Ross v Saint Frances De Chantal Roman Catholic Church
2011 NY Slip Op 32396(U)
July 13, 2011
Sup Ct, Nassau County
Docket Number: 17128/09
Judge: F. Dana Winslow
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

SOPHIA ROSS,

Plaintiff,

-against-

SAINT FRANCES DE CHANTAL ROMAN CATHOLIC CHURCH,

Defendant.

MOTION SEQ. NO.: 002
MOTION DATE: 4/10/11

INDEX NO.: 17128/09

The following papers having been read on the motion (numbered 1-3):

Notice of Motion..1
Affirmation in Opposition..2
Reply Affirmation...3

Plaintiff Sophia Ross tripped and fell on the premises known as Saint Frances De Chantal Roman Catholic Church (the "Church"). This property is located at 1309 Wantagh Avenue, Wantagh, New York and is owned, operated and maintained by the Church. The incident occurred at approximately 11:00 a.m. on Sunday, April 13, 2008, after plaintiff exited the Church after a 10:00 a.m. mass, and was walking toward Wantagh Avenue. Plaintiff has been a parishioner of the Church since approximately April 2006.

On the morning of the incident, plaintiff and her friend, Julia Degraziano ("Julia"), were walking toward a parking lot located across from the Church on the other side of Wantagh Avenue. Julia had driven plaintiff to the Church that day and had parked in said parking lot. There is a circular blacktop driveway that encircles the Church. Upon exiting the Church, parishioners must cross the blacktop driveway onto, what the parties refer to as a handicap ramp, which was cut out from an opening in a grassy area, and continue onto a concrete sidewalk leading to Wantagh Avenue. At the point where the concrete walkway intersects the blacktop driveway, there is a ramp/slope and curb cut with splay sides to the left and right side. The incident occurred as plaintiff stepped or attempted to step on the left splayed curb cut and onto the concrete walkway.

The Church moves for summary judgment on grounds that the area where plaintiff fell was open and obvious and was not inherently dangerous, and did not violate any applicable

statute or code. In support of its motion, the Church submits the deposition testimony of plaintiff and of Joseph Manza ("Manza"), facility manager of the Church, conducted on October 21, 2010; (ii) affidavit of architect Thomas R. Turkel ("Turkel"), sworn to on March 4, 2011; and (iii) photographs of the accident site. In reply, the Church submits a further affidavit of Turkel, sworn to on May 20, 2011.

Plaintiff testified at her deposition that on the morning of the accident, she had no difficulty walking into Church. A police officer was stationed in the area to direct parishioners crossing Wantagh Avenue from the parking lot which would lead them toward the Church. After mass, she and Julia started walking toward the parking lot when Julia crossed the asphalt driveway and was on the ramp waiting for plaintiff. As plaintiff was walking toward Julia, she stepped to the left side of the ramp, put her left foot on the part of the ramp that sloped upwards and tripped. Plaintiff testified that before she put her left foot up, she knew that the ramp was elevated and curved or sloped.

Manza testified that he had been employed by the Church as a facility manager since 2006. He learned about the incident from the Church's business manager Amy Markan ("Markan"). He searched the Church's office files and failed to find any incident reports on file covering the ramp where the accident occurred. At Manza's deposition, counsel for the Church informed plaintiff's counsel that Markan herself conducted a search of a central file and also found no accident report. Manza testified that the curb area is painted white to give people a better "visual concept."

Turkel opines that "the subject handicap ramp met good and accepted safety practices and did not violate New York State Building Codes (NYSBC) and standards established by the American National Standards Institute (ANSI) made part of the NYSBC with respect to the construction of handicap ramps." Specifically, Turkel states that the applicable ANSI standard provides that splayed side panels are required to be built into a handicap ramp only where a sidewalk is parallel to and contiguous with a driveway or roadway. In this case, Turkel opines that based upon his inspection of the ramp, splayed panels were not required because the ramp was perpendicular to the driveway or road, and as such, there is no pedestrian or wheelchair traffic parallel to or contiguous with the driveway. Turkel also states that the curb height and pitch complied with ANSI standards.

Generally, a defendant has the burden to make a *prima facie* showing in a slip and fall action that the defendant property owner neither created the condition which caused the accident nor had actual or constructive knowledge of the alleged defective condition. *See* **Razla v. Surgical Sock Shop, II Inc.**, 70 AD3d 916; **Pinto v. Metropolitan Opera**, 61 AD3d 949; **Hitzler v. St. Teresa's Church**, 35 AD3d 369; **Finocchiaro v. AVR Realty Corp.**, 32 AD3d 819. "A landowner has a duty to maintain its premises in a reasonably safe

[* 3]

manner." **Capasso v. Village of Goshen**, 84 AD3d 998, 999 *quoting* **Rivas-Chirino v. Wildlife Conservation Socy.**, 64 AD3d 556, 557. *See* **Basso v. Miller**, 40 NY2d 233. "To be entitled to summary judgment, a defendant is required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises" **Cassone v. State**, 85 AD3d 837.

