

Hutchinson v Sheridan Hill House Corp.
2012 NY Slip Op 33804(U)
July 23, 2012
Supreme Court, Bronx County
Docket Number: 307060
Judge: Lizbeth Gonzalez
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PART 25

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed
Settle Order
Schedule Appearance

HUTCHINSON, LEONARD

Index No. 0307060/2009

-against-

Hon. Lizbeth Gonzalez

SHERIDAN HILL HOUSE Corporation

Justice

The following papers numbered 1 to _____ Read on this motion, SUMMARY JUDGMENT DEFENDANT
Noticed on January 18 2012 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with
the annexed Decision and Order.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 7/23/12

Hon. Lizbeth Gonzalez, AJSC

LIZBETH GONZALEZ



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP4

-----X

Leonard Hutchinson,

Plaintiff,

-against-

DECISION and ORDER
Index No 307060

Sheridan Hill House Corp.,

Defendant.

-----X

Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits.....	2
Reply Affirmation.....	3

Plaintiff Hutchinson claims that he sustained personal injuries as a result of the defendant's negligence. On 4/23/09, Mr. Hutchinson allegedly tripped on a metal screw protruding from the sidewalk on the defendant's property and fell. Defendant Sheridan Hill House Corp. ("Sheridan") moves for summary judgment pursuant to CPLR 3212 on several grounds: the alleged defect was trivial and is therefore not actionable; it lacked actual and constructive notice; and it is not liable since the alleged defect was created by an independent contractor over which the defendant exercised no control.

DISCUSSION

Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) A landowner is required to maintain its property in a reasonably safe condition to avoid the likelihood of injury to others. (*O'Connor-*

Miele v Barhite & Holzinger, 234 AD2d 106 [1996].) Since the alleged accident occurred after the enactment of NYC Administrative Code § 7-210, the abutting landowner is responsible for the sidewalk's defective conditions and is liable if he or she created the condition. (*Rodriguez v City of New York*, 12 AD3d 282 [2004]; *Romero v ELJ Realty Corp.*, 38 AD3d 263 [1st Dept 2007].) To establish liability, plaintiff Hutchinson must demonstrate that the defendant created or had actual or constructive notice of the condition which precipitated his injury. (*Uhlich v Canada Dry Bottling Company of New York*, 305 AD2d 107 [1st Dept 2003].) Constructive notice is established when a defect is visible and exists for a sufficient length of time before the accident to permit the landlord or its employees an opportunity to discover and remedy the defect. (*Luzinski v Kenvic Associates*, 242 AD2d 242 [1st Dept 2007]; *Zuk v Great Atlantic & Pacific Tea Co., Inc.*, 21 AD 3d 275 [1st Dept 2005].) Here, the defendant, as the movant for summary judgment, bears the initial burden to establish lack of notice as a matter of law. (*Moreira v City of New York*, 4 AD3d 311 [2004].) The plaintiff must present evidence to establish that an alleged defect with minimal dimensions presents a significant hazard by reason of location or other circumstances giving it the characteristics of a trap or snare. (*Gaud v Markham*, 307 AD2d 845 [1st Dept 2003].) However, since no per se rule exists regarding a defect's dimensions that give rise to a landowner's liability, a trivial defect may be deemed a trap or snare. (*Argenio v MTA*, 277 AD2d 165 [1st Dept 2000].)

In support of its motion, defendant Sheridan proffers the report of Dr. Benjamin E. Rosenstadt, who examined the plaintiff, to contest the plaintiff's alleged injuries but the defendant's motion is not premised on threshold grounds. The defendant proffers photographs of the accident site; a copy of a "Change Order;" the affidavits of Arthur Pearson and Al Rapport; the unsworn findings of Nicholas Bellizzi; and the deposition testimony of Conrad Whyte, Mervin Brownshin,

Carole Gordon and plaintiff Hutchinson.

During his 11/19/10 deposition, plaintiff Hutchinson testified that he resided at 1151 Sheridan Avenue, Bronx, New York, one block away from the subject property. On 4/23/09, Mr. Hutchinson left his apartment between 10AM and 11AM to go to the supermarket approximately two blocks away. He testified that he was walking straight ahead with an unobstructed view as he reached the front of the defendant's property located at 1413 Sheridan Avenue. The plaintiff's foot caught on "something screwed on in the concrete" causing him to trip and fall. He observed this object for the first time when he looked back while laying on the ground.

