Rush v Fifth Ave. of Long Is. Assoc., LLC
2018 NY Slip Op 34376(U)
October 4, 2018
Supreme Court, Nassau County
Docket Number: Index No. 600876/17
Judge: Jeffrey S. Brown

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 12**
DOREEN RUSH,	
	INDEX #600876/17
Plaintiff,	**Mot. Seq. 1**
-against-	**Mot. Date 6.21.18**
	Submit Date 9.26.18
FIFTH AVENUE OF LONG ISLAND ASSOCIATES, LLC, CASTAGNA REALTY CO., INC.,	
Defendants.	
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The following papers were read on this motion: E File Docs Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	14
Answering Affidavit	28
Reply Affidavit.....	30

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Defendants move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint.

Before this court is a trip and fall personal injury action that occurred at the Americana Mall located on Northern Blvd. in Manhasset, New York. In support of this motion, defendants submit the deposition testimony of plaintiff Doreen Rush and Robert Ronzoni, who appeared on behalf of defendant Castagna Realty Co.

Ms. Rush testified that on August 8, 2016 she was walking on a stone walkway heading towards the Michael Kors store at the Americana Mall. She testified that up until the time of the accident, Ms. Rush was not looking towards the ground. The stone walkway was squares of the same color. As she was walking, her left toe got caught in the walkway and she was caused to fall to the ground. As she was falling she looked at the walkway and realized that the sidewalk was raised. Ms. Rush testified that one of the squares was raised approximately 3/4 to 1 inch in height over the other square. The stones in question were adjacent to each other. She was

unaware of any prior complaints that were made about the condition. Her friend Monica who came to the scene of the accident took Ms. Rush's husband to show him the area where his wife had fallen.

Robert Ronzoni testified that he is employed by defendant Castagna Realty, Inc. and has been the property manager for the Americana Shopping Center since about 2005 or 2006. As part of his duties, he oversees maintenance which consists of a team of six individuals. They perform a daily walk-through which starts in the morning to make sure there is no debris or papers in the parking lot. They do a complete walk-through as they clean the sidewalks and parking lot. If there is any defect, he is notified. There is no log kept for inspections. If a defect is found, a cone is placed there and the maintenance staff person advises him verbally. He read a report that claimed that an accident occurred on the walkway next to Prada and Michael Kors stores.

The sidewalks are made of granite, and if a repair was needed he would call in a professional company to do the work. He was unsure if any of the flags needed to be repaired for a period of two years prior to the accident. However, prior to August 8, 2016 there were instances when the granite stone on the sidewalk in question became unleveled. An outside contractor would come in and pick up the stone, level the area underneath and then replace the stone on the ground. He is unsure of the last time this work was done.

Further, he is unaware of any complaints with regard to the north-south sidewalk in the area where the accident is alleged to have occurred before the date of the accident. He also went to the place of the accident and did not observe any "trippers." Castagna Realty Co. owns the Americana Shopping Center.

Counsel for the defendants argues that the defect was trivial and further, they did not create the condition nor did they have constructive or actual notice of the condition.

In opposition, plaintiff's counsel points to the two aforesaid depositions. Arguendo, even if the defendant did submit sufficient evidence to prove the defect was trivial, plaintiff's testimony raises an issue of fact with respect to the height of the alleged defect. Further, defendants failed to document the daily inspections, thus, it is unknown whether the maintenance workers observed a dangerous condition. Nor did the defendants demonstrate a prima facie case that they did not have constructive notice, actual notice or did not create the condition.

In their reply defendants argue that plaintiff failed to demonstrate where she had fallen.

> "It is well established that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *see also William J.*

> *Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993]).

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; *see also Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

"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 [citations omitted]" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

> "A defendant in a trip-and-fall case who moves for summary judgment based on lack of notice has the initial burden of making a prima facie showing that it neither created nor had actual notice of the alleged hazardous condition, and that it did not have constructive notice of the condition for a length of time sufficient to discover and remedy it (*see Levine v. Amverserve Assn., Inc.*, 92 AD3d 728 [2012]; *Jackson v. Jamaica First Parking, LLC*, 91 AD3d 602 [2012]; *Arzola v Boston Props. Ltd. Partnership*, 63 A.D.3d 655, 656 [2009]). 'To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' (*Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598, 598–599 [2008]; *see Levine v. Amverserve Assn., Inc.*, 92 AD3d at 729; *Pryzywalny v. New York City Tr. Auth.*, 69 AD3d 598, 599 [2010]).
>
> "Here, the defendants failed to establish, prima facie, that they lacked constructive notice of the alleged condition, as the deposition testimony of the [manager] of the building [outside of] which the plaintiff fell merely referred to his general inspection practices and

> provided no evidence as to when the area in question was last inspected relative to the plaintiff's accident (*see Levine v. Amverserve Assn., Inc.*, 92 AD3d at 729)."

(*Green v Albemarle, LLC,* 107 AD3d 948 [2d Dept 2013]).

Although there is proof that the defendants did not create the condition or have actual notice, the defendants failed to demonstrate that they did not have constructive notice. Here Mr. Ronzoni, the property manager solely referred to a daily general cleaning practices which is insufficient to meet its burden. There is no evidence of a particularized or specific inspection in the area where the plaintiff allegedly fell. (*Birnbaum v New York Racing Assn, Inc.*, 57 AD3d 598 [2d Dept. 2008]). There is also no testimony as to what area was actually inspected during this walk-through or when the last time before the accident the area in question was inspected.

Further, with respect to the alleged defect:

> "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip. In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury."

(*Dery v. K Mart Corp.*, 84 A.D.3d 1303 [2d Dept 2011] [citations and internal quotation marks omitted]); *see, Schiller v St Francis Hosp*, 108 AD3d 758 [2d Dept 2013].

> "[T]here 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.' However, the defendants bear the burden of demonstrating that the defect is trivial by providing evidence including details regarding the height of the differential . . . In the instant case, [the defendants] failed to submit any objective measurements of the dimensions of the alleged defect, and it is impossible to ascertain the extent of the height differential from the photographs submitted." (*Grundstrom v. Papadopoulos*, 117 A.D.3d 788 [2d Dept 2014] [citations omitted]).

Mr. Ronzoni testimony identified a photo which to his knowledge depicted the area of the accident. From the photograph he testified that he did not see a tripping hazard. This would be

insufficient to demonstrate that the defect was trivial. In addition, plaintiff raises an issue of fact by her testimony that the defect was between 3/4 of an inch and one inch in height.

For all the aforesaid reasons, the motion to dismiss is **denied**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 4, 2018

ENTER:

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J.S.C.

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