

Gonzalez-Hernandez v Park Ave. NY LLC
2020 NY Slip Op 34925(U)
December 14, 2020
Supreme Court, Rockland County
Docket Number: Index No. 33939/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ASHEY GONZALEZ-HERNANDEZ,

Plaintiff,

**DECISION AND ORDER
(Motion # 1)**

-against-

Index No.: 33939/2018

PARK AVENUE NY LLC,

Defendant.

-----X
Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 10, were considered in connection with Defendant Park Avenue NY LLC's (hereinafter "Defendant" or "Park Avenue") Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in its favor, and dismissing the action:

PAPERS

NUMBERED

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF STEVEN FERNANDEZ/EXHIBITS A-E/MEMORANDUM OF LAW IN SUPPORT	1-4
AFFIRMATION IN OPPOSITION/EXHIBITS A-B/AFFIDAVIT OF JERSEEL GONZALEZ/AFFIDAVIT OF BART RODI, PE	5-7
AFFIRMATION IN REPLY/EXHIBITS A-D/MEMORANDUM OF LAW IN SUPPORT	8-9
CORRESPONDENCE FROM PLAINTIFF'S COUNSEL DATED 10/9/20	10

Upon the foregoing papers, the Court now rules as follows:

This personal injury action was commenced by Plaintiff with the filing of the Summons and Complaint on July 10, 2018. Plaintiff alleges that she sustained serious personal injuries when she was caused to slip and fall on an unsecured water drain cover located in a dark and dimly lit breezway leading to her family's apartment at 9 Park Avenue, Spring Valley, New York, on August 11, 2017. Plaintiff alleges that defendant negligently failed to secure the drain cover to the drain, which would have prevented it from slipping. Issue was joined with

the service of an Answer on September 20, 2018. The parties completed discovery and a Note of Issue was filed.

Defendant files the instant Notice of Motion seeking an Order granting summary judgment and dismissal of the complaint. Defendant argues that it did not have actual or constructive notice of the loose drain cover. In support of this contention, Defendant submits the examination before trial testimony and an affidavit from Steven Fernandez, the superintendent. Mr. Fernandez avers that he was the person who would secure the drain cover to the drain with liquid nails, a constructive adhesive. He also claims that he would walk through that walkway approximately 200 times each day and never observed the drain cover to be loose. Nor did he ever receive complaints regarding a loose drain cover. Additionally, defendant asserts that the action must be dismissed because the drain cover was not in a dangerous condition based upon photographs of it and because the drain cover constitutes a non-actionable trivial defect.

In opposition to the motion, Plaintiff argues that there are triable issues of fact as to constructive notice. He submits an affidavit from the Plaintiff's father, Jerseel Gonzalez.¹ Mr. Gonzalez avers that he has lived at the subject apartment complex for approximately a year prior to the accident. He notes that the breezeway was very dark and difficult to see. At the time of the accident, he heard his daughter cry and when he turned around, he saw that the drain cover was laying on the ground a few inches from the drain. The police were called and Police Office Marciano arrived at the scene. He confirmed at his examination before trial that when he arrived the hole wasn't covered and that the drain cover was located to the side.

¹ Defendant objects to consideration of the affidavit on the ground that Jerseel Gonzalez was not produced for an examination before trial. Plaintiff testified at her examination before trial on August 20, 2019, that her parents were potential witnesses because although they did not see her fall, they were walking a few feet ahead of her when she fell and immediately came to her aid. Although there was some discussion between the parties about taking Mr. Gonzalez' deposition, and at a court appearance on December 11, 2019, it does not appear that the deposition was noticed or that the parties arranged a date to conduct the non-party deposition. Nor did Defendant make a motion to strike the Note of Issue when the deposition was not held. As such, this Court finds no basis upon which to preclude the affidavit of an individual who Defendant knew was present at the time of the accident

Mr. Gonzalez further avers that during the year prior to the accident, the covers were never attached to the drains in any way other than for the occasional placement of paint cans on top of the drain, and that at least once a week for a year, he would see the drain covers knocked off the subject drain, lying somewhere near it. Mr. Gonzalez states that the cover was loose before his daughter's fall, including on the day she fell, and that at no time was the cover bonded to the drain. As such, Plaintiff contends that there are triable issues of fact as to the issue of constructive notice of the unsecured drain cover.

