Amended Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Maria Lopez,

Plaintiff,

- against -

Carollo Bakery, 37th Avenue Realty Corp., The City of New York and Tongs Realty Corp.,

Defendants.

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Index Number: 13422/10

Motion Date: 4/3/12

Motion Cal. Numbers: 16-18

Motion Seq. No.: 2-4

The following papers numbered 1 to 26 read on this motion by defendant, 76-07 37th Avenue Realty Corp., sued herein as 37th Realty Corp., and Tongs Realty Corp. for summary judgment; motion by defendant, Carollo Bakery, for summary judgment; and motion by defendant, The City of New York, for summary judgment.

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The Court, sua sponte, recalls and vacates its order issued on April 9, 2012 and substitutes the following order in its place and stead:

Motions by 37th and Tongs, Carollo Bakery and the City are consolidated for disposition.

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motions by 37th and Tongs, Carollo Bakery and the City for summary judgment dismissing the complaint and all cross-claims as against them are granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling on a raised crack in the sidewalk in front of Carollo Bakery at 76-07 37th Street in Queens County on December 29, 2009. Said abutting premises are owned by 37th and leased to Carollo Bakery.

Plaintiff testified in her deposition conducted on April 25, 2011, wherein she was shown and she referred to photographs of the area of the accident, which photographs are annexed to the moving papers, that the tip of her right foot became "entangled or trapped" in a crack that was "protruding" from the sidewalk and she stumbled and fell. The accident occurred at approximately 9:45 a.m. and it was clear and dry with daylight conditions. She testified that she was walking "down the sidewalk right in the middle" and she stumbled and fell in front of the bakery which was on her left side. She stated, "When I stumbled and I fell, I fell more towards there. Upon being asked, "When you say more towards there, when you fell, was it closer to the building or closer to the street?" she replied, "I was closer to the entrance of the bakery." When asked whether her accident happened in front of the doorway or window to the bakery, she replied, "Nearby the window where the tree is located." The Court notes that the photographs annexed to the moving papers show the front of the bakery taken from the vantage point of the curb, that the bakery has a doorway on the left and a window on the right and that the window area directly faces a curbside tree well partially depicted in the foreground of the photographs. When asked how far the left side of her body was from the bakery window, she indicated her estimate of the distance with her hands, which counsel for plaintiff and Carollo Bakery agreed was approximately 1½ feet. When asked in what direction she fell when she stumbled, she replied, "I stumble and I fell down forward."

37th and Tongs move for summary judgment upon the sole ground that the defect was too trivial to be actionable. In this regard, "not every injury allegedly caused by an elevated sidewalk slab need be submitted to a jury, and a trivial defect on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes or trip on a raised projection, is not actionable" (see Riser v New York City Housing Authority, 260 AD 2d 564 [2nd Dept 1999]). The court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to the defendant(see Hymanson v. A.L.L. Assocs., 300 AD 2d 358, 358 [2nd Dept 2002]). The

determination of whether a condition is trivial does not rest exclusively upon the dimension or depth of the defect in inches, but must be made upon an examination of all of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (Trincere v. County of Suffolk, 90 NY 2d 976, 976 [1997]).

Upon close scrutiny of the photographs, including the photographs taken by plaintiff's expert and said expert's affidavit, and consideration of all other facts and circumstances surrounding the accident as presented on this record, it is the opinion of this Court that the alleged sidewalk defect was too trivial to be actionable. The photographs merely depict a minor diagonal crack in a sidewalk flag no more than approximately two feet in length directly next to and extending to the curbside tree well. It was this crack by the curbside tree well that plaintiff's expert, Nicholas Bellizzi, a professional engineer, evaluated. However, this is not the area where plaintiff tripped and fell. As heretofore mentioned, plaintiff testified that she fell closer to the building than the curb, approximately a foot and a half from the bakery's window. The photographs only show a control joint between sidewalk flags in this location, but no raised area at all.

Even if plaintiff had testified that she tripped on the crack by the tree well, which she did not testify, Bellizzi averred that this crack was only 5/8" to 3/4" in height.

