Johnson v New York City Hous. Auth.

2010 NY Slip Op 30305(U)

February 5, 2010

Supreme Court, New York County

Docket Number: 105546/07

Judge: Barbara Jaffe

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SCANNED ON 2/16/2010

[* 1]

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

PRESENT: Justice Jaffe BARBARA JAFFE J.S.C. PART 5

Index Number : 105546/2007
JOHNSON, ANTOINETTE
VS.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 105546/07
MOTION DATE 2/1/10
MOTION SEQ. NO. 001
MOTION CAL. NO. 46

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
FEB 16 2010
NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 2-5-10

FEB 05 2010

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

ANTOINETTE JOHNSON,

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

---x

Index No. 105546/07

Motion Date: 2/1/10
Motion Seq. No.: 001
Calendar No.: 46

BARBARA JAFFE, JSC:

By notice of motion dated December 9, 2009, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes the motion.

I. BACKGROUND

In the afternoon of April 28, 2006, plaintiff allegedly tripped and fell on a crack between two sidewalk flags on premises owned by defendant. (Affirmation of John Orcutt, Esq., dated Dec. 9, 2009 [Orcutt Aff.], Exh. A). On or about July 10, 2006, plaintiff served defendant with her notice of claim, along with 12 photographs of the accident site taken soon after the accident, each reflecting a long and prominent crack which in some places appears to be at least an inch wide. (*Id.*).

At a 50-h hearing held on October 17, 2006, plaintiff testified that as she was walking, the "whole front of [her] toes" had entered into the crack, one side of which was higher than the other. As a result of her fall, she experienced severe pain in her right knee and a scraped and bloody middle toe on her right foot. (*Id.*, Exh. B). At an examination before trial on May 28, 2009, plaintiff testified that she never walked on the side of the street where she had fallen and

had never before seen the crack. (Reply Affirmation of John Orcutt, Esq., dated Jan. 25, 2010 [Orcutt Reply Aff.], Exh. A). In an affidavit dated January 6, 2010, plaintiff asserts that one sidewalk riser was raised approximately one inch above the other. (Affirmation of George Garafola, Esq., dated Dec. 15, 2009 [Garafola Aff.], Exh. A).

II. CONTENTIONS

Defendant argues that the crack on which plaintiff tripped constitutes a trivial defect which is not actionable as a matter of law. (Orcutt Aff.). In support of its position, it offers undated photographs and the unnotarized statements of four of its employees. (*Id.*, Exhs. K, L).

Denying that the sidewalk defect is trivial, plaintiff offers the affidavit of an engineer who, based on his examination of plaintiff's photographs and the sidewalk, concludes that the defect constitutes a tripping hazard, as the vertical grade differential between the two sidewalk flags is approximately one inch, and that the defect has remained consistent since the accident, notwithstanding the significantly changed condition of the sidewalk itself. Plaintiff also challenges the probative value of defendants' employees' statements. (Garafola Aff., Exh. B).

In reply, defendant asserts that the photographs prove that the defect is trivial, assaults plaintiff's credibility given her allegedly varying accounts of the size and nature of the defect, and argues that having examined the defect three years after the accident, the engineer's conclusions have no probative value. (Orcutt Reply Aff., Exh. 1).

III. ANALYSIS

Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New*

York Univ. Med. Center, 64 NY2d 851, 853 [1985]). Failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad*, 64 NY2d at 853).

When the party seeking summary judgment demonstrates entitlement to judgment, the burden shifts to the opponent to "rebut that prima facie showing" (*Bethlehem Steel Corp. v Solow,* 51 NY2d 870, 872 [1980]), by producing "evidentiary proof in admissible form sufficient to require a trial of material questions of fact." (*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965, 968 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). In opposing such a motion, the party must "lay bare" its evidentiary proof. (*Silberstein, Awad & Miklos, P.C. v Carson*, 304 AD2d 817, 818 [2d Dept 2003]).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and may not decide credibility issues. (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990], *lv denied* 77 NY2d 939 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodman*, 8 NY2d 8 [1960]).

