

**Buchanan v New York & Presbyt. Hosp.**

2017 NY Slip Op 31864(U)

August 16, 2017

Supreme Court, New York County

Docket Number: 157226/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C.  
*Justice*

PART 2

-----X

CAROL BRYCE BUCHANAN  
Plaintiff,

INDEX NO. 157226/2015

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

THE NEW YORK AND PRESBYTERIAN HOSPITAL,  
Defendant.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this application to/for Summary Judgment

Upon the foregoing documents, it is  
ordered that the motion is **denied**.

Defendant The New York and Presbyterian Hospital (“NYPH”) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Carol Bryce Buchanan’s complaint. For the reasons set forth below, the motion is **denied**.

**Factual and Procedural Background:**

This negligence action stems from an accident that occurred on March 13, 2015 while plaintiff was walking on a sidewalk abutting NYPH's building located at 523 East 70<sup>th</sup> Street, New York, New York (Capece affirmation, ¶ 3). Plaintiff claims that the toe of her right shoe struck the edge of a sidewalk flag, causing her to fall and injure her left shoulder. In moving for summary judgment dismissing the complaint, NYPH contends that the alleged sidewalk defect was not "substantial," but trivial as a matter of law and, therefore, not actionable given the totality of the circumstances surrounding the alleged incident (*id.*, ¶ 4). In opposition to the motion, plaintiff argues that whether the alleged sidewalk defect was trivial is a triable question of fact inappropriate for disposition on a summary judgment motion (Lichtman affirmation, at 2).

During her deposition, plaintiff testified that, on the day of the alleged incident, she left an MRI appointment at the Hospital for Special Surgery and proceeded to walk on East 70<sup>th</sup> street towards York Avenue. As she "was walking down the sidewalk in a usual fashion," the toe of her right shoe "hit a raised piece of pavement, sidewalk and [she] fell flat on [her] face," stopping her fall with her two hands (Capece affirmation, exhibit F at 42:21-25). Prior to her toe coming into contact with the raised piece of sidewalk, plaintiff did not notice anything unusual about the condition of the sidewalk on East 70<sup>th</sup> Street (*id.*, p. 52:7-10).

At the time of plaintiff's alleged fall, it was not raining, she was not looking at her cell phone, she was wearing her contact lenses, and about eight to ten people were walking ahead of

her with no apparent difficulty navigating the sidewalk (*id.*, pp. 42-44). After her fall, plaintiff was taken to Weill-Cornell hospital, where doctors determined that her shoulder was fractured and dislocated (*id.* at 63:12-13). She stayed in the hospital overnight and was discharged the next day (*id.* at 63:14-17).

In her verified complaint, plaintiff alleged that NYPH caused the sidewalk to “remain in a dangerous and defective condition,” thereby causing the injuries she sustained (Complaint, Capece affirmation, exhibit C, ¶¶ 10, 12).

#### **Legal Conclusions:**

A defendant seeking summary judgment “dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). If the defendant successfully makes such a showing, the burden shifts to the plaintiff to establish an issue of fact (*id.*).

In *Hutchinson, supra*, the Court of Appeals held that “there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable,” and in deciding whether a defect is trivial, as a matter of law, a court should consider all of the surrounding circumstances, such as “the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury” (*Hutchinson*, 26 NY3d at 77

[citation and internal quotation marks omitted]; *Flores v New York City Tr. Auth.*, 147 AD3d 553, 554 [1st Dept 2017]). Small defects may “be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot” (*Hutchinson*, 26 NY3d at 79).

In this case, both parties have submitted expert reports addressing the condition of the sidewalk where plaintiff allegedly fell (Lichtman affirmation, exhibit 1; Capece affirmation, exhibit K). Defendant’s expert, Adam Cassel, P.E., conducted an inspection of the relevant portion of the sidewalk area and measured the vertical difference in elevation at the joint between the adjoining sidewalk surfaces where plaintiff’s foot struck the raised portion of sidewalk to be three-eighths of an inch vertical distance in elevation at the joint which, he attests, “does not meet the criteria of a ‘substantial defect’ and/or ‘trip hazard’ as defined by the rules, regulations and statutes governing sidewalks within the City of New York” (Capece affirmation, exhibit K at 2-3). Attached to Mr. Cassel’s report are photographs of the relevant portion of the sidewalk, including photograph no. 8, which shows a “view of the raised joint, with ruler and level for scale, showing a difference in elevation of  $\pm 3/8$  of an inch with respect to the adjoining surface where the [p]laintiff reportedly tripped and fell” (*id.*, Cassel aff., exhibit 2).

Plaintiff’s expert, William Marletta, Ph.D., CSP, also performed an inspection of the accident site (Lichtman affirmation, exhibit 1, ¶ 4). However, according to Mr. Marletta, “there is approximately three-quarters of an inch (3/4”) difference in levels between the two levels of

sidewalk measured at the area identified by plaintiff” (*id.*, ¶ 6). Closer to the building, Mr. Marletta measured the “change in levels” as decreasing to “about five-eighths of an inch (5/8)” (*id.*).

In support of NYPH’s reply affidavit, Cassel maintains that this “three-quarter (3/4) inch measurement cited by plaintiff’s expert is misleading and does not accurately represent the abrupt, vertical difference in elevation at the exposed edge of the raised joint on which plaintiff reportedly testified that her ‘right toe hit’” (O’Reilly reply affirmation, exhibit A at 2). Specifically, according to NYPH’s expert, Mr. Cassell, “the measurement by plaintiff’s expert recorded the total difference in elevation between the top surfaces of the adjoining flags,” which is a “measurement that is not accurate in determining the abrupt vertical change in elevation” (*id.*).

“Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable” (*Fasone v Northside Props. Mgt. Corp.*, 149 AD3d 905, 906 (2d Dept 2017) [citation and internal quotation marks omitted]). Here, however, the photographs showing the competing measurements of the respective experts are not dispositive, but rather reflect that the experts measured the elevation differential between the sidewalk flags using different methods. Under these circumstances, it is not for the Court to determine which expert has utilized the correct measurement. The competing expert affidavits are sufficient to create a triable issue of fact and preclude summary judgment (*Padarat v New York City Tr. Auth.*, 137 AD3d 1095, 1097 [2d Dept 2016]; *cf. Saab v CVS Caremark Corp.*, 144 AD3d 540 [1st Dept 2016] [summary judgment appropriate where plaintiff failed to rebut defense expert’s measurements of alleged defect]).

Therefore, in light of the foregoing, it is hereby:

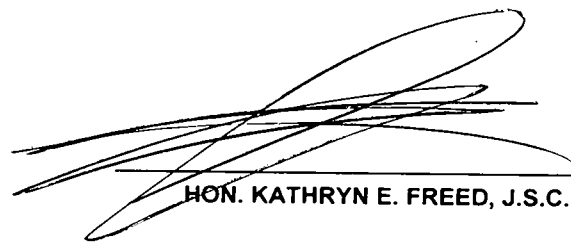
ORDERED that the motion by defendant The New York and Presbyterian Hospital for summary judgment is denied; and it is further

ORDERED that counsel for plaintiff Carol Bryce Buchanan is to serve a copy of this order, with notice of entry, upon on counsel for defendant The New York and Presbyterian Hospital, the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED that this constitutes the decision and order of the court.

8/16/2017

DATE

  
HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: