Mudie v City of New York
2020 NY Slip Op 30244(U)
February 3, 2020
Supreme Court, New York County
Docket Number: 154721/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 154721/2016

MARGARET MUDIE,

Plaintiff,

MOTION SEQ. NO. 004

- v -

THE CITY OF NEW YORK and HUDSON RIVER PARK TRUST,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 102, 103, 104, 105, 106, 107

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Margaret Mudie, defendants the City of New York ("the City") and Hudson River Park Trust ("the Trust") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was allegedly injured on April 15, 2015, when she tripped and fell over the concrete base of a light fixture mounted into Pier 84, which was located inside Hudson River Park ("the park") in Manhattan. In her notice of claim, plaintiff alleged that the light fixture was, among other things, "raised" and "defective". Doc. 96, Ex. C.

The instant action was commenced by the filing of a summons and verified complaint on June 6, 2016. Doc. 1. In her complaint, plaintiff alleged that she was injured when she tripped

and fell on a light fixture which was installed on the deck of Pier 84, which was owned by the City and maintained by the Trust. Doc. 1; Doc. 96 at Ex. D. She further claimed that defendants were negligent in creating the condition, in failing to maintain the pier in a safe condition, and in failing to warn of the dangerous condition. Doc. 96 at Ex. D.

The Trust joined issue by service of its verified answer and verified amended answer filed August 8 and August 11, 2016, respectively. Docs. 3 and 5; Doc. 96 at Exs. E and F.

Plaintiff filed a summons and amended verified complaint on August 17, 2016. Doc. 7; Doc. 96, Ex. G. The City served an answer to the amended complaint on or about August 26, 2016. Doc. 96 at Ex. H.

At her deposition in December 2018, plaintiff testified that the alleged accident occurred at Pier 84 on April 15, 2015 at approximately 1:00 pm. Doc. 96 at Ex. K, pp. 14, 22-25. The weather was sunny. Doc. 96 at Ex. K, p. 35. Prior to the accident, plaintiff had been in the vicinity for approximately two or more hours. Doc. 96 at Ex. K, p. 71. The accident occurred when plaintiff tripped over the base of a light that was installed on the floor of the pier. Doc. 96 at Ex. K, p. 69. Plaintiff tripped with her left foot on the base surrounding the light and fell forward. Doc. 96 at Ex. K, p. 70. The light itself was round and attached to the pier, standing 1-2 feet high. Doc. 96 at Ex. K, pp. 73-74. The base of the light, on which she tripped, was "some kind of concrete" that was raised above the level of the pier "[m]aybe an inch, two inches, somewhere in that area." Doc. 96 at Ex. K, pp. 74-75.

Prior to the accident, Plaintiff had "stopped momentarily" a few yards away from where the accident happened. Doc. 96, at Ex. K, p. 72. At that point, Plaintiff saw the light, but not the base of the light. Doc. 96 at Ex. K, p. 73. Specifically, she stated that she "was aware of the light, but not the raised area it was situated on." Doc. 96 at Ex. K, p. 107.

Plaintiff was shown various photographs that were marked as exhibits at her deposition. Doc. 96 at Ex. L. Viewing defendants' deposition Exhibits A, B, and E, she was able to identify the site of the accident. Doc. 96 at Ex. K, p. 82, 85, 93-94.

Plaintiff's husband, Robert Mudie, was also deposed in December 2018. Mr. Mudie testified that plaintiff tripped over the base of a light, which was "approximately one to two inches proud of the level that we were walking". Doc. 96, at Ex. M, p. 13. He explained that the term "proud" meant that the base was not flush with the pier. Doc. 96 at Ex. M, pp. 19-20. The light sitting on top of the concrete base was between nine and twelve inches high. Doc. 96 at Ex. M, p. 50. There was nothing covering or obscuring the light, which was in plain view. Doc. 96 at Ex. M, p. 34. Before plaintiff fell, Mr. Mudie had seen other such lights in the area. Doc. 96 at Ex. M, p. 18.

William Rettig, senior director of facilities for the Trust, appeared for a deposition in January 2019. His job duties included overseeing several departments which were responsible for maintaining the park's infrastructure and cleanliness, as well as maintaining some marine structures and the park's fleet of vehicles. Doc. 96 at Ex. N, pp. 6-7. According to Rettig, Pier 84 was located within the park. Doc. 96 at Ex. N, p. 17. The light fixture on which plaintiff tripped was installed prior to the date in 2006 on which the pier was opened to the public. Doc. 96 at Ex. N, p. 30. The Trust maintained the lights on the pier and, if one needed to be fixed, Rettig would direct his staff to perform whatever maintenance or repair work was necessary. Doc. 96 at Ex. N, pp. 31, 38. Prior to the date of the accident, Rettig never personally performed any work on the subject light fixture. Doc. 96 at Ex. N, p. 31. Nor was he aware of any work performed on the base of the light fixture prior to the accident (Doc. 96 at Ex. N, p. 33), or of any light fixtures or bases being changed before the incident. Doc. 96 at Ex. N, p. 36. Each light at the pier had a

circular concrete base, which was designed to be flush with the wooden planks of the pier. Doc. 96 at Ex. N, pp. 33-35. Rettig did not know of anyone claiming to have tripped and fallen over either a light fixture or its base prior to the date of the accident. Doc. 96 at Ex. N, pp. 36-37. He did not inspect the bases of the lights on a regular basis to ensure that they were flush with the pier but casually observed the lights on numerous occasions and saw that they were flush. Doc. 96 at Ex. N, p. 34.

Plaintiff filed a note of issue on March 11, 2019. Doc. 92.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint submitting, inter alia, the pleadings, the deposition transcripts, and copies of photographs marked at plaintiff's deposition. In support of the motion, defendants argue that the complaint must be dismissed because plaintiff was injured by a trivial defect and that the condition was open and obvious.

In opposition, plaintiff argues that, that part of defendants' motion that she was injured by a trivial defect, must be denied on the ground that defendants do not submit any objective measurements of the height of the base. She further asserts that defendants' argument that the condition was open and obvious inherently contradicts their argument that the defect was trivial.

In reply, defendants argue that plaintiff's opposition papers must be rejected as untimely since they were submitted subsequent to a deadline to which the parties stipulated. Alternatively, defendants reiterate their argument that the condition was trivial in nature.

LEGAL CONCLUSIONS

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-*

Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). If such a showing is not made, "the motion must be denied, regardless of the sufficiency of the opposing papers." *Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 479 (1st Dept 2018).

Trivial Defect

> When moving for summary judgment [on the ground that plaintiff was injured by a trivial defect], a defendant 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 [2015]). "[T]here is no . . . per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.* at 77 [internal quotation marks omitted], citing *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). A finding that a condition is a trivial defect must "be based on all the specific facts and circumstances of the case, not size alone" (*Hutchinson*, 26 NY3d at 77). The issue is generally a jury question because it is a fact-intensive inquiry (*id.*).

McCabe v Avalon Bay Communities, Inc., 177 AD3d 487, 488-489 (1st Dept 2019).

In determining whether a defect is trivial, the court must examine the totality of the evidence 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 at 978 (internal quotation marks omitted). Here, the photographs submitted by defendants in support of their motion "do not unequivocally demonstrate that the complained-of defect is trivial as a matter of law since its size is not discernable." *Munasca v Morrison Mgt. LLC*, 111

AD3d 564 (1st Dept 2013); *see also Grundstrom v Papadopoulos*, 117 AD3d 788 (2d Dept 2014); *Nagin v K.E. M. Enterprises, Inc.*, 111 AD3d 901(2d Dept 2013). Indeed, the photographs submitted are black and white and "of such poor quality that it is impossible to determine whether the alleged defect is trivial as a matter of law." *Deviva v Bourbon St. Fine Foods & Spirit*, 116 AD3d 654 (2d Dept 2014).

