Boesch v Comsewogue Sch. Dist.
2019 NY Slip Op 33998(U)
October 10, 2019
Supreme Court, Suffolk County
Docket Number: 602323/2017E
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Joan K. Boesch,

Plaintiff,

-against-

Comsewogue School District,

Defendant.

Motion Sequence No.: 002; MD
Motion Date: 4/3/19
Submitted: 6/5/19

Index No.: 602323//2017E

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Clerk of the Court

Upon the following papers read on this **e-filed** motion for summary judgment: Notice of Motion and supporting papers by defendant, filed March 5, 2019; Answering Affidavits and supporting papers by plaintiff, filed May 13, 2019; Replying Affidavits and supporting papers by defendant, filed May 24, 2019; it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied.

This action was commenced by plaintiff Joan Boesch to recover damages for personal injuries she allegedly sustained as a result of a trip-and-fall accident that occurred on November 8, 2016, at approximately 11:00 a.m. The accident allegedly occurred on the sidewalk adjoining Terryville Elementary School, which is located within defendant Comsewogue School District. By her complaint, as amplified by the verified bill of particulars, plaintiff alleges that defendant failed to maintain the sidewalk in a reasonably safe condition.

of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Stonehill Capital Mgt., LLC v Bank of the West***, 28 NY3d 439, 45 NYS3d 864 [2016]).

A defendant moving for summary judgment dismissing the 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" (***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d 66, 79, 19 NYS3d 802 [2015]; *see* ***Karpel v National Grid Generation, LLC***, 174 AD3d 695, 106 NYS3d 99 [2d Dept 2019] ***Cabezas v Ramos***, 173 AD3d 1131, 101 NYS3d 643 [2d Dept 2019]). To determine whether a defect is trivial, the court must consider 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, 665 NYS2d 615 [1997], quoting ***Caldwell v Village of Is. Park***, 304 NY268, 274, 107 NE2d 441 [1952]; *see* ***Karpel v National Grid Generation, LLC***, *supra*; ***Cabezas v Ramos***, *supra*; ***Melia v 50 Ct. St. Assoc.***, 153 AD3d 703, 60 NYS3d 331 [2d Dept 2017]). The Court of Appeals has stated that "there is no 'minimal dimension test' or per se rule that a defect must be a certain minimum height or depth in order to be actionable" (***Trincere v County of Suffolk***, *supra* at 977; *see* ***Kozik v Sherland & Farrington, Inc.***, 173 AD3d 994, 103 NYS3d 128 [2d Dept 2019]; ***Easley v U Haul***, 166 AD3d 852, 88 NYS3d 447 [2d Dept 2018]), and that "a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable" (***Trincere v County of Suffolk***, *supra* at 977-978; *see* ***Tesoriero v Brinckerhoff Park, LLC***, 126 AD3d 782, 5 NYS3d 261 [2d Dept 2015]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]). In general, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury (***Trincere v County of Suffolk***, *supra*; *see* ***Karpel v National Grid Generation, LLC***, *supra*; ***Cabezas v Ramos***, *supra*). Nonetheless, a defendant may not be held liable for negligent maintenance based on trivial defects on a walkway, not constituting a trap or nuisance, which may cause a pedestrian to stumble, to stub his or her toes, or to trip over a raised project (***Hutchinson v Sheridan Hill House Corp.***, *supra*; *see* ***Kozik v Sherland & Farrington, Inc.***, *supra*; ***Easley v U Haul***, *supra*). Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable (*see* ***Rambarran v New York City Tr. Auth.***, 168 AD3d 1008, 92 NYS3d 407 [2d Dept 2019]; ***Cobham v 330 W. 34th SPE, LLC***, 164 AD3d 644, 83 NYS3d 537 [2d Dept 2018]; ***Sullivan v Colonial Woods Condominiums***, 162 AD3d 704, 78 NYS3d 382 [2d Dept 2018]).

Defendant made a prima facie showing that the alleged defect was merely trivial, and thus, was not actionable as a matter of law (*see* ***Schiller v St. Francis Hosp., Roslyn, N.Y.***, 108 AD3d 758, 970 NYS2d 241 [2d Dept 2013]; ***Joseph v Villages at Huntington Home Owners Assn., Inc.***, 39 AD3d 481, 835 NYS2d 231 [2d Dept 2007]; ***Zalkin v City of New York***, 36 AD3d 801, 828

Defendant now moves for summary judgment dismissing the complaint, contending that the alleged defective condition was trivial, and thus, not actionable as a matter of law. In support of its motion for summary judgment, defendant submits, among other things, the transcript of plaintiff's General Municipal Law § 50-h hearing testimony, and the transcripts of plaintiff and Stephanie Popky's deposition testimony. In opposition, plaintiff contends that defendant failed to tender sufficient evidence to establish that the sidewalk defect was trivial as a matter of law. In support of her opposition, plaintiff submits, among other things, the affidavit of Joseph Boesch.

