

**Ramirez v 829 Adee Ave. Hous. Dev. Fund Corp.**

2021 NY Slip Op 33896(U)

July 30, 2021

Supreme Court, Bronx County

Docket Number: Index No. 20503/2017E

Judge: Dawn Jimenez-Salta

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This opinion is uncorrected and not selected for official publication.

At Part IA 27 of the Supreme Court of the State of New York, held in and for the County of Bronx, at the Courthouse thereof, 851 Grand Concourse, Bronx, New York on the 30<sup>th</sup> day of July, 2021.

P R E S E N T:  
HON. DAWN JIMENEZ-SALTA,  
Justice.

-----X  
JIMMY RAMIREZ,

Plaintiff,

– against –

829 ADEE AVENUE HOUSING DEVELOPMENT FUND CORPORATION,

Defendant.  
-----X

DECISION/ORDER

Index No. 20503/2017E

Mot. Seq. 2

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	29-39
Opposing Affidavits (Affirmations) _____	42-47
Reply Affidavits (Affirmations) _____	48

Defendant 829 Adee Avenue Housing Development Fund Corporation (defendant) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint. For the reasons set forth herein, the motion is denied.

This is an action seeking to recover damages for personal injuries allegedly sustained by plaintiff Jimmy Ramirez (plaintiff) on May 5, 2016 while riding his bicycle on the sidewalk adjacent to the premises at 829 Adee Avenue in Bronx, New York owned by defendant. Plaintiff testified at his deposition that the front wheel of his bicycle “got caught in [a] crack” on the sidewalk, causing him to fall to the ground. Plaintiff alleges, inter alia, that defendant negligently failed to maintain the sidewalk and negligently or improperly performed repairs of said sidewalk. He also alleges that defendant violated Administrative Code of the City of NY § 7-210.

In its motion, defendant argues that it is entitled to summary judgment dismissing the complaint on the grounds that it lacked actual or constructive notice of the alleged defect, that plaintiff failed to adequately identify the location of the defect, that plaintiff was the sole proximate cause of his accident and that it owed no duty to plaintiff. Defendant annexes a copy of the pleadings, the deposition transcripts of plaintiff and defendant’s witness Mario Garcia, the affidavit of Marcos Luna and photographs allegedly depicting the defect marked at plaintiff’s deposition. A statement of

material facts as required by the Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g is also annexed.

In his affidavit, Luna, the building superintendent, avers that he was responsible for “making any necessary repairs and maintenance, and/or notifying the building of any defects or hazardous conditions that required repairs.” He states that he conducted an inspection of the premises and sidewalk on May 5, 2016 in accordance with his daily routine and that he “did not observe any crack or hazardous condition on the sidewalk and no one made any complaints regarding any cracks or hazardous conditions on the sidewalk outside the property.” Defendant also notes that Garcia, president of the cooperative corporation board, testified that he was “unaware” of any prior complaints or lawsuits regarding the sidewalk upon which plaintiff allegedly fell.

Defendant further argues that plaintiff’s ill-advised decision to ride his bicycle on the sidewalk to “skip” the traffic on the street was the sole proximate cause of his accident and that it owed no duty to plaintiff, as a bicyclist, because he was prohibited from riding on the sidewalk (*see* Administrative Code § 19-176 [b] [no person shall ride a bicycle upon any sidewalk unless permitted by an official sign]; 34 RCNY 4-07 [c] [3]). In the alternative, defendant argues that the photographs of the defect show that it was trivial as a matter of law and therefore nonactionable.

In opposition, plaintiff argues that defendant’s submissions failed to address whether it caused or created the alleged defect through prior repair. He also contends that Garcia’s lack of knowledge or recollection as to any prior repairs and as to whether he observed the defect prior to plaintiff’s accident is insufficient to establish lack of notice. Plaintiff argues that Luna’s affidavit is self-serving, vague and should be disregarded. He asserts that the affidavit fails to establish that Luna in fact conducted an inspection of the subject sidewalk on the date of the accident prior to his fall.

With respect to defendant’s remaining arguments, plaintiff argues that defendant, as owner of the property, owes a nondelegable duty of care to maintain its property in a reasonably safe condition for members of the public traveling on the sidewalk and that his deposition testimony adequately described the location and dimensions of the defect. He further argues that the defendant failed to demonstrate, *prima facie*, that the alleged defect was trivial because defendant failed to provide any measurements of the defect or expert affidavit in support of the motion.

In reply, defendant contends that all of the facts in its statement of material facts should be deemed admitted because plaintiff failed to provide a counterstatement of facts in opposition to the motion as required by 22 NYCRR 202.8-g(b) (*see* 22 NYCRR 202.8 [c] [“Each numbered paragraph in the statement of material facts ... will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party”]).

As an initial matter, the Court declines to deem defendant’s statement of material facts admitted based on plaintiff’s failure to provide his own counterstatement of facts. Although there is little case law regarding 22 NYCRR 202.8-g, case law interpreting Rule 19-a of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70 [g]) upon which it is based has held that “[w]hile the rule gives the motion court discretion to deem the facts admitted, the court is not required to do so” (*Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]; *see also Al Sari v Alishaev Bros., Inc.*, 121 AD3d 506, 506-507 [1st Dept 2014]). While it would have been better for plaintiff to submit a counterstatement in accordance with the rule, plaintiff’s

affirmation in opposition addresses each paragraph of Luna's affidavit and the relevant portions of Garcia's deposition testimony relied upon by defendant in its statement. In any event, there is sufficient evidence in the record to raise triable issues of fact as set forth in detail below.