Apart from the photographs, defendants submit "no measurements of the alleged defect in support of [their] contention that the defect was trivial as a matter of law." *Pion v New York City Hous. Auth.*, 125 AD3d 462, 463 (1st Dept 2015); *see also Grundstrom v Papadopoulos*, 117 AD3d at 788 (summary judgment denied to movant where he "failed to submit any objective measurements of the dimensions of the alleged defect"). The only evidence before this Court regarding the size of the concrete base is the testimony of plaintiff and Mr. Mudie, who both estimated that the concrete base was one to two inches high. Doc. 96 at Ex. K, pp. 74-75; Doc. 96, at Ex. M, pp. 13, 19-20. However, since these are merely approximations, defendants have clearly failed to establish the existence of a trivial defect.[1]

Open and Obvious Condition

> If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to *warn* a visitor of the danger (*see Tagle v Jakob*, 97 N.Y.2d 165 [2001]). The theory underlying the "open and obvious" doctrine is this:

[1] Despite their failure to establish the measurements of the base, defendants nevertheless assert that "members of the public are depicted in some of the photographs, providing ample scale." Doc. 102 at par. 31. However, this argument is so utterly meritless that this Court is somewhat astonished that it is included in defendants' motion papers.

> "Where a danger is readily apparent as a matter of common sense, 'there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided.' Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning." (*Liriano v Hobart Corp.*, 92 N.Y.2d 232, 242 [1998], quoting Prosser and Keeton, Torts §96, at 686 [5th ed]).
>
> The hazard or dangerous condition must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open (*see Tagle v Jakob*, 97 N.Y.2d 165 [2001]), making a posted warning of the presence of the hazard superfluous (*Liriano, supra*).
>
> Therefore, a plaintiff's theory of negligence based upon the claim that the property owner violated its duty to warn of the claimed hazard may be dismissed upon a demonstration that the hazard was open and obvious. Here, however, the nature of this alleged hazard simply does not compel the conclusion as a matter of law that the claimed hazard was so obvious that it would *necessarily* be noticed by any careful observer, so as to make any warning superfluous.
>
> At the outset, the question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion (*see Tagle v Jakob*, 97 N.Y.2d 165, 169 [2001]). Nor is the mere fact that a defect or hazard is capable of being discerned by a careful observer the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked.

Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69, 71-72 (1st Dept 2004).

In holding that the raised concrete base was not an open and obvious hazard, this Court notes that the bases of the lights installed in the park were, according to Rettig, designed to be flush with the wooden planks of the pier. Doc. 96 at Ex. N, pp. 33-35. Therefore, if, as plaintiff claims, she tripped on a concrete base which was not flush with the pier, it may have been technically visible but likely to be overlooked. Additionally, as noted above, the quality of the photographs submitted by defendants is extremely poor and they are thus insufficient to establish defendants' burden of demonstrating that the base was readily observable. *See Stadler Lord & Taylor LLC*, 165 AD3d 500 (1st Dept 2018).

Even assuming, arguendo, that the alleged hazard were open and obvious as a matter of law, summary judgment would still be denied "since plaintiff is not claiming a violation of the duty to warn, but [rather] a violation of the broader duty to maintain the premises in a reasonably safe condition." *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d at 72.

Additionally, this Court notes that defendants submitted all of the exhibits to their motion (Exhibits A – N), including lengthy deposition transcripts, in one efiled document, making it extremely difficult for this Court to navigate the same. This bulk efiling is in direct violation of the Part 2 Rules, which require that each document be efiled and labeled individually. For this reason, too, the motion is denied.

Finally, although defendants make a considerable effort in their reply papers to persuade this Court to disregard plaintiff's untimely opposition to their motion, this contention is disingenuous given defendants' admission that the motion was adjourned for two weeks to allow them to reply. Thus, this Court eliminated any potential prejudice caused by the delay.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the parties are to appear for a previously scheduled early settlement conference on March 3, 2020 at 9:30 a.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

2/3/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE