

Battista v 180 Hartsdale Owners, Inc.

2014 NY Slip Op 32922(U)

June 3, 2014

Supreme Court, Westchester County

Docket Number: 58731/2011

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----x
BARBARA BATTISTA,

Plaintiff,

Index No. 58731/2011

-against-

DECISION & ORDER

180 HARTSDALE OWNERS, INC. and TOWN OF GREENBURGH,

Defendant.

-----x
The following papers numbered 1 to 14 were read on defendant 180 Hartsdale Owners, Inc. ("180 Hartsdale") motion for summary judgment dismissing the complaint and defendant Town of Greenburgh's ("the Town") cross motion for summary judgment dismissing the complaint.

PAPERS NUMBERED

Notice of Motion/Affidavits/Exhibits _____	1-3
The Town's Partial Affirmation Opposition/Exhibits _____	4-5
Notice of Cross Motion/Affidavit/Exhibits _____	6-8
Plaintiff's Opposition to Motion and Cross Motion/Exhibits _____	9-10
180 Hartsdale's Opposition to Cross Motion/Exhibits _____	11-12
The Town's Reply Affirmations _____	13-14

Factual and Procedural Background

On November 17, 2010 at about 11:00 a.m., plaintiff tripped and fell on an uneven sidewalk gap while walking to her doctor's appointment. Her doctor's office was located at 180 Hartsdale Avenue, Hartsdale, NY.

In 2004, the Town constructed a new portion of the sidewalk in the area where plaintiff fell. The new construction was to allow for a pedestrian ramp off the sidewalk onto the street. According to Andrew Viviano, the Principal Engineering Technician for the Town, at the time of sidewalk installation there were no cracks in or misleveling of the sidewalk. Notably, pursuant to Greenburgh Town Code § 430-17 an adjacent landowner to a sidewalk installed by the Town is liable for any injury or damage cause by the landowner's failure to keep or maintain the walkway.

Plaintiff commenced this personal injury action on November 16, 2011 against the Town claiming negligent installation of the new sidewalk and against 180 Hartsdale the adjacent landowner claiming failure to keep the sidewalk in good repair. Issue was joined by 180 Hartsdale in March 2012 and by the Town on January 3, 2012.

180 Hartsdale now moves for summary judgment dismissing the complaint on the ground that the condition which caused plaintiff's fall was trivial, to wit, a one inch gap between two concrete slabs. Further, 180 argues that the gap was open and obvious and not inherently dangerous.

The Town cross moves for summary judgment dismissing the complaint on the ground that it did not create the condition which caused plaintiff's fall, that it had no prior written notice of the condition that caused plaintiff's fall and the condition was trivial.

In opposition plaintiff argues that the large gap between the two concrete slabs is dangerous. Further, the slabs are not level with each other. Plaintiff claims that both these issues caused her fall. Plaintiff argues that there are issues of fact regarding whether 180 Hartsdale failed to maintain the sidewalk since it could have filled the gap with concrete and whether the Town properly installed the sidewalk in 2004.

Discussion

The Court will address the motions in the order it deems most logical.

The Town's Cross Motion for Summary Judgment

CPLR §3212(a) authorizes the court to set a deadline for the submission of summary judgment motions. In pertinent part, it states the "court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." (See CPLR 3212[a]). Untimely summary judgment motions require leave of court on good cause shown. Courts have held that "good cause" for purposes of CPLR §3212(a) requires "a satisfactory explanation for the untimeliness- rather than simply permitting meritorious, nonprejudicial filings, however tardy." (*Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 [2004]; see also *Ripepe v. Crowne Equipment Corp. et al.*, 300 A.D.2d 647, 752 N.Y.S.2d 890 [2nd Dept 2002]; *Surace v. Lostrappo*, 176 Misc.2d 408, 410, 673 N.Y.S.2d 543, 544 [1998])["Good cause is a written expression or explanation by the party or his legal representative evincing a viable, credible reason for delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement."]. "No excuse at all, or a perfunctory excuse, cannot be 'good cause'." (*Brill v. City of New York*, supra at 652). The language of the statute "reflects a legislative policy determination that 'leave' must be sought prior to the filing of a belated motion and thus necessarily prior to the court's consideration of the merits of the motion." (*John v. Bastien*, 178 Misc.2d 664, at 666 [N.Y.City Civ. Ct., 1998][emphasis added]).

Here, the Trial Readiness Order stated that all summary judgment motions shall be made within 60 days of the filing of the Note of Issue. The Note of Issue was filed on September 9, 2013. The Town made its cross motion for summary judgment on January 27, 2014 well past the expiration of the 60 day period. Notably, the Town offers no explanation for its delay in filing the cross motion. Accordingly, the Town's motion for summary judgment dismissing the complaint is DENIED.

180 Hartsdale's Motion for Summary Judgment

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

With respect to the 180 Hartsdale's contention that the defect was trivial, generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the peculiar circumstances of each case and presents a question of fact for the jury. (See *Mishaan v. Tobias*, 32 A.D.3d 1000, 821 N.Y.S.2d 640 [2nd Dept 2006]). Here the defect appears to be one inch wide and approximately ½ inch high. While it is true that the Second Department in *Hawkins v. Carter Community Housing Development Fund, Corp.*, 40 AD3d 812 [2nd Dept 2007]), found that the gap between two adjacent sidewalks slabs of 1 1/4 inch and 1 ½ inch deep and one inch wide was trivial, the Court specifically noted that the slabs in *Hawkins* were level. Here, based upon the photographs submitted

to the Court there is no question that the slabs are not level. Thus, whether the one inch gap and the misleveling is a dangerous defect is a question for the jury (see *Portanova v. Kantlis*, 39 A.D.3d 731, 732 [2nd Dept 2007]).

Further, at his deposition, Andrew Viviano the Principal Engineering Technician for the Town, testified that when the sidewalk project was completed in 2004 there were no cracks or misleveled sidewalk. However, when reviewing the photographs of the area where plaintiff fell, Mr. Viviano testified those pictures did not depict the construction project as it looked in 2004. Viviano specifically stated that the "gap" that is shown in the picture "would not and could not have existed" at the time the construction project was completed. Viviano stated that in 2004 the concrete slabs would have been flush and touching each other. In support of its motion for summary judgment, 180 Hartsdale submitted the affidavit Stanley H. Fein, P.E. In his affidavit, Mr. Fein stated that he disagreed with Mr. Viviano's opinion that the sidewalk was different when installed in 2004. Mr. Fein claims that the joint between the two sidewalks is an expansion joint which if of a normal size which was either not filled in or the filling was removed leaving a 1 inch gap. Thus, there is an issue of fact regarding whether the gap, if found to be a defect, was created by the Town or due to 180 Hartsdale's failure to maintain the sidewalk.

Accordingly, 180 Hartsdale's motion for summary judgment dismissing the complaint is DENIED.

The parties are directed to appear in the Settlement Conference Part on July 23, 2014 at 9:30 a.m. room 1600 for further proceedings.

Dated: White Plains, New York
June 3, 2014


HON. WILLIAM J. GIACOMO, J.S.C.

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