In the case at bar, the Court finds that there is no evidence demonstrating that prior to her fall, plaintiff was able to identify any problem with the ramp. Plaintiff testified at her deposition that she had no trouble walking into the Church that morning and knew before her fall that the ramp was elevated and curved. It was only after falling that she attributed her fall to the part of the ramp that sloped upwards and concluded that it was this condition that caused her to fall. "Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action." **Costantino v. Webel**, 57 AD3d 472. "Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation." **Manning v. 6638 18th Ave. Realty Corp.**, 28 AD3d 434, 435 *quoting* **Teplitskaya v. 3096 Owners Corp.**, 289 AD2d 477, 478.

However, even assuming that the elevated and sloped ramp is the condition which caused plaintiff to fall, the Court finds that neither plaintiff nor Manza has stated any fact demonstrating, or even permitting the inference, that the Church created or had actual knowledge of the condition which allegedly caused plaintiff's fall. Manza testified that he was not aware of anyone falling during his tenure at the Church (since 2006) and there were no prior accident reports on file. Manza also testified that the curb in the area where plaintiff fell, was painted white and he was aware that the Church's maintenance crews repaint it as needed.

The Court finds that the Church has in addition established that the curb "was not inherently dangerous and was readily observable by the reasonable use of one's senses." **Capasso v. Village of Goshen**, *supra* at 1000. The Church proffers the affidavit of its expert who opines with a reasonable degree of architectural certainty, that the ramp where plaintiff fell met good and accepted safety practices and was not inherently dangerous.

Accordingly, the Church has demonstrated its entitlement to judgment as a matter of law. The burden thus shifts to plaintiff to tender evidence, in admissible form, sufficient to raise a triable issue of fact. **Zuckerman v. City of New York,** 49 NY2d 557.

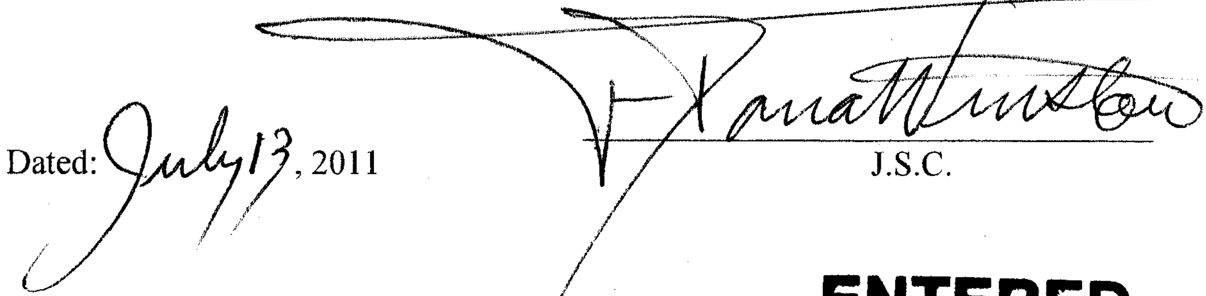
[* 4]

In opposition, plaintiff contends that the evidence establishes that (i) the Church had both actual and constructive knowledge of the condition which allegedly caused plaintiff's fall; and (ii) the ramp was inherently dangerous and did not comply with applicable Building Code regulations and ANSI standards. Plaintiff proffers her affidavit, sworn to on May 6, 2011 and an affidavit of plaintiff's expert, William Marletta, PhD ("Marletta"), a self-employed safety consultant, sworn to on April 1, 2011 (the "Marletta Affidavit"). In her affidavit, plaintiff states she "was swept by the ultra-crowded amount of people to the left side of the handicap ramp" and was "forced to step on the left curb cut as the crowd to [her] right blocked [her] path toward Julia standing on the right side of the ramp." The Court finds plaintiff's allegations (1) that the crowded condition of the Church was the result of the Church's failure to reasonably manage the congregation; and (2) that the Church's negligent failure to control the crowds was a proximate cause of the accident, to be entirely conclusory. Likewise, plaintiff's statement in her affidavit that she saw the side splay a split second before her left foot touched the splay fails to establish that the condition complained of was hazardous or was a "trap for the unwary." **Katz v. Westchester County Healthcare Corp.**, 82 AD3d 712, 713.

Plaintiff also attempts to create an issue of fact with the Marletta Affidavit. The Court finds, however, that the Marletta Affidavit is insufficient to refute the Church's *prima facie* showing of entitlement to summary judgment as a matter of law. To support his claims, Marletta alleges, among other things, that it "appears" (i) that the white paint in the driveway was not present at the time of the accident; (ii) that the concrete curb ramp was not part of the original construction in 1987; and (iii) that the concrete curb ramp was newly added and not part of the original design. Marletta also provides a chart setting forth slope conversions and cites a 1984 Building Code section without substantiating said standards' applicability to the ramp at issue in this case. The Court finds that the Marletta Affidavit is an opinion based on surmise and conjecture rather than on objective sources.

On the basis of the foregoing, it is

ORDERED, that the motion by defendant Saint Frances De Chantal Roman Catholic Church for summary judgment pursuant to **CPLR §3212** is **granted**.



Dated: July 13, 2011

J.S.C.

ENTERED
AUG 30 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE