

Brown v Prospect Hgts. Shares LLC

2019 NY Slip Op 30901(U)

April 1, 2019

Supreme Court, Kings County

Docket Number: 509347/2016

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1 day of APRIL, 2019.

PRESENT:
HON. RICHARD VELASQUEZ

Justice.

HOLLY BROWN,

Plaintiff,

Index No.: 509347/2016

-against-

Decision and Order

PROSPECT HEIGHTS SHARES LLC,

Defendants.

KINGS COUNTY CLERK
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2019 APR -3 AM 9:22

The following papers numbered 35 to 51 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	35-44
Opposing Affidavits (Affirmations) _____	46-49
Reply Affidavits (Affirmations) _____	50-51

After oral argument and a review of the submissions herein, the Court finds as Follows:

Defendant, PROSPECT HIGHTS SHARES LLC., (hereinafter "PROSPECT"), move pursuant to C.P.L.R. 3212, for an Order granting Defendants summary judgment and dismissing the Complaint of the Plaintiff upon the grounds that the alleged sidewalk

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"defect" over which the plaintiff tripped is as a matter of law too trivial to be actionable.

Plaintiff opposes the same.

FACTS

The instant action for personal injury arises out of an accident on January 31, 2016 at approximately 6:30 p.m., which was incurred due to plaintiff allegedly tripping and falling while walking on the sidewalk abutting premises owned by the defendant. As a result of this accident Plaintiff alleges to have sustained injury.

According to the plaintiff, on the date of the accident the weather was good and there was no snow on the ground. Plaintiff was on her way to an event she was walking down the middle of the sidewalk looking straight ahead when she tripped on what she described as "broken pavement" and fell onto her forehead and knee. Plaintiff testified that after she fell she observed two cracks in the sidewalk. Plaintiff estimated the crack was 2 inches in depth. As a result of the accident plaintiff alleges her left knee was broken and she fractured her left tibia and hit her head. The plaintiff was taken from the scene of the accident to Brooklyn Hospital. It is undisputed that the plaintiff did not report the condition to anyone prior to the accident.

ARGUMENTS

Defendant argues the depth of the alleged crack that the plaintiff tripped and fell over was trivial in nature because their expert finds the crack in the sidewalk was approximately $\frac{1}{4}$ of an inch in depth, and as such this matter should be dismissed.

Plaintiff argues among other things that the defendants fail to meet their burden for summary judgment because nothing they submit demonstrated that the crack in the

sidewalk was $\frac{1}{4}$ inch or less in depth. Additionally, plaintiff argues that their expert found the crack was $\frac{3}{4}$ of an inch in depth, rendering the defect not trivial as a matter of law.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

The issue of whether a dangerous condition exists on real property depends on the particular facts and circumstances of each case, and generally presents a question of fact for the jury (see *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 NYS2d 615, 688 NE2d 489; *Portanova v. Kantlis*, 39 AD3d 731, 833 NYS2d 652; *Mishaan v. Tobias*, 32 AD3d 1000, 821 NYS2d 640; *Herring v. Lefrak Org.*, 32 AD3d 900, 821 NYS2d 624). However, injuries resulting from trivial defects are not actionable, and in determining

whether a defect is trivial, a court must take account of all “the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the ‘time, place, and circumstance’ of the injury” (*Trincere v. County of Suffolk*, 90 NY2d 976, 978, 665 NYS2d 615, 688 NE2d 489, quoting *Caldwell v. Village of Is. Park*, 304 NY 268, 107 NE2d 441; see *Portanova v. Kantlis*, 39 AD3d 731, 833 NYS2d 652; *Herring v. Lefrak Org.*, 32 AD3d 900, 821 NYS2d 624); quoting *Hahn v. Wilhelm*, 54 AD3d 896, 898, 865 NYS2d 240, 241 (2008). As stated by the Court of Appeals, “there 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” (*Trincere v. County of Suffolk*, 90 NY2d at 977); quoting *Brenner v. Herricks Union Free Sch. Dist.*, 106 AD3d 766, 767, 964 NYS2d 605 (2013).

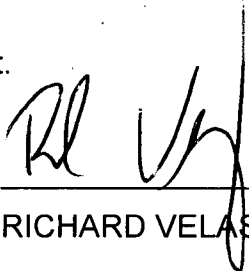
In the present case, defendants allege an investigator was sent to the scene on March 21, 2017 to conduct an inspection of the sidewalk where plaintiff allegedly fell. Pursuant to the investigator’s affidavit, with the aid of photographs the investigator identified the alleged defect in the sidewalk. After such identification he proceeded to take measurements of the alleged defect and found the crack was not more than ¼ inch in depth. The court notes that the photographs attached to the investigator’s affidavit do not contain any pictures with a ruler evidencing the actual width, depth, elevation, and irregularity of the crack. Additionally, the court also notes this investigator and these photos were taken more than one year after said accident. Under these circumstances, the expert’s affidavit and photographs are insufficient to establish that no actionable defect existed at the time of the accident (see *Ferington v. Dudkowski*, 49 AD3d 1267, 856 NYS2d 348; *Lal v. Ching Po Ng*, 33 AD3d 668, 823 NYS2d 429). Moreover, the defendant admitted in their deposition testimony that the corporation made repairs to the

sidewalk following the date of the accident, which raises more questions of fact as to the condition of the sidewalk on the date of the accident as compared to the condition depicted in the photographs submitted to the court. Therefore, the deposition testimony of the parties, and the photographs submitted as well as the conflicting expert affidavits all create issues of fact for a jury. As such, the defendant failed to meet its prima facie burden of establishing that the defect was trivial and nonactionable as a matter of law (see *Guidone v Town of Hempstead*, 94 AD3d 1054, 1055 [2012]; *Perez v 655 Montauk, LLC*, 81 AD3d 619 [2011]; *Corrado v City of New York*, 6 AD3d 380 [2004]).

Accordingly, defendant's Motion for Summary Judgment is hereby denied for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: April 1, 2019



 RICHARD VELASQUEZ, J.S.C.

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So Ordered
 Hon. Richard Velasquez

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