

Racines v Lebowitz

2012 NY Slip Op 30635(U)

March 13, 2012

Sup Ct, Queens County

Docket Number: 3117/10

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

ANGELICA RACINES, Index No.: 3117/10
Plaintiff, Motion Date: 12/08/2011
- against - Motion No.: 32

JEROME LEBOWITZ, as Executor of THOMAS Motion Seq.: 4
NEMET DBA NEMET MOTORS, K.& N.
PROPERTIES CORP., and T&N MANAGEMENT
CORP.,

Defendants.

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The following papers numbered 1 to 13 were read on defendants' motion for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendants and dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7- 10
Reply affirmation.....11- 13

This is a personal injury action in which plaintiff, ANGELICA RACINES, seeks to recover damages for injuries she sustained as a result of a trip and fall accident which occurred on August 9, 2009 outside the Nemet Motors dealership located at 153-12 Hillside Avenue.

Plaintiff commenced the instant action by filing a summons and complaint on February 5, 2010. Issue was joined by service of defendants' answer dated March 12, 2010.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and

dismissing the plaintiff's complaint on the ground that the plaintiff, when testifying at her examination before trial, was unable to identify the exact location where she fell; that plaintiff's injuries were not caused by a defect; that any defect was open and obvious and/or trivial and that the plaintiff has failed to demonstrate that defendants caused or created the dangerous condition complained of or had constructive notice of the condition.

In support of the motion, defendants submit an affidavit from counsel, Andrew B. Federman, Esq.; a copy of the pleadings; a copy of the transcript of the examination before trial of plaintiff, Angelica P. Racines; a copy of the examination before trial of Scott Perlstein on behalf of defendants; the affidavit of Scott Perlstein; and photographs of the location.

In her deposition, the plaintiff, age 80, stated that on the date in question, August 9, 2009, she was walking with the assistance of a cane. She went with her son to the defendants' Nissan dealership to purchase a new vehicle. She testified that she had been to the dealership many times prior to the accident, the last time approximately one month before for servicing on her vehicle. She stated that at approximately 1:00 or 2:00 p.m. her son dropped her off on Hillside Avenue in front of the door to the dealership. She stated that next to the front door there is a driveway where cars can enter the dealership. She testified that she began walking towards the entrance to go into the dealership but the entrance had a sign that said closed. She then turned back and stated that, "as I was turning back, I tripped over something before I got to the entrance of the Nissan dealership." She stated that the accident took place on the sidewalk about five feet in front of the door. Plaintiff stated that "I think I tripped on that area where it was not even." The plaintiff stated that she tripped with her right foot, her whole body fell forward and her face hit the ground, and she also landed on her shoulders and arm. On examination by her counsel she stated that she fell on the sidewalk that was part of the Nissan dealership close to the doorway. The plaintiff marked an area on a photograph with an x which shows a raised portion of the sidewalk directly in front of the door. She stated that the picture did not depict where she tripped but it did show where she fell. She stated that management offered no other assistance and her son called an ambulance which came and transported her to the emergency room at North Shore Hospital in Forest Hills. She was admitted to the hospital and stayed for about one week. The next month she required shoulder replacement surgery.

In his examination before trial, dated June 29, 2011, Scott

Perlstein the general manager of Nemet Motors states that on the date of the accident, the area in front of the door was in the same condition as depicted in a photograph marked at plaintiff's deposition as Exhibit F. He identified a raised portion of the sidewalk in the photograph which he believed to be less than an inch although he stated he did not know if it was less than half an inch. With respect to cleaning the area, he testified that he employed porters who would sweep the area on a daily basis. He testified that he was not at work on the date of the plaintiff's accident. He also testified that prior to the accident he was not aware of any complaints or other accidents regarding the condition of the sidewalk where the plaintiff fell. He stated that there was no accident report prepared with respect to the plaintiff's fall. After he received the summons and complaint, he spoke with Mario, the manager in charge on the day of the accident. Mario had no recollection of the accident. He stated that although there were surveillance cameras recording the area on the date in question the images from that date had been deleted by the time he received notice of the accident.

In his separate affidavit submitted in support of the motion, dated August 12, 2011, Mr. Perlstein states that as the general Manager of Nemet Motors he is fully familiar with the structural layout of each Nemet location. He has traversed the sidewalk outside each Nemet location on countless occasions and he has utilized all entrances to Nemet Motors hundreds of times. He states that the area where the plaintiff allegedly tripped is not defective. He states that it is a level sidewalk. He states that prior to the date of the accident he was never warned or placed on notice about any defective or allegedly dangerous condition.

