

Millan v 50 W. 15th LLC

2009 NY Slip Op 31785(U)

August 3, 2009

Supreme Court, New York County

Docket Number: 103029/2006

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Justice

Index Number : 103029/2006

MILLAN, EILEEN

vs

50 WEST 15TH ST CONSTRUCTION

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

The instant motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that defendant Courtney Associates' motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that counsel for defendant Courtney Associates shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

FILED
AUG 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/3/09

[Signature]

J.S.C.

HON. CAROL EDMEAD
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
EILEEN MILLAN,

Plaintiff,

Index No.: 103029/06

-against-

DECISION

50 WEST 15TH LLC, 15TH CONSTRUCTION LLC
and COURTNEY ASSOCIATES,

Defendants.

-----X
50 WEST 15TH LLC, 15TH CONSTRUCTION LLC,

Third-Party Plaintiffs,

-against-

PRECISION DRILLING, INC., UNIVERSAL
PARKING LLC, ICON PARKING SYSTEMS, LLC,
TMO, LLC, COURTNEY ASSOCIATES, MILFORD
MANAGEMENT CORP., COLGATE SCAFFOLDING
CORP., ZURICH INSURANCE GROUP, ZURICH
AMERICAN INSURANCE COMPANY, ZURICH
NORTH AMERICA, PRECISION DRILLING'S
ABC EXCESS INSURANCE CARRIERS, and
PRECISION DRILLING DEF UMBRELLA
INSURANCE CARRIER,

Third-Party Defendants.

-----X
CAROL ROBINSON EDMEAD, J.:

FACTUAL BACKGROUND

Defendant Courtney Associates (Courtney) moves, pursuant to
CPLR 3212, for summary judgment dismissing the complaint as
against it. Plaintiff cross-moves, pursuant to CPLR 3212, for
summary judgment against defendants 50 West 15th LLC and 15th

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Construction LLC (collectively, 50 West 15th) and Courtney.¹

This case involves an accident that occurred on January 20, 2006, at approximately noon, on the sidewalk on 15th Street, between Sixth and Seventh Avenues, in New York City. Plaintiff slipped and fell on a broken sidewalk, containing gravel and debris, allegedly caused by construction taking place on the abutting premises. 50 West 15th is the owner of the property that abuts the subject sidewalk, and is the general contractor for the construction project. Courtney is the owner of the property adjacent to that owned by 50 West 15th, which also abuts the section of the sidewalk where the accident took place.

The area in which the accident occurred was partially blocked by 50 West 15th, and an area for pedestrians to walk around the construction was cordoned off. The area in which the incident occurred was formerly a parking lot, and there was a cut in the curb to allow cars to enter and exit the lot.

At his examination before trial (EBT), Michael Filler (Filler), the assistant project superintendent for the subject construction, who is also a civil engineer, opined that the

¹Initially, Courtney filed the instant motion, as a third-party defendant, in opposition to a third-party motion for summary judgment. The third-party action was subsequently discontinued with prejudice, pursuant to a stipulation among the parties. Plaintiff filed the instant cross motion in opposition to Courtney's third-party motion, and the portion of that motion affecting plaintiff was not resolved by the stipulation of discontinuance. In its opposition, 50 West 15th asserts that the style "cross motion" is procedurally defective against it, because it was not the original moving party, but has failed to provide any judicial or statutory support for that proposition, and the court is disinclined to dismiss plaintiff's arguments on those grounds.

sidewalk, at the time of the accident, could probably have used some repairs (EBT, at 21). Filler testified that he had been working on the job site for approximately four months prior to the accident, and that the sidewalk where plaintiff fell was in the same condition on the day of the accident as it was on the day he started on the project (*id.* at 21-22). Filler described the area in which the accident took place in the following manner:

"It appears that fifty percent of this leaf of sidewalk was poured concrete with large aggregate. The other fifty percent was bituminous asphalt patching, blacktop, with irregular shape surface. There were some divots approximately, according to the photograph I am looking at, ranging in half an inch to an inch and a quarter, inch and a half in depth."

Id. at 33.

The photographs to which Filler alludes have been submitted in evidence with plaintiff's motion, and were indicated by Filler to be a fair and accurate representation of the area as it existed on the day in question.² It appears that the damaged leaf in the sidewalk was caused by the removal of certain utilities as part of the construction to remove a shed from the parking lot. 50 West 15th asserts that, based on Filler's testimony and the submitted photographs, the alleged defect was

² 50 West 15th, in its opposition to this motion, has argued that the photographs appearing as exhibits have not been properly authenticated by plaintiff so as to be considered by the court; however, Filler's testimony identifying the photographs that were marked at his EBT is sufficient authentication for the purposes of this motion.

trivial, thereby relieving it from any liability for plaintiff's injuries.

Plaintiff, in her EBT, stated that she has resided in the area in which the accident took place for several years, and was on her way home when she tripped and fell (EBT, at 12). She also stated that the day was clear, and it was not snowing or raining. (*id.* at 12-13).

Plaintiff further stated that, although she is familiar with the area and street in question, and was cognizant of the on-going construction in the area, she rarely walked on 15th Street, usually taking 14th Street instead (*id.* at 40).

DISCUSSION

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present 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); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231

(1978).

Effective September 14, 2003, the Administrative Code of the City of New York, section 7-210, provides that "it shall be the duty of owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition." However,

"whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury [internal quotation marks and citations omitted]."

Trincere v County of Suffolk, 90 NY2d 976, 977 (1997).

Simply stated, if the alleged defect is deemed trivial as a matter of law, no liability will attach to the abutting property owner. *Id.* Nevertheless,

"[t]he precise dimensions of the defect, be they in feet or inches, are not dispositive. While in some instances the trivial nature of the defect may loom larger than another element, a motion court must examine all the facts presented including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury [internal quotation marks and citations omitted]."

Nin v Bernard, 257 AD2d 417, 417 (1st Dept 1999).

Certain courts have determined, as a matter of law, that the defect in question was trivial, and the issue need not be submitted to a jury. Such instances involve defects that were 5/8th of an inch deep, four inches long, and two inches wide (*Burko v Friedland*, 62 AD3d 462 [1st Dept 2009]); no more than a

quarter of an inch deep (*Encarnacion v Tegford Realty LLC*, 60 AD3d 581 [1st Dept 2009]); had a depth of between 1/8th and 3/8th of an inch at any given point (*Stylianou v The Ansonia Condominium*, 49 AD3d 399 [1st Dept 2008]); or where the plaintiff regularly traversed the area in which the accident took place, and the photographs submitted with the motion papers clearly established that the defect was trivial (*Fisher v JRMR Realty Corp.*, 63 AD3d 677 [2d Dept 2009]).

Conversely, other courts have felt that the defect in question was of such a nature that the issue of its triviality would be best left to a jury's deliberations. Such instances involve defects that were more than three-quarters of an inch deep, more than seven inches long, and approximately four inches wide (*Tese-Milner v 30 East 85th Street Company*, 60 AD3d 458 [1st Dept 2009]); elevations that were more than two inches above the adjoining area, for a length of approximately two feet (*Bovino v J.R. Equities, Inc.*, 55 AD3d 399 [1st Dept 2008]); or the defect was approximately 3/16th of an inch deep (*Nin v Bernard*, 257 AD2d 417, *supra*.)

In the instant case, the depression that allegedly caused plaintiff to trip and fall was between one-half-an-inch to one-and-a-quarter to one-and-a-half inches deep. Further, from the photographs submitted, it also appears that the defect was at least a foot in length. Based on these dimensions, plus the

testimony of plaintiff and Filler, the court cannot conclude, as a matter of law, that the defect was or was not trivial. "[E]ven a trivial defect can sometimes have the characteristics of a snare or a trap [internal quotation marks and citation omitted]." *Abreu v New York City Housing Authority*, 61 AD3d 420, 420 (1st Dept 2009).

CONCLUSION

Based on the foregoing, it is hereby

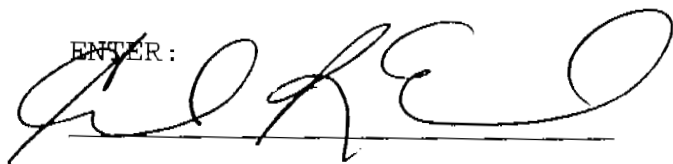
ORDERED that defendant Courtney Associates' motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that counsel for defendant Courtney Associates shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: August 3, 2009

ENTER:



Carol Robinson Edmead, J.S.C.

