

Shorin v City of New York

2018 NY Slip Op 31825(U)

July 30, 2018

Supreme Court, New York County

Docket Number: 151093/2016

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

IRIS SHORIN,

Index No.: 151093/2016
DECISION/ORDER
Motion Seq. 04 and 05

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY CENTER,
NEW YORK CITY DEPARTMENT OF
CULTURAL AFFIARS, NAVILLUS CONTRACTING,
NAVILLUS TILE, INC., and ENNEAD ARCHITECTS,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for leave to amend the complaint (motion sequence 04), plaintiff's motion to vacate the stay (motion sequence 05), and defendants' cross-motion for summary judgment (motion sequence 05).

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the City of New York, New York City Center, Inc. i/s/h/a New York City Center.
Kaufman Dolowich & Voluck, LLP, Woodbury (Megan E. Yllanes of counsel), for non-party
Westerman Construction Co., Inc.

Gerald Lebovits, J.

This court consolidates motion sequences 04 and 05 for disposition.

Background

According to plaintiff, on the morning of October 27, 2015, plaintiff allegedly tripped and fell on a sidewalk in front of New York City Center. She was familiar with the block where the sidewalk was located. (Plaintiff's 50-H Hearing at 13, lines 5-7.) Plaintiff alleges that the severe injuries she incurred were due to a sidewalk defect. (*Id.* at 10, lines 14-22.) At the time of the accident, plaintiff was walking at a normal pace, and the sidewalk pedestrian traffic was moderate to busy. (*Id.* at 14, lines 5-10.) The weather was sunny and clear (*id.* at 10, line 25), and nothing, such as construction, distracted her while she was walking. (*Id.* at 14, lines 11-14.)

Plaintiff's expert inspected the sidewalk on November 27, 2015. The inspection showed that a defect existed measuring 1 inch at its base, approximately 1 and 1/2 inches long, and between 3/8 inch and 7/16 inches deep with jagged edges. (Plaintiff's Affirmation in Opposition to Cross-Motion to Dismiss at 4.) Approximately two and half years after the accident, defendants' expert inspected the defect. That inspection revealed that the defect measured 5/16 inch in depth and 1 and 1/2 inches in horizontal length. (Defendants' Affirmation in Support of Cross-Motion at 7.)

Plaintiff sued defendants claiming that defendants are liable for the injury. Plaintiff now moves for leave to amend the complaint asking this court to add Westerman Construction Co., Inc. ("Westerman"), and to discontinue this action against Ennead Architects, LLP ("Ennead"). Plaintiff further moves to vacate the stay as against the City of New York, New York City Center, New York City Department of Cultural Affairs. In response to plaintiff's motion to lift the stay, defendants, the City of New York and New York City Center, Inc. i/s/h/a New York City Center ("City Defendants"), cross-move for summary judgment.

Plaintiff's motion for leave to amend complaint

Plaintiff's motion for leave to amend the complaint is granted in part and denied in part. Plaintiff asks this court to add Westerman as a defendant and to discontinue plaintiff's action against Ennead. (Motion sequence 4). In motion sequence 5, plaintiff moves to withdraw motion sequence 4 as against Westerman. Because this court grants that aspect of motion sequence 4, this court declines to add Westerman as a named defendant and allows plaintiff to discontinue her action against Ennead.

Plaintiff's motion to vacate the stay

Plaintiff's motion to vacate the stay is granted. The United States Bankruptcy Court for the Southern District Court of New York found that the automatic bankruptcy stay does not apply to and was not extended to the City Defendants, the New York City Department of Cultural Affairs, or Ennead Architects, LLP f/k/a PSHEK Partnership Architects. With respect to these defendants, the stay is lifted.

Plaintiff also seeks to leave ^{to} amend the caption, withdraw motion sequence 4 as against Westerman, compel an examination before trial, and set the matter down for a compliance

conference. This court grants only the request to withdraw motion sequence 4 against Westernman. The other requests are now academic.

Defendants' Cross-Motion

Defendants' cross-motion for summary judgment is granted. The issue presented in the cross-motion is whether the sidewalk defect that allegedly caused plaintiff's injury is so trivial as to warrant disposition on summary judgment. This court concludes that the size of the defect and the circumstances of this case warrant granting the cross-motion and dismissing this action.

In determining whether a defect alleged to have caused injury to a pedestrian is trivial as a matter of law, "a small difference in height or other physically insignificant defect is actionable, if its intrinsic characteristics or surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a pedestrian." (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015] [internal citations and quotation marks omitted].) When assessing the surrounding circumstances that may render a physically small defect actionable, many Appellate Division opinions repeat the phrase "not constituting a trap"; however, the question whether a defect constitutes a trap is not dispositive. (*Id.* at 78, quoting *Loughran v. City of New York*, 298 N.Y. 320, 321-322 [1948] ["Liability does not turn] upon whether the hole or depression, causing the pedestrian to fail, . . . constitutes a trap."] [internal quotation marks omitted].) In addition to that question, courts should also consider other factors such as "a jagged edge; a rough, irregular surface, the presence of other defects in the vicinity; poor lighting; or a location – such as heavily traveled walkway – where pedestrians are naturally distracted from looking down at their feet." (*Hutchinson*, 26 NY3d at 78-80 [internal citations omitted].)

