Recalde v 95-11 101st Ave. Realty Corp.
2019 NY Slip Op 31891(U)
May 13, 2019
Supreme Court, Queens County
Docket Number: 708281/2016
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

---X Index No.: 708281/2016

ILIANA RECALDE and MARLON RECALDE,

Plaintiff,

Motion
Date: April 3, 2019

-against-

Motion Cal. No.: 32

95-11 101ST AVENUE REALTY CORP.,

Motion Sequence No.:2

Defendant.

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The following efile papers numbered 34-43, 50-52 submitted and considered on this motion by defendant 95-11 101st Avenue Realty Corp. seeking an Order granting summary judgment pursuant to Civil Practice Law and Rules (CPLR) 3212 against plaintiffs Iliana Recalde and Marlon Recalde on the issue of liability.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits..................	EF 34-43
Affirmation in Opposition-Affidavits-Exhibits....	EF 50-51
Reply Affirmation-Affidavits-Exhibits................	EF 52

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY

Facts and Procedural History

This is a premises liability action. Plaintiff Iliana Recalde commenced this action on July 14, 2016 alleging that she sustained personal injuries on February 21, 2015 when she fell on the sidewalk in front of the premises located at 95-11 101st Avenue, County of Queens, State of New York. Co-plaintiff Marlon Recalde's allegations in the verified complaint are derivative, he seeks monetary damages from the loss of society, services and consortium of his wife Iliana Recalde as a result of her injuries. Defendant 95-11 101st Avenue Realty Corp. (hereinafter "Corp.") owns the subject premises. Now, defendant seeks an Order granting summary judgment pursuant to Civil Practice Law and Rules (CPLR) 3212 against plaintiffs Iliana Recalde and Marlon Recalde on the issue of liability. Defendant maintained that plaintiff failed to provide details about the shape and height of the alleged defect in the sidewalk. Also, plaintiff did not complain to anyone about the alleged defective condition of the sidewalk before or after the fall.

Deposition of Plaintiff Iliana Recalde

Plaintiff testified in sum and substance on February 21, 2015, that she fell on the sidewalk at the subject premises, at or near the medical offices located at 95-11 101st Avenue, between 95th Street and Woodhaven Boulevard, County of Queens, State of New York. She was walking from her home to the nearby bus stop. She stated that the accident occurred about 9:50 A.M. and 9:55 A.M. She recalled that there was some construction on the sidewalk and observed a patch of asphalt on the sidewalk near the curb. The asphalt was a different color than the rest of the sidewalk. She stated that she was looking straight ahead before her fall. She stated that she had one foot on the asphalt and the other on the light-colored sidewalk when she fell because the asphalt made the sidewalk uneven. At her deposition plaintiff was shown photographs and she marked the location where she fell, stating that the photographs were a fair and accurate depiction of how the area looked on the date of the accident.

Deposition of Co-plaintiff Marlon Recalde

Co-plaintiff also gave sworn testimony in this matter. He recalled seeing construction at or near the accident site which he believed to be performed by a utility company like Con Edison or National Grid. She saw utility trucks and work being done in the area one to two weeks prior to his wife's accident.

Deposition testimony of 95-11 101st Avenue Realty Corp.

Defendant also gave testimony. Elizabeth Avaricio (hereinafter "Avaricio") and her husband are co-owners of the premises. The building has medical offices on the first floor. She has owned the building for approximately sixteen years. At the time of the accident she would be in the building on a daily basis. At the time of plaintiff's accident defendant was not performing any construction work at or near the sidewalk. She observed utility trucks and workers who broke into the sidewalk, and the work was not being performed on behalf of the building. She never received any information or documentation related to the work performed on the subject sidewalk. Avaricio testified that the dark asphalt patch on the sidewalk ran the entire length of the block and in front of other buildings which it did not own. She or her husband would be responsible for maintaining the sidewalk. It was her responsibility of February 21, 2015 to inspect the sidewalk adjacent to and abutting the building for any issues. She recalled that she hired a construction company, MAT Construction in 2010, who redid the cement on the sidewalk. She never complained to anyone about the sidewalk after someone performed work on it other than her or her husband. She stated she noticed the discoloration/color of the sidewalk was different and they became angry about it since they had done work on the sidewalk. Defendant corporation did not perform the work on the sidewalk as depicted in the photographs. Avaricio was not made aware of plaintiffs accident until approximately one year after its occurrence. Therefore, no accident report exists and defendant was unaware of any one else tripping in front of the building prior to the date of plaintiff's accident. She did not take any steps to find out who performed the work on the sidewalk.

Deposition testimony of defendant's Bookkeeper Inger Germano

Inger Germano (hereinafter "Germano") defendant's employee also testified. She stated that her duties included bookkeeping, rental agreements/leases and handling any permits related to construction. She described the building as a commercial building. Defendant is responsible for maintaining and cleaning the sidewalk adjacent to the building. Sometimes Avaricio and her husband would perform the task or they hired people. After reviewing photographs, Germano testified that she had never observed the sidewalk in the condition which it was in. Further, the work on the sidewalk was not performed by or on behalf of defendant because she was responsible for obtaining work permits. In her opinion the work was performed by a utility because it continued the entire length of the block. She stated that utility companies do not always inform the defendant when they are performing work outside, and she did not know or see which entity performed the work depicted in the photographs. She did not witness the accident and was unaware of any witnesses.

Defendant's search of public records revealed that Key Span Energy Delivery N.Y.C. had a permit to open the street and the sidewalk on 101st Avenue between 95th Street and Woodhaven Boulevard for a maximum of 600 feet for the purpose of "Major Installation-Gas". The permit was issued on 11/14/2014 and valid from 11/21/14-2/11/15 just 10 days prior to the subject accident and within the two-week time period testified to by co-plaintiff Marlon Recalde. Thus, according to the defendant, the record demonstrates that the defendant did not perform any construction or work to the subject sidewalk in 2014-2015. The only construction was performed by a utility.

DISCUSSION

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong on Bank, Ltd., v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980].) The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v Garrubo*, 141 AD2d 636 [2d Dept 1988].) It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*, 64 NY2d 851 [1985].) Summary judgment eliminates cases from the Court's trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]). As summary judgment is a drastic remedy, it should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

"As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (*See Calabro v Harbour at Blue Point Home Owners Assn., Inc.*, 120 AD3d 462 [2d Dept 2014].) Defendant must demonstrate that they did not have actual or constructive notice of the alleged condition, or created or contributed to the complained of condition (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). To meet its initial burden on the issue of constructive notice,

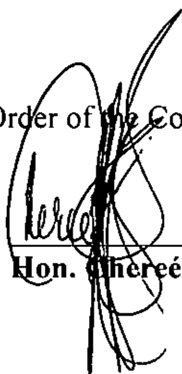
defendant must offer evidence as to when the area in question was last cleaned or inspected in relation to the time that plaintiff fell. (*See Baez v Willow Wood Assocs., LP*, 159 AD3d 785 [2d Dept 2018].)

" A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact." (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *see also Cortes v Taravella Family Trust*, 158 AD3d 788 [2d Dept 2018]; *Chojnacki v Old Westbury Gardens, Inc*. 152 AD3d 645 [2d Dept 2017].)

Defendant had a non-delegable duty to maintain and repair the sidewalk. Based upon defendant's testimony, defendant had actual and/or constructive knowledge of the alleged condition, the uneven sidewalk/sidewalk flag, which allegedly caused plaintiff to fall, or that the claimed defect was not actionable (*see* New York City Administrative Code section 7-210; *Metzker v City of New York,* 139 AD3d 828 [2d Dept 2016]; *Harakidas v City of New York*, 86 AD3d 624 [2d Dept 2011]). Defendant failed to eliminate all triable issues of fact regarding whether it had a duty to maintain the area where plaintiff fell (*see Shehata v City of New York*, 128 AD3d 944 [2d Dept 2015]; *Gelstein v City of New York*, 153 AD3d 604 [2d Dept 2017]). The permit submitted by defendant demonstrated that a utility had a permit to do work near the defendants' property, however, there is no proof that the utility performed the work on the sidewalk, thereby causing or creating the claimed defective condition (*see generally Bliss v City of New York*, 162 AD3d 730 [2d Dept 2018]; *Crawford v City of New York*, 98 AD3d 935 [2d Dept 2012]). Moreover, although defendant maintained that the utility either caused or contributed to the alleged defective condition of the sidewalk, defendant has not commenced a third-party action against any utility. Defendant's additional arguments in its reply papers which should have been included within the moving papers, (ie., that the defect is trivial or open and obvious and Administrative Code of the City of New York section 19-152) have not been addressed by the Court since the plaintiff was not afforded an opportunity to address the newly-raised arguments in a surreply (*see Allstate Ins. Co. v Dawkins*, 52AD3d 826 [2d Dept 2008]; *Harleysville Inc. Co. v Rosario*, 17 AD3d 677 [2d Dept 2005]).

Therefore, the defendant's motion is denied.

The foregoing constitutes the decision and Order of the Court.



Dated: May 13, 2019

Hon. Chereé A. Buggs, JSC

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