

Fanta v City of Albany
2020 NY Slip Op 34757(U)
April 20, 2020
Supreme Court, Albany County
Docket Number: Index No. 903375-17
Judge: Roger D. McDonough
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

HANG JA FANTA and RONALD FANTA,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 903375-17

RJI No.: 01-17-125031

CITY OF ALBANY,

Defendant.

(Supreme Court, Albany County All Purpose Term)

Appearances:

**JACOBY & MEYERS
Attorneys for Plaintiffs
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**WILLIAM G. KELLY, JR., ESQ.
CORPORATION COUNSEL CITY OF ALBANY
Attorney for Defendant
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24 Eagle Street
Albany, New York 12207**

Roger D. McDonough, J.:

Defendant seeks summary judgment in this negligence action. Plaintiffs oppose the motion. The Court did not receive any reply submissions from defendant.

Background

Plaintiff, Hang Ja Fanta (“plaintiff”) allegedly sustained injuries as a result of a fall on a sidewalk located in front of 150 State Street in the City of Albany. The fall occurred on August 5, 2016. Ronald Fanta has asserted a loss of services, society and consortium based on his

spouse's injuries. The gravamen of plaintiffs' complaint is that defendant affirmatively created a sidewalk defect in the area of the fall. Defendant unsuccessfully moved to dismiss under CPLR § 3211(a)(7). The parties have completed discovery and defendant has initiated a second round of motion practice under CPLR § 3212.

Summary Judgment Standard

To obtain summary judgment, it is necessary that movant establish his cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (*Friends of Fur Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 [1979]; CPLR § 3212(b)). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegard v. New York Univ. Med. Center*, 64 NY2d 851 [1985]).

Once such a showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof, in admissible form, to establish the existence of material issues of fact which require a trial (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue. Averments merely stating conclusions are insufficient (*Bethlehem Steel Corp. v. Solow*, 51 NY2d 870 [1980]; *Capelin Assoc. v. Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Sternbach v. Cornell University*, 162 AD2d 922, 923 [3rd Dept. 1990]). The focus is upon issue finding, not issue resolving, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (see, *B. S. Industrial Contractors, Inc. v. Town of Wells*, 173 AD2d 1053 [3rd Dept. 1991]).

Discussion

Defendant argues that summary judgment is warranted because: (1) the purported defect upon which plaintiff well was a trivial defect that cannot support a negligence claim; (2) there is

no evidence that the City of Albany caused the defect which purportedly caused plaintiff's fall¹; (3) the city did not receive any prior written notice of the defect; and (4) plaintiff's failure to watch where she was walking was an intervening and subsuming cause of her injury. Based on all of the foregoing the City also seeks summary judgment as to the consortium claim.

Prior Written Notice

Prior written notice is not now, and has never been, at issue in this case. Plaintiffs' position is that defendant itself created the sidewalk defect, thereby excusing any requirement to provide prior written notice (*see, Urban v City of Albany*, 90 AD3d 1132, 1133 [3rd Dept. 2011]).

Plaintiff's Negligence

Defendant argues that plaintiff's failure to pay attention to where she was walking was the sole proximate cause of her injuries. No case law involving slips or falls was cited in support of this theory of the case. Plaintiff contends that the proffered theory is borderline frivolous.

Pursuant to CPLR § 1411 and the relevant caselaw, the Court finds this argument to be without merit. To succeed at the summary judgment level on such an argument, defendant was obligated to, as a matter of law, eliminate any legal cause of plaintiff's injuries other than her own reckless conduct (*see, Howard v Poseidon Pools, Inc.*, 72, NY2d 972, 974-975 [1988]). Defendant's submissions on this issue simply do not reach the level to merit such an extreme determination by the Court.

Triviality of the Sidewalk Defect

Defendant maintains that plaintiff's own testimony establishes that she slipped on a pebble. As such, defendant argues that the alleged defect is so trivial that it is not actionable in a negligence claim. Plaintiff argues that defendant is being disingenuous in characterizing her testimony. Instead plaintiff avers that her testimony establishes that she fell on multiple pebbles/loose debris. Based on the deposition testimony of all the parties, the photographic evidence and the other motion submissions, the Court finds that the issue of whether the loose debris/pebbles constitutes a defective condition on the sidewalk is for the jury to decide (*see,*

¹ This argument includes a sub-argument, namely that even if defendant had caused the purported defect it was not foreseeable that the act of causing the defect would result in injury.

Trincere v County of Suffolk, 90 NY2d 976, 977 [1997]).

Defendant's Creation of the Sidewalk Defect

Defendant argues that a rational jury could not conclude that the City caused the purported defect upon which plaintiff fell. In support, defendant primarily notes that no work was being done on the sidewalk at the time of the fall. Defendant also notes that after work was done in the relevant area, the work crew swept the surrounding area of any debris. Alternatively, defendant maintains that it was not foreseeable that such a trivial defect would cause plaintiff to fall. In opposition, plaintiff has sufficient created an issue of fact regarding the City sidewalk work being done in the immediate area of plaintiff's fall on the days immediately preceding plaintiff's fall. The time frame of this work together with the photographs of the sidewalk's condition, plaintiff's exhibits from the deposition testimony, and the testimony of all the parties are sufficient to create an issue of fact as to whether defendant affirmatively created a dangerous/defective condition in terms of the loose sidewalk debris (*see, Popolizio v County of Schenectady, 49 AD3d 1117, 1118 [3rd Dept. 2008]*). Finally, based on the factual dispute as to whether plaintiff fell upon a pebble or multiple pebbles/loose debris, the Court finds defendant's foreseeable argument to be without merit. Additionally, the question as to whether an accident is foreseeable is ordinarily a question of fact (*see, Sarbak v Sementilli, 51 AD3d 1001, 1002 [2nd Dept. 2008]*).

The parties' remaining arguments and requests for relief have been reviewed and found to be lacking in merit.

Based upon the foregoing it is hereby

ORDERED that defendant's motion for summary judgment is hereby denied in its entirety.

This shall constitute the Decision and Order of the Court. This Decision and Order will be forwarded to the Albany County Clerk by the Court at an appropriate time. A copy of the Decision and Order is being forwarded to counsel for all parties. All papers in this proceeding

will be forwarded to the Office of the Albany County Clerk for filing when the Governor’s Executive Order restricting filing to essential matters is lifted. The signing of this Decision and Order and delivery of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel for the plaintiff is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the Decision and Order, except to the extent that entry cannot occur until the Governor’s Executive Order restricting filing to essential matters is lifted or until further Order of this Court, whichever is prior in time. As this is an E-FILED case, there are no papers considered for the Court to file with the Albany County Clerk.

ENTER.

Dated: Albany, New York
April 20, 2020

*Roger D. McDonough*²

Roger D. McDonough
Acting Supreme Court Justice

Papers Considered³:



- 1. Defendant’s Notice of Motion, dated November 22, 2019; 04/21/2020
- 2. Affirmation of Robert Magee, Esq., dated November 22, 2019, with annexed exhibits;
- 3. Affirmation of James W. Shuttleworth, III, Esq., dated January 10, 2020, with annexed exhibits.

²

This digitally signed Decision and Order is to be considered an Original Decision and Order by the parties, Albany County Clerk, Albany County Supreme Court Clerk, Appellate Courts and any applicable, Local, State or Federal Agency.

³ Defendant also submitted a Memorandum of Law.