

Canales v The R.C. Church of the Holy Spirit

2015 NY Slip Op 30174(U)

January 21, 2015

Supreme Court, Bronx County

Docket Number: 20311/12

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

LESLIE A. CANALES,

Plaintiff,

-against-

Index No. 20311/12

DECISION AND ORDER

THE ROMAN CATHOLIC CHURCH OF THE HOLY
SPIRIT and THE CITY OF NEW YORK,
Defendants.

HON. SHARON A. M. AARONS, J.S.C.:

Defendant Roman Catholic Church of the Holy Spirit moves for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff submits written opposition.¹ The motion is granted.

On August 14, 2011, the plaintiff was allegedly injured when she tripped and fell on the public sidewalk in front of defendant's premises at 1960 University Avenue in Bronx County. Plaintiff identified the defect as a portion of a sidewalk flag approximately ten inches from the curb line, which was raised approximately 1 ½ inches from the adjacent sidewalk flag.

In support of the motion, defendant submits the affidavits of Vincent Pici, P.E., dated October 9, 2013; the affidavit of Rev. Ricardo Fajardo dated October 11, 2013; four color photographs labeled Exhibits A through D, which were marked into evidence at the deposition of the plaintiff conducted on September 11, 2012; the unsworn, certified deposition transcript of plaintiff's deposition taken on September 11, 2012, with a cover letter of September 26, 2012, indicating that it was transmitted to the plaintiff's counsel; the summons, complaint, bills of

¹In a prior Order, defendant City of New York was granted summary judgment dismissing all claims against it.

particulars, and defendant's answer; 30 photographs of taken by letter Vincent Pici, P.E.; the curriculum vitae of Vincent Pici, P.E.; a flash drive containing a video of the sidewalk taken by Vincent Pici, P.E.; and the signed, certified deposition transcript of Carmen Reyes, defendant's witness.

It is undisputed that at her deposition, the plaintiff testified that she visited the scene of the accident with a secretarial employee of the plaintiff, who took photographs of the area. She was unable, however, at her deposition, to actually identify any sidewalk defect depicted in the photographs. She testified variously, with respect to the photographs, that "[it] looks like a sidewalk, but it's pretty dark;" that she "really can't tell" if the photograph depicted the area where she fell; "[i]t looks like a sidewalk to me, but I can't be sure this is – what area exactly this is;" and, "[i]t's hard to see in this photo." In response to defendant's question that "you can't say one way or the other whether this photo shows where your accident occurred," she answered, "Correct."

The affidavit of Rev. Ricardo Fajardo states that the sidewalk is in the same condition at the time of his affidavit, as it was at the time of the accident. Similarly, the deposition testimony of Carmen Reyes, defendant's employee, indicates that the sidewalk is unchanged from the time of the accident, and has not been repaired or altered in any way. The affidavit of Vincent Pici, P.E., states that he inspected the entire sidewalk for two hours on September 24, 2013, and inspected every sidewalk flag. He photographed every expansion joint (i.e., each space between sidewalk "flags"), and recorded a video of the entire sidewalk in front of 1960 University Avenue. He located no height differential of 1 ½ inches, and in fact found, to the contrary, that no appreciable height differential existed between any of the sidewalk flags.

In opposition, plaintiff submits additional photographs of the sidewalk, as well as the affidavit of Jennifer Rodriguez, an employee of the defendant, who states that on January 2, 2012,

she photographed and observed an area which the plaintiff identified as the place where the accident occurred. She described the defect as an unlevelled portion of a sidewalk flag 9.5 inches from the curb, 4 inches in length, 2 inches in width, and 1.5 inches in depth. Plaintiff also submits the affidavit of her mother, Gloria Canales, who states that she also was taken by her daughter to an area identified as the location of the accident, and that she also observed a defect 4 inches in length, 2 inches in width, and 1.5 inches in depth.

