Rivera v J. Nazzaro Partnership, L.P.
2014 NY Slip Op 31012(U)
April 2, 2014
Supreme Court, Suffolk County
Docket Number: 11-30681
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 11-30681
CAL. No. 13-01125OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 10-9-13
ADJ. DATE 12-17-13
Mot. Seq. #002 -MG; CASEDISP

MILAGROS RIVERA,

Plaintiff,

- against -

J. NAZZARO PARTNERSHIP, L.P. and SHORE DRUGS, INC.,

Defendants.

COHEN & JAFFE, LLP
Attorney for Plaintiff
2001 Marcus Avenue, Suite W 295
Lake Success, New York 11042

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, PENDER & KOEHLER, P.C.
Attorney for Defendants
6851 Jericho Turnpike, Suite 250
Syosset, New York 11791

Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 15 ; Replying Affidavits and supporting papers 16 - 17 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant J. Nazzaro Partnership, L.P. ("Nazzaro") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint is granted.

Plaintiff commenced this action to recover for injuries she allegedly sustained on July 20 2011, at approximately 3:00 p.m., in the parking lot outside of 30 Main Street, Bay Shore, in the Town of Islip. Plaintiff alleges that as she left the pharmacy located on said premises, and entered the parking lot, she was caused to trip and fall, sustaining injuries.

Defendant Nazzaro now moves for summary judgment dismissing the complaint. In support of the motion defendant submits, *inter alia*, its attorney's affirmation, the pleadings, plaintiff's verified bill of particulars, the deposition transcript of the plaintiff, the deposition transcript of James J. Nazzaro, as a witness for the defendant, the deposition transcript of Areli Fuentes, as a nonparty witness, and three photographs. In opposition, plaintiff submits her attorney's affirmation, the affidavit of the plaintiff, sworn to November 12, 2013, and the affidavit of Jacques P. Wolfner, P.E., sworn to November 13, 2013. This action was discontinued as to the defendant Shore Drugs, Inc.

4-7-14

Plaintiff testified that she was involved in an accident on July 22, 2011 (the correct date is July 20, 2011), at approximately 3:00 p.m. at a pharmacy on Main Street in Bay Shore. She drove there with Ariel Fuentes, a fifteen year old from her church who was staying with her for two days. She was going there to fill a prescription she had gotten from her doctor. They parked in the lot behind the pharmacy and walked around to the front entrance. They did not have her prescription and they left after five minutes using the back door of the pharmacy. The weather was fine. As she went out her right foot got stuck on something on the sidewalk and she fell in the parking lot. Ms. Fuentes was behind her when she fell. She fell 6 or 7 feet from the back door of the pharmacy. The sidewalk was cement. She walked straight, looking forward and did not look down. She did not see what she tripped on. She fell on her left side and her left arm broke. She did not see, and could not identify what caused her to fall, she only knew that her foot caught on something and she fell between two cars in the parking lot. She was on the ground for about 10 minutes when the ambulance arrived. After her first surgery, she went back to the parking lot when they took photographs. They had to take photographs of where she said she had fallen. She had not seen it before that day.

Areli Fuentes appeared as a nonparty witness. She was 15 years old on the date of her examination. She had known the plaintiff, through her church, since she was six years old. She had slept over at plaintiff's apartment the night before, and had accompanied plaintiff the next day when she went to the pharmacy. They entered the pharmacy through the back door. Plaintiff's prescription was filled and they left after 15 to 20 minutes by the rear exit. The walkway which led to the parking lot was red in color, which eventually turned to the grayish color of cement. She walked slightly behind the plaintiff. The incident occurred 10 to 12 feet from the back entrance. They were not looking down as they walked, they were looking straight ahead. Plaintiff fell at the edge of the red pavement, there was a curb where the sidewalk met the blacktop of the parking lot. Plaintiff fell on her left side, her arm struck first and then the rest of her body. A gentlemen waiting in a car called 911. She accompanied the plaintiff to the hospital in the ambulance.

James J. Nazzaro appeared as a witness on behalf of the defendant Nazzaro. He testified that he is the managing partner of the defendant, which is the owner of 30 East Main Street, Bay Shore. The brick paver walkway was installed after defendant purchased the property, but he could not recall the exact date. There were bushes along the edge of the walkway which were hand-watered by his employees. The property is currently leased to the Shore Drug pharmacy. He had various employees who would inspect the property overall, not just the pavers, from time to time. There was no strict schedule, it varied from time to time. He inspected the walkway after this action was initiated. In the area where the plaintiff alleges the accident occurred, there was a minimal height difference between the pavers and the cement of approximately one-half inch by his visual estimate. He was shown a photograph of the walkway and asked about patchwork to the cement on the right of the pavers. He testified that the patchwork was on the neighboring property. He further agreed that there was one paver, with a line through it, next to that patchwork. He did not know what caused what appeared to be a depression in one part of the pavers. He was not aware of anyone else ever falling on this walkway. The pavers were changed after this action was brought. Prior to the date of the accident, he had not received any complaints with regard to the condition of the walkway.

Plaintiff also submitted the affidavit of the plaintiff and the affidavit of Jacques P. Wolfner, P.E..