Defendant's counsel, Mr. Federman, contends that summary judgment dismissing the complaint must be granted as the plaintiff has failed to demonstrate, prima facie, that her injuries were the result of tripping on a defect in the sidewalk. Counsel asserts that in her deposition testimony the plaintiff was unable to identify exactly where she fell indicating only that she fell on a portion of the sidewalk located in front of Nemet Motors. Counsel claims that even if plaintiff tripped on an elevated portion of the sidewalk, the sidewalk is not defective or inherently dangerous but rather the condition is trivial, de minimis and not inherently dangerous. Counsel claims that the photograph annexed as Exhibit J, which includes a ruler in the elevated area, shows that the raise is less than one half inch, and as such, does not constitute an inherently dangerous condition as a matter of law (citing Fernandez v Edlund, 31 AD3d 601 [2d Dept. 2006]; Meagher-Cox v Winarski, 32 AD3d 379 [2d Dept. 2006]; Jang Hee Lee v Sung Whu Oh, 3 AD3d 473 [2d Dept.

2004]).

In opposition, the plaintiff's attorney submits an affirmation stating that the plaintiff testified that she tripped over an uneven portion of the sidewalk in front of the door to the dealership. Although the plaintiff did not identify the precise spot where she tripped on the sidewalk in the photographs counsel asserts that the plaintiff indicated that she tripped and fell in the area where the sidewalk was raised. Counsel also submits an affirmation from plaintiff's son, Jirge Floril, dated September 1, 2011, in which he states that on the date in question he was with his mother and dropped her off in front of the dealership while he went to park his car. After he parked the car and was walking back to the dealership he states that, "I observed my mother attempting to enter the dealership when she tripped and fell over the raised entrance ramp leading to the front door."

Upon review and consideration of the defendants' motion, the plaintiff's affirmation in opposition and the defendants' reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

This Court finds that the defendants have failed to meet their prima facie burden of proving entitlement to judgment as a matter of law. The courts have held that: "In a trip and fall case, a plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action, since, in that instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (Louman v. Town of Greenburgh, 60 A.D.3d 915 [2d Dept.2009]). Here, however, the plaintiff sufficiently identified the location and cause of her fall, testifying that she tripped on an area that was uneven and fell in front of the door to the dealership. In addition the plaintiff's son testified that he observed her trip over the raised entrance ramp leading to the front door.

Additionally, the defendants failed to make a prima facie showing that it lacked actual or constructive notice of the allegedly hazardous condition. The evidence it submitted in support of its motion for summary judgment revealed triable issues of fact as to whether the condition could have been

readily discovered by the defendant's porters who swept the area on a daily basis or by Mr. Perlstein who testified that he has traversed the sidewalk on countless occasions and he has utilized all entrances to Nemet Motors hundreds of times (see Bolloli v Waldbaum, Inc., 71 AD3d 618 [2d Dept. 2010]; Przywalny v New York City Tr. Auth., 69 AD3d 598 [2d Dept. 2010]).

Lastly, defendants contend that the purported defect was trivial and did not constitute a trap, as the height differential was less than ½ inch and it had no notice of any defective conditions which would warrant the imposition of liability. With respect to the issue of whether a specific defect is actionable, the Court of Appeals in Trincere v County of Suffolk (90 NY2d 976, 977 [1997]) held that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth...." Liability rests on the facts and circumstances and is generally a question of fact for the jury (*id.*). Trivial defects that do not constitute a trap or nuisance are not actionable. (Rogers v 575 Broadway Assoc. L.P., 2012 Slip Op 1444 [2d Dept 2012].)

In the instant case, the testimony and photographs annexed to the moving papers are inadequate to determine as a matter of law that no defective condition existed on the sidewalk where the plaintiff allegedly tripped and fell, or that if such a condition did exist the defect was trivial and did not constitute a trap or nuisance (see, Rogers, *supra*; Freas v Tilles Ctr., 89 AD3d 680 [2d Dept. 2011]; Araujo v City of New York, 84 AD3d 993 [2d Dept. 2011]; Ricker v. Board of Educ. of Town of Hyde Park, 61 AD3d 735 [2d Dept. 2009]; Boxer v. Metro. Transp. Auth., 52 AD3d 447 [2d Dept. 2008]).

For all of the above-stated reason, it is hereby

ORDERED that the defendants' motion for summary judgment on the issue of liability and for an order dismissing the plaintiff's complaint is denied.

Dated: March 13, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.