New York City Administrative Code § 7-210, entitled "[l]iability of real property owner for failure to maintain sidewalk in a reasonably safe condition," imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk. (*Collado v. Cruz*, 81 A.D.3d 542, 917 N.Y.S.2d 178 [1st Dept 2011]). In order to recover damages, an injured party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury. (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969, 646 N.E.2d 795, 622 N.Y.S.2d 493 [1994].) "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]). "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." (*Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]).

"[N]ot every injury allegedly caused by an elevated sidewalk slab need be submitted to a jury, and a trivial defect on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes or trip on a raised projection, is not actionable." (*Riser v. New York City Housing Authority*, 260 A.D.2d 564, 688 N.Y.S.2d 645 [2d Dept. 1999]).

The court may determine by examining the photographic and other evidence that the alleged defect is trivia, and grant summary judgment to the defendant. (*Hymanson v. A.L.L. Assocs.*, 300 A.D.2d 358, 358, 751 N.Y.S.2d 756 [2nd Dept 2002]). Here, the testimony of defendant's expert engineer, who measured and photographed the entire sidewalk, and provided photographs and a video, establishing that no defect existed. (*Corrado v. City of New York*, 6 A.D.3d 380, 773 N.Y.S.2d 894 [2d Dept. 2004] ["Contrary to the appellants' contention, the photographs of the accident site submitted in support of their motion for summary judgment were insufficient to demonstrate, as a matter of law, that the defective sidewalk condition which caused the plaintiff's fall was too trivial to be actionable."])

In opposition, the plaintiff has failed to provide any competent evidence sufficient to raise an issue of fact. The plaintiff's own testimony of a 1 ½ height differential is flatly contradicted by the photographic evidence. The plaintiff was unable to authenticate the photograph's taken by her attorney's employee. (*Saks v. Yeshiva of Spring Valley, Inc.*, 257 A.D.2d 615, 684 N.Y.S.2d 560 [2d Dept. 1999][unauthenticated photographs are not competent evidence].) Further photographs submitted by plaintiff's counsel on the present motion are also unauthenticated, and in any event, merely purport to depict several areas where the sidewalk is not level. They do not contain a ruler or any other frame of reference, and are not supported by expert testimony.

To the extent that plaintiff relies on the affidavit of her attorney's former employee, her testimony is based on hearsay (i.e., plaintiff's out of court statement that the place identified was the accident location.) Moreover, neither this witness, nor plaintiff's mother, in her separate affidavit, explained how they arrived at the conclusion that the area contained a defect 4 inches in length, 2 inches in width, and 1.5 inches in depth. Neither witness stated that they employed a ruler to measure the area, and if they did so, how they effectuated these measurements.

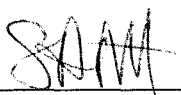
Plaintiff, as the opponent of summary judgment, "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief." (*American Motorists Ins. Co. v. Salvatore*, 102 A.D.2d 342, 476 N.Y.S.2d 897 [1st Dept. 1984]; *see also, Armstrong v. Sensormatic/ADT*, 100 A.D.3d 492, 954 N.Y.S.2d 53 [1st Dept. 2012]). Here, no photograph submitted by the plaintiff (or defendant), authenticated or otherwise, depicts an actionable defect, let alone a 1.5 inch height differential. The affidavits of the plaintiff's witnesses – a former employee of her attorney's office, and her mother – purport to have been taken to the location of the accident by the plaintiff, and to have observed the defect. However, their testimony is based on hearsay, and in any event, neither witness has actually identified the specific location of this alleged defect, nor explained how they arrived at their calculation as to the dimensions of the alleged defect. In short, defendant has documented the condition of the entire sidewalk by expert testimony and photographic evidence, and plaintiff has failed to identify the location of any actionable defect, or substantiate her claim that a height differential of 1.5 inches existed at any part of the sidewalk.

Accordingly, the motion is granted. It is accordingly

ORDERED that the complaint is dismissed, and it is

ORDERED that the defendants shall serve a copy of this ORDER on the plaintiff with Notice of Entry thereon.

Dated: January 21, 2015



SHARON A. M. AARONS, J.S.C.