Johnson v SGAJ, LLC
2020 NY Slip Op 34793(U)
August 25, 2020
Supreme Court, Orange County
Docket Number: Index No. EF001721-2019
Judge: Robert A. Onofry

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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MARIE JOHNSON,

Plaintiff,

- against –

SGAJ, LLC, SALVADOR BOUTUREIRA III and EDDY'S JERK CENTER,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF001721-2019

DECISION and ORDER

Motion Date: July 15, 2020

The following papers numbered 1 to 8 were read and considered on (1) a motion by the Defendant Eddy's Jerk Center, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claim insofar as asserted against it; and (2) a motion by the Defendants SGAJ, LLC and Salvador BOUTUREIRA, III, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claim insofar as asserted against them.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motions are granted.

Introduction

The Plaintiff Marie Johnson commenced this action to recover damages allegedly arising from a trip and fall on a sidewalk in Newburgh, Orange County, New York.

The Defendants SGAJ, LLC and Salvador BOUTUREIRA, III own the building

immediately adjacent to the sidewalk, and the Defendant Eddy's Jerk Center owns a restaurant in the building on the ground floor.

All Defendants move for summary judgment seeking dismissal of the complaint.

Factual/Procedural Background

The relevant background facts appear as follows.

At an examination before trial, the Plaintiff testified that, on May 24, 2018, she ate lunch at the Defendant Eddy's Jerk Center (hereinafter "Eddy's") with her niece, and her niece's daughter. The weather was nice and the sidewalks were dry. At approximately 2 p.m., she left Eddy's. While walking on the sidewalk, holding the hand of a two-year old, her right foot "had to stop on something" and they "tilted over." Both fell. She did not see what caused her to fall either before or after the accident.

The Plaintiff identified a photograph of the sidewalk at issue as a fair and accurate depiction of the condition of the same when she fell, and marked the vicinity where she fell.

At an examination before trial, the Defendant Salvador Boutureira III testified that he is the owner of the Defendant SGAJ LLC. SGAJ LLC owns the property adjacent to the sidewalk, at 487-489 Broadway in Newburgh. In May of 2018, Eddy's was a tenant at 487 Broadway.

In the six months leading up to the accident, Boutureira had visited the property once a month. He conducted visual inspections of the outside of the property for cleanliness and to see if anything was wrong with the property.

There had been work performed on the sidewalk in front of the property. Half of the concrete squares in front of Eddy's were repaired, closest to the curb. The City of Newburgh paid for half of the repairs, and SGAJ, LLC paid for the other half. He was unsure when the work was

performed, but thought it was between 2015 and 2018. The repair entailed tearing out the driveway and half the sidewalk, and replacing the concrete. The work was performed by a company recommended by Defendants and approved by the City of Newburgh.

Eddy's lease with SGAJ LLC did not contain a clause imposing a duty or obligation on Eddy's to repair the sidewalk or concrete in front of the property, as that was the obligation of Boutureira and SGAJ LLC.

Within several days after receiving a demand letter from Plaintiff's counsel in this case, Boutureira testified, he conducted an inspection of the sidewalk in front of the building. The inspection took several minutes. He did not see any part of the sidewalk that was raised or cracked.

At the time of his inspection, he did not notice the section of the sidewalk shown in photographs identified by the Plaintiff. In his opinion, the apparent defect shown might be damage from a snowplow, or might be moss.

At an examination before trial, the owner of Eddy's, Edward Hines, testified that customers went straight from the sidewalk into the restaurant entranceway. The sidewalk was twelve feet wide, divided into three parts of four-foot slabs. He had seen renovation and repairs to the sidewalk, the last time in 2017. He did not know much of the sidewalk was repaired, but knew that it was not the entire sidewalk. Part of the sidewalk had been closed off while the repair work was being done. Although unsure, he thought that the work might have been completed in one day. He did not pay for the work, had no say as to what part of the sidewalk was repaired, and did not inspect the sidewalk.

Eddy's Motion

Eddy moves for summary judgment seeking dismissal of the complaint and all cross claims insofar as asserted against it.

In support of its motion, Eddy's submits an affirmation from counsel, Kimberly Hunt Lee.

Lee argues that Eddy's is entitled to summary judgment (1) because it did not own, maintain or control the sidewalk where the Plaintiff allegedly fell; (2) because the Plaintiff cannot identify what caused her to fall; and (3) because Eddy's lacked actual or constructive notice of any defect on the sidewalk and (4) because the alleged defect was too trivial to be actionable.

She notes that disclosure, other than an IME, is essentially complete.

As background, Lee asserts as follows.

The building located at 487 Broadway is a mixed use property owned by SGAJ, LLC. Eddy's leases the first floor restaurant. There are apartments on the upper floors with a separate entrance. Eddy's had no involvement with the apartments and only leased the first floor restaurant space.

The Plaintiff testified that she fell because her right foot "had to stop on something." However, she testified, at the time, she was looking at the child with whom she was walking, not the ground in front of her, and she did not see what caused her to fall either before or after the fall occurred.

