Vanderhorst v CA 5-15 W. 125th LLC
2016 NY Slip Op 30384(U)
March 7, 2016
Supreme Court, New York County
Docket Number: 150756/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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SHANAYE VANDERHORST,

Plaintiff,

-against-

CA 5-15 WEST 125TH LLC and HARCO CONSULTANTS CORP.,

Defendants.

----------x

Index No. 150756/14

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Steven A. Levy, Esq.
Siler & Ingber, LLP
301 Mineola Blvd.
Mineola, NY 11501
516-294-2666

For defendants:
Daniel Levit, Esq.
Hardin, Kundla, *et al.*
110 Williams St.
New York, NY 10038
212-571-0111

By notice of motion, defendants move pursuant to CPLR 3212 for an order granting them summary judgment dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On April 1, 2013, defendants CA 5-15 West 125th LLC, and Harco Consultants Corp., respectively, the owner and general contractor for premises located in Manhattan, entered into a contract for construction work at the premises. (NYSCEF 21-22). On October 26, 2013, plaintiff, a pedestrian, tripped and fell on the public sidewalk abutting the premises owned by CA 5-15, sustaining injuries. (NYSCEF 1, 19).

On or about January 27, 2014, plaintiff commenced this action advancing claims of negligence against defendants based on their failure to maintain and/or warn of a hazardous condition of the sidewalk of which they had notice. (NYSCEF 1).

At her deposition held on March 2, 2015, plaintiff testified as to the condition of the sidewalk where she fell:

> Q. What caused you to fall?
>
> A. The uneven[ness] of the street.
>
> . . . .
>
> Q. How was the street uneven, what made it uneven?
>
> A. There was a lump in one of the sides, so.
>
> Q. A lump in one of the sides?
>
> A. Yeah, like on one side, the side I was walking on, there was – I don't know if you call it a lump or – but it was higher than a normal street. It was higher than the normal sidewalk that I was – the part I was walking on. So if you want to call it a lump or –
>
> Q. But you said it was the unevenness of the street that caused you to fall; correct?
>
> A. Correct
>
> . . . .
>
> Q. Was there a hole or a raised portion of the street or something else [that made it uneven]?
>
> A. I don't know if you want to call it, like, a little square pothole, not like a pothole but it was like a square brick that was standing up.
>
> Q. A square brick?
>
> A. Like a square little pothole type on that part where I was walking.
>
> . . . .
>
> Q. Now, the square pothole that you described, what was it made of?
>
> A. It was square and it's like a little metals with a metal outline.

(NYSCEF 19). Plaintiff testified that she stepped onto the "square pothole" which caused her to fall. When presented with a photograph, plaintiff identified the sidewalk and inset square metal

piece as the "pothole" on which she tripped. She maintained that she had not seen the raised metal piece before she tripped, was generally unaware of it beforehand, and had seen no one else trip over it. (NYSCEF 19-20).

II. DISCUSSION

A. Contentions

While defendants concede that the Administrative Code of the City of New York § 7-210 imposes liability on property owners for negligent maintenance of appurtenant public sidewalks, they argue that they are relieved from liability for the condition of the sidewalk abutting the premises here by virtue of 34 RCNY 2-07(b). (NYSCEF 14). They offer the affidavits of CA 5-15's managing agent and Harco's senior project manager, who attest without dispute, that based on a photograph, the object on which plaintiff tripped is a Con Edison cover plate for a gas service shut off valve. They deny having installed, maintained, repaired or altered the sidewalk or the cover plate, and Harco also denies having performed any work on the sidewalk, which remains in the condition it was in before it began work at the location. CA 5-15 also denies having made any special use of the sidewalk since purchasing the premises in 2013. (NYSCEF 14, 21-22).

In response, plaintiff argues that the cover plate in issue does not constitute a "cover" within the meaning of 34 RCNY 2-07(b), that defendants are thus liable for the defect, and that given her testimony about the general condition of the sidewalk, there is an issue of fact as to whether the portion of the sidewalk in question, including the cover plate, was defective. (NYSCEF 24).

In reply, defendants argue that plaintiff fails to raise a triable issue as to whether the cover

plate caused her fall, and that the authority on which she relies is inapposite. They also deny that the uneven condition of the sidewalk, as testified to by plaintiff, raises a question of fact, as she clarified that it was the "square pothole" alone that caused her to trip and fall. (NYSCEF 26).

B. Analysis

To prevail on a motion for summary judgment dismissing a cause of action, the defendant "bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action." (*Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). If the defendant meets this burden, the plaintiff must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Pursuant to the Administrative Code of the City of New York § 7-210, it is the "duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition . . . [who] shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk . . . ." (Admin. Code § 7-210[a-b]). For an owner of real property to obtain summary dismissal of a cause of action under this section of the Administrative Code, the defendant must establish, *prima facie*, not only that it did not violate Admin Code § 7-210, but also that it "neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." (*Gyokchyan v City of New York*, 106 AD3d 780, 781 [2d Dept 2013]; *Garcia v City of New York*, 99 AD3d 491, 492 [1st Dept 2012]).

Pursuant to 34 RCNY 2-07(b), "owners of covers or gratings on a street" have the duty to

"monitor[ ] the condition of the covers and gratings and the area" and "replace or repair any cover or grating found to be defective" and ensure that "[s]treet hardware [is] flush with the surrounding street surface." The rule applies to sidewalks as well as streets. (*Flynn v City of New York*, 84 AD3d 1018, 1019 [2d Dept 2011], *lv denied* 17 NY3d 709). Thus, a premises owner is not liable for defective covers or gratings on a public sidewalk even if the sidewalk abuts its premises. (*Eg, id.*; *Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]; *Hurley v Related Mgt. Co.*, 74 AD3d 648, 649 [1st Dept 2010]).

Although 34 RCNY 2-07(b) does not define "covers," research reveals no persuasive authority for the proposition that the metal cover in issue does not fall within the rule. In *Fontanazza v Central Parking System of New York*, the Appellate Term, First Department, held that the owner of a depressed valve cap, not the abutting landowner, was liable under 34 RCNY 2-07(b), and to the extent that the court in *Rojas v Con Edison*, 34 Misc 3d 69 (App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2011), held to the contrary, the court declined to follow it. (37 Misc 3d 138[A], 2012 NY Slip Op 52190[U], *1 [App Term, 1st Dept 2012]; *see also Hickman v Medina*, 114 AD3d 907, 907 [2d Dept 2014] [34 RCNY 2-07(b) applied to gas valve cap]; *Flynn*, 84 AD3d at 1018 [recessed valve gate box]; *Alvarado v City of New York*, 41 Misc 3d 1238[A], 2013 NY Slip Op 52049[U], *3 [Sup Ct, Richmond County 2013] [water valve cap]; *Fernandez v City of New York*, 2015 WL 5477923 [Sup Ct, New York County] [gas cap]).

Defendants thus set forth, *prima facie*, that they are not liable for the metal cover on which plaintiff tripped. Plaintiff's imprecise and equivocal testimony does not raise a triable issue. (*See eg, Pena v Slater*, 100 AD3d 488, 489 [1st Dept 2012] [plaintiff's equivocal testimony as to how accident occurred insufficient to raise triable issue]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order granting them summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of defendants.

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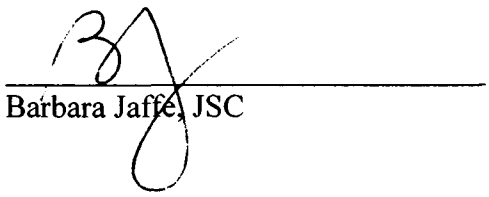

Barbara Jaffe, JSC

DATED: March 7, 2016
New York, New York