Hidric v City of New York
2010 NY Slip Op 33489(U)
December 17, 2010
Supreme Court, New York County
Docket Number: 111275/2006
Judge: Cynthia S. Kern
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[* 1]
SCANNED ON 12/22/2010

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

CYNTHIA S. KERN
J.S.C.

PART 52

Index Number : 111275/2006
HIDRIC, SOFICA
VS
CITY OF NEW YORK
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. 111275/06
MOTION DATE
MOTION SEQ. NO. 05
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this 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 is decided in accordance with the annexed decision.

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

FILED
DEC 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/17/10

CYNTHIA S. KERN **J.S.C.**
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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SOFICA HIDRIC and ISMET HIDRIC,

Plaintiffs,

Index No. 111275/2006

-against-

DECISION/ORDER

CITY OF NEW YORK, GRANITE HALMAR/SCHIAVONE JV, CO., GRANITE HALMAR CONSTRUCTION COMPANY, INC. a/k/a GRANITE CONSTRUCTION NORTHEAST, INC., SCHIAVONE CONSTRUCTION COMPANY INC., P.C.M. CONTRACTING CO., INC., CONTI ENTERPRISES, INC., TISHMAN CONSTRUCTION CORPORATION OF MANHATTAN, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, and JUDLAU CONTRACTING, INC.,

Defendants.

---x

FILED
DEC 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : ______________________________

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Answering Affidavits	2
Affirmations in Opposition to the Cross-Motion	
Replying Affidavits	3
Exhibits	4

Plaintiffs commenced the instant action to recover damages for personal injuries allegedly sustained by Sofica Hidric ("plaintiff") when she tripped and fell on State Street at or near the intersection of Whitehall Street in New York City on September 1, 2005. Defendants Schiavone Construction Co. s/h/a Schiavone Construction Company Inc. and Schiavone/Granite-Halmar, a Joint Venture s/h/a Granite Halmar/Schiavone JV., Co. ("defendants") move for

summary judgment dismissing all claims against them. Defendants' motion is denied for the reasons set forth below.

The relevant facts are as follows. On September 1, 2005, plaintiff tripped and fell on State Street near the intersection of Whitehall Street across from the Staten Island Ferry Terminal. According to plaintiff's testimony, she fell on a "crumbly" and uneven portion of the sidewalk on State Street comprised of small rocks and dirt. It is undisputed that there was construction being done around this area and that bollards were removed from the sidewalk on State Street and a curb cut was made in order to create a driveway access to the adjacent construction site.

Defendants move for summary judgment on the grounds that plaintiff does not know where she fell, does not know what caused her fall, that defendants did not have notice of any defective or dangerous condition and that there is no visible defect of any substantial nature on the sidewalk or the street at State Street at or near its intersection with Whitehall Street.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership,* 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, defendants are not entitled to summary judgment as there exists disputed issues of material fact. First, there is a triable issue of fact as to whether plaintiff

sufficiently identified the location and cause of her injury. Plaintiff is not required to identify the precise location of her fall in order to survive a motion for summary judgment. *See Aller v. City of New York*, 72 A.D.3d 563, 564 (1st Dept 2010). For example, the court in *Aller* found that a plaintiff's deposition testimony that she fell due to "unlevel ground in the middle of the sidewalks between two buildings" was sufficiently precise to survive a motion for summary judgment where plaintiff's testimony was consistent with photographic evidence submitted of an uneven sidewalk. *See id.* In the instant action, plaintiff identified the area where she fell by circling it on photographic exhibits presented to her at her deposition. Plaintiff also testified that she fell when she "hit something hard" which was "crumbling" and that the surface on which she fell was uneven with rocks and dirt. Moreover, as in *Aller*, the photographs submitted with defendant's motion for summary judgment show an uneven area of sidewalk consistent with plaintiff's testimony.

In addition, a plaintiff is not required to "state for certain that she knew exactly what she tripped over the very instant that she tripped over it." *See DiGiantomasso v. City of New York*, 55 A.D.3d 502, 503 (1st Dept 2008). For example, in *Cherry v. Daytop Village, Inc.*, 41 A.D.3d 130, 131 (1st Dept 2007), when the plaintiff was asked during her deposition whether she knew what caused her to fall and she replied "when I stepped down, my ankle, because the blacktop was uneven where it was cracking, my ankle twisted and I fell forward and to the left," the *Cherry* court found that this testimony in conjunction with other statements made during the deposition – if believed by the jury – would provide a sufficient nexus between the condition of the roadway and the circumstances of her fall to establish causation. Likewise, in the instant action, plaintiff's testimony that she tripped when she "hit something hard" that was "crumbling"

in conjunction with the other statements made during her deposition and the photographic evidence submitted would provide – if believed by a jury – a sufficient nexus between the condition of the roadway and the circumstances of plaintiff's fall to establish causation.

There is also a triable issue of fact as to whether defendants either created or had notice of a defective condition. Defendants, as the movants, bear the burden of demonstrating that there are no issues of fact as to whether they created or were aware of the alleged defective condition. Defendants have failed to meet this burden in that they have failed to demonstrate that they neither created nor were aware of the alleged defective condition. In fact, defendants admit to removing bollards from the sidewalk and creating curb cuts for driveway access to their construction site. As plaintiff alleges that her injury occurred around this area adjacent to the construction site, there remains a triable issue of fact as to whether defendants created and/or were aware of the alleged dangerous condition.

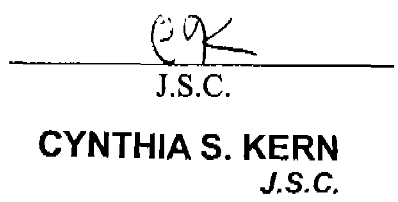
Further, there is a triable issue of fact as to whether the alleged defective condition is trivial in nature. "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *See Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 (1997). In the instant action, defendants have failed to demonstrate that the alleged defective condition is so trivial as to constitute a matter of law for this court to determine.

Finally, defendants' assertion that plaintiff caused her injury by "rushing" to make the 12:30 a.m. Staten Island Ferry is based on pure speculation. Even if the defendants had established that plaintiff was "rushing," such conduct would be a factor for the jury to consider in determining comparative negligence.

[* 6]

Accordingly, defendants' motion for summary judgment dismissing all claims against them is denied. This constitutes the order and decision of the court.

Dated: 12/17/10



J.S.C.

CYNTHIA S. KERN
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