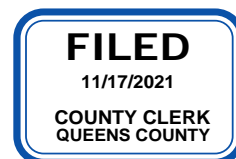


Felder v Hollis Med. Dental Real Estate LLC
2021 NY Slip Op 33145(U)
November 17, 2021
Supreme Court, Queens County
Docket Number: Index No. 717485/20
Judge: Robert I. Caloras
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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS
Justice

PART 36



-----X
ISAAH FELDER,

Plaintiff,

Index No. 717485/20

Seq. No 5

-against-

HOLLIS MEDICAL DENTAL REAL
ESTATE LLC and PRIME TIDE, LLC,

Defendants.
-----X

The following papers numbered E19-E46, E49-E59, E61-E71 read on this motion by Plaintiff for an order pursuant to CPLR 3212 granting him partial summary judgment on the issue of liability as against Defendant Prime Tide, LLC (“Prime Tide”); and the cross motion by Prime Tide for an order pursuant to CPLR 3212 dismissing the Complaint on the grounds the following grounds: 1) Plaintiff cannot identify what caused him to fall; and (2) Plaintiff’s alleged injuries are not causally related to the accident.

PAPERS

NUMBERED

Notice of Motion-Affirmations-Exhibits.....	E19-E46
Notice of Cross Motion-Affirmation in Support and in Opposition-Exhibits.....	E49-E59
Affirmation in Reply and in Opposition to the Cross Motion.....	E61-E70
Reply Affirmation.....	E71

Upon the foregoing papers, it is ordered that Plaintiff’s motion is granted and Defendant Prime Tide’s cross motion is denied for the following reasons:

According to the Complaint, on November 10, 2016 Plaintiff tripped and fell over a height differential between the sidewalk flags located at 190-02 Jamaica Avenue, Queens, New York. In an order, dated December 31, 2020 and filed on January 4, 2021, this Court granted co-Defendant Hollis Medical Dental Real Estate LLC’s motion for summary judgment and Plaintiff’s cross motion for an order pursuant to CPLR 3212, determining as a matter of law that the raised sidewalk that allegedly caused him to trip and fall was located on Defendant Prime Tide’s property on the date of the accident. Based therein, this Court dismissed the complaint and all cross claims asserted against co-Defendant Hollis, and determined that the alleged defect abuts Prime Tide’s property.

Plaintiff now moves for partial summary judgment against Prime Tide. In support thereof, he has submitted, among other things, the following: deposition transcripts for Plaintiff, Dr. Morris Nejat, owner of Hollis; and Paul Brancato, who manages Prime Tide; Defendant’s Exhibit A through D from Plaintiff’s deposition; Exhibit 1 and 2 from Dr. Nejat’s deposition; CPLR 3101(d) disclosure for Scott Silberman, P.E.; Mr. Silberman’s affidavit, curriculum vitae and report; Google Street photographs of the location of the subject accident, with capture dates of September 2011 and September 2013 as referenced in Mr. Silberman’s report; photographs of the subject accident location taken by Mr. Silberman on May 9, 2018; and notice pursuant to CPLR 4532-b of Plaintiff’s intent to request judicial notice of an image from Google Maps. At his deposition, Plaintiff testified the photo marked as Defendant’s Exhibit “A” depicted the area where he fell, and he marked a red X on the

photo marked as Defendant's Exhibit "B" indicating where his foot came into contact with the alleged defect.

Mr. Silberman stated the following: he is a licensed professional engineer in the State of New York. His opinion was based upon, in part, the following: Plaintiff's deposition transcript, along with Defendant's Exhibits marked A through D at Plaintiff's deposition; Google Street images of the location of the accident as it appeared in September 2013 and September 2011; and his inspection of the subject sidewalk on May 9, 2018. On May 9, 2018, he took pictures of the subject sidewalk marked numbers 1 through 6. Plaintiff fell in the area between the two locations where the measurements were taken in pictures 2 and 4. In the picture 1, he marked a red dashed circle where the sidewalk was mis-leveled and created a raised flag condition which resulted in a significant vertical grade differential (aka "lip"). In picture 2, he marked a red dashed oval where the adjustable square was placed, which showed the actual the actual vertical grade differential measured and found to be approximately 3 ½ inches high. Picture 3 shows the vertical grade differential at the location seen in picture 2 was over 3 ½ inches high. Picture 4 showed the actual vertical grade differential was measured and found to be approximately 2 ¼ inches high as seen in picture 5. The red dashed circle in the Google Street View picture taken in September 2011 and September 2013 both show a significant vertical grade differential where Plaintiff fell. Based upon the foregoing, he opined that the defect contributed to the unsafe condition at the subject location and was a contributing factor in this accident.

