Medina v City of New York
2016 NY Slip Op 30369(U)
February 29, 2016
Supreme Court, Queens County
Docket Number: 18228/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

MARIA MEDINA, Plaintiff, -against- THE CITY OF NEW YORK, et al., Defendants.	Index No. 18228/13 Motion Date January 12, 2016 Motion Cal. No. 106 Motion Seq. No. 4

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Upon the foregoing papers it is ordered that this motion by defendant, Young Men's Christian Association of Greater New York ("YMCA") for summary judgment against plaintiff, Maria Medina and dismissing the Complaint against it pursuant to CPLR 3212 is hereby denied.

This is a personal injury action whereby on November 26, 2012, plaintiff, Maria Medina allegedly tripped and fell while he was walking on the sidewalk in front of defendants' premises due to the negligence of defendants. Plaintiff further alleges that she fell as a result of a raised section of sidewalk and the remains of a tree which had fallen following Super Storm Sandy.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against

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(*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendants to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (*see, id.*).

"[A] property owner may not be held liable in damages for 'trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection'" (*Hymanson v. A.L.L. Assoc.*, 300 AD2d 358 [2d Dept 2002, citing *Marinacchio v. LeChambord Rest.*, 246 AD2d 514 [2d Dept 1998]).

Moving defendant, YMCA, presented a prima facie case that there are no triable issues of fact. Moving defendant, YMCA established its prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (*see, Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of the motion, moving defendant, YMCA presented, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein she testifies inter alia that: she tripped on an elevated portion of sidewalk which was "half an inch high" and that the portion was "little" and "not that big;" the examination before trial transcript testimony of Hong Yuan, an employee of YMCA; and the

examination before trial transcript testimony of Fulu Bhowmick, an employee of New York City Department of Transportation, who testified inter alia that: on May 18, 2012, a violation was issued to the property owner for a broken curb/sidewalk flag/trip hazard but said violation was repaired prior to the time of the accident; and photographs of the accident site.

Plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. In opposition, plaintiff submits, plaintiff's own affidavit; and color photographs of the accident scene. It is well-established law that photographs accurately depicting the area in which a plaintiff fell generally create an issue of fact as to whether a premises owner had constructive notice of a defect which caused a trip and fall which is best submitted to the jury (*Zavarro v. Westbury Property Inv. Co.*, 244 AD2d 547 [2d Dept 1997]). Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v. County of Suffolk*, 90 NY2d 976 [1997]).

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether defendant, YMCA had constructive notice of a defective condition, whether defendant, YMCA created a defective condition, and whether defendant, YMCA acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant, YMCA's motion for summary judgment is denied.

That branch of the cross motion by defendants, The City of New York and The City of New York s/h/a New York City Department of Transportation ("the City") for an order pursuant to CPLR 3211(a)(7) dismissing plaintiff's claims and all cross-claims as against the City Department of Transportation as it is not a suable entity is hereby granted. The Department of Transportation is a department or agency of the City. Cross movant established that actions involving a City department or agency must be brought in the name of the City pursuant to New York City Charter 17 §396. No opposition is presented on this argument. Accordingly, this branch of the cross motion is granted and the case is dismissed as against the Department of Transportation.

That branch of the cross motion by defendants, The City of New York and The City of New York s/h/a New York City Department of Transportation ("the City") for an order pursuant to CPLR 3212 extending the City's time to file a motion for summary judgment is hereby granted.

Pursuant to CPLR 3212, a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." In the instant case, the record reveals that the Note of Issue was filed on January 28, 2015, but the Court extended the time to file summary judgment motions until July 28, 2015. It is undisputed that the instant cross motion for summary judgment motion was served, one month late, on August 28, 2015. Any summary judgment motion made later than one hundred twenty days after the filing of the note of issue, requires court approval and a showing of "good cause." In *Brill v. City of New York*, the Court of Appeals held that: "'good cause' in CPLR 3212(a) requires a showing of good cause for making the delay in the motion - - a satisfactory explanation for the untimeliness - - rather than simply permitting meritorious, non judicial findings, however tardy." 2 NY3d 648 (NY 2004). "[S]tatuory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored." (*Micelli v. State Farm Automobile Insurance Company*, 3 NY3d 725 [2004][internal citations omitted]; *see also, Dettmannv Page*, 18 AD3d 422 [2d Dept 2005; *First Union Auto Finance, Inc. v. Donat*, 16 AD3d 372 [2d Dept 2005]).

The Court finds that while the cross motion is untimely, it is on a nearly identical issue already before the court on defendant, YMCA's timely motion for summary judgment and the court will thus consider it (*see, Ellman v. Village of Rhinebeck*, 41 AD3d 635, 636 [2007]; *Grande v. Peteroy*, 39 AD3d 590, 591-592 [2007]). Accordingly, that branch of cross movant's motion for leave to serve a late summary judgment motion is granted.

That branch of the cross motion by defendants', The City of New York and The City of New York s/h/a New York City Department of Transportation for an order pursuant to CPLR 3212 dismissing plaintiff's Complaint and all cross claims as against the City is denied.

Said defendant establishes a prima facie case in support via adopting the arguments and conclusions of law set forth by defendant YMCA in its motion for summary judgment that establish a prima facie case that the alleged defect is trivial in nature.

Plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. In opposition, plaintiff submits, plaintiff's own affidavit; and color photographs of the accident scene. It is well-established law that photographs accurately depicting the area in which a plaintiff fell generally create an issue of fact as to whether a

premises owner had constructive notice of a defect which caused a trip and fall which is best submitted to the jury (*Zavarro v. Westbury Property Inv. Co.*, 244 AD2d 547 [2d Dept 1997]). Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v. County of Suffolk*, 90 NY2d 976 [1997]).

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether defendant, the City, had constructive notice of a defective condition, whether defendant, the City, created a defective condition, and whether defendant, the City, acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, that branch of defendant, the City's cross motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: February 29, 2016

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Howard G. Lane, J.S.C.