Hines v HSBC Bank USA, Inc.
2015 NY Slip Op 32124(U)
November 9, 2015
Supreme Court, Wayne County
Docket Number: 74420
Judge: John B. Nesbitt

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

LUCY HINES,

Plaintiff,

-vs-

Index No.: 74420

HSBC BANK USA, INC., D/B/A HSBC BANK USA, JONES LANG LASALLE AMERICAS, INC., D/B/A JONES LANG LASALLE

2013

Defendants.

APPEARANCES: DEVALK, POWER, LAIR & WARNER, P.C.
(Richard L. DeValk, Esq., of counsel)
Attorneys for the Plaintiff

PETRONE & PETRONE, P.C.
(Brendan S. Byrne, Esq., Esq., of counsel)
Attorneys for Defendants

MEMORANDUM - DECISION

John B. Nesbitt, J.

In this premises liability case of the "trip and fall" variety, defendants test by way of summary judgment motion whether plaintiff has sufficient proof raising issues of triable fact on three essential elements of plaintiff's negligence cause of action. The motion is denied for reasons that follow.

For present purposes, the facts are uncomplicated and largely undisputed. On June 26, 2009, defendant HSBC Bank USA, Inc. ("HSBC" or the "bank") owned premises known as 26 West Main Street in the Village of Sodus. That location served as a branch of HSBC's retail banking operations open to its customers for consumer banking transactions. Part of the premises consisted of a sidewalk abutting the bank's entrance on the sidewalks's north side with West Main Street bounding the sidewalk's south side. Bank customers were required to navigate the sidewalk in order to access the bank building. Defendant Jones Lang LaSalle Americas, Inc. ("Jones Lang LaSalle") had been engaged by HSBC to perform maintenance services at this time and location.

On Friday, June 26, 2009, plaintiff Lucy Lee Hines fell on the sidewalk outside the bank entrance. At that time, Mrs. Hines was 69 years of age and a resident of Alton, a hamlet in the Town

of Sodus, located along Ridge Road approximately six miles east of the Village of Sodus. Mrs. Hines was a regular customer and frequent visitor of the bank, and drove there that morning to inquire about her account. She parked on the south side of West Main Street across from the bank, exited her vehicle, waited for passing traffic, crossed the street, stepped over the curb and onto the sidewalk, and made a couple of steps towards the bank entrance before falling. At the time she fell, she was looking at the bank entrance door not far ahead, not seeing anything irregular about the sidewalk surface. She then felt her right foot getting caught in what she thought to be some type of depression or hole in the sidewalk, causing her to stumble and fall. Her face hit the sidewalk. During her deposition, Mrs. Hines had difficulty remembering specifics after striking the sidewalk. She recalled being helped to her feet by two individuals, assisted into the bank, seated, and the arrival of an ambulance and being taken to the Newark-Wayne Hospital.

After a few weeks of recuperation, Mrs. Hines returned to the site of her mishap and viewed what she believed to be the cause of her fall. She viewed what she termed "just an ordinary hole in the cement," about six to nine inches in diameter, and "deep enough for my foot to flip over in." HSBC independently and responsibly took action to investigate and remedy, if necessary, any possible hazard that may have caused or contributed to Mrs. Hines' fall. Its Sodus branch manager, Phyllis Adriaansen, called Mark Lempert, then employed as a property manager for defendant Jones Lang LaSalle, which was under contract with HSBC to maintain bank properties located in New York State. The Sodus branch was within the geographic purview of those properties for which Mr. Lempert was responsible. Mrs. Adriaansen notified Mr. Lempert that a customer had fallen on the sidewalk and asked him to come to investigate whether any remediation was necessary. Mr. Lembert immediately responded, and found "a small, very small depression in the sidewalk," three inches in diameter, and tapered in to a quarter inch depression. Mr. Lembert did not "really deem it as a trip hazard," but, in the interest of "good customer service," nevertheless arranged for a vendor to fill it.

