Goldsmith v Cohen Bros. Realty Corp.
2015 NY Slip Op 30482(U)
March 26, 2015
Sup Ct, New York County
Docket Number: 150051/11
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

---x

BARBARA GOLDSMITH,

Index No. 150051/11

Plaintiff,

-against-

COHEN BROTHERS REALTY CORP., STRATFORD WALLACE, 135 EAST 57th STREET, LLC, AND 135 EAST 57TH MANAGING CO., INC.,

Defendants.

---x

JOAN A. MADDEN, J.

In this personal injury action, defendants Cohen Brothers Realty Corporation (Cohen Brothers), Stratford Wallace, 135 East 57th Street, LLC and 135 East 57th Street Management Co., Inc. move for summary judgment dismissing the complaint against them. Plaintiff opposes the motion only to the extent the motion seeks summary judgment dismissing the complaint as against defendants Cohen Brothers and 135 East 57th Street, LLC.

Background

Plaintiff alleges that on September 30, 2010, at approximately 2:30 pm she was walking in the plaza at 135 East 57th Street, New York, NY ("the Building") when she stepped on a metal drain which moved off the drain hole causing her to lose her balance and fall. The Building is owned by defendant Stratford Wallace, which leased the Building to 135 East 57th Street, LLC. Cohen Brothers is the Building's managing agent.

At her deposition, plaintiff testified that after she left the Building she walked down a ramp that leads to Lexington Avenue when she was "catapulted in the air and I fell flat on my

[* 2]

face" Plaintiff's Dep., at 27. According to plaintiff she "looked back and saw that the grate [which was] more or less rectangular and was now almost on a 45 degree angle and it's out of its socket. And I looked again and saw there were four screws that were supposed to hold it in its socket and there are no screws, there were just holes." Id. Before the accident, plaintiff had not been aware of the grates and had not complained about them. Id. at 32.

Kenneth Kaye, a Vice President of Cohen Brothers, testified that his duties included overseeing the cleaning services provided to the Building and its tenants. He also testified that the grates or drains are inspected frequently for any defects or hazardous conditions and the Building's employees, including day porters and night cleaners, maintain public areas, including the exterior areas, like the plaza. He also testified that he searched the relevant records of Cohen Brothers and found no complains relating to the outdoor plaza drains prior to the accident date.

Michael Spatola ("Spatola"), the chief engineer of the Building for the last six years testified that the porters maintained the plaza on a regular basis around the time of plaintiff's accident. According to Spatola, there are four drains in the plaza that lead to the sewer in the basement of the Building, and there are covers on the drains. He never found any drain covers at the outdoor plaza which did not have screws in them and he was never able to lift any drain covers up without having to remove the screws. He also testified that he never observed any drain covers not flush with the drain openings.

According to Spatola, the drains are never inspected but are cleaned every eight to ten weeks when the pipes underneath the drains are clogged, and that it was the engineering department's responsible to unclog the drains. In addition, Spatola testified that to access the drains it is necessary to remove the screws. He testified that before the accident date he had

changed some screws which were rested or broken, but did not recall how many times. He also testified that he was aware of a previous incident in which a pedestrian reported that he tore his shoe on a drain cover.

The record includes photographs of the drain covers six weeks after the accident; one depicts the drain cover allegedly at issue as missing all four screws; in other photographs two other drain covers are missing one screw and two screws respectively.

Defendants move for summary judgment arguing that there is no evidence that defendants caused or created any defective condition or had notice of it. In support of the motion defendants point to the deposition testimony of plaintiff, Spatola and Kay. Defendants also submit an affidavit from Manual Santiago a porter who was working on the date of plaintiff's accident, and who states that he personally patrolled the outdoor plaza at least three times on the date of the accident but did not notice any dangerous condition there. In addition, at oral argument, Cohen Brothers argued that it was not responsible for porters who cleaned the plaza as the porters were employed by the Building.

Plaintiff opposes the motion to the extent it seeks to dismiss the complaint as against Cohen Brothers and 135 East 57th Street, LLC, arguing that the record raises triable issues of fact as to whether these defendants caused or created the defective condition when their employees or agents removed screws from the drain and did not use reasonable care in replacing them and whether they had notice of such condition. In support of its opposition, plaintiff notes that Spatola, the chief engineer employed by Cohen Brothers, testified that there was no regular inspection of the drains. Plaintiff also submits a copy of the engineer's log dated June 7, 2010, which indicates that as per "Adam put temporary screws in drain covers in plaza until brass

screws Mike ordered come in." Plaintiff also relies on photographs taken of the drain covers six weeks before the accident, which show that there are no brass screws and that in some of the drain covers there are no screws at all.

Plaintiff also submits the expert affidavit of William Marletta (Marletta), accompanied by photographs of the drain covers which were taken by Marletta on February 20, 2013, which show that the drain cover on which plaintiff allegedly fell is secured by four brass screws whereas the other three drain covers have no screws in the covers. Plaintiff also argues that the condition on which plaintiff fell was not trivial noting that the absence of screws in the drain cover constituted a dangerous condition, and a "pedestrian trap" and that "due to the lack of retaining screws, the drain cover was unstable a could move when stepped on by a pedestrian causing the pedestrian to lose his/her footing." Marletta Affidavit, ¶ 17. Plaintiff also argues that Marletta's opinion that "the drain cover(s)...were in plain site of the owner and/or managing agent's employees, such that reasonable inspection would have disclosed the absence of screw (Id, ¶ 21), raises factual questions as to constructive notice.