Carole Gordon, the Director of Housing Development for the Bridge Inc., the defendant's corporate parent, testified during her 3/7/11 deposition, that defendant Sheridan is a not-for-profit residential facility that was created in March 2007. On 6/25/07, defendant Sheridan and Artec Construction and Development Corp. ("Artec") signed a Change Order to modify their existing construction contract for the removal and replacement of 942 square feet of the sidewalk in front of the facility. A project architect supervised Artec. Defendant Sheridan's sole role was payment to Artec upon the project's completion. Ms. Gordon stated that she and the defendant's employees were made aware of the plaintiff's 4/23/09 accident when she received his summons and complaint.¹ Ms. Gordon subsequently instructed Olga Brita and Jennifer Williams, the defendant's respective regional director and facilities director to inspect the sidewalk for any defects as described within the plaintiff's complaint but their search was to no avail. Ms. Gordon visited the facility approximately six times between its construction date in March 2007 and 4/23/09, the plaintiff's

¹ The defendant was served with the summons and complaint on 9/9/09.

accident date, and states that she never observed the alleged defect on the sidewalk.

During their respective 5/18/11 depositions, Mervin Brownshin testified that he worked at 1413 Sheridan Avenue from March 2007 through September 2008, Conrad Whyte testified that he worked at the same location from March 2008 to present. As the defendant's maintenance workers, their daily duties included cleaning, sweeping and shoveling the sidewalk in front of the premises. Mr. Brownshin and Mr. Whyte stated that they neither observed nor received complaints concerning the protruding defect.

By affidavit dated 3/8/10, Al Rapport, the defendant's hired adjuster/investigator, stated that he inspected the accident site on 1/13/10, almost nine months post-accident. Mr. Rapport observed a "metal bolt/screw-like object - consistent with plaintiff's allegations - protruding from the sidewalk attendant to the 1407 Sheridan Avenue property" which does not belong to the defendant. The alleged defect that caused the plaintiff's fall, however, is in the sidewalk abutting the defendant's property at 1413 Sheridan Avenue.

By affidavit dated 12/15/11, Arthur Pearson, an employee and "all-purpose" staff member of the defendant's law firm, states that he inspected, measured and photographed the accident site on 12/2/10, approximately eight months post-accident. Defendant's counsel provided Mr. Pearson with the plaintiff's photographs and description of the defect given during his deposition: "a round metal object about one half inch in diameter, which protruded about one half inch above the surface of the sidewalk." Mr. Pearson states that he located the object after searching for ten to fifteen minutes. His measurements of the object's diameter using a standard ruler were approximately "five eighths of an inch ("5/8"), but certainly less than three quarters of an inch ("3/4")." The height of the object

above the sidewalk's surface measured "between one eighth of an inch (1/8") and one quarter of an inch (1/4")." Mr. Pearson placed a transit Metrocard against the object and it "came up to right to the bottom of the black magnetic strip on the Metrocard's face." The photographs depicting measurements of the protrusion using both the ruler and the Metrocard are included within Mr. Pearson's affidavit.

The defendants proffer the unsworn findings of Nicholas Bellizzi, the plaintiff's consulting engineer, which are thus admissible. (*Kearse v New York City Transit Authority*, 16 AD 3d 45 [2nd Dept 2005].) Mr. Bellizzi inspected the subject sidewalk on 5/20/11, approximately two years post-accident and after the defendant shaved down the defect. Mr. Bellizzi opined that the sidewalk's "substantial defect" was not in compliance with NYCDOT Highway Rules § 2-09 and NYC Administrative Code §§ 19-152(4) and 7-210, which state in relevant part as follows.

NYCDOT Highway Rules § 2-09(c)(4) and NYC Administrative Code §19-152(4).

A trip hazard...where a flag contains one or more surface defects of one inch or greater in all horizontal directions and is 1/2" or more in depth.

NYC Administrative Code § 7-210.

(a). It shall be the duty of the owner of real property abutting any sidewalk...to maintain such sidewalk in a reasonably safe condition.

(b). Notwithstanding any other provision of the law...the owner of real property abutting any sidewalk...shall be liable for any injury to property or personal injury...proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags.

The defendants contend that the defect "measured 5/8 of an inch in diameter (or in "all horizontal directions") and about 3/16 of an inch in height, which dimensions fail to satisfy the

substantial defect criteria set forth in the NYCDOT Highway Rules and NYC Administrative Code. Mr. Bellizzi states that the defect measured approximately 1¼ inch in diameter but provides no further information. Mr. Bellizzi's photographs depict three overlapping measuring tapes with no clear explanation.

In opposition to the defendant's motion, plaintiff Hutchinson proffers photographs of the accident site and, like the defendant, he proffers his own deposition testimony and the testimony of Ms. Gordon, Mr. Whyte and Mr. Brownshin. Mr. Hutchinson proffers his uncertified hospital records and unsworn findings of Dr. Mitchell Zeren. The inadmissibility of the hospital records and Dr. Zeren's findings is not dispositive to the extent that this is not a motion on threshold grounds.

Plaintiff Hutchinson proffers excerpts of his deposition testimony wherein he states that he was walking to the supermarket when his right foot got caught on a "metal thing" causing him to fall on his shoulder. Mr. Hutchinson testified that the screw should have been removed after the sidewalk was installed.

The plaintiff cites Mr. Whyte's deposition testimony wherein the maintenance worker states that he first observed the metal protrusion while he was shoveling the sidewalk in January 2010, approximately nine months after the plaintiff's accident. The shovel struck the metal protrusion that allegedly caused the plaintiff's fall.

Ms. Gordon, the defendant's Director of Housing Development, acknowledged that when she learned of the plaintiff's case upon receiving the summons and complaint, she neither inspected the sidewalk nor inquired whether any employee had received complaints about the metal protrusion prior to the plaintiff's accident.

In a footnote, the plaintiff states that he annexed photographs that the defendant excluded from its motion papers. One of the 11 photographs identifies the protruding screw's location on the sidewalk.

CONCLUSION

Defendant Sheridan Hill House Corp. ("Sheridan") moves for summary judgment on the grounds that the alleged defect was created by an independent contractor over which the defendant exercised no control; the alleged defect was trivial and is therefore not actionable; and it lacked actual and constructive notice. To establish lack of notice, the defendant proffers the affidavits of Mr. Whyte and Mr. Brownshin, its maintenance workers who cleaned, swept and shoveled the sidewalk on a daily basis and never observed nor received complaints regarding the metal protrusion. In her affidavit, Ms. Gordon, the defendant's Housing Development Director, states that she never observed the alleged sidewalk defect prior to the plaintiff's accident. Ms. Gordon instructed the defendant's regional and facility directors to inspect the sidewalk for the defect post-accident but their respective inspections yielded no results. Plaintiff Hutchinson proffers no rebuttal evidence. Although a trivial defect may be deemed a trap or snare (*Argenio v MTA*, 277 AD2d 165, *supra*), the Court finds that the defendant established that it lacked actual or constructive notice.


The defendants contend that the defect was trivial and not substantial to the extent that it measured 5/8 of an inch in diameter and approximately 3/16 of an inch in height. In opposition, Mr. Bellizzi, plaintiff Hutchinson's engineer, opined that the defect was substantial and not in compliance with NYCDOT Highway Rules and NYC Administrative Code, both of which define a "substantial defect" as "one inch or greater in all horizontal directions and 1/2" or more in depth." Mr. Bellizzi

submits that the defect measured at “approximate 1¼ inch diameter” but provides no measurement of the defect’s depth or height from the sidewalk’s surface. The Court cannot determine that the defect was substantial or that the defendant failed to comply with NYC regulations in the absence of the second measurement.

After a careful review of the evidence, the Court finds that the defendant met its initial burden but the plaintiff failed to meet his shifting burden. Defendant Sheridan’s motion for summary judgment is accordingly granted. The defendant shall serve a copy of this Decision and Order with notice of entry upon the plaintiff within 20 days. This is the Decision and Order of the Court.

Dated: July 23, 2012

So ordered,



Hon. Lizbeth Gonzalez, AJSC

LIZBETH GONZALEZ