

**Matalon v City of New York**

2011 NY Slip Op 31359(U)

April 20, 2011

Supreme Court, New York County

Docket Number: 103894/2006

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

NORMA MATALON,

Plaintiff,

- against -

CITY OF NEW YORK and RCPI LANDMARK  
PROPERTIES, LLC,

Defendants.

INDEX NO. 103894/2006

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion for summary judgment by defendant RCPI Landmark Properties, LLC, pursuant to CPLR 3212.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

**FILED**  
MAY 24 2011

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Norma Matalon ("plaintiff") brings this personal injury action against defendants City of New York ("the City") and RCPI Landmark Properties, LLC ("RCPI") to recover damages for injuries she allegedly sustained when she tripped and fell while walking near 626 Fifth Avenue, New York, New York, purportedly due to an uneven sidewalk between the curb and a nearby tree. RCPI is the owner of the real property located adjacent to the accident site. The parties have completed discovery and the Note of Issue was filed on April 14, 2010. Plaintiff's claims against the City were dismissed on June 17, 2010. RCPI now moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that the evidence fails to prima facie establish the existence of a defective condition in the sidewalk for which RCPI may be held liable. Plaintiff has responded in opposition to the motion, and RCPI has filed a reply.

## BACKGROUND

In support of its summary judgment motion, RCPI submits, *inter alia*, depositions of plaintiff, Aaron Kaufman ("Kafuman"), Lawrence P. Giuliano, Sr. ("Giuliano"), and Abraham Lopez ("Lopez"); and plaintiff's Notice of Claim dated March 1, 2005, with attached photographs of the accident location. Plaintiff submits in opposition, *inter alia*, an affidavit of Louise Lo Presti ("Lo Presti"); and a deposition of Michael Vacek ("Vacek").

### A. The Incident

According to plaintiff's deposition, on December 24, 2004, at around 5:00 p.m., plaintiff was walking in the vicinity of Fifth Avenue and 50th Street with her friend Lo Presti after having a holiday meal at the 21 Club Restaurant. The weather was nice and it was getting darker due to nightfall. The pedestrian traffic was extremely crowded and there were people shopping at a cart near the curb.

Plaintiff and Lo Presti were separated near the Banana Republic store at 626 Fifth Avenue, which was a building owned by RCPI. As plaintiff was walking and looking ahead, she purportedly hit her left toe on "something" that was "uneven" which made her stumble. She fell to the ground and hit her head on a fire hydrant, resulting in alleged physical injuries. Plaintiff did not see what caused her to stumble prior to her fall, and she testified at her deposition that the first time she saw something that may have caused her to stumble was when she later viewed photographs taken by her counsel:

"Q. Prior to your left toe or your left foot hitting something which made you stumble, did you ever happen to see what caused you to stumble?

A. No.

Q. When was the first time you saw something that caused you to stumble, if ever.

A. When I saw the pictures.

Q. Let me ask you this. On December 24, 2004, did you happen to see what caused you to stumble?

A. All I know is I hit something with my left foot. It was having -- something was uneven or there was something there that my left

foot hit" (Not. of Mot., Ex. D at p. 22).

Plaintiff was shown photographs at her deposition, marked as Defendant's Exhibit E, depicting the site of the accident and she circled the area where she claimed she fell. She also viewed photographs that were attached to her Notice of Claim, marked as Plaintiff's Exhibit 16, and circled areas indicating where her foot allegedly made contact. She identified a raised area where her toe may have gotten stuck, but also testified that she never saw specifically what she stubbed her toe on:

"Q. Did you ever see what specifically you stubbed your toe on?

A. No. . . .

Q. My question is: How do you know your toe got stuck there in that circled area that is raised up on Plaintiff's Exhibit 16?

A. Because it's raised up. That's where I was walking. It's not level. It's not level and I was walking where it was level and suddenly, it wasn't level and my toe went into -- my toe went into something that was not level and because I got stuck there, then my toe was like caught up in there. That's how I stumbled" (*id.* at p. 81-83).

Plaintiff never returned to the accident location subsequent to the incident. She was not present when the photographs of the accident location were taken.

