

Tropper v Henry St. Settlement
2020 NY Slip Op 30906(U)
April 6, 2020
Supreme Court, New York County
Docket Number: 156721/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

DOV TROPPER,

Plaintiff,

- v -

HENRY STREET SETTLEMENT,

Defendant.

-----X

INDEX NO. 156721/2017
MOTION DATE _____
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 92-106, 108-117 were read on this motion for summary judgment.

In this action, plaintiff seeks damages for physical injuries he sustained after tripping and falling in front of defendant’s premises. Defendant denies liability. By notice of motion, he moves pursuant to CPLR 3212 for an order granting him summary judgment on liability, awarding him a special trial preference, and scheduling an inquest to determine his damages. Defendant opposes the motion for summary judgment only.

I. UNDISPUTED FACTS

On June 2, 2017, at approximately 7:30 pm, plaintiff was walking on Willett Street between Grand and Delancey Streets in Manhattan, when he tripped and fell on the sidewalk abutting defendant’s premises. (NYSCEF 1). The City of New York was dismissed from the action. (NYSCEF 68).

2. Plaintiff’s deposition (NYSCEF 97)

At his deposition held in February 2018, plaintiff testified that he is very familiar with the place where he fell as it located across the street from his residence where he has lived for 15

years and next to the synagogue he has attended for 40 years, which is to the immediate right of defendant's premises. The sidewalk is approximately 12 feet wide and is lined with some trees.

On the night of his accident, plaintiff had attended synagogue services, following which he sought to speak with another congregant whom he could see some 100 yards away in front of defendant's premises. As the congregant continued to walk away, plaintiff walked fast and/or jogged to catch up with him for some 15 seconds, or 25 yards. On plaintiff's left was the street and on his right were the property lines of various premises. The sidewalk was crowded with approximately 30 people walking with and toward him. To avoid the other pedestrians, plaintiff moved closer to the curb.

The weather that night was clear and dry, and plaintiff could see where he was walking, including the sidewalk in front of him. Before he could reach the congregant, however, he tripped on the edge of a raised sidewalk flag that was approximately three inches higher than the adjacent flag and approximately two to two and a half feet from the curb. As his toe hit the raised edge, which he had not seen, he was propelled forward and onto the ground. Although there were other trees on the sidewalk, the tree nearest to where plaintiff had fallen was the first he saw as he exited the synagogue.

A week or two later, plaintiff's friend took photographs of the accident location which plaintiff had described to him, namely, in front of defendant's premises near the raised portion of a sidewalk flag and next to a tree.

When he testified at a 50-h hearing held by the City of New York, plaintiff circled the raised edge on a photograph depicting the sidewalk flag close to the edge of a tree well that appears to be the middle of three on the block. (*Id.*, NYSCEF 102).

3. Defendant's deposition (NYSCEF 98)

Defendant's chief of operations and facilities testified at a deposition that her job responsibilities included the management of defendant's maintenance department and staff. She did not recall defendant hiring anyone between 2012 and 2017 to perform work on or to maintain the sidewalk in front of the premises. Rather, defendant regularly inspects the sidewalk adjacent to the premises for, among other things, hazards and needed repairs. After plaintiff's accident, she stated, defendant began to bevel or grind down sidewalk pavers in front of the premises.

Before plaintiff's accident, the operations chief had been told of two other such incidents on the sidewalk next to defendant's premises. She inspected those areas and found no tripping hazards or defects that would have caused anyone to fall. Other than the two incidents, she was not aware of any complaints about the sidewalk. Although she had seen uneven sidewalk flags near the premises, she could not recall where or when, and she characterized them as the "standard unevenness" of a City sidewalk.

4. City of New York deposition (NYSCEF 99)

In 2018, a record searcher employed by City's Department of Transportation (DOT) testified on behalf of City. During discovery proceedings, City produced the fruits of a sidewalk search related to the accident location and dated from June 2, 2015 to June 2, 2017. The records included those produced from DOT's Sidewalk Management Unit (SMU) which is responsible for the maintenance and condition of City sidewalks, including the issuance of violations. If a sidewalk complaint is registered with the DOT or the City's 311 system, it is forwarded to the SMU.

In the records is a complaint recorded in August 2015 from a 311 call about a broken sidewalk in front of 500A Grand Street, between Grand and Broome Streets. An inspection of

the sidewalk ensued on August 18, 2015, and DOT marked it resolved a month later, having inspected the sidewalk more than six months before the complaint and having notified the property owner of any “defect[ive] sidewalk conditions.” Although the notification to the owner would have been either by certified mailing or in hand, DOT’s search, performed in the course of the instant action, yielded no notifications or returned certified mailing receipts. Nor does the search reflect a complaint or inspection made six months before the 2015 complaint.

In another complaint, conveyed in a 311 call in August 2016, it is reported that “[t]he sidewalk is being pushed up by trees on the Willett Street side of 466 Grand Street which is a performing arts theater. There are three or four slabs that are affected . . .” (NYSCEF 104). DOT’s alleged inspection of the condition was confirmed in August 2016 and marked resolved as an inspection and notification to the owner had been recorded six months earlier. The complaint was thus closed on August 30, 2016.

A 2017 complaint was resolved to the extent that DOT had agreed to inspect the reported condition, but the records do not indicate whether it did; the complaint was closed.

5. 2010 violation (NYSCEF 105)

In 2010, after inspecting the sidewalk in front of 466 Grand Street, DOT issued a notice of violation to defendant for breakage, patchwork, an improper slope, and a trip hazard. To correct the hazard, defendant was directed to take out a permit and replace 685 feet of sidewalk pursuant to an annexed diagram. The diagram shows the sidewalk on Willett Street in front of defendant’s premises, including three tree wells. The only tree well identified as related to a sidewalk defect is the second one.

In an affidavit dated May 28, 2010, a DOT employee attested that he had served defendant with the notice of the violation by conspicuously posting it that day on the premises.

And, while a certified mailing and return receipt card addressed to defendant is attached to the violation, there is no proof that the certified mailing was received and/or signed and returned by defendant.

6. Defendant's affidavit (NYSCEF 112)

By affidavit, defendant's chief financial officer affirms that she has personal knowledge of defendant's business operations and records, including written complaints, notices, and violations issued related to its properties and abutting sidewalks. She fruitlessly searched defendant's records for written complaints pertaining to the location of plaintiff's accident and denied that defendant had received a 2010 violation by posting or by mailing, as such a notice, if received, would have been directed to her attention for handling, and to her knowledge neither she nor any other employee of defendant had received it.

II. CONTENTIONS

1. Plaintiff (NYSCEF 93)

Plaintiff argues that defendant violated its duty to maintain the sidewalk abutting its property in a reasonably safe condition by failing to repair and replace the sidewalk flag hazard on which he had tripped. As the three-inch differential between the flags is confirmed in photographs, plaintiff argues that the defect constituted an unsafe condition which was defendant's duty to repair. Moreover, he observes, in 2010, City had previously identified several defective portions of the sidewalk in that area and had served defendant with a notice of violation for them. Plaintiff thus maintains that defendant had actual notice of the defect on which he had fallen.

As defendant's witness testified that no sidewalk repairs had been performed until after plaintiff's fall and absent evidence of any repairs, plaintiff contends that defendant violated its

duty to repair the defective flag despite having had actual notice of it. The 2016 complaint gave defendant additional notice, as it indicates that DOT had notified defendant of the defect at least six months earlier and that the defect had not been repaired since 2010.

To the extent that the 2010 violation does not constitute actual notice of the defect, plaintiff claims, defendant had constructive notice of it as defendant's staff regularly inspected the area, the defect could not have developed overnight, and at least two other pedestrians had complained about the sidewalk before plaintiff's accident. Moreover, defendant's witness admitted that the sidewalk had defects.

2. Defendant (NYSCEF 109)

Defendant argues that the location of plaintiff's fall remains in issue, observing that at his deposition, plaintiff testified that he had tripped on the flag closest to the first tree well to the right of the synagogue, whereas in the photograph, he circled the second tree well as the location of the defective flag. Thus, defendant contends, plaintiff has not established, *prima facie*, the location or the nature of the defect that caused his fall.

Plaintiff also fails to establish actual notice of the defect on which he allegedly tripped, defendant maintains, claiming that DOT's record of the 2016 complaint does not reflect that an inspection was performed in response thereto or that defendant was notified of the complaint and alleged violation, and there is no evidence that it received the 2010 complaint as the certified mail return receipt is not signed and it is unclear where on the premises the violation notice had been posted. In any event, defendant denies having received it, per its employee's affidavit, and even had it been received, it provides no notice of the defect identified by plaintiff.

Defendant asserts that plaintiff also offers no evidence that the defect existed and was apparent for a sufficient period of time for defendant to have repaired it. Although he had walked

the same route approximately three times a month for the past 15 years, plaintiff testified that he had never seen it and defendant's witness did not notice a defective condition other than the "standard unevenness" of a City sidewalk.

Moreover, the two complaints of which defendant had been made aware did not occur where plaintiff had fallen and are thus irrelevant to whether defendant had notice of the defect.

To the extent that plaintiff is able to demonstrate that defendant had notice of the defect, the defect was open and obvious, and thus there was no duty to warn of it. Plaintiff testified that it was a clear and dry day, that he was very familiar with the area, and that he had no difficulty seeing the sidewalk as he was looking straight ahead while he walked. Therefore, defendant argues that plaintiff failed to use his senses reasonably to avoid the accident, especially as the sidewalk was crowded with other people and he was jogging to catch up to his friend.

Defendant characterizes the defect as trivial and thus not actionable, observing that the sole evidence of the alleged differential between the two flags at issue is plaintiff's self-serving estimate, and claims that the photograph of the flag reflects nothing more than a slight rise. Moreover, its trivial nature is demonstrated by plaintiff's frequent use of the sidewalk without incident and without having noticed it.

Defendant also denies that the raised flag was the proximate cause of plaintiff's accident, observing that plaintiff testified to having been forced to move to the left because of other people around him. Defendant thus posits that it was the crowded condition of the sidewalk that caused plaintiff's fall.

3. Plaintiff's reply (NYSCEF 115)

Plaintiff denies any inconsistency in his testimony about the location of his accident. According to him, he testified that he had fallen on the sidewalk next to the first tree he saw upon

exiting the synagogue, which is the tree well he had circled on the photograph, and he maintains that defendant was served with notice of the 2010 violation and that the diagram attached thereto shows the defect in front of the tree well at issue.

Plaintiff discounts as not probative the affidavit of defendant's chief of operations and facilities as she provides no description or dates of the records searched, observing that a failure to find the violation does not mean that it was not served on defendant in 2010.

Even absent actual notice of the defect, plaintiff argues that the violation demonstrates defendants' constructive notice as it shows that the same defect was in existence since 2010 and the 2016 complaint reflects that it was still there then.

Plaintiff also observes that he bears no burden of proving that the condition was not open and obvious, as that argument relates to his alleged comparative negligence, which need not be addressed on a motion for summary judgment. In any event, he denies having been comparatively negligent as he exited the synagogue and turned right, which was the opposite direction of his usual route and the sidewalk was crowded with other people, which forced him to walk closer to the curb.

In denying that the defect was trivial, plaintiff relies on his testimony that there was a three-inch height differential between the two flags and defendant's failure to submit evidence to the contrary.

III. ANALYSIS

1. Applicable law

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22

NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

New York City Administrative Code § 7-201 imposes a duty on landowners to repair and maintain the sidewalk abutting their property, and liability on their failure to do so where the vertical grade differential between two flags is equal to or more than one half inch (Code § 19-52[a][4]).

2. Location of accident

There is no inconsistency or doubt as to the location of plaintiff’s accident. His testimony that he tripped next to the first tree well he encountered upon leaving the synagogue is the tree well that he circled in the photograph.

3. Notice

A premises owner has a duty to maintain its premises in a safe condition and may be held liable for an injury occurring thereon if it creates a dangerous condition or has actual or constructive notice of it. (*Gani v Ave. R Sephardic Congregation*, 159 AD3d 873 [2d Dept 2018]). “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 employees to discover and remedy it.” (*Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]).

Absent proof that defendant received the certified mailing and/or that it had signed the return receipt for the 2010 notice of violation, plaintiff fails to demonstrate, *prima facie*, actual notice of the defect. To the extent that the affidavit of posting of the notice of violation is sufficient, defendant's detailed denial of having seen or received it based on its employee's personal knowledge and a search of its records, raises a triable issue of fact. In any event, there is no proof that the defect identified in the 2010 violation is the one that allegedly caused plaintiff's accident. (*See e.g., Parra v City of New York*, 137 AD3d 532 [1st Dept 2016] [City's Big Apple Map filed more than six years before plaintiff's accident did not establish constructive notice as there was no evidence that defect on map was same one that caused plaintiff's fall]).

The 2016 and 2017 complaints, even if pertaining to the location of plaintiff's accident, were not shown to have been the subject of violations that were served on defendant. Rather, according to the DOT, an inspection had been made and a notice of violation had been served more than six months earlier, thereby resolving the 2016 complaint. DOT's records, however, reflect no earlier inspections or notices between 2015 and 2017.

The two complaints received by defendant about other falling accidents pertain to locations other than that of plaintiff's accident, which plaintiff does not dispute. Nor is there evidence of other accidents where plaintiff fell. (*See Vaughn v Hudson River Yards Ventures II, Inc.*, 118 AD3d 604 [1st Dept 2014] [plaintiff's notice to defendant of similar conditions at other locations insufficient to establish notice of defect at issue]). That defendant's employee testified that she had seen defects on the sidewalk before the accident does not establish that she saw the instant defect.

Absent proof of prior complaints, accidents, or notices of violation related to the defect and location at issue, and as plaintiff had never before seen the defect notwithstanding his long-

term familiarity with the sidewalk in issue, plaintiff fails to show, *prima facie*, that defendant had actual or constructive notice of the defective sidewalk condition on which he tripped. (*See Schulman v City of New York*, 157 AD3d 548 [1st Dept 2018] [defendant's testimony that before plaintiff's accident, he was unaware of complaint or accidents on sidewalk and had received no violations about sidewalk, demonstrated lack of actual or constructive notice of defect]; *Parra*, 137 AD3d at 533 [no actual or constructive notice shown as plaintiff had never before seen defect, and defendant testified sidewalk cleaned every morning and no defects were found, and no complaints made or prior accidents]; *Burko v Friedland*, 62 AD3d 462 [1st Dept 2009] [defendant had no knowledge of prior, similar accidents on sidewalk, never saw defect on sidewalk, and did not alter sidewalk]). Thus, defendant may not be held liable for plaintiff's accident. (CPLR 3212[b]).

In light of this result, whether the condition was open and obvious and/or constituted a nonactionable, trivial defect need not be determined. In any event, plaintiff's unsupported estimate that the height differential was three inches is insufficient. (*See McCullough v Riverbay Corp.*, 150 AD3d 624 [1st Dept 2017] [plaintiff's testimony that defect two- to four-inches high speculative as she did not measure it]; *Vazquez v JRG Realty Corp.*, 81 AD3d 555 [1st Dept 2011] [plaintiff did not measure defect and submitted no expert testimony as to measurements]).

Nor does plaintiff allege or prove that the differential had other "intrinsic characteristics" or that there were "surrounding circumstances" magnifying the danger of the condition (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015]), as he was admittedly able to see the sidewalk clearly as he walked and had traveled on it several times a week for the past 15 years without seeing the alleged defect. (*See Chirumbolo v 78 Exch. St., LLC*, 137 AD3d 1358, 1359 [3d Dept 2016] [defect trivial where plaintiff traveled in area approximately 100 times

before accident]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied; it is further

ORDERED, that pursuant to CPLR 3212(b), the complaint is dismissed in its entirety,

and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff's motion for a special trial preference is denied as academic.

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4/6/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	NON-FINAL DISPOSITION		
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APPLICATION:

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CHECK IF APPROPRIATE:

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