

<b>Cuffe v NYU Hosps. Ctr.</b>
2018 NY Slip Op 31030(U)
May 24, 2018
Supreme Court, New York County
Docket Number: 158667/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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INGRID CUFFE,

Plaintiff

Index No. 158667/2014

v

DECISION AND ORDER

NYU HOSPITALS CENTER,

Defendant.

MOT SEQ 002

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from a trip-and-fall accident, the defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. For the reasons set forth below, the motion is denied.

II. BACKGROUND

In her complaint, the plaintiff alleges that, on December 20, 2012, she tripped and fell on a plastic strap in front of NYU Medical Center at 530 First Avenue in Manhattan. According to her verified bill of particulars, she claims that she "[s]tepped into packing wire which wrapped around her ankles." At her deposition, the plaintiff testified the accident occurred as she and her friend, nonparty Gail Fogel, walked to the entrance of the defendant's hospital on First Avenue near 30<sup>th</sup> Street. She

stated that she had just taken two steps on the sidewalk on the east side of First Avenue, when her feet became entangled in a sandy gray plastic strap, causing her to fall to the ground. As explained by the plaintiff, the accident occurred on a sidewalk adjacent to a low curb near the driveway of a parking garage at the hospital. As she described it, the plastic strap was similar to those used to bind magazines and packages, although there was no newsstand or store in the area.

The plaintiff testified that she did not know long the plastic strap had been on the sidewalk, and that she did not see it until after she fell. She testified, however, that there was garbage and debris, including other plastic straps, on the sidewalk and in the gutter. The plaintiff averred that she believed the plastic strap came from the hospital, where there was construction work being performed. She testified to seeing several construction workers and trucks on First Avenue, and explained that an unnamed construction worker helped her to her feet after she fell. As she described it, that same construction worker also picked up the trash from the sidewalk.

Fogel testified that the plaintiff was approximately two steps away from the sidewalk when she fell on a hard piece of gray plastic in the street. She described the object as a square made of 1/4-inch wide reinforced plastic or nylon that was commonly used to bind heavy boxes. Fogel asserted that the

plaintiff stepped onto the plastic square with both feet, and fell in the street near a curb. Fogel stated that did not see the packing material before the accident, and that she was not aware of any complaints about the sidewalk.

John McCann, the defendant's Building Systems Manager, testified that his responsibilities in 2012 included overseeing daily building operations at the hospital, which comprises 14 buildings on First Avenue between 30th and 34th Streets. McCann explained that Mario Pizzaola supervised the department in charge of maintaining the exterior grounds, and that Pizzaola's staff of 15 cleaned the sidewalk in front of the hospital on First Avenue three times a day during the week and once a day on weekends. McCann testified that the defendant did not maintain any written logs for this work. He further testified that the defendant's Security Department would notify him of a slip-and-fall accident if one had been reported, but that he was not informed of the plaintiff's accident until shortly before his deposition. McCann was not aware of any prior complaints about the sidewalk.

As McCann explained, after Hurricane Sandy in October 2012, the cellars and basements at the hospital were flooded, and there was damage to the exterior facing FDR Drive. McCann stated that the defendant hired outside contractors to perform cleaning and restoration work, and that debris generated from that work was hauled to a loading dock on FDR Drive before it was removed from

the site. McCann further stated that the storm also deposited debris on FDR Drive up to 33rd Street, but that the City of New York removed the debris well before the date of the accident. McCann believed it was unlikely that the plastic strap came from the defendant's loading dock or from trash that had collected on FDR Drive after Hurricane Sandy. McCann averred that there was also construction work taking place at the Office of the Chief Medical Examiner's building next door, but that the defendant did not own that building and was not responsible for cleaning the sidewalk in front of it.

McCann averred in an affidavit that he personally walked the exterior grounds each day to look for trash and ascertain if other issues needed to be addressed. He stated that he had never seen a plastic strap similar to the one described by plaintiff on the sidewalk, nor had he ever received a complaint about a plastic strap left on the sidewalk. He asserted that he was not aware of any prior accident where a person tripped on a plastic strap left on the sidewalk.

Aldwin John averred his in affidavit that he has been employed as defendant's Assistant Director of Environment Services since 2014, and that his duties include overseeing exterior maintenance at the hospital. John stated that two employees sweep and clean the sidewalk in front of the hospital three times a day. He asserted that he has never seen a plastic

strap similar to the one described by plaintiff on the sidewalk. He further stated that he was not aware of any prior complaints about debris on the sidewalk, and he was not aware of any prior similar accidents.

The defendant argues that it bears no liability for the accident because the plaintiff fell on the curb and not the sidewalk in front of the hospital. The defendant also argues that it did not create or have actual or constructive notice of the condition that caused the accident.

The plaintiff opposes the motion, arguing that there are triable issues of fact as to whether she fell on the sidewalk adjacent to the hospital, and that the defendant failed to establish the absence of triable issues of material fact with respect to whether it had constructive notice of the condition that caused her to fall.

III. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985) (citations omitted). The motion must be supported by evidence in admissible

form (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id. A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See id.

