

Tribich v MHP Land Assoc., LLC

2020 NY Slip Op 32643(U)

August 14, 2020

Supreme Court, New York County

Docket Number: 156889/2016

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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INDEX NO. 156889/2016

EMILIE TRIBICH,

MOTION SEQ. NO. 005, 006

Plaintiff,

- v -

MHP LAND ASSOCIATES, LLC, WINDSOR COURT, MHP
LAND ASSOCIATES, LLC d/b/a WINDSOR COURT,
GRISTEDES GROCERY, GRISTEDES 59, LLC, EMPIRE
CITY SUBWAY COMPANY (LIMITED), THE CITY OF NEW
YORK, and CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 171, 172, 177, 178, 186

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 173, 181, 182, 183, 184

were read on this motion to/for STRIKE PLEADINGS.

In this personal injury action, defendants MHP Land Associates, LLC, Windsor Court and MHP Land Associates, LLC d/b/a Windsor Court (collectively "the MHP defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them (Docs. 120-140, 186), which plaintiff Emilie Tribich ("Tribich") opposes (Doc. 177) (motion sequence 005). The MHP defendants also move, pursuant to CPLR 3042 and 3126, for an order striking the answer of co-defendant Consolidated Edison Company of New York, Inc. ("Con Edison") for failure to respond to discovery demands or, in the alternative, an order compelling Con Edison to produce the outstanding discovery (Docs. 161-170) (motion

sequence 006). Con Edison opposes the same (Docs. 181-184). After a review of the parties' contentions, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On July 7, 2015, Tribich was allegedly injured when she fell on a defective sidewalk near the intersection of East 32nd Street and Third Avenue in Manhattan (Doc. 125). In September 2017, Tribich filed a supplemental summons and amended verified complaint against, *inter alia*, the MHP defendants, the owners of the building at 151 East 31st Street ("Windsor Court") that abuts the subject sidewalk;¹ defendants Gristedes 59, LLC and Gristedes Grocery (collectively "Gristedes"), the tenants who occupied the commercial space on the southeast corner of Third Avenue and East 32nd Street; and defendant Con Edison, the alleged owner of a metal grate located near where Tribich fell (Docs. 25-25; 122 ¶ 8, 6).²

Issue was joined by all defendants (Docs. 126-128). Con Edison and Gristedes asserted cross claims against the MHP defendants for, *inter alia*, contribution and indemnification (Docs. 127, 128).

As relevant here, the MHP defendants served Con Edison with a notice of discovery and inspection on March 19, 2019 ("the 3/19/19 D&I"), requesting "[a]ll records concerning the sidewalk on the south side of 32nd Street, between Lexington Avenue and Third Avenue, in Manhattan for 2 years prior to July 7, 2015" (Doc. 169 ¶ 1). In December 2019, Tribich filed a

¹ Windsor Court occupies the entire Manhattan city block bordered by the streets and sidewalks of Lexington Avenue, Third Avenue, East 31st Street and East 32nd Street (Doc. 122 ¶ 4).

² By decision and order filed July 12, 2019, this Court (Frank, J.) granted defendant City of New York's motion for summary judgment and dismissed all claims against it (Doc. 65). Moreover, all claims were dismissed against defendant Empire City Subway Company (Limited) pursuant to a stipulation of discontinuance with prejudice (Doc. 174).

note of issue representing that all discovery in this matter was complete (Doc. 112). The MHP defendants filed their motion for summary judgment on February 3, 2020 (Doc. 120). On February 18, 2020, two days before the filing of their discovery motion, the MHP defendants notified Con Edison that its response to the 3/19/19 D&I remained outstanding and they requested that the documents be provided at its earliest convenience (Doc. 170). Con Edison asserts that it received the letter on February 20, 2020 (Doc. 181 ¶ 5).

LEGAL CONCLUSIONS:

1. The MHP Defendants' Motion Seeking Summary Judgment (Motion Sequence 005).

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (*see Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The MHP defendants maintain that they are entitled to summary judgment as a matter of law because the allegedly defective condition of the sidewalk was trivial in nature (Doc. 121 ¶ 28-39). Moreover, they claim that they neither had notice of the alleged defect nor created the

condition (Doc. 121 ¶ 40-55). In support of their motion for summary judgment, the MHP defendants submit, *inter alia*, an affidavit and the deposition transcript of Jeremiah Downey ("Downey"), the resident manager of Windsor Court (Docs. 122, 135); the transcripts of Tribich's 50-h hearing and deposition (Docs. 133-134); and color photographs of the location of the accident (Doc. 140).