Based upon the foregoing, Plaintiff argues he is entitled to summary judgment, because the height differential between the raised flags that caused him to fall was located on the sidewalk abutting Prime Tide's building, and that this defect was a substantial defect pursuant to 34 RCNY 2-09 and Section 19-152 of the Administrative Code of the City of New York. Plaintiff further argues that Prime Tide had constructive notice of this defect based upon the images of the subject location in the Google Street View pictures in September 2011 and September 2013.

In in the first branch of its cross motion for summary judgment dismissing the Complaint and in opposition to Plaintiff's motion, Prime Tide argues Plaintiff's testimony regarding the location where he fell is speculative, and failed to establish that he fell at the location he marked with an X in the photograph marked as Defendant's Exhibit "B" at his deposition.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

As a general rule, liability for a dangerous or defective condition on property is predicated upon ownership, occupancy, control, or special use of the property (*Leitch-Henry v Doe Fund, Inc.*, 179 AD3d 655 [2d Dept 2020]). Section 7-210 of the Administrative Code of the City of New York, which became effective September 14, 2003, shifted tort liability from the City to the commercial property owner for personal injuries proximately caused by the owner's failure to maintain the

sidewalk abutting its premises in a reasonably safe condition (Martinez v New York Metro District of United Pentocostal Church International, Inc., 188 AD3d 662 [2d Dept. 2020]; Harakidas v City of New York, 86 AD3d 624 [2d Dept. 2011], lv denied 20 NY3d 1000 [2013]). The language in section 7-210 mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code sections 19-152 and 16-123" (Gallis v 23-21 33 Road, LLC, __ AD3d __, Slip Op 05549 [2d Dept. 2021]; Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 521 [2008] [internal quotation marks omitted]). However, Section 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable (see Martinez v Khaimov, 74 AD3d 1031 [2d Dept. 2010]).

NYC Administrative Code 7-210(b) provides in pertinent part:

. . . {T]he owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.

NYC Administrative Code 19-152(a)(4) provides that:

The owner of any real property, at his or her own cost and expense, shall (1) install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property, including but not limited to the intersection quadrant for corner property . . . a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth.

Here, the Court finds Plaintiff established his prima facie entitlement to summary judgment against Defendant Prime Tide through his submissions which established that he fell on a raised sidewalk, with a raised vertical grade differential over 3 ½ inches high, which abutted Defendant Prime Tide's property. In opposition, Prime Tide failed to raise any triable issues of fact regarding whether the defect was hazardous, and its claim that Plaintiff did not identify what caused him to fall is without merit. "Although proximate cause can be established in the absence of direct evidence of causation [and] . . . may be inferred from the facts and circumstances underlying the injury, [m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action" (Theard v G. Fazio Constr. Co., Inc., 192 AD3d 942 [2d Dept. 2021]). "Indeed, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*id.*). Here, contrary to Prime Tide's claims, Plaintiff identified the defect that caused him to fall by marking a red X on the photo marked as Defendant's Exhibit "B" indicating where his foot came into contact with the alleged defect. Moreover, Prime Tide failed to submit any evidence controverting

Plaintiff's claims that the raised flag that caused him to fall was not greater than one half inch. Accordingly, Plaintiff's motion is granted, and the branch of Prime Tide's cross motion seeking to dismiss the Complaint due to Plaintiff's failure to identify what caused him to fall is denied.

In the remaining branch of the cross motion, Defendant Prime Tide moves for summary judgment dismissing the Complaint, because Plaintiff's alleged injuries are not causally related to the accident. In support thereof, Prime Tide submitted, among other things, the following: Plaintiff's records from Queens Hospital Center; a report, dated July 24, 2019 and May 17, 2021, from Dr. Anisa Heravian, board certified in Emergency Medicine; and an affidavit from Tamara Cohen, Ph.D., a biomechanical engineer. Based therein, Prime Tide argues that the injuries Plaintiff alleges he sustained in his Bill of Particulars are not causally related to this accident. In opposition, Plaintiff argues, among other things, that this branch of Prime Tide's cross motion is frivolous. In the alternative, Plaintiff argues issues of fact exist regarding whether his alleged damages claim are causally related to this accident. In support thereof, he submitted a report from Dr. Karen Avanesov, his treating physician who is a board certified orthopedist, which purportedly shows that his alleged injuries were caused by the subject accident.

It is well settled that even where liability is established against a Defendant, a Plaintiff may only recover for those damages proximately caused by said Defendant (NY PJI 2:277, Comment, Caveat, "Causation is relevant both to liability and damages"[Note: online treatise]; e.g, Oakes v Patel, 20 NY3d 633 [2013]). Here, based upon the parties' submissions, the Court finds issues of fact exist regarding whether Plaintiff's injuries are causally related to the subject accident. Accordingly, the branch of Prime Tide's cross motion seeking summary judgment on the issue of damages is denied.

Dated: November 17, 2021



ROBERT I. CALORAS, J.S.C.