According to plaintiff's statutory hearing and deposition testimony, she visited the school to vote on the date of the incident. She further testified that the accident occurred at approximately 11:00 a.m., when she was in the process of exiting the premises to return to her parked vehicle. After exiting the building, plaintiff allegedly traversed on a walkway, turned right, and traversed on the subject sidewalk for approximately one minute before the accident occurred. Plaintiff's husband, Joseph Boesch, allegedly was walking to her left, and was approximately one or two steps ahead of her at the time of the incident. Plaintiff testified that although she had previously visited the premises before the date of the accident, she had never traversed over the portion of the sidewalk where the accident occurred.

Plant Facilities Manager, Stephanie Popky testified that she supervised the custodians, the maintenance mechanics, and the groundsmen. She further testified that it was the responsibility of the custodians to verify that the sidewalk in front of the school was in good condition. She stated that her office never received any complaints regarding the condition of the sidewalk, and that she was unaware of anyone else who tripped and fell on subject portion of the sidewalk. According to her testimony, Popky maintains files of incident reports. However, she admitted that she did not review the incident reports on file before her deposition. Popky testified that she was notified about the incident approximately one week after it occurred, and that she inspected the subject sidewalk with insurance inspector, Jim Demeco. She stated that she observed that there was a slight height difference between the sidewalk slabs where the accident occurred, and that she observed Demeco measure the height difference to be approximately one half of an inch.

In Mr. Boesch's affidavit, he alleges that he was present when the accident occurred. He avers that he observed the raised portion of the sidewalk where the accident happened. He further states that approximately one week after the accident, he returned to the site of the accident, and he measured the height difference between the sidewalk slabs to be one inch.

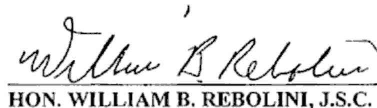
The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial

NYS2d 485 [2d Dept 2007]; ***Bekritsky v TACS-4, Inc.***, 27 AD3d 680, 815 NYS2d 587 [2d Dept 2006]; ***Murray v City of New York***, 15 AD3d 636, 790 NYS2d 696 [2d Dept 205]; ***Morris v Greenburgh Cent. Sch. Dist. No. 7***, 5 AD3d 567, 774 NYS2d 74 [2d Dept 2004]). Defendant's submissions demonstrated that the one-half-inch height differential between the sidewalk slabs was too trivial to be actionable (*see* ***Schiller v St. Francis Hosp., Roslyn, N.Y.***, *supra*; ***Joseph v Villages at Huntington Home Owners Assn., Inc.***, *supra*; ***Zalkin v City of New York***, *supra*; ***Murray v City of New York***, *supra*). Moreover, the alleged defect did not, by reason of its location, adverse weather conditions or lighting conditions, or other relevant circumstances have any of the characteristic of a trap or snare (*see* ***Bekritsky v TACS-4, Inc.***, *supra*; ***Morris v Greenburgh Cent. Sch. Dist. No. 7***, *supra*). Here, the alleged defect was located on an unobstructed sidewalk, and the accident occurred on a clear day.

In opposition, plaintiff raised a triable issue of fact as to whether the defect was trivial (*see* ***Slattery v Sachem N. High Sch.***, 114 AD3d 927, 980 NYS2d 843 [2d Dept 2014]; ***Bovino v J.R. Equities, Inc***, 55 AD3d 399, 866 NYS2d 40 [1st Dept 2008]). Specifically, plaintiff's submissions raised a triable issue of fact as to the dimensions of the alleged sidewalk defect (*see* ***Mscichowski v 601 BBA, LLC***, 134 AD3d 996, 22 NYS3d 506 [2d Dept 2015]; ***Slattery v Sachem N. High Sch.***, *supra*; ***Bovino v J.R. Equities, Inc***, *supra*).

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

Dated: 10/10/2019



HON. WILLIAM B. REBOLINI, J.S.C.

______ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**