

Roman v Mott Haven Reformed Church

2020 NY Slip Op 35504(U)

August 31, 2020

Supreme Court, Bronx County

Docket Number: Index No. 22421/2019E

Judge: Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 22421/2019E
Motion Date: 7/14/20
Motion Seq. 1

-----X
YOLANDA ROMAN,

Plaintiff,

-against-

MOTT HAVEN REFORMED CHURCH.,

Defendants.
-----X

Decision/ Order
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation as required by CPLR 2219(a), of the papers considered in the review of these motions:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support and Exhibits Thereto	1
Affirmation in Opposition and Exhibits thereto....	2
Affirmation in Reply.....	3

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Upon deliberation of the application duly made by plaintiff YOLANDA ROMAN herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR § 3212, awarding judgment in favor of plaintiff as to liability is heretofore granted.

This is an action seeking damages as a result of alleged personal injuries sustained by plaintiff, Yolanda Roman, when Plaintiff tripped and fell on a defective condition on the sidewalk.

Plaintiff alleges that Defendant had a duty to maintain the sidewalk and that Defendant was negligent in failing to repair a hole on the sidewalk, which caused Plaintiff to trip and fall. Plaintiff further alleges, that Defendant had constructive notice of the sidewalk condition as Defendant allowed the condition to exist for an extended period of time.

Defendant argues it is not responsible for maintaining the area where the alleged incident occurred. Further, that Plaintiff's expert's statements are conclusory, since no measurements were taken in person, and that issues of material fact exist as to whether Defendant had actual or constructive notice.

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any issue of material fact. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1983). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues to be determined by a trier of fact. *See Zukerman v. City of New York*, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. *Winegrad*, 64 N.Y.2d at 853. Here, Plaintiff has made a *prima facie* showing of entitlement to summary judgment the issue of liability.

Plaintiff testified that she tripped and fell on the sidewalk abutting Defendant's property. Defendant admits to ownership of the property which includes the abutting sidewalk wherein the alleged incident occurred. An owner of real property has a nondelegable duty to maintain an abutting sidewalk. NYC Administrative Code 7-210; *see Xiang Fu He v. Troon Mgt., Inc.*, 34 N.Y.3d 167, 114 N.Y.S.3d 14 (2019).

Defendant argues that they are not responsible for the alleged dangerous condition on the sidewalk because another entity repaired the sidewalk subsequent to the incident in question. The Court finds this argument unavailing.

Plaintiff further argues that Defendant had constructive notice of the defective condition as the defect existed for an extended period of time prior to the alleged incident. Plaintiff testified that she walks down that sidewalk frequently and saw the hole on prior occasions. Plaintiff further submits an expert affidavit which concluded that the hole in question took years to develop. Defendant argues that Plaintiff's expert's statements are conclusory since the expert did not inspect the hole in question in person but rather relied on Google Street View.

An expert speculates when the expert does not use support from either a personal evaluation or evidence in the record to form an opinion. *See Park v. Kovachevich*, 116 A.D.3d 182 (1st Dep't 2014). Plaintiff submits the sworn affidavit of Irvin S. Lowenstein, formerly Deputy Director/ Director Irvin S. Lowenstein, with more than 25 years of sidewalk management experience with the City of New York's Department of Transportation and the Big Apple Pothole and Sidewalk Protection Corporation Maps and Inspections. Mr. Lowenstein utilized photographs of the location obtained from Google Street View, which provided a timeline feature such as the same location as the subject accident, at various time intervals. The images obtained by Mr.

Lowenstien were from an online search mapping tool. Mr. Lowenstien then compared the images with Plaintiff's photographs identified at her deposition, as fair and accurate depictions of the sidewalk on the date of the subject incident. After evaluating the sidewalk in question using Google Street View and Plaintiff's photographs Mr. Lowenstien opined that the hole had existed for five years, creating a vertical grade differential in excess of ½ of an inch, and that the hole would form over many months or years.

Defendant's witness testified at her deposition, that she was unaware of the hole as she drives across the sidewalk in question to access her driveway into the parking lot and had never had occasion to walk along that portion of the sidewalk. Whether or not she was aware of the hole is of no consequence. Constructive notice exists where the alleged condition is visible, apparent, and "must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it." Barrera v. New York City Transit Auth., 61 A.D.3d 425, 426, 877 N.Y.S.2d 32, 33 (1st Dep't 2009). Furthermore, Defendant did not submit any expert opinion.

As such, , the Court grants summary judgment in favor of plaintiff on the issue of liability.

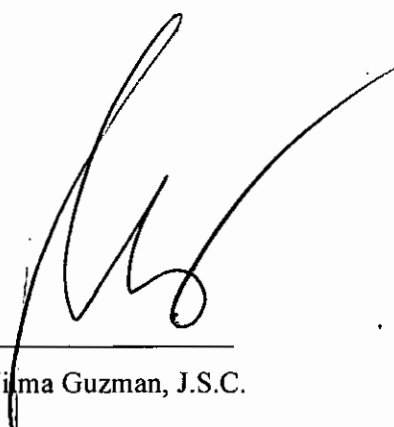
Accordingly it is,

ORDERED AND ADJUDGED that Plaintiff's Motion for summary judgment as to liability pursuant to CPLR §3212 is granted.

ORDERED AND ADJUDGED that Defendant shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this order.

This constitutes the Decision and Order of the Court.

Dated: August, 31, 2020



Hon. Wilma Guzman, J.S.C.