Ramos v 885 W.E. Residents Corp.
2019 NY Slip Op 30077(U)
January 11, 2019
Supreme Court, New York County
Docket Number: 150281/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
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JOSEFINA RAMOS,

Plaintiff,

-against-

885 W.E. RESIDENTS CORP. and AKAM ASSOCIATES, INC.,

Defendants.
---x

DECISION AND ORDER
Index No.: 150281/2016
Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this negligence action, defendants 885 W.E. Residents Corp. and Akam Associates, Inc. (collectively, Defendants), move, pursuant CPLR 3212, for summary judgment dismissing the Complaint.[1]

BACKGROUND FACTS

On the afternoon of August 2, 2015, Plaintiff allegedly tripped and fell on an elevated edge of sidewalk flagstone located on the sidewalk abutting a residential building ("885 West End") owned by defendants. 885 West End is located in upper Manhattan one block north of Plaintiff's residence at 851 West End Avenue, where she has lived for 40 years (NYSCEF doc No. 17 at 7). On the day of the accident, Plaintiff was on her way home from a church service she attends regularly and was walking via the route she always takes back to her residence (*id.* at

[1] While defendants also nominally move under CPLR 3211, the moving papers only make arguments for summary judgment pursuant to CPLR 3212.

28). As she was walking past 885 West End, she paused to look at flowerpots in front of the building and then tripped on the sidewalk (*id.*). Due to the accident, Plaintiff, who is 81 years of age, has suffered various injuries to her wrist, hand, and knee, and has undergone treatment for her injuries in the years following the accident (*id.* at 60-65). Plaintiff argues that the elevated sidewalk flagstone was a dangerous condition and defect that the defendants negligently failed to properly inspect and maintain, and defendants are therefore liable for her injuries (NYSCEF doc No. 1, ¶ 35).

On September 4, 2018, defendants filed a motion for summary judgment pursuant to CPLR 3211 and CPLR 3212, arguing that the sidewalk elevation where plaintiff fell is a non-actionable trivial defect, and not dangerous as a matter of law (NYSCEF doc No. 12, ¶ 3). Defendants also contend there is no evidence they had any actual or constructive notice of the defect *Id.* Onix Collazo, the superintendent of 885 West End, appeared for examination before trial where he testified that he regularly inspected the conditions of the sidewalk (NYSCEF doc No. 18 at 22). Collazo had seen the raised sidewalk flag where Plaintiff tripped prior to the accident, but he estimated it to be about a quarter inch high and therefore not dangerous or in need of repair. *Id.* at 31. Additionally, a video recording of plaintiff's accident captured by security cameras shows various other pedestrians walking over the same area without difficulty (NYSCEF doc No. 12, ¶ 17). Defendants also retained a civil engineer who performed an inspection and found that all sidewalk elevation differentials in the area of the accident were less than ½ inch and therefore not in violation of the New York City Administrative Code, which requires all sidewalk elevations to be less than ½ inch (NYSCEF doc No. 21, ¶ 5).

In opposition, plaintiff submits an affidavit from another engineer, Joseph Cannizzo, who measured an elevation differential, at the site of plaintiff's accident, of slightly higher than a ½ inch (NYSCEF doc No. 26, ¶ 30). Based on this measurement, Cannizzo opines that the sidewalk condition was dangerously defective (*id.*). Plaintiff argues that defendants' motion should be denied as there are material questions of fact as to the differing measurements, as well as whether defendants were negligent in maintaining the premises (NYSCEF doc No. 25, ¶ 14).

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez,* 68 NY2d at 324).

A property owner seeking summary judgment in a negligence action is "required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). In a trip and fall action, the defendant who moves for summary judgment must demonstrate "that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. TeaCo., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]).

Of course, for a defendant to be liable for a dangerous condition, one must exist on the property in the first place. The issue of "whether a dangerous or defective condition exists on the property of another so as to create liability ... is generally a question of fact for the jury" (*Trincere v. Cnty. of Suffolk,* 90 NY2d 976, 977, [1997]). However, "not every injury allegedly caused by an elevated brick or slab need be submitted to a jury," as depending on the complete circumstances of the case, defects can be trivial and therefore nonactionable for a finding of liability. *Id.* The question of whether a defect is trivial depends on the "surrounding circumstances or intrinsic characteristics" of the defect and whether they increase the risk it poses (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]). For instance, evidence showing that on the date of the accident, external conditions such as weather rendered the defect

difficult to see or walk on safely may support the conclusion that the defect, while small, constitutes a dangerous trap (*Id.* at 78-79). If the defendant satisfies the burden of establishing *prima facie* that the defect is physically insignificant and not a safety risk, the burden shifts to the plaintiff to introduce an issue of fact. *Id.*

Here, Defendants have introduced compelling evidence that the sidewalk defect was trivial in nature. According to Plaintiff's own testimony, the weather at the time was clear and sunny (NYSCEF doc No. 17, page 12). Plaintiff's path was one she had followed on a regular basis without incident. Defendants' expert witness's inspection demonstrated that the height differentials in the entire area of the accident were less than ½ inch (NYSCEF doc No. 21, ¶ 4). However, Plaintiff's expert witness came to a different conclusion upon his inspection, finding that the elevation where Plaintiff tripped was 9/16 of an inch, which is slightly higher than the ½ inch limit to sidewalk elevations imposed by the New York City Administrative Code (New York City, N.Y., Code § 19-152[a][4]). According to the code, a sidewalk flagstone elevation of a ½ inch or higher is a "substantial defect" that the property owner is under a duty to repair. *Id.* The Court cannot declare as a matter of law that a sidewalk defect is trivial when a question of fact exists as to whether it violates the City Administrative Code (*See Scuteri v. 7318 13th Ave. Corp.*, 32 NYS3d 447, 451 [Sup Ct, Kings Ct, 2016], *aff'd in part, appeal dismissed in part,* 150 AD3d 1172 [App Div. 2017]). Applicable local law that unambiguously states that defects of a certain height are substantial cannot be ignored in the Court's comprehensive analysis of whether a defect is *de minimis* as a matter of law (*id.*). Accordingly, as the expert witnesses for the parties have come to different conclusions and a triable question of fact exists as to the exact

measurements at the site of Plaintiff's accident, summary judgment cannot be granted on this basis.

As to notice, just as there is a question of fact as to the existence of a defect, there is a question of fact as to whether the putative defect was "visible and apparent" and existed "for a sufficient period" for defendants to discover and remedy it (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). As questions of fact exist as to presence of a defect and notice of it, defendants' application for summary judgment must be denied.

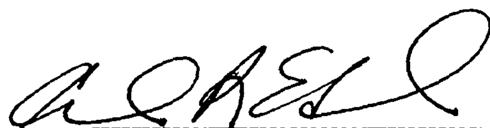
CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendants 885 W.E. Residents Corp. and Akam Associates, Inc.'s motion for summary judgment dismissing the Complaint is denied; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: January 11, 2019



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.