It has been held that a sidewalk flag that was raised 3/4" and "did not, by reason of its location, adverse weather, lighting conditions, or other relevant circumstances, have any of the characteristics of a trap or snare" was "too trivial to be actionable" (Ramirez v City of New York, __AD2d__,__, 2012 NY Slip Op 02292, *1 [2nd Dept 2012]; see also Zalkin v City of New York, 36 AD 3d 801 [2nd Dept 2007] [3/4" sidewalk elevation]). Even an elevation differential of one inch above the adjacent flag at its highest point where it does not have any of the characteristics of a trap or nuisance is regarded as too trivial to be actionable as a matter of law (see Riser v New York City Housing Authority, 260 AD 2d 564, supra). Therefore, based upon the totality of the evidence presented on these motions, 37th has established its entitlement to summary judgment by demonstrating that, under the circumstances, the 5/8" to at most 3/4" elevation differential of the crack next to the tree well was too trivial to be actionable, as a matter of law.

Counsel for plaintiff contends that Bellizzi's affidavit raises issues of fact surrounding the defective condition because

he opined that the condition was not trivial or de minimus, citing §2-09(e) of the Highway Rules of the New York City Department of Transportation which classifies as a substantial defect a trip hazard which is ½" or greater in height and §19-152(a)(4) of the New York City Administrative Code which obligates an abutting property owner to repair the sidewalk where there is a substantial defect which includes, inter alia, "a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch..."

However, although §19-152 obligates a property owner to repair a sidewalk flag that is raised ½" or greater, this section merely sets forth a threshold condition to trigger the property owner's requirement to effect repairs. It does not establish a new rule of liability for all ½" elevation differentials in the City of New York and may not be taken to abrogate the principle enunciated in Trincere v. County of Suffolk (supra) that "a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable" (id. at 977-978) but should be based upon all the facts, including the dimensions, irregularity and appearance of the defect plus the time, place and circumstance of the accident. Although an elevation differential between adjacent sidewalk flags may be ½" or greater and thus require remediation, such a defect may still be found to be trivial as a matter of law and not actionable (see Villaplana v Kane Assocs. Family Limited Parnership, 2007 NY Slip Op 52187[U] [Supreme Ct, NY County]). Likewise, §2-09 is merely an analog to §19-152 and does not establish that a ½" defect is non-trivial as a matter of law for purposes of tort liability.

Moreover, although §7-210 of the Administrative Code mirrors the duties and obligations imposed upon property owners under §19-152, such section does not declare, and no controlling authority has found, that a property owner's failure to correct a defect required under §19-152 constitutes negligence per se, or even some evidence of negligence, so that all raised sidewalk conditions of ½" or greater are automatically either non-trivial or raise an issue of fact as to whether they are trivial so as to preclude summary judgment. Section 7-210 is merely a liability-shifting statute, enacted to transfer liability for personal injury or property damage from the City to the property owner who breaches the duty to repair imposed by §19-152 (see Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193; Puello v. City of New York, 35 AD 3d 294 [1st Dept 2006]). However, although only the abutting property owner rather than the City, may now be sued for damages resulting from a failure to maintain the sidewalk as required by §19-152, the defect, although required to be repaired under the statute, may still be found to be

trivial under the totality of the circumstances.

Based upon all the circumstances presented on this record, including the appearance and depth of the crack, and considering that the accident occurred during the daylight hours on a clear, dry day, that there was no testimony that the crack was concealed or obscured in any way and that the crack did not otherwise exhibit any of the characteristics of a trap or nuisance, the crack analyzed by Bellizzi, even if it were the condition that plaintiff alleged she tripped and fell on, was too trivial in nature to sustain a cause of action. In any event, plaintiff's own testimony is that she did not fall in this area but rather within 1 ½' of the bakery, which area shows no defects whatsoever.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed as against 37th Avenue Realty Corp. and Tongs Realty Corp.