Plaintiff also submits the expert affidavit of Bart Rodi, Professional Engineer. Although the affidavit states that his curriculum vitae is annexed thereto, it was not attached. Mr. Rodi conducted a site inspection of the drains in August 11, 2017. Mr. Gonzalez' affidavit states that the drain was in the same condition as it was on the night of his daughter's accident. Mr. Rodi avers that upon inspection of the drain and its cover, there was no evidence that the drain cover had ever been affixed to the drain with liquid nails. He found the drain cover to be unsecured and loose, which he opined that violated applicable code provision and industry standards, was in a dangerous and defective condition and posed a slip hazard in the walkway.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for

summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

A defendant who moves for summary judgment in a trip and fall or slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy. Jackson v. Jamaica First Parking, LLC, 91 A.D.3d 602, 936 N.Y.S.2d 278 (2d Dept. 2012); Mantzoutsos v. 150 Street Produce Corp., 76 A.D.3d 549, 907 N.Y.S.2d 34 (2d Dept. 2010); Austin v. Town of Southampton, 113 A.D.3d 711, 712, 979 N.Y.S.2d 127 (2d Dept. 2014); Walsh v. Super Value, Inc., 76 A.D.3d 371, 375, 904 N.Y.S.2d 121 (2d Dept. 2010). To meet its prima facie burden on the lack of constructive notice, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell. Rong Wen Wu v. Arniotes, 149 A.D.3d 786, 787, 50 N.Y.S.3d 563 (2d Dept. 2017). See also Levine v. Amverserve Association Inc., 92 A.D.3d 728, 938 N.Y.S.2d 593 (2d Dept. 2012).

In the instant matter, the Court finds that Defendant met its initial burden on the issue of notice but that in opposition to the motion, Plaintiff has demonstrated a triable issue of fact. Although Defendant testified that he used liquid nails to secure the drain cover, and that he last inspected the drain cover and it was attached on the day of the accident, Mr. Gonzalez' affidavit stated that the cover was never attached or affixed to the drain itself during the year he lived there (except occasionally by the placement of paint cans on top of the drain); that the drain cover remained loose for a period of a year prior to the accident and that at least once a week for a year, he observed the cover moved several inches away from the drain itself. Accordingly, there are triable issues of fact as to constructive notice.

The Court further finds that Defendant failed to meet its prima facie burden that a drain with a loose cover would not constitute a dangerous condition. Defendant argues that the drain and the drain cover were "open an obvious" components of the walkway.

However, the claim is that Defendant was negligent in failing to secure the drain cover to the drain itself, which resulted in a dangerous condition, and not that the existence of the drain was itself an inherently dangerous condition. Defendant submits no evidence, nor an expert affidavit, that a loose drain cover would not result in a dangerous condition or would be safe to traverse upon. Accordingly, the Court need not consider Plaintiff's opposition on this issue. Likewise, although Defendant alleges that the alleged loose drain cover was a non-actionable trivial defect, Plaintiff does not claim that she was caused to trip because of a height difference between the pavement and the drain cover. As such, the trivial defect claim is without merit and does not constitute a basis upon which to grant summary judgment.

Accordingly, it is hereby

ORDERED that the Notice of Motion filed by Defendant for summary judgment dismissing the Complaint is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a settlement conference on **FEBRUARY 26, 2021 at 10:00 a.m.** via Microsoft Teams. The parties are expected to have settlement authority from their clients at that time and be able to reach out to them during the conference, if necessary.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
December 14, 2020



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO: (all parties via NYSCEF)