In some instances, injuries allegedly caused by a small defect in a sidewalk need not be submitted to a jury. (*Trincere v County of Suffolk*, 90 NY2d 976, 976 [1997].) If the specific facts and circumstances do not magnify the dangers a defect poses, a gradual, shallow depression is trivial as a matter of law. (*Lovetere v Meadowlands Sports Complex*, 143 AD3d 539, 539 [1st Dept 2016] [holding that a defect in the ceramic floor tile was insignificant and trivial and warrants disposition on summary judgment; the depth of the defect in a grouted area of the floor was 3/16 of an inch, as well as 7/8 of an inch wide and 4 inches in length]; *Santiago v United Artists Communications*, 263 AD2d 407, 407 [1st Dept 1999] [holding that a depression of 1/2 inch of a step is trivial]; *Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210, 210 [1st Dept 1998] [holding that 1 and 1/2 inches walkway depression is shallow and gradual].)

When photographs show that the defect was not hidden or covered in any way to prevent a plaintiff from seeing and identifying it as a hazard and the defect was in a well-lit area, a plaintiff has no cause of action. (*Gracia v 549 Inwood Assoc., LLC*, 136 AD3d 555, 556 [1st Dept 2016] [holding that a 1/4 inch deep trivial sidewalk defect is not actionable if the photographs demonstrate that "the crack was in the middle of the walkway, in a well-illuminated location, and was not hidden or covered in any way so as to make it difficult to see and identify as a hazard" and plaintiff provided only her and her daughter's estimates of its depth].) Also, the existence of jagged edges is not sufficient to magnify the dangers of the defect; an edge not

dangerously irregular does not magnify the danger it allegedly poses. (*Lovetere*, 143 AD3d at 539.)

Defendants demonstrate that the defect in the sidewalk was trivial and that no specific facts and surrounding circumstances magnified the dangers it allegedly posed. First, even if the facts are considered in the light most favorable to plaintiff, the depression is shallow. According to plaintiff's expert, the depression measured 1 inch at its base, approximately 1 and ½ inches long, and between 3/8 inch and 7/16 inch in depth with jagged edges.

Second, no specific facts or surrounding circumstances magnified the dangers that the defect allegedly posed. Specifically, the defect was not hidden or covered and thus it was not difficult for the plaintiff to see the defect: as plaintiff's picture shows, the defect was in the middle of the sidewalk slab. In addition, although plaintiff at her 50-H hearing alleged that the sidewalk traffic was "moderate to busy," she admitted that nothing distracted her, such as construction (Plaintiff's 50-H Hearing at 13, lines 5-7), that it was a sunny day (*id.* at 10, lines 23-25), and that she was walking at a normal pace. (*Id.* at 14, lines 5-7.) Moreover, she admitted at the hearing that she was familiar with the area. (Plaintiff's 50-H Hearing at 13, lines 5-7.) Given these circumstances, it was not difficult for plaintiff to identify the defect as a trap or hazard if it was one.

Furthermore, although plaintiff argues that the allegedly jagged edges of the defect are dangerous, defendants' and plaintiff's pictures demonstrate that the defect was not dangerously irregular. (*See Dick v Gap, Inc.*, 16 AD3d 615, 615 [2d Dept 2005] [finding that photographs of the sidewalk demonstrated that the alleged defect was visibly more shallow than plaintiff's description of the alleged defect].) Thus, the allegedly jagged edges do not render the defect nontrivial.

Plaintiff also argues that defendants' pictures were taken two years after the accident and therefore that the depth of the defect could be more shallow today than it was in October 27, 2015, the day of the accident. But plaintiff fails to argue that the sidewalk is not in substantially the same condition as it existed at the time of the accident, and defendants' expert inspection shows that the depth of the defect is 1/16 or 2/16 of an inch less than it was two years ago, while its length remains the same. (*See Saab v CVS Caremark Corp.*, 144 AD3d 540, 541 [1st Dept 2016] [holding that photographs of a sidewalk defect taken two years after the accident are admissible, because defendant testified that there had been no repairs to the sidewalk since the accident and plaintiff did not argue that the photographs did not show the sidewalk in substantially the same condition as it existed at the time of the accident].)

Therefore, defendants' cross-motion for summary judgment is granted.

Accordingly, it is

ORDERED that Iris Shorin's motion for leave to amend complaint (motion sequence 04) is granted in part and denied in part. This court declines to add Westerman as a named defendant and allows plaintiff to discontinue her action against Ennead Architects; and it is further

ORDERED that Iris Shorin's motion to vacate the stay is granted (motion sequence 05). Accordingly, with respect to the City of New York, New York City Center, and the New York City Department of Cultural Affairs, the stay is lifted. Also, this court also grants Iris Shorin's request to withdraw motion sequence 4 against Westerman; and it is further

ORDERED that the City of New York and New York City Center's cross-motion for summary judgment is granted (motion sequence 05) and the action is dismissed against these defendants; and it is further

ORDERED that the stay shall remain in effect as against Navillus Tile Inc., and Navillus Contracting.

Dated: July 30, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.