Belton v 2044 7th Ave. Hous. Dev. Fund Corp.
2019 NY Slip Op 32688(U)
September 4, 2019
Supreme Court, New York County
Docket Number: 160570/2015
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

BEVERLY BELTON,

Plaintiff,

-against-

2044 7th AVENUE HOUSING DEVELOPMENT FUND CORPORATION.

Defendant.

----------x

DECISION AND ORDER
Index No.: 160570/2015
Motion Sequence 002

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

MEMORANDUM DECISION

In this negligence action, defendant 2044 7th Avenue Housing Development Fund Corporation moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the Complaint against it.

BACKGROUND FACTS

On November 28, 2014, Plaintiff was walking home when she tripped and fell on a gap in the curb of the sidewalk between 121st and 122nd Streets in Manhattan. The part of the sidewalk Plaintiff fell on is adjacent to her home at 2044 7th Avenue, which is owned by Defendant. Plaintiff was trying to pass by a group of pedestrians when her shoe became caught in a gap. Plaintiff estimated the gap to be less than six inches in length and noted that the gap was in the curb section of the sidewalk (NYSCEF doc No. 40 at 39). Defendant's representatives testified that they had not received complaints for defects or work orders at the location of Plaintiff's accident (NYSCEF doc No. 36, ¶¶ 19, 23).

Defendant now moves for summary judgment, arguing that it did not have actual or constructive notice of any alleged defect in the sidewalk. Defendant also contends that it is not responsible for the area of the sidewalk where Plaintiff fell, as while city regulations hold that building owners are responsible for maintenance of adjacent sidewalks, the regulations specifically exclude curbs. In reply, Plaintiff opposes the motion and argues that Defendant did not meet its initial burden of proof in demonstrating that it had no notice of the defect, and that Plaintiff's fall was caused in part by an elevation in the part of the sidewalk outside Defendant's building. Plaintiff also retained an engineer who testified that the location of the accident was in an area under Defendant's purview.

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]). When a defect exists, constructive notice to the defendant requires that the defect be "visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discovery and remedy it." (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, [1986]).

Under the New York City Administrative Code, property owners have a non-delegable duty to maintain abutting sidewalks in a reasonably safe condition (Administrative Code §7-210). However, the Code defines "sidewalks" as "that portion of a street between the curb lines . . . and the adjacent property lines, but not including the curb, intended for the use of pedestrians" (§ 19-101 [d]). A property owner is thus entitled to summary judgment upon a prima facie showing establishing as a matter of law that plaintiff "did not slip on the sidewalk, but rather, on the curb in between the street and the sidewalk, and that it neither created the defect or made special use of the curb" (*Ascencio v New York City Housing Authority*, 77 AD3d 592 [1st Dep't 2010]). Defendant argues that Plaintiff's own testimony indicates that she fell on the city-owned curb, and therefore Defendant is not liable for her injuries.

Plaintiff contends that this is a mischaracterization of her testimony, and that she in fact tripped and fell in two places, both in front of Defendant's building (NYSCEF doc No. 52 at 3). Plaintiff has submitted photos demonstrating that her foot was caught in a part of the sidewalk separately from the curb, and also retained an expert who noted that Defendant had received past violation notices and made repairs to the sidewalk after her fall. Plaintiff also notes that although, consistent with the holding in *Ascenio*, courts decline to impose liability to property owners for injuries that occur on curbs, courts will still impose liability in situations where plaintiffs fall on sidewalk areas in between the curb line and the property line *(see James v 1620 Westchester Ave., LLC,* 105 AD3d 1, 3 [1st Dept 2013] [denying summary judgment to a property owner because the plaintiff fell between the curb line and the adjacent property line of the defendant's building]). Plaintiff argues the photo evidence makes it clear Plaintiff fell not on the curb but rather on the area between the street line and the curb.

More critically, the past violations and subsequent repair work made by Defendant mean that Defendant cannot deny it maintains the sidewalk area. While evidence of subsequent repairs and remedial measures is generally not discoverable or admissible in a negligence case, an exception applies when, as here, there is a factual issue of maintenance or control (*see Cacciolo v Port Auth. of N.Y. and N.J., 186 AD2d 528, 588; Klatz v Armor Elevator Co.*, 93 AD2d 633). Therefore, Defendant's subsequent repair is admissible here to show it recognized its responsibility to maintain the entryway under the lease. Defendant's general manager also testified that additional repairs were made after Plaintiff's accident took place (NYSCEF doc No. 52, ¶ 68).

Defendant, in reply to Plaintiff's opposition, argues that Plaintiff's expert testimony should be disregarded as it relies on photographs of the sidewalk that were not properly authenticated and thus should be deemed inadmissible. Defendant further contends that the past City violation for the sidewalk area should be disregarded as it was issued in 1998, and no evidence suggests that there were any open work orders to remedy violations in the sidewalk at the time of Plaintiff's accident (NYSCEF doc No. 59, ¶ 22-24). Defendant also noted Plaintiff's expert did not personally inspect the sidewalk and therefore his conclusion about the cause of Plaintiff's accident is completely speculative in nature, particularly as Plaintiff never testified about any ongoing patchwork or other reconstructive measures on the sidewalk.

While the Court is inclined to agree that Plaintiff has not unequivocally demonstrated that her fall occurred on an area of the sidewalk completely under the control of Defendant, Defendant has also not met its threshold burden of eliminating all material issues of fact from this case. Only when the defendant meets that burden does the Court examine the sufficiency of

plaintiff's opposition papers (*see Rivera v YMCA of Greater New York*, 37 A.D.3d 579 [2d Dept. 2007] citing *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]). Here, at the very least, factual issues exist pertaining to the extent Defendant exerted control over the sidewalk premises. If Defendant acted in the past to make repairs to the sidewalk area, it is a question for the jury as to whether it maintained responsibility for the part where Plaintiff fell, as well as whether it had sufficient actual or constructive notice of the alleged cracks.

As Plaintiff has raised questions of fact regarding Defendant's duty to maintain the area of the sidewalk in which she fell, summary judgment is an improper remedy at this juncture.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant 2044 7th Avenue Housing Development Fund Corporation's motion for summary judgment dismissing the Complaint is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly; 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: September 4, 2019

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

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