may be nonetheless examined by the court to see if there are factual disputes to be tried. Corrado v. City of New York, 6 AD3d 380 (2nd dept. 2004).

The landlord has failed to prove that the defect in the sidewalk is so trivial that it is inactionable. Although the crack is (according to plaintiff's EBT testimony and sworn affidavit) "up to" a half inch deep, it is approximately 6 - 8 inches wide. The crack is easily visible in the photographs that defendant has attached to its motion for summary judgment. These are the same photos that defendant asked plaintiff questions about at her deposition. Closeup photos show an irregular, jagged edge to the crack running perpendicular to the direction that plaintiff was walking in when the accident occurred. A reasonable jury could decide that the crack or crevice was deep enough to cause plaintiff to trip. Therefore, not only has defendant failed to prove its entitlement to

summary judgment as a matter of law, but there is a factual dispute that must be put to the jury to decide.

Notice

Although there is no evidence of complaints (actual notice) to Bergdorf Goodman about the crack prior to the date of the accident, the landlord has failed to prove that it did not have constructive notice of a dangerous condition.

First of all, it is unimportant (for the purposes of this motion) whether the crack is directly in front of Bergdorf Goodman or somewhere between the two stores which are at street level. Defendant owns the building located at 754 Fifth Avenue; both stores are its tenants. Thus, defendant has a nondelegable duty to maintain the sidewalk area in front of its building in "a reasonably safe condition." NYC Admin Code § 7-210 (a), (b).

The photographs that defendant has attached to its motion show a crack that is fairly wide and visible at a distance. Although Langton testified he inspected the sidewalk once or twice a week, there is no evidence that the crack was not present (did not exist) prior to plaintiff's accident. There is, therefore, also a triable issue of fact whether the defendant kept the sidewalk area in front of its building in "a reasonably safe condition" and whether the crack was present for a sufficient period of time so as to afford defendant constructive notice of a dangerous conditions. These material issues of fact preclude the grant of summary judgment to the defendant.

Conclusion

Defendant has failed to prove its defenses and therefore is not entitled to summary judgment. Plaintiff has, in any event, raised issues of fact for the jury to

decide. Defendant's motion for summary judgment dismissing the complaint is denied in its entirety.

Since the note of issue has been filed, this case is ready for trial. Plaintiff shall serve a copy of this decision and order on the Trial Support Office so that the case may be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 22, 2009

So Ordered:



Hon. Judith J. Gische, JSC

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