Del La Cruz v El Mundo Super Market, Inc.
2015 NY Slip Op 30251(U)
February 5, 2015
Supreme Court, Queens County
Docket Number: 5837/2013
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

FAUSTA DE LA CRUZ,

Plaintiff,

- against -

EL MUNDO SUPER MARKET, INC. AND TOMAS RODRIGUEZ,

Defendants.

Index No.: 5837/2013

Motion Date: 11/26/14

Motion No.: 10

Motion Seq.: 1

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The following papers numbered 1 to 17 were read on this motion by defendant, EL MUNDO SUPER MARKET, INC., for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendant and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 8
Affirmation in Opposition-Affidavits-Exhibits	9 - 14
Reply Memorandum	15 - 17

This is an action for damages for personal injuries sustained by the plaintiff, Fausta De La Cruz, on May 23, 2010, when she purportedly slipped and fell on the public sidewalk abutting the premises known as El Mundo Supermarket, Inc., located at 42-16 Junction Boulevard, Queens County, New York. In her verified bill of particulars dated June 21, 2013, plaintiff asserts that the defendant was negligent in causing, permitting or allowing a dangerous and defective condition on the driveway owned, operated, and maintained by the defendant. Plaintiff claims that the defendant had constructive notice of the dangerous condition as the defective condition was visible, apparent, and existed for a sufficient length of time prior to

the accident that the defendant had sufficient time to notice and remedy the dangerous condition.

The plaintiff commenced this action by filing a summons and complaint on March 27, 2013. Issue was joined by service of the answer of defendant El Mundo Super Market, Inc., dated June 6, 2013. Defendant, Thomas Rodriguez is in default. Plaintiff filed a Note of Issue on June 24, 2014. The matter is presently scheduled on the calendar of the Trial Scheduling Part for May 12, 2015.

The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiff's complaint. Defendant asserts that they have satisfied their prima facie burden of proof on the motion because the plaintiff, in her pre-trial testimony, failed to identify a particular dangerous or defective condition which existed on the sidewalk and purportedly caused her to trip and fall.

In support of the motion, the defendant submits an affirmation from counsel, David I. Robinson, Esq., a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of the plaintiff, Ms. De La Cruz; a copy of the transcript of the examination before trial of Carmen Vizcaino on behalf of El Mundo Supermarket; and photographs identified at plaintiff's examination before trial depicting the sidewalk where the plaintiff is alleged to have fallen.

The plaintiff, age 63, a home health care attendant, testified at an examination before trial on March 28, 2014. She stated that she was involved in an accident on May 23, 2010 at 8:30 a.m. She was on her way to a client's home and was walking on the sidewalk to the bus stop on Junction Boulevard. As she was walking she tripped and fell in front of El Mundo Supermarket. She described the area where she fell as "a little lifted." She stated that the area where she fell was a driveway leading to the store's parking lot and there was a slope to the sidewalk in that area. When asked through the interpreter if she knew what caused her to fall she stated that she did not know, she said "I just fell. I just fell there, I didn't notice. I know that when I fell there, when I fell right there, I didn't look downward." She was asked if her foot got caught on anything and she answered, "I only know that I fell. And then from that moment on I don't remember anything." She did not know if there was a height differential between two sidewalk blocks where she fell. She stated that she did not notice any garbage or debris on the

ground. She was taken by ambulance to Elmhurst Hospital where she had an open reduction to repair a fracture to her left leg.

Carmen Vizcaino testified that he is employed as an administrator at El Mundo Supermarket. She did not learn about plaintiff's accident until she received a letter from her attorneys. She then spoke to two employees who worked on the day of the accident and neither of them knew anything about it. She stated that no accident report was prepared. She stated that there is a driveway off of Junction Boulevard owned by El Mundo which is used to deliver merchandise to the store. She stated that in 2007 the driveway was repaved. Since that time she never received any complaints about the condition of the driveway or the sidewalk and was not aware of any prior accidents at that location. She stated that she walks on the area where the accident occurred on a daily basis and has not observed any cracks, defects, or raised flags. She stated, based upon her own inspection, that the sidewalk is flat and level in that area.

Defendant contends that the plaintiff failed to testify to a dangerous condition on the sidewalk and also failed to identify a dangerous condition on the photograph which she identified. Defendant asserts that plaintiff cannot establish what caused her to fall and thus cannot establish that a dangerous condition existed or that any alleged negligence of the defendant was a proximate cause of her accident. Defendant claims that the Second Department has consistently held that where a plaintiff is unable to identify the case of a fall the trier of fact would have to engage in speculation on the issue and summary judgment would be warranted (citing Kletke v GOS Corp., 51 AD3d 875 [2d Dept. 2008]; Pluhar v Town of Southampton, 29 AD3d 975 [2d Dept. 2006]). Defendant claims that there is no testimony from the plaintiff identifying any specific defect stating only that the sidewalk was lifted. With respect to notice, defendant states that there is no evidence that defendant created a defective condition or that the defendant had actual or constructive notice of a defective condition.