This Court finds that the MHP defendants have failed to establish that the alleged defect was trivial as a matter of law. "In determining whether a defect alleged to have caused injury to a pedestrian is trivial as a matter of law, a small difference in height or other physically insignificant defect is actionable, if its intrinsic characteristics or surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a pedestrian" (*Shorin v City of NY*, 2018 NY Slip Op 31825[U], 2018 NY Misc LEXIS 3301, *4 [Sup Ct, NY County 2018] [internal quotation marks and citations omitted]; see *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015]). When assessing whether the surrounding circumstances render a physically small defect actionable, this Court should consider factors such as the presence of, *inter alia*, "a jagged edge; a rough, irregular surface; the presence of other defects in the vicinity; poor lighting; or a location — such as heavily traveled walkway — where pedestrians are naturally distracted from looking down at their feet" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 78 [internal citations omitted]).

As relevant here, Tribich testified that the sidewalk was "pebbly," that "[t]here was a little dip in the pebbly condition," and that the difference in height elevation of the defective sidewalk was "minimal" (Doc. 133 at 23, 25-26). Tribich also estimated the elevation of the defect to be between $\frac{1}{4}$ and $\frac{1}{2}$ of an inch, but she could not tell for sure (Docs. 133 at 26; 134 at 89). Although the MHP defendants rely predominantly on this testimony to assert that the height of the defect

was trivial, it is well-settled that "[t]here is no minimal dimension test or per se rule that a defect must be a certain minimum height or depth in order to be actionable" (*Abraham v Dutch Broadway Assoc., L.L.C.*, 67 Misc 3d 1234[A], 2020 NY Slip Op 50713[U], 2020 NY Misc LEXIS 2806, *10 [Sup Ct, NY County 2020] [internal quotation marks and citations omitted]).

Tribich testified at her deposition that her fall was caused by the "depression of the sidewalk *and the pebbled area*" (emphasis added) (Doc. 134 at 27, 32) and the MHP defendants' own proof, including the photographs, confirms that the sidewalk was covered with loose pebbles (Doc. 140). Further, Downey conceded during his deposition that the condition of the sidewalk was "serious" and that it constituted a walking hazard (Doc. 135 at 38). Thus, despite the minor height elevation at the location where Tribich fell, it cannot be said, given the surrounding condition of the sidewalk, that the defect was trivial and therefore not actionable as a matter of law (*see Fazio v Costco Wholesale Corp.*, 85 AD3d 443, 443 [1st Dept 2011]; *Schaaf v Pork Chop, Inc.*, 24 AD3d 1277, 1277-1278 [4th Dept 2005]; *Webb v Audi*, 208 AD2d 1122, 1123 [3d Dept 1994]; *compare Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 78-80; *Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210, 210 [1st Dept 1998]).

This Court also rejects the MHP defendants' argument that the motion should be granted on the grounds that they neither created nor had actual or constructive notice of the alleged defect (Doc. 121 ¶ 40-55). "A defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*Abraham v Dutch Broadway Assoc., L.L.C.*, 67 Misc 3d 1234[A], 2020 NY Slip Op 50713[U], 2020 NY Misc LEXIS 2806, *7 [Sup Ct, NY County 2020] [brackets omitted], quoting *Ash v City of NY*, 109 AD3d 854, 855 [2d Dept 2013]).

The MHP defendants attempt to satisfy this burden by submitting the affidavit of Downey who affirms, as relevant here, that the MHP defendants had no actual or constructive notice of the "little dip" or "depression" in the sidewalk since no complaints were made with respect to this alleged condition prior to Tribich's accident (Doc. 122 ¶ 11-14). However, this claim is belied by Downey's own deposition testimony. Downey acknowledged that he noticed the defective sidewalk within six months prior to Tribich's fall, that he attempted to contact Con Edison to make the repairs, and that a company was ultimately hired to repair the defective sidewalk (Doc. 135 at 26-37). Based on the foregoing, the MHP defendants have failed to establish their prima facie entitlement to summary judgment and the motion is denied.

2. The MHP defendants' motion to strike the answer of defendant Con Edison (Motion Sequence 006).

The MHP defendants move, pursuant to CPLR 3042(c) and (d); 3126, for an order striking Con Edison's answer and precluding it from offering any evidence against them at trial or in any motion due to Con Edison's failure to respond to the 3/19/19 D&I (Doc. 162 at 1-2). In the alternative, the MHP defendants seek an order, pursuant to CPLR 3042, compelling Con Edison to provide the documents and information demanded in the 3/19/19 D&I (Doc. 162 at 2). The MHP defendants also request that this Court award them attorney's fees, legal expenses and costs (Doc. 162 at 2).

Con Edison urges this Court to deny the motion on the grounds that the MHP defendants waited almost a year to request a response to said demands and then raised no objection either when Tribich filed the note of issue or in their summary judgment motion (Doc. 181 ¶ 2-7). Further, Con Edison argues that the demand is overly broad and vague and that the relevant

documents have already been provided (Docs. 181 ¶ 6; 184). Attached to their opposition papers, Con Edison submits a formal response objecting to the MHP defendants' demand as improper (Doc. 184).

As an initial matter, the MHP defendants have failed to adhere to this Court's Part Rules, which, alone, is grounds for dismissal of the motion (*see Hornsby v Cathedral Parkway Apts. Corp.*, 179 AD3d 584, 584 [1st Dept 2020]). "This Court's rules include that, as a prerequisite to the filing of any motion related to discovery, the parties must conference with this Court regarding the issues to be raised by the motion. If, after the conference, the issues cannot be resolved and it is necessary to make a motion, the movant, in its affirmation of good faith, must set forth (1) the efforts it made to resolve the issues and (2) precisely state when and by whom it was granted leave to file the motion" (*McKee v Sciame Constr., LLC*, 2020 NY Slip Op 30308[U], 2020 NY Misc LEXIS 473, *3 [Sup Ct, NY County 2020] [Freed, J.]). There is no indication that the MHP defendants have complied with this Court's directives. Additionally, this motion was filed a day after the good faith letter was received by Con Edison, belying the MHP defendants' claim that good faith efforts were made to resolve this dispute.

In any event, the MHP defendants have failed to establish that Con Edison's delay in responding to the 3/19/19 D&I was willful, contumacious or due to bad faith so as to warrant striking the pleadings or preclusion (*see Jones v NY City Tr. Auth.*, 293 AD2d 322, 323 [1st Dept 2002]; *Villega by Ayala v NY City Hous. Auth.*, 231 AD2d 404, 405 [1st Dept 1996]). Moreover, although "[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue" in certain circumstances (*Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]), no such exercise of discretion is warranted here. The demand for "*all records*" relating to the sidewalk for a period of two years

prior to the accident is overbroad (*see Scorzari v Pezza*, 111 AD3d 916, 916 [2d Dept 2013]) and the MHP defendants have failed to refute Con Edison's claim that all relevant documents have already been provided. Although the MHP defendants also move pursuant to CPLR 3042, that statute pertains to bill of particulars, which is not relevant here. Therefore, the motion is denied, including that branch of the motion seeking attorney's fees, legal expenses and costs on this motion (*see Janicki v Beaux Arts II LLC*, 2016 NY Slip Op 30614[U], 2016 NY Misc LEXIS 1331, *13-14 [Sup Ct, NY County 2016]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants MHP Land Associates, LLC, Windsor Court and MHP Land Associates, LLC d/b/a Windsor Court, pursuant to CPLR 3212 (motion sequence 005), is denied; and it is further

ORDERED that the motion by defendants MHP Land Associates, LLC, Windsor Court and MHP Land Associates, LLC d/b/a Windsor Court seeking discovery, pursuant to CPLR 3042(c) and (d) and CPLR 3126 (motion sequence 006), is denied in its entirety; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, counsel for defendants MHP Land Associates, LLC, Windsor Court and MHP Land Associates, LLC d/b/a Windsor Court shall serve a copy of this order, with notice of entry, on all parties; and it is further

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

8/14/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE