

Mohamed-Munas v Rob

2021 NY Slip Op 33960(U)

August 10, 2021

Supreme Court, Queens County

Docket Number: Index No. 706933/19

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

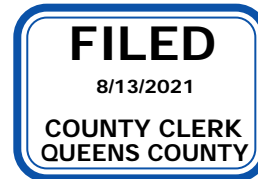
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MOHAMED MOHAMED-MUNAS,
Plaintiff,

Index No.: 706933/19
Mot. Date: 6/8/21
Mot. Seq. 4

-against-

PARVIN ROB, NURUL AMIN AND NURUL
AMIN DBA NITHUN CONSTRUCTION CO.,



Defendants.

-----X

PARVIN ROB,
Third-Party Plaintiff,

-against-

NURUL NOBI A/K/A NURUL ALAM A/K/A
NURUL AMIN A/K/A AMIN NURUL AND
NURUL NOBI A/K/A NURUL ALAM A/K/A
NURUL AMIN A/K/A AMIN NURUL D/B/A
ABC COMPANY, A FICTITIOUS NAME
INTENDED TO REPRESENT THE
CONSTRUCTION/HOME IMPROVEMTN
BUSINESS OWNED, OPERATED AND
MANAGED BY NURUL NOBI A/K/A NURUL
ALAM A/K/A NURUL AMIN A/K/A AMIN
NURUL,

Third-Party Defendants.

-----X

The following papers were read on this motion by defendant/third-party plaintiff Parvin Rob for an order granting her summary judgment, pursuant to CPLR 3215, and dismissing plaintiff's complaint.

	PAPERS
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	EF 69-87
Answering Affidavits-Exhibits.....	EF 107-108
Replying Affidavits-Exhibits.....	EF 109

Upon the foregoing papers, it is ordered that the motion by defendant/third-party plaintiff Parvin Rob is denied.

In this action seeking damages for personal injuries allegedly sustained by plaintiff Mohamed Mohamed-Munas, in a trip-and-fall, on the sidewalk adjoining the premises (a private home) owned by defendant Parvin Rob, located at 88-23 170th Street, Jamaica, New York. Plaintiff maintains he was caused to trip-and-fall over pieces of construction debris, consisting of small concrete rocks and bricks. He further maintains that he sustained the injuries due to the negligence of defendants. The record reflects that defendant Rob retained third-party defendants to repair broken portions of her concrete driveway.

Defendant/third-party plaintiff Parvin Rob moves for an order granting her summary judgment, pursuant to CPLR 3215, and dismissing plaintiff's complaint.

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries. (*See Gordon v Muchnick*, 180 AD2d 715 [2d Dept 1992]).

A defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Knack v Red Lobster*, 98 AD3d 473 [2d Dept 2012]; *Sloane v Costco Wholesale Corp.*, 49 AD3d 522, 523 [2d Dept 2008]; *see also Kramer v SBR & C.*, 62 AD3d 667 [2d Dept 2009]). A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

Here, the moving defendant established her *prima facie* entitlement to judgment, as a matter of law, by submitting evidence that she neither created nor had actual or constructive notice of the condition that allegedly caused the plaintiff's accident. In support of the motion, defendant submits, *inter alia*: her examination before trial transcript testimony, wherein she testified, *inter alia* that: on the date of his accident, the debris covered only 25%-30% of the sidewalk leaving the remaining 70%-75% of the sidewalk clear; within two weeks prior to the date of the accident the plaintiff was aware that construction was ongoing at the premises as he saw evidence of it on at least two prior occasions; and prior to the date of the accident, the plaintiff had never made any

complaints to anyone regarding construction debris on the sidewalk adjoining the subject premises. Additionally, defendant Rob submitted her own examination before trial transcript testimony wherein she testified *inter alia* that: during the course of construction, she never observed any construction debris on the adjoining sidewalk; she was present in her home during the time the construction was ongoing; she never heard about anyone falling on the adjoining sidewalk; and she never received any complaints from anyone regarding rocks, bricks or other construction debris on the adjoining sidewalk prior to July 17, 2018, nor did she receive any violations/citations from any municipality as a result of the construction work being performed.

Plaintiff raises a triable issue of fact in opposition. Plaintiff submits, *inter alia*: his own examination before trial transcript testimony, wherein he testified that he fell over some of the construction debris that had been left on the corner of the sidewalk outside moving defendant's home. He also submits the examination before trial transcript testimony of defendant Rob, wherein she testified, *inter alia* that, after work each day, her contractor would transport the damaged cement from the driveway to the grassy area next to the sidewalk and leave it there overnight. Further, he submitted photographs of the subject accident site.

It is well-established law that photographs accurately depicting the area in which a plaintiff fell generally create an issue of fact as to whether a premises owner had constructive notice of a defect which caused a trip and fall which is best submitted to the jury (*Zavarro v Westbury Property Inv. Co.*, 244 AD2d 547 [2d Dept 1997]). Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]).

Accordingly, there are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether defendant/third party plaintiff had either actual or constructive notice of a defective condition, whether defendant/third-party plaintiff created a defective condition causing plaintiff's accident, and whether defendant/third-party plaintiff acted reasonably under the circumstances (*See Gonzalez v American Oil Co.*, 42 AD3d 253 [1st Dept 2007]). On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, the motion must be denied.

Accordingly, it is

ORDERED that the motion by defendant/third-party plaintiff Parvin Rob for an order granting her summary judgment, pursuant to CPLR 3215, and dismissing plaintiff's complaint is denied.

The foregoing constitutes the decision and order of the Court.

Dated: August 10, 2021

A handwritten signature in black ink, appearing to read 'T. Dufficy', with a stylized flourish at the end.

TIMOTHY J. DUFFICY, J.S.C.