Thus, Lee asserts, while the Plaintiff testified that her right foot hit "something," she had no idea what that "something" was. She never looked to see what caused her to fall and could

not give a better description of what happened. Consequently, Lee argues, it cannot be determined whether she was caused to trip by a defect in the sidewalk, or by a rock or other transient object on the sidewalk, or whether she merely stumbled or stubbed her toe.

Moreover, she notes, Hines testified that Eddy's never made any repairs to the sidewalk, and that it had no control over the sidewalk and no responsibility to maintain it. Further, Hines testified that he had never made nor received any complaints about the sidewalk.

By contrast, Lee notes, Boutureira testified that SGAJ repaired and maintained the sidewalk and concrete area in front of 487 Broadway. He also testified that he was never advised of any complaints about the sidewalk before the accident occurred.

Finally, Lee argues, any alleged defect at issue is too trivial to be actionable, to wit: Hines opined that the differential between the slabs in the photograph identified by the Plaintiff was no more than ½ inch.

The Motion of Boutureira/SGAJ LLC

Boutureira and SGAJ LLC also move for summary judgment seeking dismissal of the complaint and all cross claims insofar as asserted against them.

In support of the motion, they submit an affirmation from counsel, John McCaffrey.

McCaffrey argues that Boutureira and SGAJ LLC are entitled to summary judgment for the same or similar reasons argued by Eddy's, to wit: (1) the Plaintiff cannot identify what caused her to fall; (2) SGAJ LLC did not have actual or constructive notice of any defect on the sidewalk; and (3) to the extent any defect existed, it was too trivial to be actionable.

In opposition to the motions, the Plaintiff submits an affirmation from counsel, Michael Radigan.

Radigan notes that none of the Defendants produced the photographs identified by the Plaintiff at her examination before trial. The photographs, he asserts, which he had appended to his opposition papers, shows one slab of the sidewalk significantly protruded over the other. This, he argues, "constituted a trap or nuisance that ensnared Plaintiff's foot as she walked and as she was distracted and preoccupied with the safety of the baby walking with her."

Indeed, he notes, no Defendant submitted any measurements of the height differential between the slabs, or proffered an affidavit or report from an expert.

In sum, he argues, the testimony of the parties and the photographs demonstrate that the Plaintiff sufficiently identified the cause of her accident, that the defect was not trivial, and that the Defendants had constructive notice of the defect.

Finally, Radigan argues, Boutureira and SGAJ LLC may be held liable to the Plaintiff because they conceded that they had a duty to maintain the sidewalk, and Eddy's made be held liable because it made "special use" of the sidewalk, to wit: it was immediately adjacent to the restaurant, and customers used the sidewalk to gain entrance to the restaurant.

In reply, Eddy's submits an affirmation from counsel, Kimberly Hunt Lee.

Lee argues that the Plaintiff never alleged that Eddy's made "special use" of the sidewalk. Rather, the Plaintiff merely alleged that Eddy's controlled, and/or leased the sidewalk. Thus, Lee asserts, this represents a new theory of liability improperly raised for the first time in opposition to a motion for summary judgment motion and it should not be considered by the Court.

In any event, she argues, the argument lacks merit, as the use of the sidewalk to enter the

restaurant does not constitute a "special use" of the sidewalk.

Otherwise, she notes, the Plaintiff appears to concede that Eddy's otherwise had no duty to maintain the sidewalk.

Finally, Lee argues, although the Plaintiff submitted photographs of the area in question, the Plaintiff clearly testified that she did not see what caused her to fall either before or after the fall occurred. Indeed, Lee asserts, the Plaintiff's identification of a photograph at an examination before trial conducted almost a year after she tripped and fell is the "very definition of speculation and is insufficient to establish that a condition over which defendants had control was the cause of her accident."

Discussion/Legal Analysis

In general, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner. *Maya v. Town of Hempstead*, 127 A.D.3d 1146 [2nd Dept. 2015]. An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty. *Maya v. Town of Hempstead*, 127 A.D.3d 1146 [2nd Dept. 2015].

To hold a non-municipal defendant liable for a dangerous and defective condition on a sidewalk, a plaintiff must demonstrate (1) that the defendant owned, controlled, occupied or made special use of the sidewalk; (2) that the sidewalk was in a dangerous and defective

condition, and that the defendant had either actual or constructive notice of the same; and (3) that the dangerous and defective condition was a proximate cause of damages. *Shehata v. City of New York*, 128 A.D.3d 944 [2nd Dept 2015]; *Weinberg v. City of New York*, 43 A.D.3d 489 [2nd Dept 2004]; *Aversano v. City of New York*, 265 A.D.2d 437 [2nd Dept. 1999].

To provide constructive notice, the dangerous and defective condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it. *Shehata v. City of New York*, 128 A.D.3d 944 [2nd Dept 2015].

"Special use" is a narrow exception to the general rule. It imposes an obligation on an abutting landowner who puts part of a public way to a special use for his or her own benefit, which part is subject to his or her control, to maintain the part in a reasonably safe condition. *Breland v. Bayridge Air Rights, Inc.*, 65 A.D.3d 559 [2nd Dept. 2009]. Special use cases generally involve the installation of an object in the street or on the sidewalk, such as an oil cap or a runway, for the benefit of a private landowner. *Minott v. City of New York*, 230 A.D.2d 719 [2nd Dept. 1996]. The common thread is an installation exclusively for the accommodation of the owner of the premises which he or she is bound to repair in consideration of private advantage. *Minott v. City of New York*, 230 A.D.2d 719 [2nd Dept. 1996]. The special use is a use different from the normal intended use of the public way, and thus, the special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use. *Minott v. City of New York*, 230 A.D.2d 719 [2nd Dept. 1996]. Thus, for example, the use of a public sidewalk by customers of a business to access the business, without more, does not constitute a "special use" of a sidewalk.

Ruffino v. New York City Transit Authority, 55 A.D.3d 817 [2nd Dept. 2008].

A plaintiff's inability to identify the cause of his or her fall is fatal to a negligence cause of action because, in such an instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation. *Louman v. Town of Greenburgh*, 60 A.D.3d 915 [2nd Dept 2009]. Thus, a defendant may establish a prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall. *Mallen v. Dekalb Corp.*, 181 A.D.3d 669 [2nd Dept. 2020]. Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation. *Mallen v. Dekalb Corp.*, 181 A.D.3d 669 [2nd Dept. 2020][although the plaintiff testified that, three weeks after the accident, she observed a "broken cracked sidewalk" in the area where she allegedly fell, she acknowledged that, on the day of the accident, she did not look to see what caused her to fall]; *Dennis v. Lakhani*, 102 A.D.3d 651 [2nd Dept. 2013][although the plaintiff testified that he found loose cement two days after the accident, he could identify this condition as the cause of his slip and fall]; *Douse v. City of New York*, 70 A.D.3d 764 [2nd Dept. 2010][although the plaintiff asserted that a "piece of metal sticking out of the concrete" caused her to fall, she first observed the same approximately one month after the alleged incident, when she returned to the scene with her attorney]; *Louman v. Town of Greenburgh*, 60 A.D.3d 915 [2nd Dept 2009][the plaintiff concluded that she tripped over a crack only after her daughter inspected the area where the accident occurred on the day following the occurrence, and reported to her mother that she observed a crack at that location].

Finally, a defect may be too trivial to be actionable.

A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect, or the surrounding circumstances do not increase the risks it poses. *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66; *Mejias v. City of New York*, 183 A.D.3d 886 [2nd Dept. 2020]. In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury. *Mejias v. City of New York*, 183 A.D.3d 886 [2nd Dept. 2020].

Here, it is noted, as a threshold issue, no party identified whether the sidewalk at issue is public or private. Regardless, dismissal of the action is warranted.

As a threshold issue, the Court finds that no Defendant demonstrated, *prima facie*, that the alleged defect at issue was too trivial to be actionable. Thus, the branches of the motions which seek relief on that ground are denied.

However, the Court agrees that the Plaintiff has simply not identified the cause of her fall sufficient to withstand summary judgment. Rather, at best, she merely testified that a photograph taken of the sidewalk after the fact that showed a potentially dangerous and defective condition in the vicinity of where she fell. Thus, those branches of the motions which are to dismiss the complaint on that basis are granted.

In light of the foregoing, which affords all Defendants complete relief, the balance of the arguments are academic. Nonetheless, the Court will address the same.

First, as to Eddy's.

Eddy's demonstrated, *prima facie*, that it did own, control or make special use of the

subject sidewalk, and that it did not otherwise owe a duty to maintain or repair the same. That Eddy's customers used the sidewalk to access the business does not constitute a "special use" of the sidewalk.

Thus, if reached, this would provide a separate and distinct basis to dismiss the complaint and all cross claims insofar as asserted against Eddy's.

Further, Eddy's demonstrated that it did not create the alleged dangerous and defective condition at issue, and that it lacked actual notice of the same.

However, it did not demonstrate that it lacked constructive notice of the same. Rather, the nature of the alleged defective and dangerous condition itself raises an issue of fact whether it was visible and apparent, and existed for a sufficient length of time before the accident, to have permitted Eddy's to discover and remedy it.

Thus, if reached, the alleged lack of notice would not provide a basis to dismiss the complaint as against Eddy's.

As to Boutureira and SGAJ LLC, both concede a duty to maintain and repair the sidewalk.

However, each also demonstrated, *prima facie*, that they did not create the alleged dangerous and defective condition at issue. Further, each demonstrated that they lacked actual notice of the same.

However, for the reasons discussed *supra*, neither demonstrated that they lacked constructive notice of the same.

Thus, if reached, lack of notice would not provide am additional basis to dismiss the complaint as against to Boutureira and SGAJ LLC.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion of Eddy's Jerk Center is granted, and the complaint and all cross claims are dismissed insofar as asserted against that Defendant; and it is further,

ORDERED, that the motion of the Defendants SGAJ, LLC and Salvador BOUTUREIRA, III, is granted, and the complaint and all cross claim are dismissed insofar as asserted against those Defendants.

The foregoing constitutes the decision and order of the court.

Dated: August 25, 2020
Goshen, New York

ENTER

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