In opposition, plaintiff's counsel, Keith Gilman, Esq., states that the motion should be denied as there is testimony in the record indicating that the plaintiff knows what caused her to fall and further, plaintiff submits an expert affidavit which raises question of fact as to whether the sidewalk in question was reasonably safe.

In support of the opposition, the plaintiff submits a copy of the plaintiff's testimony taken on November 8, 2010 at her 50-h hearing. At the hearing the plaintiff testified that on the

morning of the accident she was going to the bus stop and was walking on Junction Boulevard near 43rd Street. She was asked to describe the problem with the sidewalk where she fell she stated, "I don't know. I know that I fell. I know that it's not very level." She stated that it seemed like there was a little hill and that some part of the sidewalk was higher than the other. She stated that she lost her balance and it seems like it was because there was a problem with the sidewalk. She didn't notice any grease, oil or debris where she fell. She stated that she was just walking, the sidewalk wasn't level and she fell.

Counsel asserts that the photograph identified by the plaintiff shows the unevenness of the sidewalk. Plaintiff's counsel asserts that he also served the defendant with notice in the response to defendant's combined demands dated August 26, 2013 that he intended to call engineer Scott Silberman to testify as to irregularities in the sidewalk. Counsel submits the report of Mr. Silberman, a physical engineer who inspected the sidewalk in question in September 2010. The engineer states that he measured the slope of the sidewalk in the area where the plaintiff fell. He found that at one specific point, the sidewalk slopes down at 11% and then suddenly slopes back up at 6%. He states that in his opinion that is a drastic and arbitrary change in grade and direction change, he states that the change in slope constitutes a violation of the New York City Administrative Code and Highway Rules and created a sidewalk that was not in reasonably safe condition.

Plaintiff states that as the plaintiff's examination before trial describes the cause of the fall the defendant has failed to establish, prima facie, entitlement to judgment as a matter of law with respect to the causation of the accident. Further counsel asserts that the plaintiff's examination before trial as well as her 50-h testimony specifies the cause of the accident as, "like a hill," and "not very level." Thus the plaintiff states that there is a question of fact as to the cause of her trip and fall accident. Further, plaintiff asserts that the sudden and arbitrary change in grade of the sidewalk found by the engineer in the longitudinal slope led him to believe that the sidewalk contained a substantial defect that was not reasonably safe. IN addition, the plaintiff alleges that the photographs submitted by the defendant show a "waviness" in the sidewalk. Counsel also asserts there is a question of fact as to whether the defendant in the three years between the replacement of the sidewalk and the plaintiff's accident should have discovered and remedied the defect in the sidewalk.

In reply, defendant asserts that there was no testimony at the plaintiff's 50-h hearing that provides any further evidence to support the plaintiff's claim that her fall on the sidewalk was due to a dangerous and defective condition. In addition defendant claims that the affidavit of the plaintiff's expert is not admissible for purposes of the instant motion because the plaintiff did not exchange a CPLR 3101(d) expert witness exchange with the defendant. Counsel claims that the defendant's response to disclosure naming Mr. Silberman as their expert does not comply with CPLR 3101(d) because it fails to disclose the sum and substance of the expert's opinion (citing Pellechia v Partner Aviation Enterprises, Inc., 80 AD3d 740 [2d Dept. 2011]). Further, counsel asserts that the Silberman affidavit only contains speculation as there is no proof that he analyzed the particular area where the plaintiff fell

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

This Court finds that the defendant has failed to meet its prima facie burden of proving entitlement to judgment as a matter of law in that the defendant's own proof raises an issue of fact. The courts have held that: "in a trip and fall case, a plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action, since, in that instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (Louman v Town of Greenburgh, 60 AD3d 915 [2d Dept. 2009]). Here, however, the plaintiffs deposition testimony and 50-h hearing testimony sufficiently identified the cause of her fall, testifying through an interpreter that she tripped on an area that was lifted up, not level, sloping and like a hill. Therefore, the defendant's application for summary judgment must be denied.

In addition, even if the defendant had made a prima facie case, this court finds that the affidavit of the plaintiff's expert delineating violations of the New York City Administrative Code raises a question of fact as to whether there was a drastic and arbitrary change in the grade of the sidewalk that may have

been a proximate cause of the plaintiff's trip and fall accident on the sidewalk. This court finds that the defendant was sufficiently apprised of the name, qualifications and subject matter of the expert's testimony in the plaintiff's response to demands for discovery and inspection such that he defendant was not prejudiced by the report of the expert submitted in opposition to the motion (see Rivers v Birnbaum, 102 AD3d 26 [2d Dept. 2012]).

Thus, construing the evidence in the light most favorable to the non-moving party and giving the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence, and for all of the above stated reasons, it is hereby,

ORDERED, that the defendant's motion for summary judgment dismissing the plaintiff's complaint is denied.

Dated: February 5, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.