Martinez v Ista W. 35th St. LLC
2022 NY Slip Op 30083(U)
January 13, 2022
Supreme Court, New York County
Docket Number: Index No. 152741/15
Judge: Sabrina B. Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57
____________________________________X
JOE MARTINEZ,
Plaintiff,

-against-

ISTA WEST 35TH STREET LLC and
RADIO STAR LLC,
Defendant
____________________________________X
ISTA WEST 35TH STREET LLC,

Third-Party Plaintiff,

-against-

RADIO STAR LLC,

Third-Party Defendant.
____________________________________X

DECISION & ORDER

Index No.: 152741/15

Motion Seq 1 & 2

HON. SABRINA B. KRAUS

The following e-filed documents, listed by NYSCEF document number were read on these motions for summary judgment (Motion Seq No 1 and 2): 61-75, 76-78, 80-103, 107, 111 - 133, and 135-147,

BACKGROUND

Plaintiff commenced this action in Supreme Court New York County seeking damages for personal injuries as a result of an alleged sidewalk defect. The property is owned by ISTA West 35th Street LLC (ISTA) and leased to Radio Start LLC (Radio). ISTA appeared and filed a cross claim as against Radio Star for negligence in maintaining the sidewalk in front of the leased premises. Radio appeared and asserted cross claims as against ISTA.

THE PENDING MOTIONS

In May 2021, Radio moved for summary judgment, dismissing Plaintiff's complaint, as well as ISTA's cross-claims. In June 2021, ISTA moved for summary judgment, dismissing Plaintiff's complaint, as well as, any cross-claims. On January 10, 2022, the court heard oral argument and reserved decision.

The motions are consolidated herein for disposition. For the reasons stated below the motions are granted in part.

DISCUSSION

The following facts are established by the moving papers. On September 8, 2014, Plaintiff was walking on the sidewalk of 35th Street, between 5th and 6th Avenue, when the heel of his sneaker on his left foot came in contact with a crack on the sidewalk, which he alleges caused him to stumble and suffer personal injuries. Plaintiff was walking a routine route on his way home from work when the accident occurred. The accident occurred in front of 3 West 35th Street, New York, New York (Subject Premises). Plaintiff did not notice the crack in the sidewalk prior to the accident. ISTA is the owner of the Subject Premises. Radio is a tenant of the Subject Premiss and occupies the street level store, pursuant to a lease.

Radio and Ista's motion for summary judgment as against Plaintiff is granted

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital,* 68 NY2d 320 [1986], citing *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404,)".

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, supra, 49 N.Y.2d at p. 562)".

Specifically, in an action involving a defect in a sidewalk, "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. Only then does the burden shift to the plaintiff to establish an issue of fact, *(Hutchinson v. Sheridan Hill House Corp.*, 19 NYS3d 802, [Ct of Appeals 2015])."

Radio argues the complaint should be dismissed because the crack in the sidewalk was a trivial defect and thus non-actionable. In support, Radio offers the affidavit of Frank P Villano, P.E. (Villano), who inspected the accident location in September 2017, three years after the accident occurred. Villano measured the height differential between the highest portion of the two surfaces separated by the crack, and found it to be 11/16 of an inch. Villano opines that the defect in the sidewalk was the result of daily wear and tear, and is a trivial defect, not a tripping hazard.

In opposition, Plaintiff, for the first time, now states that the height differential of the crack in the sidewalk was an inch and a half at the time of the incident. Plaintiff does not submit any evidence to support this allegation, beyond his own testimony. Plaintiff submits the affidavit of his own expert, Scott M. Silberman, P.E. (Silberman). Silberman did not visit the site of the alleged incident, but rather formed an opinion based on the documents contained in Radio's

motion to dismiss, including the photographs taken in February 2018, as well as Plaintiff's deposition testimony, and affidavit dated August 17, 2021.

