

Morales v Seward Park Hous. Corp.

2012 NY Slip Op 31847(U)

July 12, 2012

Supreme Court, New York County

Docket Number: 114323/2010

Judge: Doris Ling-Cohan

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

PRESENT: Hon Doris Ling-Cohan
Justice

PART 36

Index Number : 114323/2010
MORALES, EULALIA
vs.
SEWARD PARK HOUSING
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant for
summary judgment is denied in accordance
with the attached memorandum decision.

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

FILED
JUL 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/12/12

[Signature], J.S.C.

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

FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

JUL 16 2012

-----x
EULALIA MORALES,

**NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff,

Index No.: 114323/10

-against-

Motion Seq. No.: 001

SEWARD PARK HOUSING CORPORATION,

Defendant.

-----x
DORIS LING-COHAN, J.:

Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

Plaintiff allegedly slipped and fell on a public sidewalk adjacent to defendant's premises at a point immediately adjacent to a tree well. At the time of the accident, May 6, 2010, plaintiff was 83 years old. It is alleged that there was a height differential between the two sidewalk slabs surrounding the tree well.

At her examination before trial (EBT), plaintiff testified that she never measured the height differential between the two slabs, admitted that she walked that same section of sidewalk once every two weeks, and stated that she never complained to anyone about the sidewalk being lifted at that location. At the time of the occurrence, plaintiff was walking with a walker when

the front wheels of the walker caught and she fell. Plaintiff's EBT, at 48, 54-56.

Later at her deposition, plaintiff opined that the height differential was approximately two-and-a-half inches. *Id.* at 99-102.

It is defendant's contention that, to the extent that there was any defect in the sidewalk, it was trivial and not dangerous to the general public using that street. Frank Durant (Durant), defendant's general manager, provided an affidavit in support of the instant motion, in which he averred that the section of the sidewalk where plaintiff allegedly tripped was not noticeably raised and was not indicated as something to be repaired. Motion, Ex. E. However, Durant admitted that a section of the sidewalk, approximately 20 feet away from the area where plaintiff claims that she tripped, needed to be repaired because a tree had been clipped by a passing truck, and so defendant continued to repair down the whole street, including the section where the accident occurred. *Id.* Durant said that defendant was never informed of the alleged accident until after the repairs were made.

Defendant asserts that, because plaintiff never actually measured the alleged defect, nor had an expert examine and measure the section of the street where the accident took place, plaintiff can only speculate as to the height differential. As a

consequence, defendant maintains that plaintiff cannot prove that the alleged defect was anything more than trivial, and the complaint should be dismissed.

The court notes that photographs of the street, taken after the accident and before any work was performed, show a differential between two sidewalk slabs, but the height differential cannot be readily ascertained by the photographs. Motion, Ex. D.

In opposition to the instant motion, plaintiff asserts that, pursuant to section 7-210 of the Administrative Code of the City of New York, a property owner is under a duty to maintain a sidewalk that abuts its property, and, section 19-152 (a) (4) of said Code defines a "substantial defect" as one with a "vertical grade differential between adjacent sidewalk flags ... greater than or equal to one half inch." ¶4, Affirmation in Opp. Plaintiff contends that her deposition testimony, in which she opined that the height differential between the two sidewalk slabs where she fell was approximately 2½ inches, and the photographs of the area, create a question of fact precluding granting defendant's motion for summary judgment.

In reply, defendant argues that the affirmation of plaintiff's counsel submitted in opposition to the instant motion is insufficient to defeat defendant's requested relief. Defendant states that plaintiff's arguments are based on pure

speculation, since no expert has been retained to opine as to the alleged danger of the condition, nor was the height differential ever actually measured by plaintiff. According to defendant, plaintiff's entire contention is based on her speculation of the height differential between the two sidewalk slabs.

Defendant also claims that the photographs alone are insufficient to support plaintiff's allegations, since the photographs do not include any measuring device that would prove the height differential. Moreover, plaintiff admitted that she never noticed that the sidewalk was lifted prior to her accident, that she walked at that location every one to two weeks, and that her walker never got caught prior to the time of the alleged incident.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt

as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Defendant's motion is denied.

"Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the particular circumstances of each case and presents a question of fact for the jury. However, trivial defects are not actionable, and in determining whether a defect is trivial, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury [internal quotation marks and citation omitted]."

Mishaan v Tobias, 32 AD3d 1000, 1001 (2d Dept 2006); *Trincere v County of Suffolk*, 90 NY2d 976 (1997); *Morales v Riverbay Corp.*, 226 AD2d 271 (1st Dept 1996).

Here, defendant has "failed to demonstrate its entitlement to summary judgment since it did not establish that the defect in the subject [sidewalk] was trivial as a matter of law."

Dominguez v OCG, IV, LLC, 82 AD3d 434, 434 (1st Dept 2011). The court notes that, it is defendant's burden on this motion, to establish that the alleged defect which caused plaintiff's fall was in fact trivial, as a matter of law. Further, in support of the within motion for summary judgment, defendant failed to supply a copy of the pleadings as required. CPLR §3212.

Moreover, defendant's entire argument is based on its reliance on the photographs and deposition testimony of plaintiff

[* 7]

to support its position that the height differential was trivial. The photographs are not inconsistent with plaintiff's deposition testimony, defendant has not provided the affidavit of an expert substantiating its position that the defect was trivial, nor has defendant provided any actual measurement of the height differential.

Significantly, the photographs do not conclusively establish the depth of the defect, and the court finds that plaintiff's testimony raises an issue of fact with respect to the alleged defect. *Rivas v Crotona Estates Housing Development Fund Co.*, 74 AD3d 541 (1st Dept 2010); see also *Nin v Bernard*, 257 AD2d 417 (1st Dept 1999).

The case relied upon by defendant, *Vasquez v JRG Realty Corp.* (81 AD3d 555 [1st Dept 2011]), is distinguishable from the case at bar, in that, in *Vasquez*, the defendant provided both witness testimony and an expert's affidavit as to the allegedly trivial nature of the defect. In the instant matter, defendant has provided nothing more than its own speculation as to the trivial nature of the defect. Therefore, defendant has not met its burden and has failed to establish its right to summary judgment of dismissal. *Delancy v Town Sports International*, 88 AD3d 635 (2d Dept 2011).

CONCLUSION

Based on the foregoing, it is hereby

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

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: July 12, 2012

FILED

JUL 16 2012

NEW YORK
COUNTY CLERK'S OFFICE
Doris Ling-Conan, J.S.C.

J:\Summary Judgment\Morales trivial defect.wpd