Since scrutiny of the photographs of the area where plaintiff testified she fell - approximately 1½' from the window of the bakery - shows no defect, and the the crack by the tree well that Bellizzi analyzed, even if plaintiff had testified that this was the spot where she tripped and fell, which she did not so testify, was trivial and not actionable, Carollo Bakery and the City are also entitled to summary judgment dismissing the complaint and all cross-claims against them.

Even if, arguendo, there were a question of fact as to whether or not the alleged condition of the sidewalk that allegedly caused plaintiff to trip and fall was trivial, Carollo Bakery and the City are still entitled to summary judgment.

With respect to Carollo Bakery, the Court notes that §7-210 of the General Municipal Law places liability only upon owners of premises abutting a public sidewalk for injuries sustained by pedestrians as a result of a failure to maintain or repair the sidewalk, and not tenants. It is undisputed that Carollo Bakery is not the owner of the abutting premises, but the tenant. Therefore, no statutory liability attaches to it for failing to maintain and repair the sidewalk.

Without merit is plaintiff's counsel's argument that since 37th hired Tongs to manage the property and make repairs and that the latter inspected the premises, including the sidewalk, every 2-3 weeks, Carollo had constructive notice of the condition. In the first instance, counsel fails to explain how a property management agreement between 37th and Tongs would serve to impart constructive notice of any defective condition of the sidewalk upon Carollo

Bakery. Moreover, Peter Lam of Tongs testified in his deposition that he never observed anything wrong with the sidewalk that needed repair, which testimony is harmonious with this Court's finding that the alleged condition, if such a condition even existed, in fact, was too trivial to be actionable. Thus, there is no issue of constructive notice in this matter.

Also without merit is counsel's contention that since Carollo Bakery did not provide plaintiff with a fully-executed copy of the lease between it and 37th, there is a question of fact as to whether Carollo Bakery was contractually responsible to maintain and repair the sidewalk. The Court notes that plaintiff never alleged that Carollo failed to comply with discovery and never moved to compel Carollo to produce the lease. Indeed, plaintiff filed a note of issue on October 4, 2011 and never indicated that discovery was incomplete. Moreover, in reply, counsel for Carollo represents that a fully-executed copy of the lease was provided to plaintiff's counsel and annexes as proof thereof his response to plaintiff's notice for discovery and inspection, which response is dated July 11, 2011, and which response annexes a copy of the lease thereto. Therefore, plaintiff's counsel's contention that there is a question as to Carollo's responsibilities because it failed to provide a copy of the lease is disingenuous, at best.

Pursuant to the lease, Carollo is only responsible for making non-structural repairs to the premises and there is no provision in the lease requiring Carollo to repair the sidewalk.

Furthermore, even if the lease contained a provision requiring Carollo to repair and maintain the sidewalk, such provision would only serve to render it liable to its landlord, 37th, upon the basis of contractual indemnification. "Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff" (Collado v Cruz, 81 AD 3d 542, 542 (1st Dept 2011]). This reflects both the general rule that a contractual obligation, standing alone, imposes a duty only in favor of the promisee and specific third-party beneficiaries, establishes only a cause of action for breach of contract, and does not give rise to tort liability in favor of a third party where the alleged harm results from mere inaction (see Eaves Brooks Costume Co. V. Y.B.H. Realty Corp., 76 NY 2d 220 [1990]; Torres v. City of New York, 298 AD 2d 318 [1st Dept 2002]), as well as the statutory mandate of §7-210 of the General Municipal Law that imposes a nondelegable duty upon the owner of the abutting premises to maintain and repair the sidewalk (see Collado v Cruz, supra).

Finally, the City is also entitled to summary judgment. Since

§7-210 of the Administrative Code absolves the City of liability for sidewalk defects, shifting responsibility to the abutting property owner, and since it has shown unrebutted evidence that it did not create the allegedly defective condition of the sidewalk, it is entitled to summary judgment as a matter of law.

Accordingly, the motions are granted and the complaint is dismissed in its entirety.

Dated: May 29, 2012

KEVIN J. KERRIGAN, J.S.C.