Mrs. Hines commenced this action on June 5, 2012, seeking damages as a result of her fall on June 26, 2009. Of course, merely being injured on another's property does not make the property owner perforce liable. As a general rule, property owners are not strictly liable for injuries resulting to users of their property, regardless of the status of the user, whether he be an invitee, licensee, or trespasser. Rather, the liability of an owner of land is measured by "the single standard of reasonable

care under the circumstances," which is a standard "no different than that applied in the usual negligence action" (*Basso v Miller*, 40 N.Y.2d 233, 241[1976]). In this case, it is not disputed that defendant HSBC owned, possessed, and/or controlled the sidewalk at issue. An owner or possessor of building open to the public, such as a store, office building or other place of public assembly, is required to provide a safe means of entry and exit (*Backiel v. Citibank, N.A.*, 299 A.D.2d 504,507 [2d Dep't 2002]). As such, it had "a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable" (PJI 2:90). This duty was non-delegable and not obviated by any negligent performance of a maintenance contract by a third party (1A NY PJI 2:90, at 571). So too, it is not disputed that the presence of Mrs. Hines on the sidewalk was reasonably foreseeable. As such, for Mrs. Hines to recover, she "must prove: (1) that the premises were not reasonably safe; (2) that [HSBC] was negligent in not keeping the premises in a reasonably safe condition; and (3) that [HSBC]'s negligence in allowing the unsafe condition to exist was a substantial factor in causing [her] injury" (PJI 2:90).

HSBC moves for summary judgment dismissing the complaint in its entirety pursuant to CPLR 3212. HSBC argues that the record adduced on the motion demonstrates insufficient proof as a matter of law as to each of the three elements necessary to support a verdict in favor of Mrs. Hines. First, the alleged defect was *de minimis* - trivial in nature - not constituting a hazard or dangerous condition so to breach HSBC's duty to keep the premises in a reasonably safe condition. Second, in any event, HSBC was not negligent, because it did not create the allegedly dangerous condition, nor did it have actual or constructive notice thereof. Third, the plaintiff's proof shows that it is as likely as not that Mrs. Hines' fall was caused by a non-actionable slip on the sidewalk unconnected to any defect in the sidewalk itself.

In assessing the merits of HSBC's motion, a brief review of the summary judgment simpliciter is appropriate. Summary judgment motions require a court to determine whether the cause of action, counterclaim, or defense requires a trial before it can be sustained or rejected (CPLR 3212[b]). A trial is required where disputed issues of fact require resolution before a cause of action, counterclaim or defense can be determined meritorious or not (Siegel, *New York Practice* §278 at 476 [5th ed 2011]). Such a motion must be supported by proper evidentiary proof that, if uncontroverted, entitles the moving party to judgment as a matter of law (CPLR 3212[b]). The party

moving must make a *prima facie* showing that judgment is required as a matter of law, and provide sufficient evidence to show the absence of any material issue of fact that would require trial for resolution (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]). If movant meets that burden, the opposing party must respond with proper proof challenging one of more of the factual claims upon which summary judgment depends (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Judges are reminded that summary judgment is a "drastic remedy and should not be granted where there is any doubt as to the existence of triable issues" (*Dal Construction Corp. v. City of New York*, 108 AD2d 892, 894 [2nd Dept., 1985]). Only where "no reasonable view of the evidence" supports a claim or defense should a court rule upon its merits as a matter of law (*Eddy v. Syracuse University*, 78 AD2d 989 [4th Dept. 1980]). "Where varying inferences are possible, however, the issue is one for the jury"(*id.*) Accordingly, evidence presented in a motion for summary judgment must be viewed in the light most favorable to the party opposing the motion (*Rizk v. Cohen,* 73 NY2d 98, 103 [1989]).

