

Parker v Battery Park City Auth.

2011 NY Slip Op 32806(U)

October 25, 2011

Sup Ct, NY County

Docket Number: 103888/10

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: _____
Justice

PART 55

Index Number : 103888/2010
PARKER, BARBARA
vs.
BATTERY PARK CITY AUTHORITY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/26/11
MOTION SEQ. NO. _____

Motion to/for _____
No(s) 1-3
No(s) 4-5
No(s) 6

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum decision and Order.*

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

Note Pre trial Conference 11/28/11 @ 2 PM

FILED

OCT 26 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/20/11

[Signature] J.S.C.
JANE S. SOLOMON

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER NON-FINAL DISPOSITION
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X

BARBARA PARKER,

Plaintiff,

-against-

BATTERY PARK CITY AUTHORITY,

Defendant.

-----X

SOLOMON, J.:

Plaintiff Barbara Parker (Parker) sues defendant

Battery Park City Authority (Battery Park) for injuries suffered in a trip and fall in front of the New York Mercantile Exchange Building, in Battery Park City. Battery Park moves for summary judgment on the ground that Parker failed to establish her prima facie case.

Parker is seventy eight years old. She runs for exercise on a daily basis. On September 13, 2009, she was running her daily route from her nearby home to TriBeCa Tower, also in lower Manhattan, when she tripped and fell. At her 50-h hearing, Parker testified that her sneaker got caught on the lip between two cement sidewalk pavement slabs. She stated that there was a one to one-and-a-half inch height differential between the slabs (Parker 50-h Hearing, attached to Braun Affirmation, Ex. B, p. 25). She did not notice the problem until after she fell. She was presented with photographs of the sidewalk (Opposition, Ex. A). The first photograph (Photo 1)

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DECISION & ORDER

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depicts a wide view of the street, and does not show any noticeable depression in the sidewalk. The second and third photographs (Photos 2 & 3) are closeups of the sidewalk, taken from different angles, which shows a clear depression between the smaller pavers and the larger flagstone that creates an edge. On Photo 1, Parker identified generally where she fell (Opposition, Ex. B), though she was unable to pinpoint the location (Parker 50-h Hearing, attached to Braun Affirmation, Ex. B, p. 27-8). On Photos 2 & 3, she identified the lip as what she tripped over.

Bruno Pomponio (Pomponio), the Director of Maintenance for the Battery City Parks Conservancy, testified for Battery Park. His duties included maintaining all hard surfaces in Battery Park City. He testified that no pedestrian filed a complaint and none of his employees filed a report regarding the condition of the area where Parker fell. He also testified that Battery Park employs a stone mason whose job it is to inspect and repair stonework, but that there is no regular inspection schedule (Pomponio deposition, attached to Braun Affirmation, Ex. H, p. 17), and no one was specifically assigned to inspect or oversee the area where Parker fell.

Battery Park argues that Parker has failed to establish her case because she cannot identify the exact location of her fall. In response to a question asking her to indicate the precise location of her fall, she responded by pointing to three

areas within the same area of Photo 1, and stated that she could not pinpoint which lip she tripped over. A plaintiff, in response to a summary judgment motion, is not required to "prove precisely which particular crack in the roadway caused her to fall . . . it is enough that she presented competent evidence which, if believed, would support a reasonable juror's conclusion that one of the cracks in this area of the pavement was the cause of her fall" (*Cherry v. Daytop Village, Inc.*, 41 AD3d 130 [1st Dept., 2007]). Parker has presented sufficient competent evidence to survive summary judgment. To the extent that her 50-h testimony and her EBT differ slightly, that is a question of credibility best left to the jury.

Battery Park next argues that the defect that Parker tripped over was trivial. A defect that is trivial warrants dismissal as a matter of law (*Trincere v. County of Suffolk*, 90 NY2d 976, 976 [1997]). However, the First Department holds that "[w]hile a gradual, shallow depression is generally regarded as trivial . . . the presence of an edge which poses a tripping hazard renders the defect nontrivial" (*Argenio v. Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept., 2000] [citations omitted]). The photographs (Opposition, Ex. A) depict an edge that poses a nontrivial tripping hazard.

Finally, Battery Park argues that it did not have actual or constructive notice of the condition. Admittedly,

there is no evidence of actual notice. Battery Park claims that there is no evidence that the condition existed for a sufficient length of time to permit it the opportunity to discover and remedy it (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]), and, therefore, there is no evidence that it had constructive notice. This is incorrect. The condition was not transitory (i.e. trash or ice), and the photographs provide evidence of a depression in the sidewalk that a jury could determine formed over, and existed for, a sufficient length of time for Battery Park to discover and remedy it (see, e.g., *Haseley v Abels*, 84 AD3d 480 [1st Dept., 2011][photographs of the site, when viewed in the light most favorable to plaintiff, is evidence of constructive notice]).

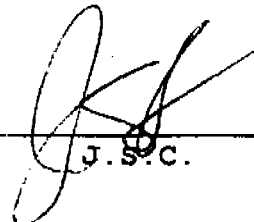
In light of the foregoing, it hereby is

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

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on November 28, 2011 at 2 P.M.

Dated: 10/25, 2011

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Enter: 

 J.S.C.
JANE S. SOLOMON