

Lopez v CRP Uptown Portfolio II LLC

2019 NY Slip Op 31202(U)

May 3, 2019

Supreme Court, New York County

Docket Number: 150213/2016

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

JOSE A. LOPEZ,

Plaintiff,

- v -

INDEX NO. 150213/2016

MOTION DATE

MOTION SEQ. NO. 005

CRP UPTOWN PORTFOLIO II LLC and 2108 DELI GROCERY, INC.,

Defendants.

-----X

CRP UPTOWN PORTFOLIO II LLC,

Third-Party Plaintiff,

- v -

YUEN FA REALTY, INC. and 2108 DELI GROCERY INC.,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 116, 118, 119

were read on this motion for summary judgment.

Plaintiff moves pursuant to CPLR 3212 for summary judgment. Defendant CRP Uptown Portfolio II LLC opposes and cross-moves for summary judgment. Plaintiff opposes.

I. BACKGROUND

Plaintiff testified that on February 20, 2014, he was walking in Manhattan between 165th Street and 164th Street when he tripped on the sidewalk along Amsterdam Avenue. At the time, he was looking straight ahead and no one was walking nearby. He explained that he tripped due

to a height differential between sidewalk flags. He had never before complained about the condition nor did he know its duration. (NYSCEF 94).

The senior property manager of 2108 Amsterdam Avenue, owned by defendant, testified that she conducted routine inspections of the property, and that between 2013 and 2015, she had been to the property between 30 and 50 times, but never saw an issue with the sidewalk or knew of any complaints about or repairs being made to it. Although the building's superintendent had been instructed to inform her of any sidewalk issues, he never did. On a photograph of the sidewalk on which plaintiff had marked the alleged defect, the senior building manager located the defect in front of both 2106 and 2018 Amsterdam. (NYSCEF 95, 96).

II. CONTENTIONS

A. Plaintiff (NYSCEF 90-104)

Plaintiff asserts that as the owner of the property abutting the sidewalk where plaintiff fell, defendants had a duty to maintain the sidewalk in a reasonably safe condition, and that defendants allowed it to remain hazardous for a year before the accident, despite knowing that the public would be traversing it. He also notes that he has no obligation to disprove his alleged comparative fault to be entitled to summary judgment.

In support, plaintiff submits a photograph that was admitted at his deposition on which he circled the location of the accident (NYSCEF 95) and the affidavit (NYSCEF 99) and expert report (NYSCEF 98) of a professional engineer, who opines therein that the location of plaintiff's accident, in front of 2108 Amsterdam Avenue, had been repaired, but in reliance on photographs (NYSCEF 97) provided by plaintiff, there was a half-inch differential in the adjoining sidewalk flags at the time of plaintiff's accident. Plaintiff also offers the first page of an affidavit from a sidewalk defect expert (NYSCEF 101), who states therein that he relies on

images of the sidewalk pulled from the internet (NYSCEF 102), which plaintiff contends are admissible under “the professional reliability exception.”

B. Defendant (NYSCEF 106-113)

Defendant argues that in claiming that he tripped on the sidewalk while walking between 2106 and 2108 Amsterdam Avenue, plaintiff implies that it had no duty to repair the defect. It asks that plaintiff’s professional engineer’s expert opinion be disregarded as conclusory and lacking a factual basis, observing that the engineer relies on a site inspection conducted three and a half years after plaintiff’s accident and after sidewalk repairs had been made, and a single, one-dimensional photograph taken before the repair, and that no explanation is offered as to how the engineer reached his conclusion that the sidewalk contained an elevation differential of one-half inch.

Defendant also maintains that plaintiff’s sidewalk expert’s opinion too is conclusory and without a factual basis. Moreover, he asserts, photographs culled from the internet are not properly considered on a motion for summary judgment, as the professional reliability exception does not apply. It offers the affidavit of its own expert who opines that plaintiff’s sidewalk defect expert has no basis for concluding that the height differential in the sidewalk was one-half inch, and that based on the photographs relied upon by plaintiff’s sidewalk expert, some “extraneous deposits” exist near the sidewalk abutting 2106 Amsterdam Avenue. (NYSCEF 113).

In the alternative, if plaintiff is arguing that the defect is a half-inch in height, defendant maintains that it is entitled to summary judgment because the defect is trivial, and in his deposition, plaintiff complained of no other defects in the sidewalk or ambience.

Defendant also argues that it is entitled to summary judgment because it neither created the defect nor had actual or constructive notice of it.

C. Plaintiff's reply (NYSCEF 118-119)

In reply, plaintiff argues that whether he saw the defect before his accident or complained about it is irrelevant, and that the absence of any complaint received from the superintendent by the building manager does not conclusively establish that no defect was present. Moreover, the building manager's testimony on that score should be disregarded as the superintendent did not testify, and as she admittedly conducted routine inspections of the property, she should have known of the sidewalk defect.

Plaintiff also contends that his expert's conclusions are supported in his report, and observes that he and his expert claim that the differential is greater than one-half inch. To the extent that defendant asserts that the defect is trivial, it provides no supporting expert affidavit.