It is noted that, contrary to the claims of the plaintiff, the deposition of James J. Nazzaro as a witness on behalf of the defendant Nazzaro is admissible. The transcript was signed by the witness and, therefore, adopted as accurate by both the witness and the defendant. Furthermore, the plaintiff has not challenged the accuracy of the transcript (*see* ***Carey v Five Brothers, Inc***, 106 AD3d 938, 966 NYS2d 153 [2d Dept 2013]). The court also notes that the transcript was forwarded to the witness by the notary acting on behalf of the plaintiff. Thus, any explanation for the notary's failure to certify the transcript would be the responsibility of the plaintiff, since the defendant would have no control over the actions of said notary.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fshkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 528, 866 NYS2d 681 [2d Dept 2008]; *see* ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 823, 881 NYS2d 149 [2d Dept 2009]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence (*see* ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 823, 881 NYS2d 149; ***Noia v Maselli***, 45 AD3d 746, 747, 846 NYS2d 326 [2d Dept 2007]; ***Franks v G & H Real Estate Holding Corp.***, 16 AD3d 619, 620, 793 NYS2d 61 [2d Dept 2005]). " [A] plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (***Capasso v Capasso***, 84 AD3d 997, 998, 923 NYS2d 199 [2d Dept 2011]; ***Patrick v Costco Wholesale Corp.***, 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]; *see, also,* ***Dennis v Lakhani***, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]).

Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the facts and circumstances of the case (*see* ***Schiller v St Francis Hospital***, 108 AD3d 758, 970 NYS2d 241 [2d Dept 2013]; ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Sokolovskaya v Zemnovitsch***, 89 AD3d 918, 933 NYS2d 90 [2d Dept 2011]; ***Dery v K***

Mart Corp., 84 AD3d 1303, 924 NYS2d 154 [2d Dept 2011]). However, injuries resulting from trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip, are not actionable (*see* ***Sokolovskaya v Zemnovitsch***, *supra*; ***Shohet v Shaaya***, 43 AD3d 816, 844 NYS2d 317 [2d Dept 2007]). There is no minimal dimension test or per se rule, thus, to determine whether a defect is trivial as a matter of law, the 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 circumstance of the injury" (***Trincere v County of Suffolk***, *supra* at 978 [internal quotation marks omitted]; ***Sokolovskaya v Zemnovitsch***, *supra* at 92). There is, however, insufficient evidence submitted to resolve the motion on this issue.

Here, defendant established, prima facie, its entitlement to judgment as a matter of law by submitting, inter alia, a transcript of plaintiff's deposition testimony, demonstrating that plaintiff was unable to identify what caused her to trip and fall. Plaintiff, in fact testified that she walked straight, looking forward, did not look down, and she did not see what she tripped on (*see* ***Altinel v John's Farms***, 113 AD3d 709, 979 NYS2d 360 [2d Dept 2014]); ***Dennis v Lakhani***, *supra*; ***Patterson v Corner Rock Realty, Inc.***, 71 AD3d 969, 896 NYS2d 881 [2d Dept 2010]; ***Kaplan v Great Neck Donuts, Inc.***, 68 AD3d 931, 892 NYS2d 425 [2d Dept 2009], *lv denied* 14 NY3d 708, 900 NYS2d 730 [2010]). Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused the trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer conjecture (*see* ***Dennis v Lakhani***, 102 AD3d 651, 958 NYS2d 170; ***Alabre v Kings Flatland Car Care Ctr., Inc.***, 84 AD3d 1286, 924 NYS2d 174 [2d Dept 2011]; ***Manning v 6638 18th Ave. Realty Corp.***, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]). In addition, defendant established that it did not create a dangerous or defective condition, and did not have actual or constructive notice of the existence of any such condition for a sufficient length of time to discover and remedy it, as required in an action alleging premises liability (*see* ***Rizos v Galini Seafood Rest.***, 89 AD3d 1004, 933 NYS2d 703 [2d Dept 2011]). The installation of the pavers was inspected by employees of the defendant, and the area was inspected, if on a variable basis. No one had previously complained about any problem with the pavers.

In opposition, plaintiff failed to present competent evidence sufficient to raise a triable issue of fact. The affidavit submitted by plaintiff is a self-serving attempt to raise feigned issues of fact. Plaintiff went back two months later to the area where the accident occurred and claims that the area was in the same condition as when she fell and she could identify what caused her to fall. All of this despite the fact that she never looked down on the walkway and never saw what caused her to fall. As such, it is insufficient to raise a triable issue of fact (*see* ***Steinvaag v City of New York***, 96 AD3d 932, 947 NYS2d 536 [2d Dept 2012]; ***Nai Ren Jiang v Yeh***, 95 AD3d 970, 944 NYS2d 200 [2d Dept 2012]; ***Bolde v Borgata Hotel Casino & Spa***, 70 AD3d 617, 892 NYS2d 892 [2d Dept 2010]).

In addition, inasmuch as plaintiff did not know what caused her to fall, it would be speculative to assume that the alleged code violations raised by plaintiff's expert proximately caused plaintiff's fall (*see* ***Kaplan v Great Neck Donuts, Inc.***, 68 AD3d 931, 892 NYS2d 425; ***Denicola v Costello***, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007]). The expert's affidavit is also insufficient to raise any issue of fact. First, it is based on plaintiff's unsupported claim that the walkway was in the same condition on the day of his inspection as on the day of the accident. Second he claims, merely by visual inspection, and without checking the actual construction, that the depression in the walkway was due to "inadequate

manual compaction". Finally he ignores the fact that there was damage and patching to concrete immediately adjacent to the depressed pavers. This adjoining property is not owned by the defendant. Thus, the expert failed to consider that the depressed pavers could have been caused by the same event that caused the damage to the adjacent property's concrete or that it could have been caused by whoever did the patching. Based on these facts, the expert's affidavit is speculative and of no evidentiary value (*see* ***Constantino v Webel***, 57 AD3d 472, 869 NYS2d 179 [2d Dept 2008]).

In light of the foregoing, the defendant's motion for summary judgments is granted.

Dated: April 2, 2014

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION