

Caraway v North Park Preserv. LP
2019 NY Slip Op 30010(U)
January 4, 2019
Supreme Court, New York County
Docket Number: 157877/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

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WILLIE CARAWAY,

Plaintiff,

- v -

NORTH PARK PRESERVATION LP,

Defendant.

INDEX NO. 157877/2015

MOTION DATE _____

MOTION SEQ. NO. 003

DECISION AND ORDER

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HON. BARBARA JAFFE:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83 were read on this motion to/for summary judgment.

By amended notice of motion, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes.

I. PLAINTIFF’S ALLEGATIONS

In his first complaint, filed on or about June 2, 2015, plaintiff does not mention the date of his accident or how he was injured, stating only that he was injured on premises owned and maintained by defendant. (NYSCEF 56). In his first amended complaint he adds that he was injured on or about February 24, 2014 (NYSCEF 57), and in his second amended complaint, that he was injured on or about February 6, 2014 (NYSCEF 58). In his verified bill of particulars, plaintiff maintains that the accident occurred on February 6, 2014, and that defendant was negligent in failing to maintain its sidewalk in a reasonably safe condition. (NYSCEF 60). None of plaintiff’s pleadings references snow or ice on the sidewalk at the time of his accident.

During his deposition, plaintiff testified that his accident occurred “around February, the first week of February,” and on a weekday, not on the weekend, and that he had no records

reflecting the actual date of the accident. At the time, he lived in a building on defendant's premises, and had exited his apartment and began walking on a walkway in an interior courtyard in the premises. It had snowed a few days before, and he had observed snow on the ground. While it appeared that the walkway had been shoveled, and that less than one foot of snow had accumulated on it, there remained patches of ice with the snow. He described the accident as follows: "as I came out of the building and I was walking, the accident happened because the concrete was not level so my right foot hit the lip and I tripped. As I'm trying to regain my footing with my foot I slipped because there was (sic) patches of ice there." Plaintiff estimated the height differential at a few inches and authenticated photographs as accurately depicting the sidewalk defect on which he tripped. (NYSCEF 62).

II. DEFENDANT'S ARGUMENTS

Defendant asserts that plaintiff does not establish that there were any defective or unsafe conditions related to the concrete walkway, as it "is obvious from the photographs that there is nothing wrong with the interior walkways which are clearly in excellent condition." It also argues that plaintiff does not demonstrate a *prima facie* case of either a defective sidewalk or a snow and ice condition thereon given his "confused date of loss and [absent] evidence of any defects or notice of defects." (NYSCEF 55).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial.

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad* 64 NY2d at 853).

While the plaintiff bears the ultimate burden of proof at trial, a defendant moving for summary judgment bears the initial burden of demonstrating that it is entitled to judgment by submitting evidentiary proof in admissible form. (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2015]). As “a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.” (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]).

Here, defendant offers no evidence based on personal knowledge reflecting that there was no defect in the walkway. Counsel’s conclusory assertion is not probative and the photographs neither clearly nor obviously depict an absence of a defect. Defendant’s employee’s testimony that the walkway had been completely replaced with a new one two to three years before plaintiff’s accident does not establish that there was no defect at the time of the accident. Defendant thus fails to meet its *prima facie* burden of establishing that the walkway was not defective or unsafe. (*See Bronstein v Benderson Dev. Co.*, AD3d , 2018 NY Slip Op 08625 [2d Dept 2018] [defendant moving for summary judgment in slip and fall case must demonstrate, *prima facie*, that it neither created condition, nor had actual or constructive notice of it; “burden cannot be satisfied merely by pointing out gaps in the plaintiff’s case”]).

As defendant fails to establish *prima facie* entitlement to summary judgment, there is no need to consider the sufficiency of plaintiff’s opposition. (*Collado*, 126 AD3d at 929). Even if considered, plaintiff raises a triable issue regarding the walkway defect through the affidavit of

his expert, who examined photographs of the walkway and inspected it, and who opines that plaintiff tripped on a gap between two concrete slabs that was approximately three-quarters of an inch deep and seven-eighths of an inch wide, thereby creating a hazard and a trap by creating a depression large enough to cause a person to trip on it. (NYSCEF 75). (*See Suarez v Emerald 115 Mosholu LLC*, 164 AD3d 1130 [1st Dept 2018] [plaintiff raised factual issue through expert's opinion that defect in sidewalk flags created trap-like hazardous condition and one known to cause trip and fall accidents]).

Plaintiff's uncertainty of the date of the accident is cured by his testimony that it occurred the first week of February and on a weekday. Defendant offers no evidence that there were no snow or ice conditions during that week, or that they did not undertake any snow or ice removal efforts then or that their efforts did not create a hazardous condition. (*See Morris v Home Depot USA*, 152 AD3d 669 [2d Dept 2017] [defendant could not meet *prima facie* burden regarding hazardous icy condition by pointing to gaps in plaintiff's case]). Even had defendant met its burden on this issue, plaintiff submits proof through his expert that during the first week of February, there was significant snowfall and below freezing temperatures, thereby raising a triable issue. (*See Jones v New York City Housing Auth.*, 157 AD3d 426 [1st Dept 2018] [factual issue raised as plaintiff's expert opined that, after reviewing relevant climatological reports, while snow had stopped falling before accident, snow and ice would have remained on ground, giving defendant sufficient time to discovery and remedy it]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied.

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1/4/2019
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