

Barrera v Morris Ave. Props. LLC

2020 NY Slip Op 31210(U)

May 6, 2020

Supreme Court, New York County

Docket Number: 159884/2015

Judge: Kathryn E. Freed

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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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CAMELIA BARRERA

Plaintiff,

- v -

MORRIS AVENUE PROPERTIES LLC,

Defendant.

-----X

INDEX NO. 159884/2015
MOTION DATE 02/01/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action commenced by plaintiff Camelia Barrera, defendant Morris Avenue Properties LLC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on June 15, 2015 in which plaintiff tripped and fell on a public sidewalk adjacent to 1704 Morris Avenue in The Bronx, which premises were owned by defendant. Doc. 1.

In the complaint, filed September 25, 2015, plaintiff alleged that she was injured due to the negligence of the defendant in maintaining the sidewalk. Doc. 1. Specifically, she claimed that the sidewalk was, inter alia, “cracked”, “holey”, “chipped” and “uneven”. Doc. 1.

Defendant joined issue by its answer filed October 6, 2013, denying all substantive allegations of wrongdoing and asserting several affirmative defenses. Doc. 13.

In her bill of particulars, plaintiff alleged that her fall was caused by a "defective, hazardous, unsafe, broken, cracked, uneven, holey, chipped, depressed, raised, unsmooth, loose condition and [that the sidewalk] was negligently and/or improperly maintained." Doc. 36. Plaintiff further alleged that defendant improperly constructed the sidewalk. Doc. 36. Additionally, plaintiff alleged violations of New York City Administrative Code Title 19, sections 19-138, 19-139, 19-143, 19-148 and 19-147. Doc. 36. In her supplemental bill of particulars, plaintiff claimed that she was injured when she fell on the sidewalk in front of the premises and that defendant had actual and/or constructive notice of the condition. Doc. 37.

At her deposition in December 2017, plaintiff testified that she tripped over "the black thing that they put in the streets." Doc. 39 at 31-32. She then clarified that there was a "black thing" on the sidewalk. Doc. 39 at 32. She did not recall

seeing the “black thing” prior to her fall; did not ever complain about it prior to the incident; and knew of nobody who made such a prior complaint. Doc. 39 at 32-34. She did not see the "black thing" until after she fell and could not remember what it looked like. Doc. 39 at 34, 41.

During her deposition, plaintiff was shown various photographs of the alleged accident location which had been exchanged by her attorney, and the pictures were marked as exhibits. Doc. 40. Although plaintiff never saw the photographs before and did not know who took them, she testified that the “black thing”, which appeared to be a trench in the sidewalk backfilled with tar, was depicted in exhibits 2, 4, 6, 10 and 13. Doc. 39 at 42-47. She said that she fell on the black paved area depicted in exhibit 6. Doc. 39 at 50. She also circled the part of the paved asphalt depicted by exhibit 12 as the place where she fell. Doc. 39 at 51.

Luis Diaz testified at his deposition in October 2018 that he was the manager of 1704 Morris Avenue as of the date of the incident. Doc. 41 at 9-10. His duties included ensuring that the sidewalks adjacent to the building were not broken. Doc. 41 at 41. He said that defendant never used black asphalt to make repairs and that such material was only used by the City of New York or Con Edison. Doc. 41 at 68, 17. He did not recall the sidewalk being opened up for any work in 2015. Doc. 41 at 32. When shown photographs of the area of the incident, however, he

identified a “repair or trench along the sidewalk.” Doc. 41 at 32-33. Although he acknowledged that repairs were made to the sidewalk, he did not know who made them or why they were made. Doc. 41 at 33, 37-38. The superintendent of the building was responsible for inspecting the sidewalks and telling Diaz if something needed to be repaired. Doc. 41 at 42, 47.

Plaintiff filed a note of issue and certificate of readiness on May 23, 2019. Doc. 30.

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, defendant submits, inter alia, the pleadings, bills of particular, deposition transcripts, photographs marked at plaintiff’s deposition, and the affidavit of its expert engineer, Michael Cronin, P.E.

Defendant argues that it is entitled to summary judgment dismissing the complaint because plaintiff failed to identify the cause of her fall and since the condition of the sidewalk was open and obvious.

In his affidavit, Cronin states, based on his review of the complaint, bills of particular, photographs, and deposition transcripts, that it is his opinion, to a reasonable degree of engineering certainty, that the sidewalk depicted in exhibit 12 marked at plaintiff’s deposition, which, she said, depicted the area of her fall, was free of any dangerous conditions or tripping hazards, and that it did not violate any New York codes, statutes or regulations. Doc. 43. Cronin maintains that the

"black thing" which plaintiff claims she fell on is completely code compliant and not "dangerous." Doc. 43. He further asserts that the black colored portions of the sidewalk are clearly open and obvious to anyone readily using his or her senses. Doc. 43.

In opposition to the motion, plaintiff argues, inter alia, that defendant failed to establish its prima facie entitlement to summary judgment; she identified the dangerous condition which caused her fall; that the condition was not open and obvious; and that Cronin's affidavit fails to establish that the condition was not dangerous.

Plaintiff submits an affidavit in opposition to the motion in which she states, inter alia, that she "was walking on the regular lighter colored sidewalk when [she] felt one of [her] feet move downwards and roll" and that "[a]fter [she] fell, [she] saw a black "thing" in the sidewalk where [she] had placed [her] foot when it moved downwards and rolled, which is what caused [her] to trip." Doc. 50.

In reply, defendant argues, inter alia, that it established its entitlement to summary judgment as a matter of law that plaintiff's affidavit must be disregarded since she attempts to feign an issue of fact.

LEGAL CONCLUSIONS:

It is well-settled that the proponent of a motion for summary judgment "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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v. New York Telephone*, 220 A.D.2d 728 (2d Dept. 1985). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 750 N.Y.S.2d 1 (1st Dept. 2002).

This Court finds that defendant failed to establish its prima facie entitlement to judgment as a matter of law. Diaz's vague testimony, which revealed his inability to remember any details about the condition of the sidewalk, failed to establish as a matter of law that defendant did not cause or create the allegedly dangerous condition or have actual or constructive notice of the same. At the very least, defendant failed to establish that the allegedly "dangerous condition did not exist when the area was last inspected . . . before plaintiff fell." *See Joachim v*

AMC Multi-Cinema, Inc., 129 AD3d 433 (1st Dept 2015) citing *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 (1st Dept 2011).

Nor does Cronin's affidavit entitle defendant to summary judgment. Cronin represents that the photograph marked as exhibit 12 at plaintiff's deposition does not depict any dangerous tripping hazard. However, the photograph is taken from such a substantial distance that it would be impossible for him to have reached this conclusion based on it. Further, since he never examined the site or had any measurements of the height differential, if any, between the "black thing" and the rest of the sidewalk, he lacked any basis upon which to reach his conclusions. *See Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC*, 95 A.D.3d 709, 709, (1st Dept 2012) citing *Cassano v Hagstrom*, 5 NY2d 643, 646 (1959); *see also Guo Ping Li v Overseas Partnership Co., Inc.*, 176 A.D.3d 608, 608-609 (1st Dept 2019). "Where [as here an] expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no probative force . . ." *Amaya v Denihan Ownership Co.*, 30 AD3d 327, 327 (1st Dept 2006) quoting *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 (2002).

Even assuming, arguendo, that defendant established its entitlement to summary judgment, this Court would find that plaintiff's affidavit created an issue of fact regarding whether a dangerous condition existed on the sidewalk. Although plaintiff's testimony regarding the cause of her fall was not a model of clarity, she

repeatedly stated that it was caused by a “black thing” on the sidewalk. Defendant urges that plaintiff’s testimony was speculative because “she never testified or attested that the “black thing” was otherwise unlevel, uneven or that any height differential existed at all.” Doc. 53 at 17. Although plaintiff is correct that plaintiff did not give such testimony, she was not questioned in detail at her deposition regarding the mechanics of her fall. Indeed, the words “cause”, “caused”, and “how” are conspicuously absent from the word index to plaintiff’s deposition. Since there is nothing in plaintiff’s affidavit that directly contradicts her deposition testimony, there is an insufficient basis for finding that she has improperly attempted to feign a factual issue. *See Shapiro v Boulevard Housing Corp.*, 70 AD3d 474, 475-476 (1st Dept 2010) (since plaintiff’s self-serving affidavit did not undercut prior testimony, it could not be disregarded as feigned). In any event, any inconsistency regarding the cause of her fall is an issue of credibility to be determined by a jury. *See DiGiantomasso v City of New York*, 55 AD3d 502, 503 (1st Dept 2008).

Finally, defendant’s claim that the complaint must be dismissed because the condition was open and obvious is without merit. Initially, this argument inherently contradicts defendant’s argument that plaintiff could not identify the condition which allegedly caused her fall. Additionally, even if the condition were open and obvious, this would only relieve defendant of the duty to warn and

not of the duty to maintain the sidewalk in a reasonably safe condition. See Polini v Schindler El. Corp., 146 A.D.3d 536, 536 (1st Dept 2017) citing Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69, 70 (1st Dept 2004).

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

ORDERED that the motion by defendant Morris Avenue Properties LLC seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that, within 10 days of entry of this order, defendant shall serve a copy of this order, with notice of entry, on counsel for plaintiff; and it is further

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

5/6/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE