

Rick v DiFusco

2009 NY Slip Op 30247(U)

January 21, 2009

Supreme Court, Nassau County

Docket Number: 2576/07

Judge: F. Dana Winslow

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SUN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

SUSAN RICK,

**TRIAL/IAS, PART 7
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION DATE: 4/30/08
MOTION SEQ. NO.: 001**

PAUL J. DIFUSCO AND ANDREA DIFUSCO

INDEX NO.: 2576/07

Defendants.

The following papers having been read on the motion (numbered 1-2):

- Notice of Motion for Summary Judgment.....1**
- Affirmation in Opposition.....2**

Motion by defendants, Paul J. DiFusco and Andrea DiFusco, pursuant to CPLR 3212, for an Order, granting them summary judgment and dismissing the complaint of the plaintiff, Susan Rick, is **granted**.

This is an action in negligence by plaintiff, Susan Rick, a 62 year old woman, to recover for personal injuries allegedly sustained on May 14, 2006 at approximately 12:00 p.m., when she tripped “on the sidewalk in front of 52 Salem Road, North Merrick, New York specifically in the vicinity of the pachysandra which encroachs [sic] on the sidewalk and cast a shadow thereupon” (*Bill of Particulars*, ¶4). The subject premises are owned by the defendants, Paul and Andrea DiFusco.

Plaintiff alleges that on the day of the accident she parked her car on Salem Road “about three or four houses down” from Sacred Heart Church (*Rick Tr.*, p. 10) and was walking towards the parking lot of the church for 12:00 p.m. mass. She was familiar with the area and was in the neighborhood about twice a month. In fact, she also stated that she occasionally parked on Salem Road when attending church.

Plaintiff testified at her oral examination before trial that on the day of her accident, she was looking straight ahead and at the sidewalk. Prior to the accident, she had seen and was cognizant of the existence of a raised sidewalk flag where she ultimately had her accident. She had previously walked over the area of the sidewalk where she had her accident and had thought to herself “that it was an accident waiting to happen” (*Rick Tr.*, p. 21). She stated that on the day of her accident, she again noted the raised flag (*Id.*, p. 24). She knew there was a crevice in the sidewalk but while she was walking and approaching the sidewalk flag, she heard children screaming on the other side of the street and thus turned her head. She stated that the next thing she knew, she was on the ground (*Rick Tr.*, p. 14). Plaintiff testified that as she turned and looked to her left, she was walking. She stated that “a gentleman came over from across the street. I believe the father of the children who were screaming, and he asked me if I was alright” (*Id.*, p. 16). She stated that she never got that man’s name (*Id.*). Plaintiff testified that she did not remember the particular house where she fell and did not look at the address (*Id.*, p. 17). She also stated that she never made any complaint to the homeowner where she fell (*Id.*, p. 15).

Defendant Paul J. DiFusco testified that he and his wife owned the property at 52 Salem Road since 1983. Paul testified that when he moved in his house, there were no trees planted in front of the home. He stated that in 1987, he planted a pear tree in front of his home. At the same time, plaintiff planted pachysandra under and around the pear tree. He then added black plastic edging approximately 5" high. Defendant testified that he maintains his lawn, as well as the grass area between the sidewalk and the curb, every two weeks. As to the trees, defendant stated that he hires a professional company to trim the trees on an as needed basis. Defendant stated that he last trimmed the pachysandra and grass surrounding the pear tree on the sidewalk within the two

weeks preceding plaintiff's accident. Defendant also stated that, prior to plaintiff's accident, he was aware of an approximately ½ inch raised sidewalk flag in front of his home. Yet, he never observed any people trip, stumble or lose their balance over the flag. He stated that with regards to this accident, he spoke to his neighbor who lived across the street, Timothy Skully, who stated that he came to plaintiff's aid when she fell. Defendant stated this neighbor "told [him] that approximately that time of the year, the woman had fallen a few homes east of me on the sidewalk, and he ran over to help her up, and she said she was okay and she didn't need assistance and she went on her way" (*DiFusco Tr.*, pp. 17-18). Apparently, this neighbor also informed the defendant that the lady fell in front of a home located "two to three homes east" of the defendants' residence (*Id.*).