Plaintiff submits Lo Presti's affidavit in support of her opposition to summary judgment. Lo Presti states in her affidavit that at the time of the accident, she realized that plaintiff was not walking with her. She looked around and saw that plaintiff was walking on the sidewalk near the curb and that she was falling. Plaintiff hit her head on the fire hydrant and Lo Presti went over to her. Plaintiff was lying in the street and purportedly told Lo Presti that she tripped when her foot came into contact with something hard. There was an area near plaintiff's feet adjacent to a tree where two sidewalk flags met and they were not level. The flag that was more to the west was closer to the fire hydrant and was raised at least an inch above the flag that was closer to Fifth Avenue. Lo Presti looked at the area where plaintiff had been walking prior to her fall, and nothing was present that could have caught plaintiff's foot other than the

elevated portion of the sidewalk. There was no debris in the area where plaintiff fell. Lo Presti viewed the photographs that were annexed to plaintiff's Notice of Claim and indicated that the portion of the sidewalk that was circled in two of the photographs was the same area that she saw near plaintiff's feet, and which she had described as not being level.

B. The Premises

Tishman Speyer was the managing agent for RCPI on the date of plaintiff's accident. Banana Republic was the ground floor tenant. RCPI submits a deposition of Giuliano, a property manager for Tishman Speyer; and a deposition of Kaufman, an assistant property manager who reports to Giuliano.

Giuliano testified that as part of its duties in December 2004, Tishman Speyer would check the sidewalks daily in order to see if there were any tripping hazards. If an uneven sidewalk was observed on the property, it would be barricaded and repaired to safeguard the public from potential harm. Complaints made by the public regarding the condition of the sidewalks were maintained in control logs. Giuliano searched through Tishman Speyer's repair records for the sidewalk in the vicinity of the accident location and did not find any documentation of repairs or incidents during the month before or after the accident. Giuliano was also unaware of any prior accidents at the location for two years prior to date of the incident.

Kaufman testified that Tishman Speyer surveyed the sidewalks of its building daily in order to note its condition and to look for uneven sidewalks. He had never heard of Tishman Speyer cutting tree roots because the sidewalk was uneven. Kaufman was not aware of anyone else falling at the location of plaintiff's accident.

RCPI also submits a deposition of Lopez, a record searcher for the New York City Department of Transportation, who conducted a search of City records for two years prior to and up to the date of plaintiff's accident. The search focused on applications, permits, cut

forms, complaints, repair records, and contracts for the accident location. Lopez found no sidewalk violations or complaints for the location.

Plaintiff submits a deposition of Vacek, a Senior Forester for New York City Parks and Recreation ("City Parks"), indicating that there were no records of street trees being planted by City Parks for the block where the accident occurred. Vacek also testified that the owner of the premises could have planted trees if it had obtained a permit to do so, but Vacek did not conduct a search to see if any permits were issued.

#### DISCUSSION

RCPI argues that it is entitled to summary judgment dismissing the complaint, as a matter of law, because plaintiff cannot establish the existence of a defect in the sidewalk that caused her alleged injuries. Specifically, RCPI contends that plaintiff cannot demonstrate, prima facie, either that RCPI created the condition that caused her accident, or that it had actual or constructive notice of a dangerous condition in the sidewalk. RCPI references plaintiff's deposition testimony indicating that she never actually saw what she hit her toe on, and that she was unable to identify what may have caused her fall until viewing the photographs taken outside of her presence. RCPI also claims that it has established that it neither created the alleged condition nor had actual or constructive notice of any defective condition since Giuliano testified that there were no records of repairs to the sidewalk prior to the accident; Giuliano was unaware of anyone else falling at the site or complaining of an uneven sidewalk; and the City's records contained no documentation of complaints or violations regarding the condition of the sidewalk. RCPI further argues that even if a defect existed, it cannot be held liable for plaintiff's injuries because the alleged height differential was trivial.

Plaintiff argues that RCPI has not met its burden of establishing its entitlement to judgment as a matter of law. Plaintiff argues that Giuliano and Kaufman were not actually employed by the building on the date of the accident, and that their testimony is conclusory and

insufficient to establish the non-existence of an uneven sidewalk prior to plaintiff's accident. Plaintiff also contends that the photographs and Lo Presti's testimony establish that there was a height differential of at least one inch between the sidewalk flags.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). When deciding the motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that where, as here, a defendant moves for summary judgment in a trip-and-fall case, the defendant "has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did

not have actual or constructive notice of the condition" (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; see also *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

Here, RCPI has met its initial burden of demonstrating that it neither created nor had actual or constructive notice of any hazardous conditions prior to the accident. The depositions of the Tishman Speyer employees and Lopez indicate that there were no observations or complaints of tripping hazards in the sidewalk around the time of the incident (see *Elkman v Consolidated Edison of New York*, 71 AD3d 817, 818 [2d Dept 2010]). RCPI also presents plaintiff's deposition testimony indicating that she was unable to identify the cause of her fall since she never saw what her toe hit (see *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006] ["Defendants demonstrated prima facie entitlement to judgment as a matter of law through the deposition testimony of plaintiff and his girlfriend that they were unable to identify the cause of the fall."]; *Morgan v Windham Realty, LLC*, 68 AD3d 828, 829 [2d Dept 2009]).

However, in opposition, plaintiff has raised a triable issue of fact sufficient to defeat RCPI's motion. In order to survive a motion for summary judgment, plaintiff is not required to identify at the time of the accident exactly where she fell and the precise condition that caused her to fall (see *Aller v City of New York*, 72 AD3d 563, 564 [1st Dept 2010]; *Tomaino v 209 East 84th St. Corp.*, 72 AD3d 460, 461 [1st Dept 2010]; *Hidric v City of New York*, 2010 WL 5401372 [Sup Ct NY County 2010]). For example, in *Aller*, 72 AD3d at 564, the First Department found that a plaintiff's deposition testimony that she "fell due to 'uneven' ground in the middle of the

sidewalk between two buildings" was sufficiently precise to survive a motion for summary judgment where the plaintiff's testimony was consistent with the photographic evidence submitted of an uneven sidewalk at the location of the accident.

In the instant case, even though plaintiff could not identify the exact cause of her fall, she testified that she fell on something that was "uneven." She identified the area where she allegedly fell by circling it on the photographic exhibits presented to her at her deposition, and the photographs submitted with her motion depict an uneven area of sidewalk consistent with her testimony. Moreover, plaintiff presents the testimony of Lo Presti, an eyewitness who was near the accident location around the time it occurred. Lo Presti states that she observed unlevel sidewalk flags of about one inch in the area where plaintiff was walking at the time of her fall. The Court finds the totality of this evidence sufficient to raise questions of fact for the jury (*see id.*; *Hidric v City of New York*, 2010 WL 5401372).

The Court further finds summary judgment inappropriate because there are triable issues of fact regarding whether the alleged defect in the sidewalk was trivial in nature (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *Tineo v Parkchester South Condominium*, 304 AD2d 383, 383 [1st Dept 2003]; *Hidric*, 2010 WL 5401372).

Accordingly, RCPI's motion for summary judgment dismissing the complaint is denied.

For these reasons and upon the foregoing papers, it is,

**FILED**

ORDERED that RCPI's motion for summary judgment dismissing the complaint is

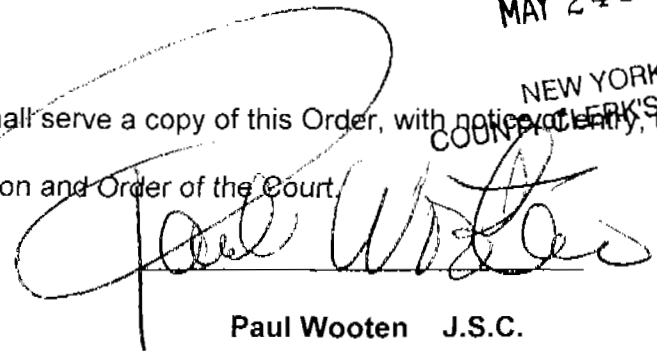
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denied; and it is further,

ORDERED that plaintiff shall serve a copy of this Order, with notice of Clerk's Office, upon RCPI.

NEW YORK  
COUNTY CLERK'S OFFICE

This constitutes the Decision and Order of the Court.



Paul Wooten J.S.C.

Dated: April 20, 2011

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST