Tejeda v Creg Realty Corp.
2021 NY Slip Op 30183(U)
January 22, 2021
Supreme Court, New York County
Docket Number: 160663/2017
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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ALVIN TEJEDA,

Plaintiff,

-against-

CREG REALTY CORP. and MERFIN MORROBEL,

Defendants.

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DECISION AND ORDER

Index Number

160663/2017

FRANK P. NERVO, J.:

Defendants move for summary judgment in their favor contending that plaintiff is unable to identify the defective condition he alleges caused him to fall and that no defective condition existed. Alternatively, defendants contend that even if a defect was present, it was trivial in nature. Finally, defendants contend they lacked notice of the alleged defect and therefore cannot be held liable. Plaintiff opposes, contending that he was able to identify the defect causing him to fall. Plaintiff further contends that he was able to identify the defective condition several days after his fall when his friend escorted him to the location where the friend observed plaintiff lying on the ground.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a

matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Landowners in New York City have a duty to maintain the sidewalk abutting the property in a reasonably safe condition[1] (New York City Administrative Code § 7-210; *see generally James v. 1620 Westchester Avenue LLC*, 105 AD3d 1, 4 [Richter, J.] [1st Dept 2013]). This affirmative duty is nondelegable (*Xiang Fu He v. Troon Mgmt., Inc.*, 34 NY3d 167 [2019]).

Defendants contend that plaintiff is unable to identify the defect that caused his fall. Thus, defendants argue, they are entitled to summary judgment as plaintiff has not established a connection between the condition of the sidewalk and his accident. Where a plaintiff is unable to identify the defect causing his or her injury, summary judgment is proper (*see Siegel v. City of New York*, 86 AD3d 452 [1st Dept 2011]).

Plaintiff testified that he lost consciousness immediately upon impacting the ground (*id.* at 63), and therefore had no independent recollection of the events from the

[1] Subject to certain exceptions not relevant to this motion.

moment he struck the ground until he regained consciousness after being transported to the hospital by ambulance (*id*. at 59-63). Nevertheless, plaintiff identified the cause of his fall to be "a broken part" of the sidewalk approximately two to three inches long in front of the defendants' premises (NYSCEF Doc. No, 41 at P. 58; 80). Consequently, defendants have failed to establish, as a matter of law, that plaintiff was not caused to fall due to the defect on the sidewalk abutting their defendants' property. Under these circumstances, summary judgment is improper (*Figueroa v. City of New York*, 126 AD3d 435 [1st Dept 2015]). Likewise, issues of fact related to the location of plaintiff's fall, and the alleged defect causing the fall, preclude summary judgment.

Next, defendants contend their expert has established the defect is trivial and could not cause a person to fall or trip. "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 NY3d 66 [2015]). The trivial defect doctrine applies with equal force to municipalities and private landowners (*id*. at 81). However, there is no minimum depth or height of a defect for it to be actionable, and granting a defendant summary judgment based solely on the dimensions of the alleged defect is improper (*Trincere v. County of Suffolk*, 90 NY2d 976, 977 [1997]). Instead, the Court must consider the totality of the facts and circumstances in determining whether a defect is trivial, or the danger imposed by an otherwise small defect is magnified by other factors (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d at 77).

Here, plaintiff contends that the defect causing his fall was approximately two to three inches long (NYSCEF Doc. No, 41 at P. 58 and 80). Defendant's expert report found a repaired joint and slab in the sidewalk approximately 24 feet long, but found no height differential or defect in the sidewalk (NYSCEF Doc. No. 44).[2] However, the photograph exhibits to plaintiff's deposition clearly show a missing portion, depression, or defect in the sidewalk several inches long and wide, with an appreciable height differential where four sidewalk flags intersect (NYSCEF Doc. No 49). Based upon the photographic evidence, testimony of plaintiff, and size and location of the alleged defect the Court cannot, as a matter of law, determine the alleged defect to be trivial. Consequently, summary judgment on this basis is inappropriate.

Finally, to the extent that defendants contend they lacked notice of any defect and therefore cannot be held liable, such claim is without merit. To be certain, New York City Administrative Code § 7-210 does not impose strict liability against abutting property owners for defects in the sidewalk; the injured party must prove the elements of negligence, including notice (*Yuk Ping Cheng Chan v. Young T. Lee & Son Realty Corp.*, 110 AD3d 637 [1st Dept 2013]; *Gyokchyan v. City of New York*, 106 AD3d 780 [2d Dept 2013]). "Thus, in support of a motion for summary judgment dismissing a cause of action pursuant to Administrative Code of the City of New York § 7–210, the property owner has the initial burden of demonstrating, prima facie, that it neither

[2] An expert's affirmation is properly considered where it is non-conclusory and supported by an evidentiary foundation (*Bender v. Gross*, 33 AD3d 417 [1st Dept 2006]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Here, the remainder of defendants' expert's report is conclusory, without probative value, and seeks to make determinations of law inappropriate for an engineer. The Court has not considered the conclusory portions of the report.

created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*id*. at 781). To establish lack of notice, a defendant must present evidence related to when the area at issue was last inspected or cleaned, prior to accident (*Sabalza v. Salgado*, 85 AD3d 436, 438 [1st Dept 2011]). Here, however, the conflicting testimony and photographs do not establish defendants lacked notice of the alleged defective condition causing plaintiff's injury (*id*. at 781-82; *see also Yuk Ping Cheng Chan v. Young T. Lee & Son Realty Corp*., 110 AD3d at 637). Consequently, having failed to meet their burden, defendants' motion must be denied (*Alvarez v. Prospect Hosp*., 68 NY2d at 324). Assuming, arguendo, that defendants had met their prima facie burden, the conflicting testimony and photographs of the alleged defective condition also raise an issue of triable fact for the fact finder to resolve, and summary judgment is likewise inappropriate.

Accordingly, it is

ORDERED that defendants' motion is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated: January 22, 2021

Enter:

Hon. Frank P. Nervo, J.S.C.