Plaintiff alleges in her complaint that the dangerous and defective condition causing her to trip and fall was: "overgrown [pachysandra] which had overgrown on the public sidewalk and thus obscuring and hiding a dangerous misleveling between adjacent flags of concrete" (*Complaint*, ¶9). She claims that this dangerous and defective condition created a trap, snare and a tripping hazard. Plaintiff contends that the defendants created a dangerous condition by planting pachysandra under and around a tree located on the public sidewalk abutting their property. Plaintiff submits that pachysandra was dangerous and inappropriate for usage around a street tree on the public sidewalk because of its rhizomatous nature which caused it to rapidly spread onto the sidewalk thereby creating a public nuisance. The pachysandra allegedly significantly encroached the sidewalk blocking plaintiff's view of the dangerous condition and obscuring a raised sidewalk flag thereby compounding the condition causing her to trip and fall.

The homeowner defendants seek summary judgment dismissal of plaintiff's

complaint. Defendants argue that while they planted the tree and the pachysandra on the sidewalk abutting their property, plaintiff was aware of the existence of a raised sidewalk flag but failed to observe the uneven and raised condition. Defendants argue that the fact they planted a tree does not cast them in liability. Further, defendants submit that plaintiff testified that she did not remember the particular house in front of which she fell and did not look at the address. This, taken together with what their neighbor, Timothy Skully, told the defendant, the movants claim identifies a different location of plaintiff's fall altogether.

First, defendants' argument that plaintiff did not fall on their property is an argument based on inadmissible hearsay of a neighbor who has failed to offer his own affidavit confirming his personal knowledge of the facts. Other than defendant's own statement concerning Skully's account of plaintiff's accident, no other evidence supports this claim (*LaCapria v. Bonazza*, 153 AD2d 551 [2nd Dept. 1989]). Defendant's statement on this point is conclusory, speculative and based on hearsay. As such, it is inadmissible as support for defendant's case (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Second, while the issue of whether a condition is a hazard or open and obvious is usually a question of fact, this Court nevertheless grants defendants motion for summary judgment. Even if, as plaintiff contends, the uneven flag was covered with "overgrown pachysandra", plaintiff knew that both, the uneven sidewalk flag and the pachysandra, were there, and indeed would not have seen the flag, obscured or not, given her description of how the accident occurred. The uneven flag plaintiff struck – covered, as she claims, by the pachysandra - must be viewed in the context of her regular use of the sidewalk and her consistent knowledge of the uneven flag even moments before her fall. Therefore, even though plaintiff claims she did not see the

flag, just before coming in contact with it, as a matter of law, this does not bespeak any negligence on defendant's part. Here, plaintiff admitted that she knew the uneven flag was there, and indeed its presence, even if obscured, was obvious because of her frequent and regular use of the sidewalk.

Furthermore, it cannot be overlooked that the plaintiff was not looking at the sidewalk when she fell. Thus, even if the allegedly overgrown pachysandra was a dangerous condition, it was not the proximate cause of her injuries. The proximate cause cannot be found in anything for which the defendant is responsible (*Lynn v. Lynn*, 216 AD2d 194, 195 [1st Dept. 1995] quoting *Ingersoll v. Liberty Bank*, 278 NY 1, 7 [1938]).

The Court further notes that the proof of notice is absent in the context of the questionable location of the fall and the Court further believes that the presence of Pachysandra would be difficult at best, to sustain a liability verdict, in violation of a ordinance forbidding the planting of some adjacent to a sidewalk.

For these reasons, defendants' motion for summary judgment is **granted** and plaintiff's complaint is herewith **dismissed** in its entirety.

This constitutes the Order of the Court.

Dated: ~~June 30, 2008~~ *original Admin. misplaced* *JW* ENTER:
JSC *January 21, 2009* *JSC*

F. J. Danak Winslow
J.S.C.

ENTERED
JAN 28 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE