Fatone v 965 Midland Ctr., LLC.
2015 NY Slip Op 30377(U)
February 23, 2015
Supreme Court, Bronx County
Docket Number: 305989/2011
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

X

SALVATORE FATONE and SALLY ANN FATONE,

Plaintiffs,

-against-

965 MIDLAND CENTER, LLC., A&A MAINTENANCE CALIFORNIA, INC., and A&A MAINTENANCE ENTERPRISE, INC., both individually and d/b/a "A&A MAINTENANCE",

Defendants.

X

DECISION/ORDER

Index No.: 305989/2011

The following papers numbered 1 to11 read on the below motions noticed on August 20, 2014 and August 29, 2014, and duly submitted on the Part IA15 Motion calendar of **November 20, 2014**:

Papers Submitted	Numbered
965 Midland's Affirmation in Support of Motion, with Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
965 Midland's Aff. In Reply, Exhibits	5,6
A&A's Affirmation in Support of Motion, with Exhibits	7,8
Pl.'s Aff. In Opp., Exhibits	9,10
965 Midland's Aff. In Opp.	11

Upon the foregoing papers, defendant 965 Midland Center, LLC ("965 Midland") moves for summary judgment, dismissing the complaint of the plaintiff Salvatore Fatone[1] ("Plaintiff"), and all cross-claims, pursuant to CPLR 3212(b). Plaintiff opposes the motion. Separately, defendant A&A Maintenance Enterprise, Inc. ("A&A"), moves for summary judgment, dismissing the complaint and all cross-claims, pursuant to CPLR 3212(b). Plaintiff and 965 Midland oppose the motion.

In the interest of judicial economy, these motions are consolidated and disposed of in the following Decision and Order.

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[1]Sally Ann Fatone is no longer a party to this action.

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I. Background

This action arises out of an alleged trip-and-fall accident that occurred on January 10, 2011, on the sidewalk abutting the premises located at 965 Midland Avenue in Yonkers, New York. At relevant times, the premises was owned by 965 Midland, and occupied by commercial tenant A&A. According to Plaintiff's bill of particulars, this accident occurred "approximately 300 feet from the intersection of Central Avenue, approximately five feet from the main entrance of 965 Midland Avenue, and approximately five feet from the curb, where the sidewalk was broken, raised, uneven and depressed."

At his deposition, Plaintiff testified that he had been living at 963 Midland Avenue for 25-30 years. On the date of this accident, Plaintiff was walking to a nearby convenience store, as he did regularly. His route to the store involved walking passed the "Midland Center" building, located at 965 Midland Avenue. Plaintiff testified that the building had been completed in 2007. When the building was completed, new sidewalks were installed. He walked by this area over 1,000 times previously without incident, and he never noticed a problem with the sidewalks. On the morning of his accident, Plaintiff had exited his house, turned left, and walked approximately ten steps. The accident occurred when Plaintiff's left foot caught something. Plaintiff sustained injuries when he fell down on his left knee and landed on his face.

Before being taken to the hospital, Plaintiff remained at the accident location for at least thirty minutes. He testified that he had never before seen a raised portion of the sidewalk while at the scene. Later, however, Plaintiff identified the cause of his accident as a raised or mis-leveled portion of the sidewalk that he discovered upon returning to the accident location with his brother. When asked how he knew that was the spot when he had never seen it before, Plaintiff stated "All I know is that I was walking and I fell in that general area, okay? That's being honest with you. I fell in that general area. I fell hard." Plaintiff did not know how long the raised or depressed portion of the sidewalk had been there. He made no previous complaints about the condition. Soon after the accident, Plaintiff's wife and daughter arrived at the scene. His daughter, Melissa, testified that she saw that the sidewalk was uneven where her father was walking, and Plaintiff pointed out this condition as he was lying on the ground. His wife, Sally Ann, also testified that Plaintiff pointed out where he fell, although she conceded that since she

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wasn't there, she could not indicate herself the exact spot that caused the accident.

