NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

GARY CONSTANTINO,

Plaintiff,

MEMORANDUM DECISION/ORDER
Index No.: 301970/10

-against-

GLENMART LLC and BERTRAM M. GROSS,

Defendants.

HON. MARK FRIEDLANDER

Defendant, Glenmart LLC ("Glenmart"), moves for an order, pursuant to CPLR§3212, granting Glenmart summary judgment dismissing plaintiff's complaint and the cross-claim of defendant, Bertram M. Gross ("Gross"). Defendant Gross moves for an order, pursuant to CPLR§3212, granting Gross summary judgment dismissing plaintiff's complaint and the cross-claim of defendant Glenmart. The motions are consolidated for disposition and decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on March 27, 2009, as a result of the cave-in of a portion of the sidewalk around the property line of 5614 Broadway and 5616 Broadway, Bronx, New York,

In support of the motions, defendants submit a copy of the pleadings, transcripts of the deposition testimony of plaintiff, of defendant Gross, and of Mark Lipton ("Lipton")(a partner of Glenmart), as well as various photographs, the affidavit of Joseph Nicoletti (President of Joseph Nicoletti Associates, Professional Land Surveyors, P.C.), and the affidavit of defendant Gross.

In opposition to the motions, plaintiff submits plaintiff's affidavit and various

photographs. Defendant Gross also submits the affidavit of Gerald T. O'Buckley, a licensed professional surveyor.

Both defendants seek summary judgment on the ground that they did not cause or create the alleged hazardous condition and/or have actual or constructive notice thereof. Defendant Glenmart also asserts it neither owed nor breached any duty to plaintiff, as plaintiff's accident did not occur on Glenmart's property.

The facts, as culled from the pleadings, transcripts of deposition testimony, affidavits and exhibits submitted, are as follows: Plaintiff testified his deposition that, on Friday night, March 27, 2009, at exactly 10:30 P.M., he was standing on the sidewalk, between 5614 and 5616 Broadway, approximately three to four inches from the curb, when suddenly, without warning, the sidewalk caved in. Plaintiff fell up to his waist into the collapsed hole, which was approximately two feet deep. Plaintiff described the portion of the sidewalk that caved in as being hollow underneath. There was no water in the collapsed portion of the sidewalk and it had not rained that day or the day before. When asked to describe the spot where he fell, plaintiff testified as follows:

> Q. Before you went to stand on the spot where the accident happened what did it look like?
>
> A. It looked okay to me.
>
> Q. Were there any holes or cracks?
>
> A. No, I know the curb, the curb was pretty low, but I didn't see any actual big cracks or anything. I saw a little crack, but nothing wrong. But that place used to be flooded with a lot of water from time to time. It still does.

(Tr. pg. 46, lines 17 – 25, pg. 47, lines 2 – 6).

Plaintiff further testified that, before the accident happened, he had no way of knowing that the sidewalk was going to give way or collapse.

Lipton testified that Glenmart owns 5614 Broadway and Gross owns 5616, the adjoining property. Lipton works in the Benjamin Moore paint store located in the front of 5614 Broadway, five days a week, generally between 7:30 A.M. to 5:00 P.M. With respect to the sidewalk located in front of 5614 Broadway, he testified that it was in good condition, and that, for six months prior to plaintiff's accident, he did not notice any unleveling or unevenness on the sidewalk. He noticed that, after it rained, water would pool on the roadway, but not onto the curb or sidewalk.

Lipton further testified that, with respect to the sidewalk located in front of 5616 Broadway, he did not observe any holes in the sidewalk, or see any holes in the sidewalk abutting the curb at 5614 or 5616 Broadway. Lipton did not see any repair work done to the sidewalk in the front of either premises.

Gross testified that he managed the building located at 5616 Broadway. His responsibilities included collecting the rent once a month and taking care of any problems with repairs, which he either handles personally, or by hiring others. Approximately ten to fifteen years prior to plaintiff's accident, sometime in the early nineties, there had been some major repair work to the sidewalk. Other than this, he did not believe that any other major repair work was done to the sidewalk in front of 5616 Broadway, and he had never done any repair work to the curb in front of 5616 Broadway prior to plaintiff's accident.

The defendants have established a *prima facie* entitlement to summary judgment. The evidence shows that no pre-accident signs of a dangerous condition were visible on the surface of

the portion of the sidewalk that collapsed. Plaintiff testified that he never noticed any any actual big cracks. "I saw a little crack, but nothing wrong." Plaintiff contends that his observation as to the frequency of flooding at that sidewalk constitutes proof of constructive notice of a hazardous condition. However, this contention is mere speculation, unsupported by any expert testimony, and does not suffice to prove that the alleged flooding rendered the sidewalk subject to collapse or foreseeably dangerous.

The motions by both defendants for summary judgment are granted and plaintiff's complaint is dismissed. Having dismissed plaintiff's complaint on the grounds specified above, the Court need not address the contention of defendant Glenmart that the alleged hazardous condition was not located on the sidewalk abutting its own property.

The foregoing constitutes the Decision and Order of the Court.

Dated: 7/8/14

MARK FRIEDLANDER, J.S.C.