

**Botfeld v Wong**

2012 NY Slip Op 32144(U)

August 14, 2012

Supreme Court, New York County

Docket Number: 106680/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

ROBERT BOTFELD as Executor of the Estate of  
ROSE BOTFELD, Deceased,

INDEX NO. 106680/09

Plaintiffs,

- against-

MOTION SEQ. NO. 002

LILY WONG and ARTBAGS CREATIONS, INC.,  
Defendants.

The following papers, numbered 1 to 3, were read on this motion by defendant LILY WONG, for summary judgment pursuant to CPLR 3212.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

PAPERS NUMBERED	
<b>FILED</b>	1
	2
	3

AUG 15 2012

Cross-Motion:  Yes  No

NEW YORK

This is a negligence "trip-and-fall" action brought by Robert Botfeld (Botfeld) as Executor of the Estate of Rose Botfeld (decedent) to recover damages for injuries allegedly sustained when decedent tripped and fell on the public sidewalk adjacent to property owned by defendant Lily Wong (Wong), located at 1130 Madison Avenue, New York, New York. The parties have completed discovery and the Note of Issue has been filed. Wong now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint for plaintiff's failure to establish a *prima facie* claim of negligence. Botfeld has filed opposition to the motion and Wong has submitted a reply.

BACKGROUND

This action arises out of an accident that occurred on January 29, 2009 at approximately 1:30 or 2:00 p.m. in which decedent allegedly tripped and fell over a gas cap located on a public sidewalk directly abutting Wong's property. Botfeld alleges that as a result of this incident decedent sustained a fracture of her right hip requiring surgery, among other injuries.

At his deposition Botfeld testified that he was walking with decedent, his mother, on the west side of the sidewalk on Madison Avenue, between 84<sup>th</sup> and 85<sup>th</sup> streets in New York, New York, when decedent "suddenly stumbled" and fell (Botfeld EBT, p. 48, line 18). Botfeld testified as follows:

- Q. During the time that your mother was on the ground after the accident, did you speak to your mother?  
A. Yes.  
Q. Did you ask her what happened?  
A. Yes, I think.  
Q. What did she tell you?  
A. She said she tripped?  
Q. Did she tell you what she tripped on?  
A. No, we didn't know.  
(*id.*, p. 62, lines 7-17).

In his affidavit, which is attached to his opposition papers, Botfeld asserts that after the accident he was able to determine that decedent fell on the gas cap because "the gas cap was in exactly the same place on the sidewalk where [decedent] started to trip" (Botfeld Affidavit at ¶ 6). Following the accident, Botfeld testified that he took "three or four" photographs of the accident location, including a close-up photograph of the gas cap (Botfeld EBT, p. 55, line 17; Botfeld Affidavit at ¶ 9).

Wong is the owner of the property directly abutting the sidewalk where decedent fell. The property, located at 1130 Madison Avenue, New York, New York, contains a retail storefront operated by defendant Arbags Creations, Inc. (Arbags)<sup>1</sup> and a one-family residence occupied by Wong.<sup>2</sup> Wong testified at her deposition that she had never previously noticed the raised gas cap. Moreover, she testified that there have not been any prior accidents on the sidewalk adjacent to her property and that she never received any building code violations.

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<sup>1</sup> The parties discontinued the action as against Arbags pursuant to a stipulation dated September 22, 2010.

<sup>2</sup> The address for the one-family residence is 21 East 84<sup>th</sup> Street, New York, New York.

Decedent commenced the instant action via Summons and Complaint filed May 12, 2009. Issue was joined on or about July 22, 2009 when Wong interposed her answer. Subsequent to commencing the herein action, Rose Botfeld died.<sup>3</sup> On April 26, 2010, pursuant to this Court's order, the caption was amended to substitute Robert J. Botfeld, Executor of the Estate of Rose Botfeld, as plaintiff in this action.

Before the Court is Wong's motion for summary judgment pursuant to CPLR 3212 dismissing the complaint as asserted against her. In support of the motion, Wong submits, *inter alia*, a copy of the Summons and Complaint, the deposition transcript of Botfeld dated July 1, 2010, the deposition transcript of Wong dated July 23, 2010 and two black and white photographs of the accident location. Wong makes three arguments in support of her motion. First, she argues that Botfeld's claim is speculative because he cannot identify the cause of decedent's fall. Second, Wong maintains that Botfeld cannot show that she created, or had actual or constructive notice of the dangerous condition. Lastly, Wong asserts that the alleged defective condition is trivial, warranting summary judgment in her favor.

In opposition, Botfeld submits, *inter alia*, a copy of his affidavit dated January 5, 2011, and a copy of the expert affidavit of Joseph Farahnik, P.E. dated December 17, 2010. Botfeld addresses each of Wong's three arguments in his opposition. First, he maintains that "[w]hile [he] testified at [his] deposition that [he] did not 'know' what caused [his] mother to trip - [he] said that because [he] did not actually see her foot hit the gas cap. However [he is] 100% certain that the gas cap is what her foot hit and what caused her to fall" (Botfeld Affidavit at ¶ 8). Second, Botfeld maintains that actual or constructive notice is not a necessary element where the defective condition is a gas cap used for a gas pipe entering the building.<sup>4</sup> Notwithstanding

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<sup>3</sup> Rose Botfeld died from lung cancer, unrelated to the injuries alleged in this action.

<sup>4</sup> Botfeld did not provide any case law to support this allegation.

the foregoing, Botfeld maintains that Wong had constructive notice of the defective gas cap because the defective condition was obvious for months, if not years, prior to the accident as demonstrated by the photographs attached to his opposition papers. Lastly, Botfeld maintains that the gas cap is not a trivial defect as it was raised two inches above the ground.<sup>5</sup>

#### STANDARDS

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65

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<sup>5</sup> Although Botfeld maintains in his affidavit that the gas cap was elevated two inches above the sidewalk, no actual measurements were provided.

NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well-established that an abutting landowner will not be liable to a pedestrian injured by a defect in a public sidewalk unless the landowner created the defective condition, caused the defect to occur because of some special use, or has a statutory duty to maintain the sidewalk (*see McGee by McGee v City of New York*, 252 AD2d 483, 483-84 [2d Dept 1998]). New York City Administrative Code (Admin. Code) § 7-210 imposes such a duty on abutting landowners to "maintain [the] sidewalk in a reasonably safe condition" and further provides that the owner "shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk" (NYC Admin. Code §7-210). The First Department has interpreted Admin. Code § 7-210 as imposing liability "when it is established that the owner of said property created the condition alleged" or "failed to remedy the condition, despite having prior actual or constructive notice of it" (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-61 [1st Dept 2010]).

However, as a preliminary matter, a defendant in a trip-and-fall case can establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the plaintiff's inability to identify the cause of the accident (*see Bottiglieri v Wheeler*, 38 AD3d 818, 818 [2d Dept 2007]). "[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 810 [2d Dept 2010]). Once a defendant makes this *prima facie* showing, the burden shifts to the plaintiff to raise a triable issue of fact regarding his ability to identify the cause of the fall. It is well-settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

## DISCUSSION

Wong submitted deposition testimony showing that Botfeld did not see any defect prior to decedent's accident and "didn't know" what caused her to fall (Botfeld EBT, p. 62, line 17). As such, the Court finds that Wong has met her initial burden of demonstrating her *prima facie* entitlement to judgment as a matter of law by showing that Botfeld was unable to identify the cause of decedent's fall (*see Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006] [finding that defendant met its burden by presenting deposition testimony showing that plaintiff was unable to identify the cause of the fall]; *Patrick*, 77 AD3d at 810).

In opposition Botfeld's proffered evidentiary proof, in the form of his affidavit, is insufficient to establish the existence of material issues of fact regarding his ability to identify the cause of the fall (*see Reed*, 30 AD3d at 320; *Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). It is well accepted that "[a]ffidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, 'creates on a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment'" (*Telfeyan*, 40 AD3d at 373, quoting *Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *see also Zylinski v Garito Contr.*, 268 AD2d 427 [2d Dept 2000]). The Court finds that Botfeld's affidavit directly conflicts with his prior testimony and is "self-serving and tailored to avoid the consequences of [this] earlier testimony" (*Van Damme v Gelber*, 79 AD3d 534 [1st Dept 2010]). Moreover, the Court finds Botfeld's proffered explanation for the apparent contradiction unavailing; to wit, that he only testified that he did not "know" what caused decedent's fall because he did not actually see her foot hit the gas cap, but is nevertheless certain that the gas cap was the cause of the fall. As such, Wong's motion for summary judgment dismissing plaintiff's complaint is granted in its entirety.

For these reasons and upon the foregoing papers, it is,  
 ORDERED that defendant Lily Wong's motion for summary judgment dismissing the  
 complaint is granted; and it is further,  
 ORDERED that defendant Lily Wong shall serve a copy of this Order, with Notice of  
 Entry, upon plaintiff and upon the Clerk of the Court who is directed to enter judgment  
 accordingly.

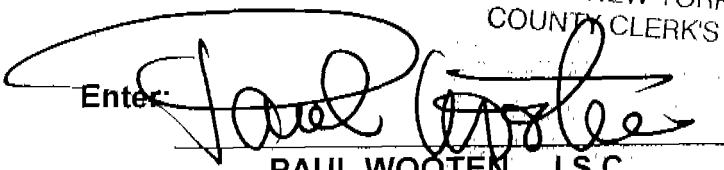
This constitutes the Decision and Order of the Court.

**FILED**

AUG 15 2012

NEW YORK  
 COUNTY CLERK'S OFFICE

Dated: Aug. 14, 2012

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 PAUL WOOTEN J.S.C.

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