It is well-settled that "[t]he owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection." (*Morales v Riverbay Corp.*, 226 AD2d 271 [1st Dept 1996]). Whether a defect in a sidewalk is trivial does not depend solely on its dimensions. Rather, "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." (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *quoting Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]). "[E]ven a trivial defect may constitute a snare or trap." (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]; *see Abreu v NYCHA*, 61 AD3d 420, 421 [1st Dept 2009 [lengthy irregularity in cement might have been capable of catching plaintiff's sandal]). Thus, sidewalk defects measuring one-inch have been found to be not trivial. (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361 [4th Dept 2008] [sidewalk slabs with height differential of one inch insufficient to satisfy defendant's burden of showing defect was trivial]; *Boxer v Metro. Transp. Auth.*, 52 AD3d 447 [2d Dept 2008] [where plaintiff alleged defect was one inch and defendant alleged it was one-half inch, triable issues of fact existed]; *Mishaan v Tobias*, 32 AD3d 1000 [2d Dept 2006] [photographs showed broken and cracked sidewalk, and portion of sidewalk was raised at least one inch, raising triable issue]).

Here, defendant offers only the inadmissible statements of its employees as proof that the sidewalk defect on which plaintiff tripped was trivial, and the photographs do not satisfy its burden. Thus, defendant has failed to establish, *prima facie*, that the defect is trivial and non-actionable.

Even if defendant has met its burden, plaintiff's engineer not only measured the defect but compared it with plaintiff's photographs and concluded that the vertical grade differential of the two flags had not changed since 2006. That he had not examined the site until three years later does not render his opinion unreliable. (*Compare Tese-Milner v 30 East 85th St. Co.*, 60 AD3d 458 [1st Dept 2009] [expert stated that defect was three-quarters of inch deep and opined it

was unsafe; expert's conclusion that defect had existed for long time was based on comparison of condition during inspection and photographs taken immediately after accident], *with Burko v Friedland*, 62 AD3d 462 [1st Dept 2009] [opinion of expert based on condition of defect more than three years after accident insufficient to raise factual issue]).

Plaintiff's description of how her toes entered the crack, moreover, warrants an inference that it constituted a tripping hazard, as it was wide enough and deep enough to trap her shod toes. While her 50-h testimony may not, in and of itself, be sufficient to prove that the defect was not trivial, it does not constitute an admission and does not clearly contradict her affidavit. (*Cf Benedikt v Certified Lumber Corp.*, 60 AD3d 798 [2d Dept 2009] [defendant driver signed official report containing admission against interest and then, in opposition to plaintiff's motion for summary judgment, submitted affidavit which "merely raised feigned issues of fact, which are insufficient to defeat a motion for summary judgment."]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [1st Dept 2000] [while issues of fact and credibility not ordinarily resolved on motion for summary judgment, where self-serving affidavits submitted in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid consequences of earlier testimony, they are insufficient to raise triable issue of fact to defeat defendant's motion for summary judgment]). Finally, the photographs also present an issue of fact as to whether the defect is trivial. Consequently, notwithstanding the absence of any significant circumstance indicative of a snare or trap, triable issues exist as to whether the defect is trivial.

IV. CONCLUSION

Accordingly, it is hereby

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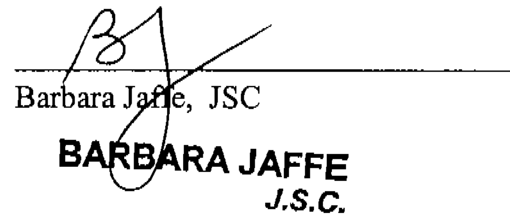
ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties appear for a compliance conference on March 30, 2010 at 2 pm in room 103 instead of on May 4, 2010, as originally scheduled.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: February 5, 2010

FEB 05 2010

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FEB 16 2010

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