

Cammarata v Dartmouth Coop. Corp.

2017 NY Slip Op 32004(U)

September 21, 2017

Supreme Court, Queens County

Docket Number: 700924/2015

Judge: Robert J. McDonald

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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

REGINA CAMMARATA, Index No.: 700924/2015

Plaintiff, Motion Date: 9/14/17

- against - Motion No.: 31

DARTMOUTH COOPERATIVE CORP. and METRO Motion Seq.: 1
MANAGEMENT & DEVELOPMENT, INC.,

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants DARTMOUTH COOPERATIVE CORP. and METRO MANAGEMENT & DEVELOPMENT, INC. for an Order pursuant to CPLR 3212, granting defendants summary judgment on the issue of liability:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 18 - 25
Affirmation in Opposition-Exhibits.....	EF 26 - 31
Reply Affirmation.....	EF 32 - 33

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on August 18, 2014 when she tripped and fell on the sidewalk adjacent to defendants' premises located at 86-28 - 86-30 155th Avenue, Howard Beach, New York 11414. Plaintiff claims that she tripped and fell when her foot came into contact with the vertical rise/exposed face of an uplified sidewalk flag adjacent to defendants' premises.

Plaintiff commenced this action by filing a summons and complaint on February 3, 2015. Defendants joined issue by service of an answer dated August 19, 2015. Defendants now move for an order granting summary judgment and dismissing plaintiff's complaint on the grounds that the alleged condition is trivial in nature and there was no notice of any defect.

In support of the motion, defendants submit an affirmation from counsel, Anthony Marino, Esq.; a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on September 19, 2016; and a color copy of a photograph of the subject sidewalk and alleged defect.

At her deposition, plaintiff testified that at the time the incident occurred, both feet made contact with the sidewalk elevation, causing her to stumble and fall. The front of her toes made contact with the elevation. The sidewalk slab that caused her to fall was higher than the section she was coming from. Directly to the left of the subject sidewalk, was a big tree with big roots. At the time of the incident, she was walking by herself with a cane in her right hand. She fell forward. The right side of her face struck the concrete sidewalk. She immediately felt pain in her face and both knees. She was diagnosed with a right wrist fracture. She walked on the subject sidewalk in the past and never noticed the elevation. Prior to her fall, she did not notice the elevation and never had any conversation regarding the elevation.

Based on plaintiff's testimony and the submitted photograph, defendants' counsel contends that the slightly ramped sidewalk cannot be said to be a dangerous or defective condition. Counsel further contends that the alleged defect is not actionable as it was merely trivial, causing only plaintiff's front toes to make contact with the alleged elevation.

In opposition, plaintiff submits an affirmation from counsel, John N. Miras, Esq.; a copy of a color photograph of the alleged defective sidewalk; a copy of the transcript of the examination before trial of Muhamed Blanca on behalf of defendant Dartmouth Cooperative Corp. taken on September 22, 2016; copies of color photographs of the subject sidewalk taken by Robert L. Schwartzberg, P.E.; and an expert affidavit from Robert L. Schwartzberg, P.E. dated September 13, 2016.

Mr. Blanca testified that he was employed by defendant Dartmouth Cooperative Corp. for over thirty years as superintendent. Plaintiff's fall happened on a portion of the sidewalk that is abutted by a tree. He did not undertake any investigation after he learned of plaintiff's fall. He did not make or fill out any incident report. Approximately three to four years before the incident, he had someone grind down the raised portion of the sidewalk slabs at the incident location. He traversed the subject sidewalk at least five days a week, and inspected the subject sidewalk on a daily basis. Prior to the

subject incident, he put cement in between the subject sidewalk slabs because there was a space between the two slabs caused by an adjacent tree. No work was done to the subject sidewalk slabs after plaintiff's incident.

On August 22, 2016, Mr. Schwartzberg, a licensed professional engineer, inspected the incident site. Mr. Schwartzberg also met with plaintiff who explained how the incident occurred and identified the location where she was caused to trip. He measured the sidewalk flag to be six feet in width by approximately five feet in length. The projected vertical rise between the two subject sidewalk flags was 1-3/8 inches in the vertical. He measured the ground down area of the subject sidewalk flag at the incident site to be approximately eighteen inches and to be continuous across the entire width of the sidewalk flag. He further opined that the downward angle of the area which had been ground down supported his finding that the sidewalk was at an elevation of more than one full inch above the surface of the adjacent sidewalk flag at the incident site. He opined that the subject sidewalk was a serious trip hazard and a violation of the New York City Administrative Code. It is also his opinion that the subject sidewalk was not kept in a proper state of repair and was not maintained free from hazardous conditions. He concluded that a conscientious visual inspection of the subject sidewalk would have revealed the unsafe conditions at the subject site.

Based on the testimony, photographs, and Mr. Schwartzberg's affidavit, plaintiff's counsel argues that defendants failed to make a prima facie showing that the condition in question was too trivial to be actionable because defendants failed to offer any measurement of the subject sidewalk. Counsel further contends that issues of fact exist including, but not limited to, whether defendants caused or created the subject condition, whether defendants had constructive notice of the subject condition, and whether the condition was readily apparent to defendants.

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 Monroe 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]).

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 testimony and photographs annexed to the moving papers are inadequate to determine, as a matter of law, that no defective condition existed on the sidewalk where plaintiff allegedly tripped and fell, or that if such a condition did exist, the defect was trivial and did not constitute a trap or nuisance (see Freas v Tilles Ctr., 89 AD3d 680 [2d Dept. 2011]; Araujo v City of New York, 84 AD3d 993 [2d Dept. 2011]; Ricker v Board of Educ. of Town of Hyde Park, 61 AD3d 735 [2d Dept. 2009]; Boxer v Metro. Transp. Auth., 52 AD3d 447 [2d Dept. 2008]). Moreover, it is for a jury to decide, based on the circumstances surrounding the incident, whether the raised sidewalk flag involved herein constitutes an actionable defect for which plaintiff may recover (Hutchinson v Sheridan Hill House Corp., 26 NY3d 72 [2015]).

Accordingly, and for the above stated reasons, it is hereby,

ORDERED, that the motion by defendants DARTMOUTH COOPERATIVE CORP. and METRO MANAGEMENT & DEVELOPMENT, INC. for summary judgment dismissing the complaint is denied in its entirety.

Dated: September 21, 2017
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.