A property owner is under a duty to maintain its property "in a reasonably safe condition in view of all the circumstances" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [internal quotations omitted]; see also Administrative Code § 7-210). A defendant moving for summary judgment in a premises liability action has the initial burden of establishing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence (see *Labiner v Jerome Florist, Inc.*, 189 AD3d 624, 625 [1st Dept 2020]; *Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]).

Here, viewing the evidence in the light most favorable to plaintiff as the non-moving party, defendant failed to demonstrate its entitlement to judgment as a matter of law by showing that the sidewalk was kept in a reasonably safe condition, and that it did not cause or create and lacked notice of the alleged sidewalk condition. Though defendant established prima facie that there were no prior complaints about the alleged condition and no prior incidents (see *Velocci v Stop & Shop*, 188 AD3d at 439, citing *Frederick v New York City Hous. Auth.*, 172 AD3d 545, 545 [1st Dept 2019]), there are triable issues of fact as to whether the condition existed for a sufficient length of time for defendant to have discovered and remedied it based on, inter alia, the photographs submitted by the parties (see *Solomon v Diego Beekman Mut. Hous. Dev. Fund Corp.*, 190 AD3d 660, 660 [1st Dept 2021]; *Flanders v Sedgwick Ave. Assoc., LLC*, 156 AD3d 504, 504 [1st Dept 2017] ["A jury could infer from plaintiff's photograph of the defective condition that the condition existed for a sufficient length of time for owner defendants to have discovered it and had time to repair it"]).

Defendant's submissions also failed to address whether the alleged defect was caused or created by defendant through repair or whether any work was performed on the subject sidewalk prior to plaintiff's accident. Garcia's lack of knowledge as to whether there were any repairs or "changes" to the sidewalk prior to plaintiff's accident is insufficient to satisfy defendant's prima facie burden (Garcia's tr at 25, 39, 46).

With respect to defendant's argument that plaintiff failed to identify the location of the alleged defect, the Court finds that plaintiff sufficiently described the characteristics of the defect and particularized its location at his deposition (see *Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015]). During his deposition, plaintiff marked and circled the alleged defect in the photographs presented to him and described through his testimony where it was situated on the sidewalk in relation to the premises. That defendant's witness later testified that the crack circled by plaintiff in the photographs was located on Matthews Avenue, rather than Adeo Avenue, does not render plaintiff's testimony speculative.

Defendant also failed to establish that it owed no duty to plaintiff or that his conduct in riding his bicycle on the sidewalk was the sole proximate cause of the accident (see *Powers v 31 E 31 LLC*, 123 AD3d 421, 422-423 [1st Dept 2014]). Plaintiff's alleged violations of Administrative Code § 19-176(b) and 34 RCNY 4-07(c)(3) may be evidence of comparative negligence, but they do not relieve defendant of its common-law and statutory duties to maintain the premises and abutting sidewalk (see *Schneider v Diallo*, 14 AD3d 445, 446 [1st Dept 2005], citing *Elliot v City of New York*, 95 NY2d 730, 730 [2001]). Defendant failed to otherwise demonstrate as a matter of law that plaintiff's decision

to ride his bicycle on the sidewalk was so reckless and unforeseeable as to sever the causal connection between his injuries and any alleged negligence on defendant’s part (*Powers v 31 E 31 LLC*, at 423).

The photographs relied upon by the parties, the circumstances of the accident and plaintiff’s testimony as to the dimensions of the alleged defect as being “about two inches deep... [and] three inches” wide (Plaintiff’s tr at 55) also raise an issue of fact as to whether said defect was nontrivial (see *Abraham v Dutch Broadway Assoc. L.L.C.*, 192 AD3d 550, 551 [1st Dept 2021], citing *McCabe v Avalon Bay Communities, Inc.*, 177 AD3d 487, 489 [1st Dept 2019]). The determination as to whether the defect was trivial is more appropriately left for the trier of fact in this case (see *McCabe v Avalon Bay Communities, Inc.*, at 489 [“A finding that a condition is a trivial defect must be based on all the specific facts and circumstances of the case, not size alone. The issue is generally a jury question because it is a fact-intensive inquiry”] [internal quotation marks and citations omitted]).

The same photographs and issues preclude judgment as a matter of law on the basis that the condition was open and obvious and not inherently dangerous (see *Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 453 [1st Dept 2018]; *Powers v 31 E 31 LLC*, 123 AD3d at 422).

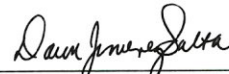
The Court has considered the remaining arguments and finds that they are insufficient to establish defendant’s entitlement to summary judgment based on the proof provided.

Accordingly, it is

ORDERED that defendant’s motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint is denied.

This constitutes the Decision and Order of the Court.

E N T E R,

  
Dawn Jimenez-Salta, J.S.C.  
**Hon. Dawn Jimenez-Salta**  
**Justice of the Supreme Court**

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER