

**Sibony v 207 E. 74th St. Owners, Inc.**

2016 NY Slip Op 30995(U)

January 28, 2016

Supreme Court, New York County

Docket Number: 150424/14

Judge: Jennifer G. Schechter

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

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MIRIAM SIBONY,

Plaintiff,

Index No. 150424/14

-against-

207 EAST 74<sup>th</sup> STREET OWNERS, INC.,

Defendant.  
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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendant moves for summary judgment dismissing the complaint. The motion is denied.

#### Background

Plaintiff Miriam Sibony commenced this action to recover for injuries that she sustained on January 3, 2013 at approximately 11:30 AM when she tripped and fell on the sidewalk in front of defendant's premises located at 207 East 74th Street in Manhattan. Plaintiff alleges that she tripped over a branch of a discarded Christmas tree that had been placed on the sidewalk for pickup by the New York City Sanitation Department.

Plaintiff testified, in relevant part, that it was a clear day and she left her apartment to get her car. She wanted to cross the street, in the middle of the block, to get to her car (Affirmation in Opposition [Opp], Ex C, Sibony Transcript [S Tr] 12:7-8, 13:11-13, 14:25, 15:4-7, 33:5-15). She saw one wrapped Christmas tree parallel to the sidewalk where she wanted to cross (S Tr 24:13-16). She took a step to the right to avoid the tree, however, when she took a step

forward she tripped on a branch attached to the tree that she did not see until after she fell (S Tr 20:4-25, 25:1-22, 23:4-23, 24:13-16, 35:3-10, 14-22, 36:20-24, 37:4-17). She tripped on the sidewalk and fell into the street (S Tr 34:5-8, 19-21). She does not know who put the tree at that location or for how long it was there (S Tr 30:16-25, 31:2-6).

In support of its motion, defendant relies on the testimony of Juan Arias, the doorman on duty at the time of the accident. He testified that he did not know how long the tree had been on the sidewalk, whether it was wrapped or who took the tree out (Opp, Ex D, Juan Arias Transcript [JA Tr] 9:4-25, 10:2-8). He further testified that there was more than one tree and that they were lying side to side but that they were not obstructing the sidewalk (JA Tr 13:23-25, 14:17-19, 15:2-6).

Spyro Papathanasiou--the building's resident manager superintendent--explained that porters take the old Christmas trees out of the building to be picked up by sanitation (Spyro Papathanasiou Transcript [SP Tr] 7:3-19, 15:2-25, 16:2-5). The trees were to be placed in the first flag area on the sidewalk, free of decoration and wrapping (SP Tr 17:3-25). The trees would be about 20 feet to the right of the entrance (SP Tr 19:6-23). He recalled that on the day of the accident everything looked normal, there was no tripping hazard and

there were three trees stacked, two side by side and one on top (SP Tr 31:8-25, 32: 2-5). He explained that when he went to assist Ms. Sibony, she was located near the Christmas tree area 20 feet west of the entrance (SP Tr 23: 2-18).

Defendant urges that the action should be dismissed as the placing of trees on the sidewalk for pick up created an open and obvious condition that was not inherently dangerous and that it was plaintiff's own negligence in attempting to climb over the tree(s) to cross the street that caused the accident (Affirmation in Support [Sup Aff] ¶ 6).

Plaintiff urges that defendant failed to meet its burden as it has not demonstrated that it maintained the sidewalk in a reasonably safe condition at the time of the accident (Opp at ¶ 8).

#### Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a *prima facie* showing

of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (see *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against summary judgment. Indeed, the moving party's failure to make a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

Plaintiff correctly points out that the defendant did not meet its heavy burden here (Opp at ¶ 8). Defendant failed to sufficiently establish, at a minimum, that the premises was kept in a reasonably safe condition. Giving plaintiff the benefit of every possible inference, the court is unable to conclude as a matter of law that the tree branch plaintiff tripped on was open and obvious and that the sidewalk was kept in a reasonably safe condition (*Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599 [1st Dept 2010]) [defendant did not establish protruding metal grate cover was open and obvious and, even if it had, that would only negate duty to warn and not the duty to maintain the premises

in a reasonably safe condition]; *Price v Staples The Off. Superstore E., Inc.*, 85 AD3d 447 [1st Dept 2011][even if evidence demonstrated condition was open and obvious, triable issue existed as to whether premises was in a reasonably safe condition and jury could conclude rolled up carpet was a tripping hazard]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 Ad3d 69 [1st Dept 2004][obviousness of danger is a factor that will impact foreseeability of an accident and comparative negligence but will not, as a matter of law, relieve the landowner of the duty to maintain the premises]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: January 28, 2016



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HON. JENNIFER G. SCHECTER