

Alvarez v New York Downtown Hosp.

2013 NY Slip Op 33726(U)

November 21, 2013

Supreme Court, Bronx County

Docket Number: 307756/2009

Judge: Norma Ruiz

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

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PART 22

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

Case Disposed
Settle Order
Schedule Appearance

-----X
ALVAREZ, MARILYN

Index No. 0307756/2009

-against-

Hon. NORMA RUIZ

NEW YORK DOWNTOWN

Justice.

-----X

The following papers numbered 1 to 4 Read on this motion, SUMMARY JUDGMENT DEFENDANT
Noticed on September 10 2012 and duly submitted as No. 1 on the Motion Calendar of 1-7-13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	2
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice:
Dated:

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 11 21 13

Hon. 
NORMA RUIZ, J.S.C.

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 307756/2009

MARILYN ALVAREZ

-against-

Present:
HON. NORMA RUIZ

NEW YORK DOWNTOWN HOSPITAL and
FC BEEKMAN ASSOCIATES, LLC

Defendants.

The following papers numbered 1 to 4 Read on this motion SUMMARY JUDGMENT
Noticed on 9/10/12 and duly submitted as No. 1 on the Motion Calendar of 1/7/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion
to:

Papers	Numbered
Notice of Motions and Affidavits Annexed.....	1- 2
Notice of Cross Motion and Answering Affidavits.....	3
Replying Affidavits	4
Memorandum of Law	

Other:

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendant New York Downtown Hospital's ("Hospital") motion for summary judgment is denied upon a review of the moving papers and opposition submitted thereto.

In this negligence action, the plaintiff seeks damages for injuries she sustained when she tripped and fell on the sidewalk of the defendant's property. The accident occurred on July 23, 2009 at approximately 6:45 pm. The plaintiff had visited the defendant's hospital for a doctor's appointment. Afterward, she left the building through the exit located at 170 Williams Street. According to the plaintiff, she descended the staircase and made a right turn on the sidewalk. She then tripped and fell on an uneven portion of the sidewalk that had a height differential of approximately one and to one a half inches. Plaintiff stated that there was scaffolding over the

sidewalk due to ongoing construction and that the area was poorly lit. As a result of the accident, the plaintiff sustained a right distal tibial shaft fracture and a right distal fibular shaft fracture. Both fractures required open reduction and internal fixation. The plaintiff underwent additional surgical intervention to remove hardware.

Defendants move for summary judgment on various grounds. Movants cite Administrative Code of City of NY (“Administrative Code”) § 7-210 to argue that the location of the plaintiff’s accident was not a sidewalk, thus, she can not recover. They contend that the “slightly raised portion of pavement outside of New York Downtown Hospital was not part of the sidewalk because it was never intended to be used by pedestrians” (see defendants’ affirmation in support p. 6). Movants state that the raised pavement was originally part of a shrubbery bed and not a walkway because pedestrians could not walk through the shrubs. Prior to the plaintiff’s accident, the shrubbery had been in place for approximately 20 years. They conceded that the “slightly raised” edge that caused the plaintiff’s accident was part of the shrubbery bed which was present when the shrubbery was pulled out and the planter bed filled-in with concrete, at the defendants request. Movants further conceded that the edge of the planter had always been “slightly raised” compared to the surrounding concrete. In addition, movants assert that even after the shrubs were removed, the area was still not meant for use by pedestrians. According to the movants, the shrubs were removed to facilitate ongoing construction in the area. The scaffold surrounding the planter tapered off into a dead end. “Pedestrians would be unable to walk through the area without ducking through the scaffolding blocking it off and eventually they would reach a place where the scaffolding met the end of the building which was blocked off with nowhere to exit” (see defendants’ affirmation in support at p. 7). In support, defendant annexed photographs as Exhibit “R.”

The court notes that the photograph identified as B4 in Exhibit “R” contradicts the defendants’ allegation that a pedestrian would have to duck under a scaffold in order to walk on the area in question. In the picture, there is no such scaffold blocking access to this area.

