

Narvaez v Vornado Realty Trust
2021 NY Slip Op 31109(U)
April 2, 2021
Supreme Court, New York County
Docket Number: 155315/2017
Judge: Verna Saunders
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36
Justice
INDEX NO. 155315/2017
LILIA NARVAEZ, Plaintiff MOTION SEQ. NO. 004

- v -

VORNADO REALTY TRUST, VORNADO NEW YORK RR ONE L.L.C., VORNADO, INC., VORNADO PROPERTIES, and THE MADISON SQUARE GARDEN COMPANY, Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for SUMMARY JUDGMENT

Plaintiff commenced this action to recover for injuries sustained as a result of a trip and fall which occurred due to a defective condition on defendant's property.

Defendant Madison Square Garden Company ("MSG") moves the court, pursuant to CPLR 3212, seeking summary judgment and dismissal of the complaint as against it. Defendant avers that insofar as plaintiff has asserted several different versions of the event, the defect allegedly causing her fall is de minimis; MSG did not have notice of the alleged condition; and MSG is entitled to summary judgment. Plaintiff opposes averring, inter alia, that MSG has failed to establish prima facie entitlement to summary judgment; the motion is pre-mature as MSG has not been deposed; plaintiff has only proffered one version of events; and no expert has opined on whether the defect is de minimis or trivial.

In support of the instant motion, MSG argues that plaintiff offers contradicting claims regarding her accident in that she alleged she was pushed by an unknown person; that she slipped inside of Pennsylvania Station ("Penn Station") and landed outside of the station; that she fell due to a depression/hole in the pavement at the entrance of Penn Station; and that she fell due to pebbles and sand from nearby construction. MSG asserts that despite which of these claims is true, it is entitled to summary judgment. Specifically, if plaintiff was pushed by an unknown party, MSG cannot be held liable for the acts of third parties. As to the claim that the accident took place inside of Penn Station, MSG argues that it cannot be held liable for accidents which do not occur on its property. As to allegations of the accident occurring on defective pavement outside of Penn Station, MSG avers that the alleged defect is de minimis and thus, not actionable. MSG further contends that the allegation about the pebbles and sand is a new theory presented at plaintiff's deposition and should be disregarded by the court. However, assuming the court

1 The action was discontinued as against the Vornado defendant. (See Stipulation of Discontinuance, NYSCEF Doc No. 36.)

allows plaintiff to assert a new claim, the claim of construction debris is based upon speculation and plaintiff cannot establish MSG had notice of the alleged condition. Finally, MSG avows that the statutory provisions pled by plaintiff, to wit: the Administrative Code, 1968 Building Code, 2006 New York City Building Code, and Property Maintenance Code are inapplicable or otherwise fail to impose liability on MSG.

In opposition, plaintiff argues that only one version of the incident has ever been asserted and MSG has taken plaintiff's deposition out of context. Plaintiff asserts she tripped and fell at the entrance in front of Penn Station due to a hole containing sand/pebbles. Plaintiff maintains she was never pushed by a third party and that the EMS report contains several discrepancies, including referring to her as male. Plaintiff presumes that some of the discrepancies may be attributed to the fact that Spanish is her preferred language and thus, EMS may have misunderstood her. Nevertheless, plaintiff argues that if the court were to find that she presented different versions of events, the question as to the correct location of her incident should be resolved by a jury. Plaintiff further argues that the motion is premature as depositions of MSG have not been conducted. Plaintiff contends that MGS's argument as to lack of notice is unsupported and the affidavit submitted by MSG fails to mention whether sand or gravel was found in the hole, whether the hole contained a flat surface, or whether it was uneven. Additionally, plaintiff argues that MSG has failed to establish it did not maintain or control the area directly outside of the door to Penn Station or that the defect was *de minimus*. Lastly, despite applicability of the building codes cited, plaintiff argues she is not barred from recovery as MSG was negligent in its maintenance of the premises.

In reply, MSG argues that its motion is not premature insofar as plaintiff waived her right to depose MSG when she filed the Note of Issue and Certificate of Readiness for Trial and that plaintiff has failed to comply with discovery throughout the action and is not entitled to further discovery. With respect to plaintiff's argument that a jury should determine the location of the incident, MSG avers that a jury may resolve a dispute between parties, not between a plaintiff and herself.

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) The evidentiary proof tendered must be in admissible form. (*see Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065 [1979].) Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) The proof raised by the opponent to the motion "must be sufficient to permit a finding of proximate cause "based not upon speculation, but upon a logical inference to be drawn from the evidence." (*Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], quoting *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743 [1986].)

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach. (*see Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981].) A motion for summary judgment may be properly granted when a defendant demonstrates that it

did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall. (*see Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014].)

Generally, whether a dangerous or defective condition exists on the property of another so as to create liability "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." (*Schechtman v Lappin*, 161 AD2d 118, 121 [1st Dept 1990].) However, not every injury allegedly caused by a defect in the sidewalk need be submitted to a jury. (*see, e.g., Hecht v New York*, 60 NY2d 57,61 [1983][claim involving trivial gap between two flagstones of the sidewalk was properly dismissed].)

The Court of Appeals has ruled that while there is no bright line rule that a defect must be of a certain minimum height or depth in order to be actionable, dismissal of a plaintiff's claim may be proper after examination of all the facts and circumstances presented, "including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstances of the injury." (*Trincere v County of Suffolk*, 90 NY2d 976 [1997] [citations omitted]; *see also, Caldwell v Is. Park*, 304 NY 268 [1952].)

As an initial matter, a review of the record reveals that plaintiff has consistently failed to comply with discovery and the court (Ling-Cohan, J.) declined to so-order the stipulation of the parties to vacate plaintiff's Note of Issue and Certificate of Readiness dated July 31, 2019 (NYSCEF Doc. No 89) and granted MSG's motion to strike the complaint for failure to comply with discovery to the extent that if plaintiff failed to appear for a deposition on or before September 18, 2019 or within seven days thereof, her complaint would be stricken. (NYSCEF Doc No 71). As such, plaintiff's argument that the instant motion is premature as discovery is incomplete since MSG or its expert have yet to be deposed is unavailing and without merit. Plaintiff has chosen not to actively participate in discovery, failed to move the court seeking to vacate the July 31, 2019 Note of Issue, and plaintiff failed to appeal orders of the court pertaining to her Note of Issue, thus, plaintiff has waived her right to any further discovery.

Plaintiff appeared for a deposition on September 18, 2019, as ordered by the court (Ling-Cohan, J.). While plaintiff asserts, in her opposition, that she fell outside of Penn Station on the pavement maintained by MSG, at her deposition, she testified that "[t]he accident started at the door inside of Penn Station" and she "was slipping" as she passed the door. (Plaintiff Tr at 81, lines 7-9). Plaintiff's opposition directs this court to her testimony wherein she asserts that when she exited Penn Station there was a hole and that her heel was caught in it causing her to trip (Plaintiff Tr at 93, lines 19-23). However, plaintiff again repeats her prior testimony that she began to fall when she was inside of Penn Station. (Plaintiff Tr at 94, lines 8-13). Hence, despite the arguments advanced by plaintiff, in opposition, that the accident occurred on the pavement outside the doors of Penn Station, plaintiff's testimony reflects that she began to fall when she was inside of Penn Station. Thus, insofar as plaintiff did not identify the object, defect, or condition causing her to trip inside of Penn Station and further, that Penn Station is a separate entity from MSG, summary judgment is warranted.

Assuming arguendo that the accident did in fact occur on the pavement just outside the doors of Penn Station, the court finds the alleged defect *de minimus* in nature based upon the

photographs submitted, as well as, the sworn affidavit of Bernard P. Lorenz. (MSG exhibit H, J). Annexed to the moving papers, is the sworn affidavit of Bernard P. Lorenz, professional engineer with experience in forensic engineering, investigation, and evaluation of design and construction elements relating to civil engineering and safety. In his affidavit, Lorenz attests that he conducted an inspection of the location and affirms that at the location of the accident are two doors measuring five feet, three inches in clear width; there is an eight inch-wide aluminum saddle located below the doors; there is a concrete walkway section measuring two feet, four inches in depth on the exterior side of the doorway and spans the width of the door opening and the other door openings to the left, as viewed entering the doorway; the walkway section is sloped 3.1° degrees away from the doorway and 0.9° to the right; there is an area of spalled concrete approximately eight inches in width by five inches in length in the concrete walkway section approximately nine and one half (9 1/2) inches from the saddle; the maximum depth within the approximate center of the spalled concrete is five eighths (5/8) of an inch; and all other areas within the spalled concrete are less than one half (1/2) inch in depth relative to the surrounding concrete sidewalk section.

Taking into consideration plaintiff's allegations; the photographs annexed at exhibit H which fail to depict characteristics of a trap, tripping hazard or snare such as a sharp edge or large difference in elevation; and the sworn statement of Lorenz, the court finds that the alleged defect is trivial such that it is not actionable. (see e.g. *Morales v Riverbay Corp.*, 226 AD2d 271 [1st Dept 1996].) With respect to plaintiff's assertions that the depression in the pavement contained pebbles and/or sand from nearby construction, the court finds that plaintiff failed to establish that MSG had actual or constructive notice of the condition and failed to rebut the arguments advanced asserting that they did not have notice of the alleged condition. All remaining arguments not addressed herein are either without merit or need not be addressed given the findings above. Accordingly, it is hereby,

ORDERED that defendant Madison Square Garden Company's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that, within 20 days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

April 2, 2021


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: