Leon v Angelo's Rest.
2015 NY Slip Op 32422(U)
December 21, 2015
Supreme Court, Queens County
Docket Number: 15784/2013
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

EDELMIRA LEON,

Plaintiff,

- against -

ANGELO'S RESTAURANT and MACARI ASSOCIATES, LLC,

Defendants.

- x

Index No.: 15784/2013

Motion Date: 11/16/15

Motion No.: 97

Motion Seq.: 4

The following papers numbered 1 to 11 read on this motion by defendant, MACARI ASSOCIATES, LLC (Macari), for an order, pursuant to CPLR 3212, granting summary judgment in favor of Macari and dismissing plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Plaintiff's Affirmation in Opposition-Exhibits	5 - 7
The City of New York's Affirmation in Opposition-Exhibits	8 - 10
Reply Affirmation	11

This is an action for damages for personal injuries sustained by plaintiff, Edelmira Leon, on May 22, 2012, when she tripped and fell on the sidewalk abutting the premises located at 95-58 Roosevelt Avenue, Queens County, New York. Plaintiff claims that she tripped because of uneven bricks and as a result fractured her left knee.

Plaintiff commenced an action for negligence against the tenant, Angelo's Restaurant, the landlord, Macari, and the City of New York by filing a summons and complaint on August 15, 2013. Macari joined issue by service of a verified answer dated October 25, 2013. The action was discontinued with prejudice against Angelo's Restaurant by Stipulation of Discontinuance dated June 1, 2015 and signed by all parties. By Short Form Order dated November 20, 2015 and entered on December 3, 2015, the action was dismissed against the City of New York (Kerrigan, J.).

Macari now moves for an order granting summary judgment and dismissing plaintiff's complaint on the ground that it bears no liability for negligence for the allegedly uneven bricks abutting its premises. Macari contends that plaintiff failed to demonstrate that Macari caused or created the dangerous condition complained of or had actual or constructive notice of the condition. Macari also asserts that despite its duty to keep the premises in reasonably safe condition, the alleged dangerous condition is trivial in nature based upon the fact that the height differential between the bricks was less than one inch.

In support of the motion, Macari submits an affirmation from counsel, Jeffrey P. Yong, Esq.; a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; a copy of the stipulation dated June 15, 2015; copies of the transcripts of the examinations before trial of plaintiff, Dmitriy Surkov, a research assistant for the Department of Transportation Litigation Services, and Michael Allimonos, the manager of the subject premises; photographs of the allegedly hazardous condition; and an expert affidavit from Andrew S. Haimes.

In her examination before trial, plaintiff testified that on the date of the accident she was walking from a bus stop on Junction Boulevard at the corner of Roosevelt Avenue to a pharmacy. She walked approximately five feet from the bus stop when she fell. She states that her left foot came into contact with the elevated brick and she fell forward. The walkway was composed of bricks and following her fall, she observed that there was a brick block elevated from the ground approximately two inches. At the time of the incident, it was sunny outside and she was wearing sneakers.

At his deposition taken on January 8, 2015, Dmitriy Surkov, a research assistant at the Department of Transportation Services Unit of the City of New York, testified that there were no corrective action requests or notices of violations, including sidewalk violations, regarding the subject sidewalk.

Michael Allimonos, a property manager for Lewis and Murphy Realty who manages the subject building, testified that Macari was responsible for defects to the sidewalk. He states that he was at the subject property five days a week surrounding the time of the incident and he had never seen a brick detached, or raised, from the sidewalk. He also states that he never received any complaints regarding raised bricks and he was not aware of any injuries occurring prior the date of the incident. Mr. Allimonos testified that Angelo's Restaurant never complained to him regarding the condition of the sidewalk. He stated that after he received the summons and complaint he went to the subject location, inspected the entire sidewalk, and did not find any problems with the sidewalk.

Macari also submits the affidavit of Andrew S. Haimes, a Professional Engineer licensed to practice in New York. Mr. Haimes inspected the subject premises on April 15, 2015, three years after the subject accident. He notes that plaintiff was walking northward when the accident occurred. He states that the brick in question was slightly above the adjacent bricks, but not evenly on all sides. He used a digital caliper/depth gauge to measure the height differential between the subject brick and adjacent bricks and found on the north side of the subject brick the height differential varied from 0.232 inches to 0.429 inches. He opines that "[s]ince the adjacent brick on the north side is lower than the subject brick, it would be impossible for a person walking north to trip over the north edge of the brick." On the south side of the brick, Mr. Haimes found the height differential varied from 0.267 inches to 0.302 inches. Mr. Haimes states that New York City Department of Transportation and typical industry specifications generally specify no more than a 1/8 inch difference in height for newly installed concrete paver sidewalks or pavements, but that the standards also acknowledge that a small amount of settling over time is typical. In Mr. Haimes' opinion, it would not be unusual to see differentials of 1/4 of an inch or more in adjacent pavers in older pavements or sidewalks and that a 1/4 of an inch differential in height between adjacent pavers is not considered excessive. He concludes that the subject brick should not be considered a tripping hazard.

Macari claims that based on the deposition testimony, there is no proof in the record that it had constructive notice of a dangerous condition. Counsel claims that there were no complaints or injuries ever reported in the area in question. Macari also contends that based upon the deposition testimony and the photographs identified by the plaintiff, the alleged defect is too trivial to be actionable based upon the fact that there was a small height differential and the accident happened during daylight hours on a sunny day. Counsel claims that a property owner may not be held liable for trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his or her toes, or trip over a raised projection. Counsel contends that the defect plaintiff alleges to have fallen was a height differential of less than a half an inch, and therefore, the defect is too trivial to be actionable as a matter of law.

In opposition, plaintiff argues that Macari failed to make a prima facie showing that it lacked constructive notice of the alleged defective condition. Plaintiff's counsel, Altagracia M. Nunez, Esq., contends that the condition was readily identifiable

with the exercise of a proper inspection. Counsel also claims that Macari failed to make a prima facie showing that the condition in question was too trivial to be actionable. In support of the opposition, plaintiff submits her own deposition testimony and affidavit stating that the brick was raised approximately two inches above the other pavers, and therefore, the defect is not trivial. Counsel further contends that the conflicting testimony regarding the height differential creates a triable issue of fact for the jury.

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 or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]). Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (see Kwong On Bank, Ltd. v Monrose Knitwear Corp., 74 AD2d 768[2d Dept 1980]).The evidence will be construed in a light most favorable to the non-moving party (see Benincasa v. Garrubbo, 141 AD2d 636, [2d Dept 1988]).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (Sermos v Gruppuso, 95 AD3d 985 [2d Dept. 2012]; see Spindell v Town of Hempstead, 92 AD3d 669 [2d Dept. 2012]; Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc., 61 AD3d 629 [2d Dept. 2009]). The defendant has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it (see Jackson v Jamaica First Parking, LLC, 91 ADd 602 [2d Dept. 2012]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]).

Regarding constructive notice, Macari did not provide any testimony as to when the sidewalk was last inspected prior to the accident or whether the alleged uneven bricks existed for a sufficient time for Macari to have discovered and remedied the condition (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]; Lawrence v Celtic Holdings, LLC, 85 AD3d 874 [2d Dept. 2011]; Baines v. G & D Ventures, Inc., 64 AD3d 528 [2d Dept. 2009]). Accordingly, this Court finds that Macari failed to establish, prima facie, that it lacked constructive notice of the defective condition that allegedly caused the plaintiff to slip and fall (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

Regarding whether the alleged defect is trivial, generally, the issue of whether a dangerous or defective condition exists on real property depends on the particular facts of each case, and is properly a question of fact for the trier of fact (see Trincere v County of Suffolk, 90 NY2d 976 [1997]; Turuseta v Wyassup-Laurel Glen Corp., 91 AD3d 632 [2d Dept. 2012]; Milewski v Washington Mut., Inc., 88 AD3d 853 [2d Dept. 2011]). However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (see Aguayo v New York City Hous. Auth., 71 AD3d 926 [2d Dept. 2010]; Joseph v Villages at Huntington Home Owners Assn., Inc., 39 AD3d 481 [2d Dept. 2007]; Outlaw v Citibank, N.A., 35 AD3d 564 [2d Dept. 2006]; Taussig v Luxury Cars of Smithtown, Inc., 31 AD3d 533 [2d Dept. 2006]). In determining whether a defective condition is trivial as a matter of law, a court must examine the facts presented, including the width, depth, elevation, irregularity, and appearance of the condition, along with the time, place, and circumstances of the injury (see Trincere v County of Suffolk, 90 NY2d 976 [1997]; Grosskopf v 8320 Parkway Towers Corp., 88 AD3d 765 [2d Dept. 2011]; Pennella v 277 Bronx River Road Owners, Inc., 309 AD2d 793 [2d Dept. 2003]). There is no "minimal dimension test" or "per se rule" that the condition must be of a certain height or depth in order to be actionable (Trincere v County of Suffolk, 90 NY2d 976 [1997]).

Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable (see Schenpanski v Promise Deli, Inc., 88 AD3d 982 [2d Dept. 2010]; Aguayo v New York City Hous. Auth., 71 AD3d 926 [2d Dept. 2010]; Fisher v JRMR Realty Corp., 63 AD3d 677 [2d Dept. 2009]; Outlaw v Citibank, N.A., 35 AD3d 564 [2006]; Maiello v Eastchester Union Free School Dist., 8 AD3d 536 [2d Dept. 2004]). Here, the photographs submitted with the motion papers show a height differential which appears to more than a trivial defect. Moreover, Mr. Haimes' inspection of the subject defect was conducted three years after the accident. Accordingly, the affidavit has no evidentiary value for purposes of this motion because the condition of the sidewalk can be transient in nature depending on changes due to the public walking on the sidewalk on a daily basis. As there was no evidence or testimony provided by Macari as to the condition of the sidewalk on the date of the accident, Macari failed to demonstrate that the height differential was of a trivial nature on the date of the accident (see Lansen v SL Green Realty Corp., 103 AD3d 521 [1st Dept. 2013]; Hahn v Wilhelm, 54 AD3d 896 [2d Dept. 2008]; Lal v Ching Po Ng, 33 AD3d 668[2d Dept. 2006]).

Since Macari did not meet its prima facie burden, it is not necessary to consider the sufficiency of the opposition papers (see Anastasio v Berry Complex, LLC, 82 AD3d 808 [2d Dept. 2011]; Gerbi v Tri-Mac Enters. of Stony Brook, Inc., 34 AD3d 732 [2d Dept. 2006]; Tchjevskaia v Chase, 15 AD3d 389 [2d Dept. 2005]).

Accordingly, based upon the foregoing, and viewing the evidence in the light most favorable to the nonmoving party, it is hereby,

ORDERED, that the motion by defendant, Macari Associates, LLC, for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: December 21, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.