In reply, defendants argue that plaintiff cannot rely on Marletta's affidavit as plaintiff did not serve an expert witness disclosure before defendants moved for summary judgment.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that

[* 5]

material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 324 (1986).

"It is well established that a landowner (or possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk." O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dept. 1996). For an owner to be held liable, it must be shown that "the owner or possessor either created the condition, or ha[d] actual or constructive knowledge of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2d Dept. 2000).

Here, the record raises triable issues of fact as to whether the agents of either the Cohen Brothers or 135 East 57th Street LLC caused or created the condition by removing the screws in order to clean the pipes. In addition, while there is no evidence that defendants had actual notice of the missing screws on the drain covers, there are issues of fact as to whether they had constructive notice. Constructive notice requires that a hazard be "visible and apparent and . . . exist for a length of time prior to the accident sufficient to permit defendant's employees to discover and remedy it." Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986); Planatamura v. Penske Truck Leasing, 246 A.D.2d 347 (1st Dept. 1998).

On a motion for summary judgment, the movant has the burden of demonstrating "the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed." Giuffrida v. Metro North Commuter R.R. Co., 279 A.D.2d 403, 404 (1st Dept. 2001). Thus, "[o]nly where

[* 6]

the record is 'palpably insufficient' to establish constructive notice 'that the condition existed for a sufficient period to afford the [defendant], in the exercise of reasonable care, an opportunity to discover and correct it' can it be said that there is no factual issue to submit to the trier of fact." Giambrone v. New York Yankees, 181 A.D.2d 547, 548 (1st Dept. 1992) (quoting Lewis v. Metropolitan Transp. Auth., 99 AD2d 246, 251, (1st Dept. 1984) aff'd 64 N.Y.2d 670 [1984]).

Under this standard, it has not demonstrated as a matter of law that either the Cohen Brothers or 135 East 57th Street LLC lacked constructive notice of the condition of the drain, particularly as the record shows that while the drains themselves were not inspected, the plaza area was regularly cleaned by defendants' employees and Mr. Santiago's statement that he did not notice any defect in the plaza on the date of the accident is not dispositive under the circumstances here. Moreover, even though the porters were employed by the Building, the Cohen Brothers, as the managing agent, was responsible for supervising them.

In addition, contrary to defendants' position, the alleged defect was sufficient to give rise to liability. "Whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (1997), citing Guerrieri v. Summa, 193 A.D.2d 647 (2d Dept. 1993). In determining whether an alleged defect is trivial as a matter of law, the court must examine all the facts presented, including the width, depth, elevation, irregularity and appearance of the alleged defect, along with the time, place and circumstances of the injury, and whether it constitutes a trap or a snare. Trincere v. County of Suffolk, 90 N.Y.2d at 977, citing Caldwell v. Village of Isl. Park, 304 N.Y. 268 (1952).

[* 7]

Here, based on the photographs of the drain showing the missing screws and the affidavit of plaintiff's expert, triable issues of fact exist as to whether the drain constitutes a defective condition giving rise to potential liability. See Argenio v. Metropolitan Transp. Auth., 277 A.D.2d 165 (1st Dept. 2000) (denying defendant's motion for summary judgment as the record raised questions of fact as to ¼ inch depression in Grand Central Terminal with her testimony that many people were around her, which the court said made it less likely the plaintiff would see the depression, and expert testimony stated that the defect constituted a tripping hazard); McKenzie v. Crossroads Arena, LLC, 291 A.D2d 860 (4th Dept.), lv dismissed, 98 N.Y2d 647 (2002) (denying defendants motion for summary judgment where there were questions of fact as to whether the ¾ inch difference in height between concrete slabs outside of arena created a tripping hazard).

Moreover, defendants' argument that the court should not consider Marletta's affidavit is unpersuasive. Following oral argument, the court permitted plaintiff to submit a sur-reply as to defendants' assertion that the expert witness disclosure regarding Marletta was not timely served. The sur-reply affirmation and affidavit of service from a paralegal employed by the plaintiff's law firm shows that the expert witness disclosure of Marletta was served on the attorney for defendants on July 30, 2014, which is before the summary judgment motion was made. In addition, the court finds that the expert affidavit is sufficiently detailed and based on facts in the record so as to be probative of the issues of whether the drain cover constituted a defective condition and with respect to constructive notice.

Finally, while defendants argue that plaintiff' s testimony is unclear as to which drain cover she fell on, such argument, at best, only raises issues of fact, and is thus not a basis for

granting summary judgment to defendants.

In view of the above, it is

ORDERED that defendants' motion for summary judgment is denied with respect to defendants Cohen Brothers Realty Corporation and 135 East 57th Street, LLC and granted without opposition with respect to defendants Stratford Wallace, and 135 East 57th Street Management Co., Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants Stratford Wallace, and 135 East 57th Street Management Co., Inc. dismissing the complaint as against them; and it is further

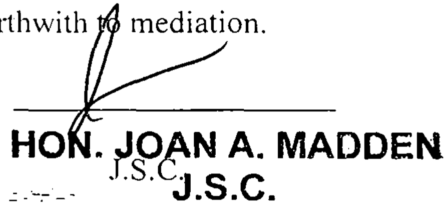
ORDERED that the action is severed and continued against defendants Cohen Brothers Realty Corporation and 135 East 57th Street, LLC; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of Trial Support (room 158), who are directed to mark the court's records to reflect the change in caption herein; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: March 26, 2015



HON. JOAN A. MADDEN
J.S.C.
J.S.C.