

**Drouin v City of Newburgh**

2020 NY Slip Op 35280(U)

November 9, 2020

Supreme Court, Orange County

Docket Number: Index No. EF002165-2020

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X

**CURTIS DROUIN,**  
Plaintiff,

**DECISION AND ORDER**

**INDEX NO.: EF002165-2020**

**Motion Date: 10/7/2020**

Sequence No. 2

-against-

**CITY OF NEWBURGH, CITY OF NEWBURGH  
DEPARTMENT OF PUBLIC WORKS, 255  
FIRST STREET, LLC, and "ABC CORP.", (the  
latter name being fictitious, true name unknown,  
and used to connote persons responsible for this  
occurrence),**

Defendants.

-----X

**SCIORTINO, J.**

The following papers numbered 1 to 21 were considered in connection with the application of defendant 255 First Street, LLC, for summary judgment, dismissing the Complaint and all cross-claims as against it:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Walsh)/Exhibits A-I	1 - 11
Affirmation in Opposition (Radigan)/Exhibits 1- 5	12 - 17
Affirmation in Reply (Mahoney)/Exhibits AA-CC	18 - 21

**Background and Procedural History**

This is an action for personal injuries arising out of a slip and fall accident which is alleged to have occurred on April 16, 2019 at approximately 11:00 a.m. near 255 First Street in the City of Newburgh. Plaintiff alleges that he fell to the ground on a dangerous, defective and/or hazardous

area of broken and uneven sidewalk.

On June 9, 2020, Newburgh was served with a Summons and Complaint (Exhibit D) which had been electronically filed on March 16, 2020, just prior to the limitations of the Court's functions due to the COVID crisis. Newburgh filed its Answer on June 12, 2020. (Exhibit F) Co-defendant 255 First Street LLC filed its Answer on May 14, 2020. (Exhibit E) By Decision and Order dated July 28, 2020, this Court granted the application of defendants City of Newburgh and Newburgh Department of Public Works for summary judgment.

By Notice of Motion electronically filed on August 11, 2020, defendant 255 First Street seeks summary judgment dismissing the complaint and all claims as against it.

On September 4, 2020 a virtual conference was held. Plaintiff's counsel was directed to prepare and serve a Supplemental Bill of Particulars detailing the approximate location of the alleged fall with specificity and a description of the defect. Plaintiff filed Supplemental Bill of Particulars dated September 4, 2020 which included ten (10) photographs. Subsequently, the motion was adjourned at defendant's request to October 7, 2020.

Note of Issue has not been filed.

### **Motion for Summary Judgment**

In support of the motion, defendant argues the record unequivocally establishes that defendant did not create the condition complained of which plaintiff claims caused the alleged incident, nor did defendant have notice of the defect.

Defendant argues that plaintiff's unverified Complaint fails to describe, in any meaningful detail, the condition complained of regarding the subject sidewalk or where the alleged condition existed along the course of the sidewalk. Defendant notes the photograph made part of plaintiff's

Notice of Claim is unauthenticated and of very poor quality. Though, defendant served discovery demands dated May 12, 2020, plaintiff has failed to date to respond to defendant's discovery demands. As such, defendant has been denied its right to ascertain in detail the condition which plaintiff complains of and its precise location.

Even if plaintiff had sufficiently described the condition complained of and its location, defendant argues it did not create the alleged condition, nor did it have actual or constructive notice of same. There is no evidence in the record that defendant performed any work relative to the subject sidewalk created the subject condition.

With respect to notice, defendant argues there is no evidence that defendant had actual notice of the alleged condition. No complaints or comments were received from tenants, the City of Newburgh or the building department, or any non-party. In support of the motion, defendant attaches the affidavit of Yoel Glanz, principal of defendant. Mr. Glanz avers that, prior to the date of plaintiff's alleged accident, the City of Newburgh's Building Department issued no violations with respect to the subject sidewalk. He never received any complaints or comments regarding any aspect of the sidewalk or adjacent to the sidewalk; nor did he receive complaint or comment that anyone had slipped, tripped, or fallen due to any condition of the subject sidewalk.

Defendant attaches the affidavit of Joel Stern, an individual who collected rent and performed work on the premises. In his affidavit, Mr. Stern states that defendant did not make a special use of the subject sidewalk.

Defendant also attaches the affidavit of the City Clerk, Lorene Vitek, submitted in support of co-defendant's dispositive motion. Ms. Vitek states that she made a search of the files in her office and found no record of written notice of a dangerous condition at or near 255 First Street

within the City, on or before April 16, 2019, the date of plaintiff's alleged fall.

Defendant argues it had no constructive notice, the plaintiff has failed to sufficiently describe the condition complained of and its location, and there is no evidence in the record that the alleged condition was visible or apparent.

As this Court recently granted co-defendants' motion for summary judgment, the cross-claims should be dismissed as a matter of law.

### **Opposition**

In opposition, plaintiff argues Defendant's motion is premature. Plaintiff's discovery demands are outstanding, and no depositions have taken place as of this date. Plaintiff avers it has responded to all disclosure demands. On September 5, 2020, Plaintiff's Verified Bill of Particulars and Plaintiff's Demands were served. (Exhibit 5)

Plaintiff appends the plaintiff's affidavit in which plaintiff indicates he was traveling on the sidewalk in front of 255 First Avenue in Newburgh, when his foot was suddenly caught on a protruding concrete slab within the sidewalk. The deteriorated and uneven concrete slabs had overgrown grass growing between them. Plaintiff tripped and fell forward, impacting his body into the sidewalk.

Plaintiff argues the precise location and conditions are sufficiently demonstrated in plaintiff's affidavit, as well as the photographs, attached as Exhibits 1 through 3 to plaintiff's opposition. Plaintiff notes in his affidavit, "Attached as Exhibits '1', '2' and '3' are photographs of the location on the sidewalk where I tripped and fell. These photographs are a true and accurate depiction of the conditions of the concrete slabs on the sidewalk on the day of my accident." (Plaintiff's Affidavit, par. 5) Plaintiff argues the height of the grass growth indicates that the sidewalk slabs had been

separated and uneven for a long period of time, and masked the gap between the slabs and concealed the raised slab from plaintiff's view.

Plaintiff argues defendant has failed to submit any evidence that it maintained the sidewalk in a reasonably safe condition, and has therefore failed to meet its burden on summary judgment. Defendant has also failed to establish that it did not have constructive notice of the sidewalk's defects. The photographs and affidavit of plaintiff show that the sidewalk's condition raise a triable issue of fact as to whether the visibly uneven nature of the concrete slabs constituting the sidewalk existed for a sufficient length of time for defendant to have constructive notice. Plaintiff notes that defendant's affidavits are self-serving and insufficient to establish defendant lacked constructive notice of the condition of the sidewalk.

Plaintiff avers that defendant's tenants may testify that they had informed the defendant's agents or employees of the dangerous condition within the sidewalk abutting the premises. Plaintiff argues that, as the record is insufficiently developed, defendant failed to meet its *prima facie* showing of entitlement to summary judgment.

### Reply

In reply, defendant argues plaintiff has failed to set forth with appropriate detail the precise location of plaintiff's alleged accident. Plaintiff's attempts to supplement the Verified Bill of Particulars are patently insufficient, lacking specificity, are vague, and fail to adequately describe the precise location of plaintiff's alleged accident.

Defendant argues plaintiff's Supplemental Bill of Particulars fails to comply with the basic requirement of plaintiff to set forth the "approximate location" of the subject accident, pursuant to CPLR 4043(a)(2) and the controlling case law. Defendant cites to *Mastey v. Mancusi*, 122 Misc. 2d

199 (Sup. Ct., Kings Co., 1983) for the proposition that defendants are entitled to a precise description of the accident.

Plaintiff's Supplemental Bill of Particulars provides, "the accident complained of herein occurred on April 16, 2019 at approximately 11:00am while the plaintiff was lawfully and properly walking on the sidewalk in front of 255 First Street... More specifically, the plaintiff was walking at or near the fence which surrounds the perimeter of the property. Furthermore, attached hereto are photographs which will clearly and accurately depict the location of the defective condition on the defendant's property." Defendant argues that plaintiff's description is deficient, and the 10 photographs attached to the Supplemental Bill of Particulars are not authenticated by plaintiff himself. Defendant notes that no mention is made as to when these photographs were taken, and based on the numerals on one of the photographs itself, it appears to have been taken on September 15, 2017. Defendant notes the alleged incident occurred on April 16, 2019.

Plaintiff's opposition makes no reference to the affidavits of Mr. Glanz, Mr. Stern, and Ms. Vitek. Therefore, the facts contained therein are deemed admitted. Instead, plaintiff speculates that defendant's tenants may testify that they had informed defendant of the dangerous condition of the sidewalk. Plaintiff has not indicated that it has attempted to contact any such tenant.

Defendant argues plaintiff has failed to raise a triable issue of fact, and therefore, the motion should be granted.

### Discussion

"A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact." *Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 (2d Dept 2011),

citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986) The function of the Court on such a motion is issue finding, and not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957) The Court is obliged to draw all reasonable inferences in favor of the non-moving party. *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept 1995) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. *Anyanwu v. Johnson*, 276 AD2d 572 (2d Dept 2000) The issue of whether a dangerous condition exists on real property “is generally a question of fact for the jury,” depending as it does on the particular facts and circumstances. *Green v. Price Chopper*, 164 AD3d 478 (2d Dept 2018); *Taussig v. Luxury Cars of Smithtown, Inc.*, 31 AD3d 533 (2d Dept 2006); *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 446 (2d Dept 2005)

A defendant moving for summary judgment in a premises liability case must make a *prima facie* showing that it “maintained the premises in a reasonably safe condition and it did not create a dangerous or defective condition on the property or have either actual or constructive notice of a dangerous condition for a sufficient length of time to remedy it.” *Baez v. Willow Wood Associates, LP*, 159 AD3d 785 (2d Dept 2018); *Rendon v. Broadway Assoc. Ltd. Partnership*, 109 AD3d 975, 976-977 (2d Dept 2013) “A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it.” *Id.*, citing *Bravo v. 564 Seneca Ave. Corp.*, 83 AD3d 633 (2d Dept 2011)

Here, defendant made a *prima facie* showing of its entitlement to judgment as a matter of law through its submission of affidavits of Yoel Glanz, Joel Stern, and Lorene Vitek. Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980) In opposition, plaintiff submits an affidavit of plaintiff and three photographs depicting the uneven concrete slabs of a sidewalk in front of a house. Drawing all reasonable inferences in favor of the non-moving party, as the Court is constrained to do on a motion for summary judgment, plaintiff has raised a triable issue of fact as to whether the visible and apparent condition existed for a sufficient length of time for defendant to have discovered and remedied the defect.

In light of the foregoing, the application of defendant 255 First Street for summary judgment is denied.

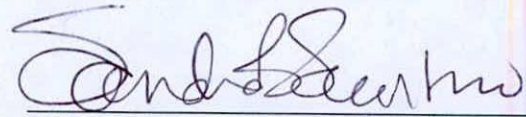
Cross-claims were dismissed as moot in the July 27, 2020 Decision and Order.

The parties shall appear for a virtual conference on ~~December 16~~ 2020 at 10:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 9, 2020  
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*