Joseph Deglomini testified on behalf of 965 Midland. He explained that 965 Midland is a real estate holding entity that owns the property at the accident location. The premises was originally an empty plot of land. Over the next few years, an office building was constructed, along with a sidewalk. Upon completion of the sidewalk in either 2006 or early 2007, the City of Yonkers inspected the sidewalk in order to grant a Certificate of Occupancy to the bulding. At the time of this alleged incident, the office building was occupied by tenant A&A. Mr. Deglomini testified that he conducted monthly inspections of the premises, including the sidewalk, and never noticed any settling on the sidewalk in front of the building. He was unaware of prior complaints or accidents. No work was performed on the sidewalk after its original installation in 2006 through the date of this accident.

965 Midland also submits an affidavit from Thomas E. Cerchiara, a licensed land surveyor. He states that, according to a survey he conducted in 2013, the accident location occurred outside the deed line of the property owned by 965 Midland Avenue, and within the City of Yonkers' right of way.

965 Midland now moves for summary judgment, arguing that they breached no duty owed to Plaintiff. The applicable local law, Yonkers City Code §103-1, imposes no tort liability upon landowners for failure to maintain allegedly defective public sidewalks. 965 Midland argues that there is no evidence that they created this condition or caused it to exist because of some special use of the sidewalk. In addition, they argue that the accident occurred outside of their property line. If the Court were to find that the local law imposed tort liability, the moving defendants contend that they had no actual or constructive notice of this condition. Alternatively, 965 Midland argues that Plaintiff has not sufficiently identified the cause of his accident, which is fatal to his claim.

In opposition to the motion, Plaintiff initially argues that the defendant's expert affidavit must be disregarded since he was not properly disclosed during the course of discovery. Plaintiff also submits an affidavit from a title insurance underwriter, disputing the defendant's claim that the sidewalk was not a part of their property. Plaintiff agrees that 965 Midland can only be liable for a defective sidewalk if there is a statute that imposes liability, or if the defendant

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created the condition. Plaintiff contends that Yonkers City Code 103-1 actually imposes liability in tort for landowners who "created the defective condition." Regarding that issue, Plaintiff submits an affidavit from a sidewalk expert, who opines that this sidewalk was not installed properly and was "missing an essential ingredient in its construction: crushed bluestone" which would have prevented the mis-leveling/settling condition that occurred here. Plaintiff also contends that the defendant's arguments regarding sidewalk maintenance are "disingenuous" since the defendant subsequently repaired the defective portion of the sidewalk in the months following this accident. Moreover, 965 Midland has not established a lack of actual or constructive notice. Finally, Plaintiff contends that he adequately identified the mis-leveled sidewalk as the cause of his accident. Although he did not know precisely what caused him to fall, the circumstantial evidence, photographs, and testimony from fact witnesses demonstrate a non-speculative causal link between this accident with the alleged defect.

In reply, 965 Midland contends, *inter alia*, that the testimony of the alleged "fact witnesses" does not create a triable issue of fact since they did not witness this accident and therefore their accounts are not probative. The defendant also notes that Plaintiff's expert affidavits must be disregarded since they were not disclosed during the course of pre-trial discovery, and in any event, are conclusory and insufficient to raise an issue of fact. 965 Midland also argues that Plaintiff "seeks to apply incorrect law for sidewalk defects." Notice is not a basis for liability under these circumstances, and 965 Midland did not create the allegedly hazardous condition.

Separately, defendant A&A moves for summary judgment, dismissing the complaint and all cross-claims. A&A, like 965 Midland, argues that the complaint must be dismissed because Plaintiff could not identify the cause of his accident. Alternatively, A&A argues that it cannot be found negligent since (1) the City of Yonkers, the municipal owner of the sidewalk, is the entity ultimately responsible for incidents involving the sidewalk's use, and (2) A&A, as a commercial tenant, was not responsible for the structural integrity of the sidewalk. The lease agreement at issue ("Lease") requires the landlord, 965 Midland, to conduct any "structural repairs" of the premises. A&A submits the deposition testimony of its Vice President of Operations, Eric Wheeler, who testified that A&A performed no maintenance or repairs on the

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sidewalk and did not otherwise create any hazardous condition.

Plaintiff opposes A&A's motion with similar arguments to 965 Midland's motion. Plaintiff also contends that the lease rider ("Rider"), at paragraph 42, requires A&A to make all repairs and replacement to the premises. Defendant 965 Midland opposes A&A's motion on the basis of this Rider provision, and maintains that its cross-claims for contractual indemnification should not be dismissed. 965 Midland requests the Court to "search the record" and grant them summary judgment on these cross-claims, since A&A was obligated to maintain the sidewalk pursuant to the Lease and Rider.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

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III. Applicable Law and Analysis

To impose liability upon a landowner in a trip and fall action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). A defendant is charged with having constructive notice of a defective condition when said condition is visible, apparent, and exists for a sufficient length of time (*Gordon v American Museum of Natural History*, 67 N.Y.2d 836 [1986]). The notice required must be more than general notice of any defective condition. Id. The law requires notice of the specific condition alleged at the specific location alleged. *Id.* With respect to an abutting public sidewalk, generally, the owner or one in possession of property will not be liable to a pedestrian injured by a defective condition on the sidewalk unless (1) the owner or possessor created the dangerous condition, or caused the condition to occur because of some special use, or (2) a statute or ordinance placed the obligation to maintain the sidewalk upon the owner or possessor (*see Montalvo v. Western Estates*, 240 A.D.2d 45 [1st Dept. 1998][internal citations omitted]; *Taubenfeld v. Starbucks Corp.*, 48 A.D.3d 310 [1st Dept. 2008]; *Dalder v. Incorporated Village of Rockville Centre*, 116 A.D.3d 908 [2nd Dept. 2014]).

This Court agrees with the moving defendant that the ordinance at issue does not explicitly impose tort liability upon the landowner. Yonkers City Code §103-1 states, in pertinent part, "It shall be the duty of the owner of any lot or piece of land in the City to keep the sidewalks in front of the premiss owned by him at all times in good repair and in a safe condition for public use." It is settled that, "[a] statute, ordinance or municipal charter will not, however, impose tort liability upon abutting owners based on their negligent conduct unless the language thereof not only charges the landowner with a duty but also specifically states that if the landowner breaches that duty he will be liable to those who are injured as a result of a sidewalk defect or unsafe condition." (*Montalvo,* 240 A.D. at 47, citing (*Kiernan v Thompson*, 137 AD2d 957, 958; *Jacques v Maratskey*, 41 AD2d 883.) Yonkers City Code §103 does not contain such a provision. (*See Rodriguez v. City of Yonkers*, 106 A.D.3d 802 [2nd Dept. 2013]; *Bruh v. City of Yonkers*, 269 A.D.2d 346 [2nd Dept. 2000]). The question to be determined is therefore whether

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there is an issue of fact as to whether the defendants created the allegedly defective condition or caused it to occur because of some special use (*Rodriguez, supra*).

Even without considering the conclusory affidavit of its land surveyor, 965 Midland carried its initial burden of demonstrating that they did not create the defective condition that allegedly caused this accident. Mr. Deglomini testified that his company hired a contractor to install the sidewalk when the premises was constructed in 2006 or early 2007. Inspectors from the City of Yonkers inspected the sidewalk upon completion in order for the building to obtain a Certificate of Occupancy. He was unaware of any violations issued as a result of this installation, and unaware of any repairs being performed on the sidewalk prior to this accident. The mere fact that 965 Midland installed the sidewalk does not lead to an inference that they created this defective condition. In addition, 965 Midland established that it did not make "special use" of the sidewalk, as there is no indication that the defendant "derived a special benefit unrelated to the public use or different from that conferred on the public at large" (*Lozano v. 979 Third Ave. Assoc., Inc.*, 24 Misc.3d 144 [A] [App. Term, 1st Dept. 2009]; *Vrabel v. City of New York*, 308 A.D.2d 443 [2nd Dept. 2003]).