D. Defendant's reply (NYSCEF 120)

Defendant reiterates its argument.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37

[2017]).

A. Plaintiff's motion

To be held liable for a dangerous condition on property, a defendant must have had occupancy, ownership, control, or special use of it. (*Gibbs v Port Auth. of New York*, 17 AD3d 252, 254 [1st Dept 2005]; *Pantazis v City of New York*, 211 AD2d 427, 427 [1st Dept 1995] [one must own, maintain, operate or control property to be held liable for dangerous or defective condition]). Although generally, the non-delegable duty to repair and maintain roadways and sidewalks lies with the municipality (*Stiuso v City of New York*, 87 NY2d 889, 891 [1995]; *Cabrera v City of New York*, 45 AD3d 455, 456 [1st Dept 2007]), in New York City, it is the duty of the owner of real property abutting any sidewalk to maintain the sidewalk in a reasonably safe condition (New York City Administrative Code § 7-210; *Fernandez v Highbridge Realty Assocs.*, 49 AD3d 318, 319 [1st Dept 2008]).

Thus, to hold defendant liable here, plaintiff must show that it owned the property abutting the location of the sidewalk defect (*id.*), which he does not do absent evidence demonstrating that the alleged sidewalk defect abutted 2108 Amsterdam Avenue, as opposed to 2106 Amsterdam Avenue.

Even had plaintiff had established, *prima facie*, that defendant is responsible for the sidewalk defect, he must also show that the defect is substantial, not trivial. To determine whether a defect is trivial as a matter of law, the court must consider “the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury.” (*Flores v New York City Transit Auth.*, 147 AD3d 553, 554 [1st Dept 2017], quoting *Trincere v Cty. of Suffolk*, 90 NY2d 976, 978 [1997]). Although there is no *per se* rule that a defect must be a minimum height or depth to be actionable (*Trincere*, 90 NY2d at 977),

Administrative Code § 19-152(a) provides that a vertical grade differential between adjacent sidewalk flags greater than or equal to one-half inch constitutes a substantial defect. Defects of one-half inch or more were found to be trivial under the pre-amendment Code. (*Scuteri v 7318 13th Ave. Corp.*, 52 Misc 3d 391, 397 [Sup Ct, Kings County 2016], *affd in part, appeal dismissed in part* 150 AD3d 1172 [2d Dept 2017]).

An expert's conclusory and speculative opinion is not probative and should not be relied on in deciding a motion for summary judgment (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Here, it is undisputed that plaintiff's engineer inspected the sidewalk after it had been repaired, and thus, his inspection has no probative value. (*See e.g., Gilson v Metro. Opera*, 15 AD3d 55, 59 [1st Dept 2005], *affd* 5 NY3d 574 [2005] [expert's measurement of light in theater two years after plaintiff injured and in different place of accident not probative]). Additionally, the photographs relied upon by the engineer lack sufficient clarity to determine the height of the defect. Thus, the engineer's opinion is not considered. Neither is the affidavit of plaintiff's sidewalk expert, as it is incomplete.

Accordingly, plaintiff's motion for summary judgment is denied.

B. Defendant's cross-motion

Under the Administrative Code, landowners are not strictly liable for injuries that result from dangerous conditions on a sidewalk abutting their property. (*Martinez v Khaimov*, 74 AD3d 1031, 1032 [2d Dept 2010]). To be entitled to summary judgment, the defendant must demonstrate that it neither created nor had actual or constructive knowledge of the alleged sidewalk defect. (*Burko v Friedland*, 62 AD3d 462, 462 [1st Dept 2009]).

Defendant, here, demonstrates *prima facie* that it neither created nor had notice of the

defect, as its property manager denied having received any complaints concerning the sidewalk, and no alterations or repairs to it had been previously performed. (*See Gomez v Congregation K'Hal Adath Jeshurun, Inc.*, 2012 WL 8123838, *2 [Sup Ct, NY County 2012], *aff'd* 104 AD3d 456 [1st Dept 2013] [defendant's administrative manager's lack of recall of complaints, alterations, or repairs on sidewalk established *prima facie* entitlement to summary judgment]).

In opposition, plaintiff raises no issue of fact as to whether defendant had notice of the allegedly defective condition. That the superintendent did not testify is of no moment as it is reasonably inferred from the property manager's testimony that she received no report of any complaints from the superintendent or anyone else. Moreover, she personally saw no defect even though she often inspected the sidewalk.

While plaintiff's claim against defendant 2108 Deli Grocery, Inc. remains, it has neither answered nor appeared in this action despite being served in 2016. As plaintiff did not move for a default judgment against 2108 Deli Grocery, Inc. within a year of its default, plaintiff's claims are dismissed as against it. (CPLR 3215[c]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied in its entirety; it is further

ORDERED, that defendant CRP Uptown Portfolio II LLC's cross-motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant CRP Uptown Portfolio II LLC as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the complaint is dismissed as against defendant 2108 Deli Grocery, Inc.;

it is further

ORDERED, that defendant CRP Uptown Portfolio II LLC's third-party action is severed and continued unless a stipulation of voluntary discontinuance is filed; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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5/3/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE