SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 515755/2016
Calendar No. 36

----------X

MIGUEL GALVEZ,

**DECISION/ ORDER**

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

----------X

The following papers numbered 1-3 were read on this motion:

| Papers | Numbered |
|---|---|
| Notice of Motion/& Affidavits (Affirmations)..... | 1 |
| Affirmation in Opposition..... | 2 |
| Reply Papers..... | 3 |

Upon the foregoing papers the motion is decided as follows:

In this action to recover damages for personal injuries, by Notice of Motion dated June 3, 2018, defendant NEW YORK CITY HOUSING AUTHORITY [hereinafter "NYCHA"] moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint. Plaintiff MIGUEL GALVEZ opposes the motion.

This action arises out of an accident that occurred on February 24, 2016 when plaintiff alleges he was injured while riding his bicycle over a defect in the walkway leading from his apartment building located at 487 Carlton Avenue, Brooklyn, New York.

The proponent of a motion for summary judgment has the initial burden of making

MS #03
XMD

a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient proof eliminating any material issues of fact *(see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v. City of New York*, 49 NY2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). If the proponent meets this burden, the burden shifts to any party opposing the motion to come forward with proof in admissible form raising a triable issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman*, 49 NY2d at 562; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1068). If the proponent fails to meet its initial burden, the Court must deny the motion regardless of the sufficiency of the opposition papers (*see Winegrad*, 64 NY2d at 853; *New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 AD3d 547).

In support of summary judgment, defendant NYCHA argues that plaintiff was uncertain of the precise location of the defect that caused his accident, and the purported defect alluded to in photographs of the accident site were "trivial" and therefore not actionable at law. Defendant also contends that it did not have notice of any cracks or damage or hazardous conditions on the walkway at this location.

A plaintiff's inability to identify the cause of his or her accident is fatal to his or her cause of action (*Alayev v. Juster Associates, LLC*, 122 AD3d 886; *Jackson v. Fenton*; 38 AD3d 495, 495). However, contrary to NYCHA's contention, the injured plaintiff identified at his deposition, with the aid of photographs of the accident scene, the uneven portion of the walkway that caused him to lose control of his bicycle.

In support of the motion, the defendant submitted transcripts of the plaintiff's deposition, in which the plaintiff testified while looking at photographs of the accident location, "At the top here, I was coming from the lobby of the building on my bike. I actually rode over this and when I actually hit this part here, that's when the bike lost control." "This whole thing here, this is where the floor dents in. I am not sure which point I rode over, but I know that once I rode over this section here, right over here, that's when I lost control." Defendant asked, "Does this photo depict an area that you're claiming caused your bike to go out of control?" Plaintiff testified,"Yes." "There's no specific area that I can actually circle, it's the whole section." Here, viewing the evidence in the light most favorable to the plaintiff as the nonmovant, the defendant failed to establish, prima facie, that the injured plaintiff did not know what defect precisely caused his bicycle to lose control.

In determining whether a defect is trivial, the court must examine all of 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; *Deviva v. Bourbon Street Fine Foods & Spirit*, 116 AD3d 654). There is no "minimal dimension test" or "per se rule" that a condition must be of a certain height or depth in order to be actionable (*Trincere v. County of Suffolk at 977*; *see Milewski v. Washington Mut., Inc.*, 88 AD3d 853; *Ricker v. Board of Educ. of Town of Hyde Park*, 61 AD3d 735). Photographs which fairly and accurately represent the

accident site may be used to establish whether a defect is trivial and not actionable (*see Das v. Sun Wah Rest.*, 99 AD3d 752). The photographs attached to the motion and referenced by the plaintiff in his testimony do not demonstrate trivial defects as a matter of law. Thus, defendant has failed to establish its prima facie burden.

Defendant has failed to show it did not have constructive notice of the defect in the walkway. NYCHA submitted the transcript of the testimony of David Rios, building superintendent, who testified he is responsible for maintenance and janitorial conditions of the subject building and grounds. He testified he had been taking care of the 487 Carlton Avenue building going on three years as super. Rios testified he became super for the subject building and grounds sometime in the beginning of 2016. Rios later testified he did not recall when he became the super for 487 Carlton, saying he had no recollection. Rios testified that the caretaker makes daily inspection of the building grounds. He stated that there was no specific form or document that is filled out by the caretaker to indicate any conditions that are unsafe. Rather, the caretaker informs the supervisor caretaker or the assistant superintendent by "word-of-mouth" about unsafe conditions and the supervisor notes it on the checklist. Rios did not recall when, within the last five years, any bricklayers repaired any sidewalk on 487 Carlton. Rios also testified he did not recall which area of the sidewalk was repaired in 2016 or what prompted NYCHA to repair the sidewalk. The Court finds that NYCHA failed to make a prima facie showing that it did not have constructive notice of the alleged defect (*see*

*Baratta v. Eden Roc NY, LLC*, 95AD3d 802).

Since NYCHA failed to make a prima facie showing that the walkway was not in a hazardous condition, that it did not have notice or constructive notice of the condition, and that the injured plaintiff's accident was not proximately caused by its negligence in failing to remedy the defect, summary judgment is denied. (*see Jackson v. Fenton*, 38 AD3d 495, 496).

Inasmuch as defendant did not establish its entitlement to judgment as a matter of law, there is no need to review the sufficiency of the plaintiffs' opposition papers (*see Bloechle v. Ranieri*, 21 AD3d 435, 436).

Accordingly, it is hereby

**ORDERED** that defendant's' motion for summary judgment is hereby **DENIED** in its entirety.

Dated: August 13, 2019

**PETER P. SWEENEY, J.S.C.**

HON. PETER P. SWEENEY, J.S.C.

2019 AUG 27 AM 9:04
KINGS COUNTY CLERK'S OFFICE
FILED