Finding that the Yonkers City Code does not impose tort liability in this matter, it is unnecessary to address 965 Midland's arguments regarding actual or constructive notice. Moreover, the Court need not address 965 Midland's alternate argument that Plaintiff failed to adequately identify the cause of his fall.

In opposition, Plaintiff failed to raise a genuine issue of fact. Plaintiff's counsel agrees with the moving defendant that "it is only liable for a defective sidewalk if there is a statute which imposes liability, or if said defendant created the condition" (Aff. In Opp. to 965 Midland, at 13). Plaintiff then argues that the statute at issue - Yonkers City Code §103-1, actually imposes liability in this matter. This Court disagrees. While the statute does impose on landowners a duty to keep abutting sidewalks in good repair and safe, it does not impose tort liability upon landowners for injuries caused by violations of that duty (*see Dalder v. Incorporated Village of Rockville Centre*, 116 A.D. at 910). Plaintiff then argues that the actual standard the Court must follow is whether defendant "created the dangerous condition [or] had prior actual or constructive notice of its existence," citing *Arzeno v. City of New York*, 42

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Misc.3d 1234[A][Sup. Ct., Bx. Cty., 2014]). *Arzeno*, however, involved an accident that occurred in New York City within the penumbra of New York City Admin. Code §7-210, clearly inapplicable to this accident, that occurred in Yonkers. Plaintiff's contentions with respect to 965 Midland's alleged actual or constructive notice are therefore unavailing under these circumstances.

Plaintiff argues that there is an issue of fact as to whether 965 Midland created this hazardous sidewalk condition, relying on an affidavit of its expert, Irvin S. Loewenstein. This affidavit must be disregarded, since Plaintiff did not disclose this expert until he filed opposition papers, well after the note of issue and certificate of readiness were filed (*see Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520 [1st Dept. 2012]; *Garcia v. City of New York*, 98 A.D.3d 857, 859 [1st Dept. 2012]). For the same reasons, the Court cannot consider the affidavit of Robert Audette. Accordingly, Plaintiff has submitted no evidence in admissible form to raise an issue of fact as to whether this sidewalk was negligently installed, or that 965 Midland otherwise created the allegedly hazardous condition. He does not argue that 965 Midland made special use of the sidewalk at the accident location. Evidence of a subsequent repair in the accident location is not admissible to show that the defendant was negligent under these circumstances (*see e.g. Hinton v. City of New York*, 73 A.D.3d 407 [1st Dept. 2010]). In light of the foregoing, the Court does not reach the issue of whether Plaintiff sufficiently identified the cause of his fall.

A&A separately moves for summary judgment, dismissing the complaint and all cross-claims. In light of the above analysis, A&A is also entitled to dismissal of Plaintiff's complaint. As noted, there was no applicable statute ordinance applicable to these facts that imposed tort liability upon a tenant or land occupier for failure to maintain a public sidewalk. Moreover, there is no evidence that A&A created the allegedly defective condition, nor did they cause it to occur because of a special use. Mr. Wheeler was unaware of any work performed on the sidewalk in the five years prior to this accident, and he never reported any irregularities regarding an abnormal condition on the sidewalk in front of the building. Plaintiff has submitted no admissible evidence in opposition to raise a genuine issue of material fact as to whether A&A created the condition, or caused it to exist because of some special use. Absent a statute or ordinance specifically imposing tort liability under these circumstances, Plaintiff's arguments

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with respect to notice are irrelevant. Even if the applicable Lease and Rider obligated A&A to maintain the sidewalk, this does not impose on A&A a duty to a third party, such as Plaintiff (*see Collado v. Cruz*, 81 A.D.3d 542 [1st Dept. 2011]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that 965 Midland and A&A's motions for summary judgment, dismissing the Plaintiff's complaint and all cross-claims, are granted, and it is further,

ORDERED, that Plaintiff's complaint, and all cross-claims asserted against those defendants, are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 2/23 ,2015

Hon. Mary Ann Brigantti, J.S.C.