

Lopez v City of New York

2019 NY Slip Op 34990(U)

August 30, 2019

Supreme Court, Richmond County

Docket Number: Index No. 150156/2018

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

-----X
DANIEL LOPEZ,

Plaintiff,

-against-

CITY OF NEW YORK, TRAVIS ENTERPRISE
GROUP LLC and A.S.A.R. INTERNATIONAL CORP.,

Defendants.

-----X

DECISION & ORDER

Index No. 150156/2018

Motion No. 2112 - 003

The following papers numbered "1" through "3" were fully submitted on the 3rd day of July 2019.

	Papers Numbered
Notice of Motion by Defendants Travis Enterprise Group LLC and A.S.A.R. International Corp. for Summary Judgment Dismissing the Complaint, with Supporting Papers (dated May 17, 2019).....	1
Plaintiff's Affirmation in Opposition (dated June 18, 2019).....	2
Reply Affirmation (dated June 28, 2019).....	3

Upon the foregoing papers, the motion (Seq. No 003) of defendants Travis Enterprise Group LLC and A.S.A.R. International Corp. for summary judgment dismissing the Complaint is denied.¹

¹ The instant action was discontinued with prejudice as against defendant The City of New York by Stipulation dated April 2, 2019.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Daniel Lopez on April 3, 2017 when he tripped on a raised pipe in an unpaved area abutting certain commercial premises located at 425A Wild Ave, Staten Island, New York. Plaintiff testified at his deposition that the pipe protruded approximately 3 to 4 inches above the dirt ground.

Defendant Travis Enterprise Group LLC (hereinafter, "Travis") is the owner of the subject property which was under construction at the time of the accident. Travis retained defendant A.S.A.R. International Corp. (hereinafter, "A.S.A.R.") as the general contractor for the project. The president of Travis, Andrzej Szczech, held the position of superintendent of the general contractor's (A.S.A.R.) construction work.

BACKGROUND

Presently before the Court is the motion of defendants Travis and A.S.A.R. for summary judgment dismissing the Complaint as against them on the grounds, *inter alia*, that (1) a dangerous or defective condition did not exist at the location in question, (2) plaintiff's own negligent actions and carelessness was the sole proximate cause of his accident, (3) defendants did not have actual or constructive notice of a dangerous condition, nor did they cause or create the alleged defect, and (4) the condition was open and obvious, and not inherently dangerous.

In support of the motion, defendants submit photographic evidence which they maintain "unequivocally" indicates that the pipe in question protruded 2 to 3 inches above the ground, not 3 to 4 inches as plaintiff testified. They maintain that the condition of the pipe, as depicted in the photographs, was trivial and not dangerous as a matter of law. In this regard, it is argued that

courts have routinely dismissed cases where the alleged defect is (1) trivial, (2) open and obvious, and (3) not inherently dangerous.

Movants further contend that plaintiff's negligent actions in failing to exercise care and observe "where he was walking, *i.e.*, on an unpaved dirt area abutting an active construction site", was the sole proximate cause of his accident. Finally, citing *Gordon v. American Museum of Natural History* (67 NY2d 836, 837 [1986]), movants rely on the well-established principle, *i.e.*, "to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employee to discover and remedy it." Applying the foregoing standard to the case at bar, defendants maintain there is no evidence in the record that they had actual or constructive notice of the alleged defect prior to plaintiff's accident, or that they created the condition. Movants note that the deposition testimony of their witness, Andrzej Szczech, the superintendent of the construction project, is uncontroverted. He could not recall when the pipe was installed. He further testified that the pipe was installed by one of defendants' subcontractors.

For the reasons set forth above, defendants maintain they are entitled to judgment as a matter of law.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *see Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In this case, it is the Court's opinion that defendants have failed to meet their initial burden of establishing, prima facie, that the alleged defect was not a dangerous condition, and/or that the pipe in the "dirt ground" was open and obvious. Their reliance solely on inadmissible photographic evidence, *i.e.*, certain unauthenticated photographs (including Google Map images and aerial photos) marked as Exhibits "1" through "17" for identification at plaintiff's deposition, is legally insufficient (*see Zuckerman v. City of New York*, 49 NY2d at 562).

More particularly, although movants contend that the photographs accurately depict the condition of the pipe at the time of the accident, it is uncontroverted that the photographer and the date of the proffered photographs is unknown. At plaintiff's deposition, a proper foundation and authentication for the admissibility of the photographs was lacking. Generally, proof that the photographs were taken close in time to the accident and fairly and accurately represent the conditions as they existed on the date of the accident is required (*see Saporito v. City of New York*, 14 NY2d 474, 476 [1964]; *Davidow v. CSC Holdings, Inc.*, 156 AD3d 682, 682-683 [2d Dept 2017]).

"A photograph is...admissible as a depiction of a fact in issue upon proof of its accuracy by the photographer or upon testimony of one with personal knowledge that the photograph represents that which it purports to depict" (*Corsi v. Town of Bedford*, 58 AD3d 225, 229 [2d Dept 2008], *lv denied* 12 NY3d 714 [2009]; *see e.g., Alcantara v. New York City Tr. Auth.*, 140 AD3d 808, 809 [2d Dept 2016]).

Here, plaintiff did not testify that the images portrayed in *any* of the photographs fairly and accurately depict the condition of the pipe in the ground as it appeared on the day of his accident. Notably, there are variances in the appearance of the defect portrayed in the proffered

photographs. To the extent relevant, with respect to Exhibit “1”, although plaintiff identified a “pipe sticking out of the ground” and testified that the photograph fairly and accurately depicted the “location of the accident”, the condition and height of the pipe above the ground were not clearly depicted in that photograph. Accordingly, the record does not provide admissible evidence to support defendants’ assertion that the pipe did not present a danger and that its condition was open, obvious and trivial in nature.

Based on the foregoing, the Court finds that the photographic evidence defendants rely on is inadmissible and, therefore, legally insufficient to eliminate triable issues of fact as to the irregularity, height, appearance and nature of the defect at the time of the occurrence (*cf. Davidow v. CSC Holdings, Inc.*, 156 AD3d at 682; *Alcantara v. New York City Tr. Auth.*, 140 AD3d 808, 809). Similarly, defendants’ arguments on the issues of actual and constructive notice are unavailing. The construction superintendent’s bare assertions at his deposition failed to establish, as a matter of law, that the defective condition of the pipe was not caused or created by defendants, their agents or employees. This is a matter of credibility for the jury.

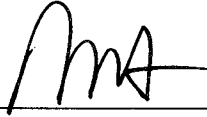
Accordingly, it is

ORDERED, that the motion of defendants Travis Enterprise Group LLC and A.S.A.R. International Corp. for summary judgment dismissing the Complaint is denied; and it is further ORDERED, that the Clerk mark his records accordingly; and it is further

ORDERED, that the parties are to appear in the Settlement Conference Part on
September 24, 2019 in 18 Richmond Terrace, Room 114, Staten Island, New York at 9:30 A.M.

This constitutes the decision and order of the Court.

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.

Dated: August 30, 2019