Three issues control the disposition of this motion. First, is there an issue of fact whether the alleged sidewalk defect constituted an unreasonably risk to pedestrian traffic? Second, assuming so, is there an issue of fact whether HSBC breached its duty to protect foreseeable sidewalk users, such as the plaintiff, by failing to remedy the sidewalk defect? Third, assuming so, is there an issue of fact whether the sidewalk defect proximately caused plaintiff's fall?

Regarding the first issue, HSBC contends that any defect was *de minimus* as a matter of law and, as such, not actionable. The issue raises the issue whether a defect is significant enough so to create a duty to protect pedestrians against the concomitant risk of injury..

> "To be actionable a defect in a sidewalk must be of such a nature that a reasonably careful person should foresee the probability of injury to a user, and if not, the complaint should be dismissed. In a case involving minor defects in the pavement, there is no rule that municipal liability turns upon whether the hole or depression causing the pedestrian to fall is at any particular depth. What is relevant is the overall size and shape of the defect. In determining whether a defect is trivial, the court must consider all the relevant facts, including the defect's width, depth, elevation, irregularity and appearance, as well as the time, place and circumstances of the accident.
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> Not every noticeable difference in elevation in a sidewalk will create a question of fact. ... 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.
> * * *
> Factors that make a defect difficult to detect normally present a question of fact to be resolved by the jury. The location of a depression in a heavily traveled pedestrian walkway renders observation of the defect less likely" (1A PJI3d 2;111, at 681-682 (2015)(citations omitted)

Thus, while there may be some cases where a court may find, as a matter of law, that a defect is so trivial as be non-actionable,"generally [it will be] a question of fact for the jury" to decide whether a particular property condition is unreasonably dangerous so to create liability (*Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 [1997], quoting *Guerriere v. Summa*, 193 A.D.2d 647 [2d Dep't 1993]; see also, *Loughran v. City of New York*, 298 N.Y. 320 [1948]).

Given the present record, the Court cannot conclude, as a matter of law, that the sidewalk defect predicating plaintiff's liability claim was trivial or did not constitute a trap or snare for pedestrian traffic.

The second issue - foreseeability of injury - is a factor central to any negligence claim. "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension" (*Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 344 [1928]). As such, "[a] owner of real property cannot be held liable for injuries caused by a defective condition unless it has actual or constructive notice of that condition" (1A PJI 2:90, at 580, 623 [2015]). There is no proof here that HSBC had actual notice of the alleged defect. Mrs. Hines' theory is that the bank had constructive notice. Courts allow a jury to "infer from the irregularity, width, depth and appearance of the defect whether the condition existed for such time that the defendant, in the exercise of reasonable care, should have known of it" (id. at 599). The affidavit of David Cooper, a local mason, is submitted by Mrs. Hines to raise an issue of fact from which a jury may make such inference in this case.

Given the present record, the Court cannot conclude, as a matter of law, that a jury could not infer that HSBC should have known of the sidewalk defect prior to Mrs. Hines' fall based upon the nature of the depression, the likely forces creating such depression, and the time necessary for such forces to do so.

The third issue - proximate cause - requires proof that would allow a jury to infer that the alleged sidewalk defect caused Mrs. Hines to trip and fall.

> A plaintiff's inability to identify the defective condition that caused plaintiff's fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused plaintiff's injuries would be based on speculation. The rationale for this rule is that if a plaintiff cannot identify the defective condition, it is just as likely that the fall could have been caused by some factor for which the defendant is not responsible, e.g. misstep by the plaintiff or loss of balance" (1A PJI 2:90, at 572, 627 [citations omitted]).

Given the present record, a jury could credit Mrs. Hines's testimony, as reflected in her deposition, that it was her foot getting deflected in the depression that caused her to lose balance and then fall. That she did not, or could not, identify the cause of her fall in the minutes or hours following the accident does not bar a jury from believing her later testimony on this issue.

Accordingly, the motion of defendants for summary judgment is denied.

Dated: November 9, 2015
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice