

<b>Rizzo v Brookside Mgt. Corp.</b>
2019 NY Slip Op 34618(U)
November 4, 2019
Supreme Court, Dutchess County
Docket Number: Index No. 2017-52695
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS**

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CATHY RIZZO,

Plaintiff,

**DECISION AND ORDER**

-against-

Index No.: 2017-52695

BROOKSIDE MANAGEMENT CORP.,  
BROOKSIDE GARDENS LLC, BROOKSIDE  
GARDENS-INC., BROOKSIDE GARDEN  
ASSOCIATES LLC and BROOKSIDE GARDEN  
APARTMENTS,

Motion Seq. #3

Defendants.

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**ACKER, J.S.C.**

The following papers, numbered 1 to 20, were read on Defendant Brookside Management Corp.'s (hereinafter "Defendant Brookside Management" or "Defendant") motion pursuant to CPLR 3212 to dismiss the Complaint:

Notice of Motion-Affirmation of Andrew J. Funk, Esq. with Exhibits A-I.....	1-11
Affirmation in Opposition of John A. Del Duco III, Esq. with Exhibits 1-5-Memorandum of Law in Opposition .....	12-18
Reply Affirmation of Andrew J. Funk, Esq. with Exhibit 1 .....	19-20

The instant action was commenced against the Defendants<sup>1</sup> with respect to a trip and fall that occurred on or about February 11, 2016<sup>2</sup> at premises known as "Brookside Garden

<sup>1</sup> The Complaint has been dismissed as to Defendants Brookside Gardens Inc. and Brookside Gardens Associates LLC. No Answer has been submitted on behalf of Brookside Gardens LLC or Brookside Garden Apartments, but Plaintiff has not moved for default judgment against said Defendants.

<sup>2</sup> The Court notes that although Plaintiff testified that the accident occurred on February 12, 2015, the Complaint and Verified Bill of Particulars identify the accident date as February 11, 2016. Moreover, medical records

Apartments” located at 1 Colonial Drive, Wappinger Falls, New York. As acknowledged in the Funk Affirmation, Defendant Brookside Management owns the “general location” on which Plaintiff alleges to have fallen.

Defendant Brookside Management moves for summary judgment alleging, in sum and substance, that there is no proof that Plaintiff’s accident occurred on Defendant Brookside Management’s property.<sup>3</sup> In support of the motion, Defendant Brookside Management submits the pleadings, Plaintiff’s Verified Bill of Particulars, the deposition transcripts of Plaintiff and Esad Muratovic, on behalf of said Defendant, and photographs of the area where Plaintiff alleges that she fell.

It is well settled that on a motion for summary judgment, the proponent “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, “the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact.” *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

“In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party.” *Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept. 2015]. “While the ultimate burden of proof at trial will be borne by the plaintiff, a

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contained in the motion papers indicate that Plaintiff sought medical attention after the accident on February 14, 2016.

<sup>3</sup> As will be discussed, *infra*, Defendant Brookside Management fails to provide any other substantive legal argument as to whether it created or had notice of the alleged dangerous condition. Defendant does argue that it had no duty to protect against an open and obvious condition, however, the open and obvious condition is alleged to be a sign. As it is uncontested that the alleged dangerous condition herein is broken and defective pavement, it seems this argument is mistakenly raised herein.

defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form.” *Vumbico v. Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept. 2017]. “On a summary judgment motion by a defendant, the defendant does not meet its initial burden by merely pointing to gaps in the plaintiff’s case; rather, it must affirmatively demonstrate the merit of its claim or defense.” *Id.*

Notably, in support of the instant motion, Defendant Brookside Management relies almost exclusively upon the argument that Plaintiff cannot prove that she fell on property owned by said Defendant. Defendant Brookside Management maintains that the address in the Complaint and Verified Bill of Particulars is not the proper address for the property it owns and that the photographs that Plaintiff has submitted cannot be relied upon to show a defective condition. However, as noted above, identifying “gaps” in Plaintiff’s proof will not serve to establish Defendant’s entitlement to summary judgment.

It is uncontested that Plaintiff was unfamiliar with the location of her accident, as she had never been there before and she was stopping at the apartment complex to inquire whether there were any rentals available. As such, it is not surprising that Plaintiff cannot identify the exact address of the area of the complex where she fell. Nevertheless, Defendant cannot rely upon Plaintiff’s failure to identify the proper street address as affirmative proof that Plaintiff did not fall at Defendant Brookside Management’s property. Indeed, Defendant Brookside Management does not argue that the subject property is not on Colonial Drive; rather, it alleges that “1 Colonial Drive” is not an address in its apartment complex.

Nor does Defendant Brookside Management carry its burden by arguing that the photographs produced by Plaintiff do not prove that the accident occurred on its property. In

fact, Defendant Brookside Management's witness affirmatively identified the photographs as depicting an area on the grounds of the subject property, near Building 4. Accordingly, based upon the testimony of Defendant Brookside Management's own witness, the photographs submitted by Plaintiff demonstrate that the accident occurred on Defendant's property.

As it is clear that the accident in question occurred on Defendant Brookside Management's property, said Defendant had a duty to maintain the property in a reasonably safe condition. *Gani v. Ave. R Sephardic Congregation*, 159 AD3d 873 [2d Dept. 2018]. A defendant property owner, or a party in possession or control of real property, who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition, nor had actual or constructive notice of its existence. *Id.*

Significantly, Defendant does not provide any evidence or legal argument that it neither created the allegedly dangerous or defective condition, nor had actual or constructive notice of its existence.<sup>4</sup> Instead, Defendant argues that Plaintiff cannot establish that there is a defective condition based upon her photographs. However, the burden on this motion is upon Defendant Brookside Management, not on Plaintiff.

Viewing the evidence submitted by Defendant in the light most favorable to Plaintiff, as this Court must (*see Boulos, supra*), it is uncontested that Plaintiff fell on Defendant Brookside Management's property. In addition, Plaintiff provided photographs showing the area where

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<sup>4</sup> Defendant's Notice of Motion and the introductory paragraphs of the Funk Affirmation indicate that Defendant would be arguing that it had no notice of the alleged defect, but the Affirmation contains no further allegations or legal arguments as to notice. Although Defendant does attempt to address the issue of notice in its reply, Defendant cannot rely on arguments raised in its reply for the first time in order to establish its *prima facie* case. *Cotter v. Brookhaven Mem'l Hosp. Med. Ctr., Inc.*, 97 AD3d 524, 525 [2d Dept. 2012].

she fell and testified that the photograph marked "Exhibit C" at her deposition show a hole in broken, uneven pavement. As such, in order to establish its *prima facie* entitlement to summary judgment, Defendant was required to submit proof that it did not create this allegedly dangerous condition, nor have actual or constructive notice of it. Defendant Brookside Management has failed to do so.

Rather than provide evidence showing that it did not create the condition or have notice of it, Defendant Brookside Management merely asserts that the photographs do not show a defect and that no hole is shown therein. This assertion is put forth in the Funk Affirmation, without any expert support or citation to deposition transcripts. However, where, as here, the affirmation of an attorney is not based upon personal knowledge of the facts, it is of no probative or evidentiary significance. *Onewest Bank, FSB v. Michel*, 143 AD3d 869, 871 [2d Dept. 2016]. Without any evidence that it did not create the alleged dangerous condition or that it did not have notice of said condition, Defendant has failed to establish its *prima facie* case and its motion for summary judgment is denied. As Defendant Brookside Management failed to meet its initial burden as the movant, the burden never shifted to the Plaintiff to submit evidence sufficient to raise a triable issue of fact. *Bisono v. Quinn*, 125 AD3d 704, 705 [2d Dept. 2015].

Finally, the Court notes that on the issue of notice, Defendant's own witness testified that Plaintiff's photographs depict the area as it looked prior to a repaving project in 2014. He also testified that he had received complaints about that area prior to the repaving and that there was a dip in the pavement about an inch deep and two feet wide. Having failed to provide any admissible evidence as to the exact date when the area was repaved, Defendant has also raised a question of fact as to whether Plaintiff's accident occurred before or after the area was repaved

and summary judgment is denied on that basis as well.

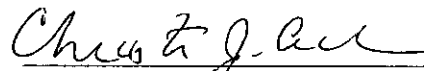
The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that Defendant Brookside Management's motion for summary judgment is DENIED; and it is further

ORDERED that as the parties have previously been advised, this case is scheduled for a settlement conference on **January 28, 2020 at 9:30 am.**

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
November 4, 2019

  
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CHRISTI J. ACKERS, J.S.C.

To: All parties via ECF