

Loonam v 1248 Prop. LLC

2020 NY Slip Op 33438(U)

October 15, 2020

Supreme Court, Kings County

Docket Number: 504946/2016

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of OCTOBER, 2020

PRESENT:

HON. RICHARD VELASQUEZ, Justice.

-----X
JESSICA LOONAM and KENNITH BARTLETT,

Plaintiff,

-against-

Index No.: 504946/2016
Decision and Order

1248 PROPERTY LLC and RA CONSULTANTS
LLC and WARREN GEORGE, INC.

Defendants,

-----X
1248 PROPERTY LLC,

Third- Party Plaintiff,

-against-

WARREN GEORGE, INC.,

Third-Party Defendants,

-----X

The following papers NYSCEF Doc #'s 80 to 115 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	80-89; 110-111
Opposing Affidavits (Affirmations) _____	92-108; 112
Reply Affidavits _____	114; 115

After having heard Oral Argument on SEPTEMBER 30, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant, 1248 PROPERTY LLC., move pursuant to CPLR 3212, for an Order granting Defendants summary judgment and dismissing the Complaint of the Plaintiff;

and (b) pursuant to CPLR 3212 for summary judgment in the third-party action. (MS#7). Plaintiff opposes the same. Defendant WARREN GEORGE INC partially opposes the same. Defendant WARREN GEORGE also moves pursuant to 3212 for summary judgment dismissing all claims and cross claims. (MS#8).

FACTS

The instant action for personal injury arises out of an accident on January 7, 2016 at approximately 8:30 a.m., which was incurred due to plaintiff allegedly tripping and falling while walking on the sidewalk abutting premises located at 12 E. 48th Street, New York, NY (hereinafter the premises). As a result of this accident Plaintiff alleges to have sustained injury.

The plaintiff testified On January 7, 2016 at approximately 8:30 am, she was lawfully walking east on the sidewalk on the south side of 48th Street in front of the Premises. Plaintiff testified that as she walked from Fifth Avenue toward Madison Avenue, she observed a scaffold erected in front of the premises located at 12 East 48th Street. She walked past the site every day. She observed a homeless man who was settled under the scaffolding, before the door of the building. She also noted that a women was walking ahead of her, and there was a man walking his dog was coming toward her. She didn't recall the sun shining, so she presumed it was cloudy. The plaintiff testified;

"I was walking along, I stepped on something with my left foot. I was in mid-stride with my right foot up in the air and when I stepped on that thing, I had no balance, and I fell on my right side." "When I turned around, I could see this mound of concrete on the sidewalk." [EXHIBIT "D", pages 38-39].

Plaintiff further testified:

Q. What was the shape of this mound of concrete?

A. Round, not a perfect dome, but a round shape.

Q. Was it flush with the sidewalk?

A. No.

Q. What was the color of this mound of concrete?

A. Gray.

Q. Was it the same color as the rest of the sidewalk?

A. Yes. [EXHIBIT "D", page 40].

ARGUMENTS

Defendant argues the depth of the alleged cement mound that the plaintiff tripped and fell over was trivial in nature or that it was open and obvious, and as such this matter should be dismissed.

Plaintiff argues among other things that the defendants fail to meet their burden for summary judgment because nothing they submit demonstrated that the cement mound in the sidewalk was trivial or open and obvious. Specifically, plaintiff contends defendants have not met their burden because they fail to annex any pictures or reports that clearly show the measurements of the alleged defect. Additionally, plaintiff argues that their expert found the "mound of cement" was a ½ inch depth and had a ten (10) inch diameter, rendering the defect not trivial as a matter of law.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce

evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

The issue of whether a dangerous condition exists on real property depends on the particular facts and circumstances of each case, and generally presents a question of fact for the jury (see *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 NYS2d 615, 688 NE2d 489; *Portanova v. Kantlis*, 39 AD3d 731, 833 NYS2d 652; *Mishaan v. Tobias*, 32 AD3d 1000, 821 NYS2d 640; *Herring v. Lefrak Org.*, 32 AD3d 900, 821 NYS2d 624). However, injuries resulting from trivial defects are not actionable, and in determining whether a defect is trivial, a court must take account of all "the facts 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 976, 978, 665 NYS2d 615, 688 NE2d 489, quoting *Caldwell v. Village of Is. Park*, 304 NY 268, 107 NE2d 441; see *Portanova v. Kantlis*, 39 AD3d 731, 833 NYS2d 652; *Herring v. Lefrak Org.*, 32 AD3d 900, 821 NYS2d 624); quoting *Hahn v. Wilhelm*, 54 AD3d 896, 898, 865 NYS2d 240, 241 (2008). As stated by the Court of Appeals, "there

is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere v County of Suffolk*, 90 NY2d at 977); quoting *Brenner v. Herricks Union Free Sch. Dist.*, 106 AD3d 766, 767, 964 NYS2d 605 (2013).

In the present case, both defendants fail to meet their burden. The photographs annexed to defendants motion do not contain any clear pictures with a ruler or other measuring device evidencing the actual width, depth, elevation, and irregularity of the "cement mound".¹ Under these circumstances, the photographs annexed to the moving papers are insufficient to establish that no actionable defect existed at the time of the accident (see *Ferington v. Dudkowski*, 49 AD3d 1267, 856 NYS2d 348; *Lal v. Ching Po Ng*, 33 AD3d 668, 823 NYS2d 429). As such, the defendants failed to meet their prima facie burden of establishing that the defect was trivial and/or open and obvious and nonactionable as a matter of law (see *Guidone v Town of Hempstead*, 94 AD3d 1054, 1055 [2012]; *Perez v 655 Montauk, LLC*, 81 AD3d 619 [2011]; *Corrado v City of New York*, 6 AD3d 380 [2004]). Therefore, both defendants motions for summary judgment dismissing the plaintiff's complaint are hereby denied.

Next, the court will address defendant, 1248's motion for summary judgment on their claim for common-law indemnification. It is well settled "the owners are required to prove not only that they were not negligent, but also that the proposed indemnitor, was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the

¹ The Court notes defendant, Warren George INC, in NYSCEF Doc. No. 111 p.6 paragraph numbered 15, states, "WGI hereby adopts 1248 PROPERTY's evidence and arguments on this issue and incorporates them as if fully set forth herein (See NYSCEF Doc. No. 81, ¶¶ 43-53)."

injury.” *Quoting, Benedetto v. Carrera Realty Corp.*, 32 AD3d 874, 875–76, 822 NYS2d 542 (2006). In the present case, defendants 1248 fail to establish either requirement, as stated above. Therefore, 1248 request on the basis of common-law indemnification against WARREN GEORGE, INC is premature, as there is no proof in this record that WARREN GEORGE INC. was “negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff’s injury” because there has been no determination as to what work if any gave rise to plaintiff’s injury (*see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [2004]; *Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557-558 [2003]; *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]). *Quoting, Benedetto v. Carrera Realty Corp.*, 32 AD3d 874, 875–76, 822 NYS2d 542 (2006). Additionally, 1248 fails to annex any contract with WARREN GEORGE as a result the court is unable to make a determination regarding any insurance coverage claims.

Accordingly, defendant’s 1248 Motion for Summary Judgment dismissing plaintiffs complaint is hereby denied for the reasons stated above. (MS#7). Defendant WARREN GEORGE’s motion for summary judgment dismissing plaintiff’s complaint is hereby denied. (MS#8).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
October 15, 2020


HON. RICHARD VELASQUEZ

OCT 15 2020

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KINGS COUNTY CLERK