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" De Paris v Women's Natl. Republican Club, Inc., 148 AD3d 401, 403-404 (1<sup>st</sup> Dept. 2017); see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480 (1<sup>st</sup> Dept. 1990). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense. See Koulermos v A.O. Smith Water Prods., 137 AD3d 575 (1<sup>st</sup> Dept. 2016); Katz v United Synagogue of Conservative Judaism, 135 AD3d 458 (1<sup>st</sup> Dept. 2016).

"In determining whether summary judgment is appropriate, the

motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1<sup>st</sup> Dept. 1992).

B. OWNERS' LIABILITY FOR FOR DEBRIS ON SIDEWALKS

Section 7-210 of the Administrative Code City of the City of New York imposes a duty upon an owner of real property abutting a sidewalk to maintain the sidewalk in a reasonably safe condition. See Bronfman v East Midtown Plaza Hous. Co., Inc., 151 AD3d 639, (1<sup>st</sup> Dept. 2017); Collado v Cruz, 81 AD3d 542 (1<sup>st</sup> Dept. 2011). A "sidewalk" is defined as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." Administrative Code City of NY § 19-101(d). As such, the duty to maintain the sidewalk does not extend to the curb. See Lebron v City of New York, 144 AD3d 566 (1<sup>st</sup> Dept. 2016); Garris v City of New York, 65 AD3d 953 (1<sup>st</sup> Dept. 2009).

Contrary to its contention that it is free from liability because the accident occurred on a curb, the defendant has not demonstrated that plaintiff fell on the curb. Although Fogel testified the accident occurred in the street, the plaintiff testified unequivocally that the plastic strap on which she tripped was located on the sidewalk, and that she tripped while

on the sidewalk, not the curb. The plaintiff described the area where she fell as part of the driveway leading into a parking garage, and she testified that several photographs marked at her deposition depict a sidewalk and driveway. Thus, insofar as the defendant's motion is predicated on the contention that the plaintiff fell on the curb, as opposed to the sidewalk, it must be denied.

To sustain a common-law negligence claim for an injury resulting from a dangerous premises condition, a plaintiff must demonstrate that an owner either created the allegedly dangerous condition or had actual or constructive notice of it. See Early v Hilton Hotels Corp., 73 AD3d 559 (1<sup>st</sup> Dept. 2010). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 838 (1986) (citations omitted). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." Ross v Betty G. Reader Revocable Trust, 86 AD3d 419, 421 (1<sup>st</sup> Dept. 2011) (citations omitted). "[W]here the hazardous condition is transitory, a defendant may establish its entitlement to summary

judgment by demonstrating that the condition could have arisen shortly before the accident." Betances v 185-189 Audubon Realty, LLC, 139 AD3d 404, 405 (1<sup>st</sup> Dept. 2016) (citations omitted).

Although the defendant presented evidence that it did not create the condition (see Schulman v City of New York, 157 AD3d 548 [1<sup>st</sup>. Dept. 2018]), it failed to demonstrate its lack of notice. See Simpson v City of New York, 126 AD3d 640 (1<sup>st</sup> Dept. 2015); Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp., 110 AD3d 637 (1<sup>st</sup> Dept. 2013); cf. Perez v 68 Orchard, LLC, 126 AD3d 570 (1<sup>st</sup> Dept. 2015). Generally, a defendant moving for summary judgment on the ground that it did not have constructive notice of a dangerous condition must show that it recently inspected the area in question, or repeatedly inspected the area for a sufficient period of time leading up to the accident. See Guzman v Broadway 922 Enters., LLC, 130 AD3d 431 (1<sup>st</sup> Dept. 2015); Rivera v Tops Mkts., LLC, 125 AD3d 1504 (4<sup>th</sup> Dept. 2015); Mike v 91 Payson Owners Corp., 114 AD3d 420 (1<sup>st</sup> Dept. 2014). Proof of recent inspections is not required only where it is demonstrated that such inspections would not have disclosed the dangerous condition or defect. See Branham v Loews Orpheum Cinemas, Inc., 31 AD3d 319 (1<sup>st</sup> Dept. 2006), citing Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc., 15 AD3d 857 (4<sup>th</sup> Dept 2005).

Although McCann described the defendant's general routine for cleaning the sidewalk, his averments are not sufficient to

establish that the routine was followed on the day of the accident. See Dylan P. v Webster Place Assoc., L.P., 132 AD3d 537 (1<sup>st</sup> Dept. 2015), affd 27 NY3d 1055 (2016). Nor do they demonstrate that a timely inspection would have failed to disclose the presence of the debris on which the plaintiff allegedly tripped. Since John did not begin working for the defendant until 2014, his affidavit lacks probative value as to the condition of the sidewalk on the date of the accident in 2012, or when it was last inspected prior to the accident. Inasmuch as the defendant failed to present any specific evidence of when the sidewalk was last cleaned or inspected before accident, its motion must be denied, without regard to the sufficiency of the plaintiff's opposition papers.

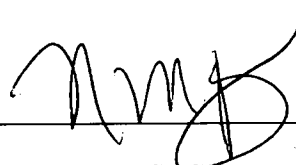
#### IV. CONCLUSION

In light of the foregoing, it is ORDERED that the defendant's motion for summary judgment dismissing the complaint is denied.

This constitutes the Decision and Order of the court.

Dated: May 24, 2018

ENTER: \_\_\_\_\_

  
J.S.C.  
**HON. NANCY M. BANNON**