The court finds no merit to this argument. First, contrary to the defendants’ suggestion, Administrative Code § 7-210 does not address a plaintiff’s right to recover damages for accidents that occur on a sidewalk. Instead, section 7-210 addresses the duty of a real property owner to maintain any abutting sidewalk in a reasonably safe condition. In addition, it sets forth the liability

of a real property owner who fails to maintain any abutting sidewalk in a reasonably safe condition.

Here, the location of the plaintiff's accident falls squarely within the definition of a sidewalk. "Although § 7-210 does not define the term 'sidewalk,' Administrative Code § 19-101(d) defines sidewalk as 'that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestirans'" (*James v. 1620 Westchester Ave., LLC*, 105 AD3d 1, 3 [1st Dept 2013]). The Appellate Division, First Department has held that in the absence of a definition in section 7-210, the definition of sidewalk in section 19-101(d) governs (*James, surpa*).

According to Administrative Code section 7-210 if the location of a plaintiff's accident was not part of the sidewalk, then the owner of the abutting property does not have a duty to maintain it in a reasonably safe condition. Such has been found to be the case, for instance, when an accident occurs within a city-owned tree well (see *Vucetovic v. Epsom Downs, Inc.*, 10 NY 3d 517 [2008]) or a pedestrian ramp (*Ortiz v. City of New York*, 67 AD3d 21 [1st Dept 2009] [Court held pedestrian ramps were part of the curb] rev'd on other grounds 14 N.Y.3d 779 [2010]), or a sidewalk metal grate owned by the Metropolitan Transit Authority (*Storper v. Kobe Club*, 76 AD3d426[1st Dept 2010]). Even if the area where the shrubs were located was not intended for pedestrian use, the defendants can not escape liability here on the grounds that they did not have a duty to maintain the subject area because movants failed to produce any evidence that they did not own, maintain, negligently remove the shrubs or otherwise cause the alleged defective condition that resulted in the plaintiff's fall (see *Kleckner v Meushar 34th Street, LLC*, 80 AD3d 478 [1st Dept 2011]).

On the contrary, there is evidence that the shrubs were owned by the Hospital. The defendants' witness John Buscemi ("Buscemi") described them as the "hospitals shrubbery" (see Buscemi's deposition transcript at p. 14). It was the defendants who directed that the shrubs be removed and the planter filled in with concrete (see Buscemi transcript at p. 19). Moreover, the defendants conceded that the edge of the planter was always higher than the surrounding concrete and remain raised even after the planter was filled with concrete.

Alternatively, defendants allege that the plaintiff's accident is not actionable because the defect in question is trivial in nature.

It is well settled that on a summary judgment, the court must accept the opposing parties

factual allegations as true. According to the plaintiff, her accident occurred at approximately 6:45p.m. as she was exiting the Hospital. At that time, it was raining and while some daylight remained the plaintiff described the natural light as gloomy, and the lighting conditions under the scaffold were dim additionally, she was holding an opened umbrella. While the plaintiff could not estimate the height differential between the edge of the planter and the surrounding sidewalk, defendants state that the measurement is one and a half inches.

The Court of Appeals explained in *Trincere v. County of Suffolk*, “there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable. . . whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (90 NY2d 976, 977 [1997][citations omitted]). The Court cautioned “a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable. Instead, the court should examine the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the “time, place and circumstance” of the injury (*id*).

Given the allegations of poor lighting and weather conditions, the court finds that it can not hold the alleged defect trivial as a matter of law. It is a question of fact that must be decided by a jury.

Lastly, the defendants argue the complained of defect was open and obvious and thus not actionable. Based on the facts of this case, the court find that the defendants did not meet their burden in establishing the one and a half height differential was an open and obvious condition.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: 11/21/13

Bronx, New York



HON. NORMA RUIZ, J.S.C.