

Selvaggio v Freedom Ave. Assoc.

2010 NY Slip Op 31739(U)

June 9, 2010

Sup Ct, Richmond County

Docket Number: 103248-08

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

CHRISTINA SELVAGGIO,
 Plaintiff,
 -against-
 FREEDOM AVENUE ASSOCIATES, HUNTER
 RIDGE CO. and GATEWAY ARMS REALTY CORP,
 Defendants.

DCM PART 6
 HON. PHILIP G. MINARDO
 DECISION AND ORDER
 Index No.103248-08
 Motion No.: 001

The following papers numbered 1 to 3 were fully submitted on the 3rd day of June, 2010.

	Papers Numbered
Notice of Motion_____	1
Affirmation in opposition_____	2
Reply Affirmation_____	3

Defendants RICHMOND HEARTLANDS, INC., HUNTER RIDGE CO., and
 GATEWAY ARMS REALTY CORP. move for summary judgment dismissing the complaint
 pursuant to CPLR § 3212.

Plaintiff CHRISTINA SELVAGGIO commenced this action to recover damages for
 personal injuries sustained as a result of a slip and fall accident which occurred on or about June
 3, 2008, on the sidewalk in front of the premises located at 131 Freedom Avenue, County of
 Richmond. Plaintiff CHRISTINA SELVAGGIO contends that at approximately 8:30 a.m.,
 while she was out walking her dog, her dog pulled her into a foot-print shaped hole in the

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sidewalk. Plaintiff argues that defendants RICHMOND HEARTLANDS, INC. and GATEWAY ARMS REALTY CORP. were negligent in maintaining the sidewalk in question, that they had notice of the alleged defect in the sidewalk, and that plaintiff's injuries are due to defendant's failure to repair said defect.

As a result of the incident, plaintiff allegedly sustained, *inter alia*, a tear of the Lisfranc ligament left foot, sprain of the Lisfranc ligament left foot, fracture of the cuboid left foot and a sprain/strain of the left foot. Plaintiff also suffers from RSD on her left foot which is allegedly permanent in nature. In addition, the plaintiff has learned that she is a candidate for surgery on her foot.

In moving for summary judgment, defendants contend that the defect in the concrete was so minor as to be trivial and that the defect did not have the necessary characteristics to be actionable. In support of defendant's motion for summary judgment are photographs of the scene of the accident and the affidavit of ANIL DIZAREVICENT, the building superintendant for Hunter Ridge Apartment Complex, which is managed by defendant Gateway Arms Realty. In his affidavit, Mr. Dizarevincent describes the sidewalk defect as "only about three inches long, 2 ½ inches wide, and much less than an inch deep." Similarly, MR. DIZAREVICENT states in his affidavit that prior to this incident, he "walked the sidewalk 3-4 times a week" and he "never saw the condition plaintiff claims to have fallen over."

In opposition, plaintiff CHRISTINA SELVAGGIO argues that the court should consider a variety of factors in order to determine whether the defect is actionable. Plaintiff also argues that she did not see a defect in the sidewalk because she was involuntarily pulled into the hole by

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her dog, and that the defect is not a trivial defect. Furthermore, plaintiff testified in her 50-h hearing that the hole was “more than one inch deep” and probably about two (2) inches deep.

“It is well-established that the 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 or her toes, or trip over a raised projection.” (Trionfero v. Vanderhorn, 6 A.D.3d 903, 903 [2004] quoting Guerrieri v. Summa, 193 A.D.2d 647 [1993]; Liebl v. Metropolitan Jockey Club, 10 A.D.2d 1006 [1960].) Summary judgment is appropriate where the condition of the sidewalk “as described by the parties and depicted in the photographs did not pose an unreasonable risk of harm to the public and possessed none of the characteristics of a trap or nuisance.” (Id. at 904). “There 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]). The court will examine “facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place, and circumstance’ of the injury.” (Id. at 978). Summary judgment is appropriate where the width of the defect is slight and there is no elevation differential between the defect and the rest of the ground. (Losito v. JP Morgan Chase and Co., 72 A.D.3d 1033 [2010]). Where the photographs are not clear on their face, the moving party must provide additional facts to support a prima facie showing for summary judgment. (Berry v. Rocking Horse Ranch Corporation, 56 A.D.3d 711 [2008]). The mere happening of an accident does not give rise to liability. (Wells v. Finnegan, 177 A.D.2d 893 [3rd Dep’t. 1991].) The court has discretion, when looking to all the surrounding evidence,

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to determine that some evidence is “incredible as a matter of law.” (Abrams v. Gerold, 37 A.D.2d 391 [1st Dep’t. 1971].)

Here, plaintiff CHRISTINA SELVAGGIO tripped over the sidewalk in front of her apartment complex where she had lived since April 4, 2000. In her EBT testimony, the plaintiff testifies that on the date of the accident, at 8:30a.m., she had been out walking her dog, an activity that she testified to performing each day and multiple times per day. She similarly testified that the weather conditions were “dry, clear and sunny.” Moreover, she testifies that she was standing still and looking straight ahead at her dog when her dog suddenly pulled her into a defect in the sidewalk. Plaintiff also testifies that she may have noticed the alleged defect some time prior to the time of her accident. Plaintiff identified the sidewalk defect which allegedly caused her to fall by marking a circle on a photograph with her initials. That particular photograph attached in her affidavit reveals a number of shaded areas in the concrete, including a small shaded area which the plaintiff circled. Similarly, in her EBT testimony the plaintiff contends that the photographs provided represented an accurate description of the accident site.

Defendants’ representative Mr. Dizdarevic avers in his affidavit that the defect was “three inches long, two and one half inches wide, and much less than an inch deep.” Neither of the parties has measured the exact depth of the alleged defect in the photographs which caused the plaintiff to fall. However, the plaintiff in her affidavit describes the defect as being “more than one inch deep and probably about two inches deep.” The photos attached by both the plaintiff and defendants reveal several similarly-sized shaded spots along the sidewalk of the premises in front of 131 Freedom Avenue. This Court finds that as depicted in the photographs

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these defects in the sidewalk could not be as deep as one to two inches and finds plaintiff's contentions in that regard to be incredible as a matter of law. (Abrams, *supra* at 394). Moreover, the defendant cannot be held liable simply because the plaintiff was pulled by her dog and caused to trip and fall. As presented, the submitted photographs, even without any objective measuring device, have evidentiary value when considered in conjunction with the testimony of the parties. (Berry, *supra* at 712).

Accordingly, this Court finds that the facts reveal a *de minimus* defect in the sidewalk as a matter of law, and that the defects do not pose an unreasonable risk of harm to pedestrians. The defendants RICHMOND HEARTLANDS, INC. and GATEWAY ARMS REALTY CORP. have met their initial burden of showing lack of negligence and the plaintiff has failed to raise an issue of fact as to whether the sidewalk defect is not trivial.

Accordingly, the defendant's motion for summary judgment is granted and the complaint is dismissed.

This shall constitute the decision and order of the court.

Dated: July 9, 2010

ENTER

s/ Philip G. Minardo

J.S.C.