In his opinion, Silberman relies on § 19-152(a)(4) of the Administrative Code of the City of New York, which defines a substantial defect as:

> 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

Silberman argues that even accepting as true Villano's measurement of the crack at 11/16 of an inch, it wold still be considered a substantial defect, being greater than half an inch.

The Court of Appeals in *Hutchinson*, supra, clearly lays out the framework for courts to consider when deciding if a defect is trivial, and thus non-actionanable. The size or dimension of the defect is only one factor to be considered. The court cites to an earlier decision, *Trincere v County of Suffolk* (90 NY2d 976 [1997]), wherein they said,

> *Trincere* thus recognizes the doctrine that a defect alleged to have caused injury to a pedestrian may be trivial as a matter of law, but requires a holding of triviality to be based on all the specific facts and circumstances of the case, not size alone. In our opinion, we cited *Guerrieri v Summa* (193 AD2d 647 [2d Dept 1993]), which expressed the trivial defect doctrine as the principle that a defendant " 'may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection' " (id. at 647, quoting *Liebl v Metropolitan Jockey Club*, 10 AD2d 1006, 1006 [2d Dept 1960], rearg denied 11 AD2d 946 [2d Dept 1960]; see also e.g. *Trionfero v Vanderhorn*, 6 AD3d 903, 903-904 [3d Dept 2004]; *Squires v County of Orleans*, 284 AD2d 990, 990 [4th Dept 2001]; *Morales v Riverbay Corp.*, 226 AD2d 271, 271 [1st Dept 1996]). *Trincere* and the line of cases in which it stands establish the principle that a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it "unreasonably imperil[s] the safety of" a pedestrian (*Wilson v Jaybro Realty & Dev. Co.*, 289 NY 410, 412 [1943]).

The court in *Hutchinson* further states, " lower courts, appropriately, find physically small defects to be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot." However, the court notes that, "if a defect is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence," and yet an accident occurs that is traceable to the defect, there is no liability," citing *Beltz v City of Yonkers*, 148 NY 67, 70 [1895].

In the instant action, at his deposition, Plaintiff admits he was walking the same route he had walked for almost thirty (30) years, and that the alleged incident occurred around approximately 3:10 in the afternoon, on a cloudy day. Plaintiff described the lighting as "okay". Plaintiff stated there was scaffolding around where the alleged incident occurred, but that there was lighting under the scaffolding, and that there was nothing hindering him from seeing the area where the accident occurred. Plaintiff described the pedestrian traffic as medium. Plaintiff admits that in the thirty (30) years that he had walked past this area, he never noticed the crack.

Plaintiff was shown photographs of the crack during his deposition, at which time he acknowledge the photographs fairly and accurately depict how the area looked at the time of the accident. These photographs, submitted as exhibit L to Radio's motion for summary judgment, show only a slight height differential between the two pieces of concrete in the sidewalk. A crack, so slight, that even Plaintiff, who daily, walked safely over this area, over thirty (30) years, himself never noticed.

The *Hutchinson* court , citing *Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 984 [2d Dept 2011]), states, photographs that are acknowledged to "fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable"

In further support, Ista cites to a case, with similar facts, wherein the court found the defect to be trivial. In *Shiles v. Carillon Nursing and Rehabilitation Center*, LLC, 54 A.D.3d 746 (2nd Dept. 2008), the court found that a sidewalk crack was trivial despite plaintiff's testimony that there was a 2" height differential, as the incident occurred during daylight hours, on a clear day, with nothing obstructing her view.

In consideration of all of the facts as presented by the parties, including the appearance of the crack, taken together with the time, place and circumstance of the alleged injury, the court finds that Radio and Ista have established that the crack in the sidewalk was trivial and insufficient to sustain a cause of action. Plaintiff has failed to establish an issue of fact, as the only evidence submitted by Plaintiff was that of an expert, who's opinion mainly focused on the size of the defect, and not the other relevant factors as discussed above.

It is unnecessary for the court to address the cross claims, as Plaintiff's action is dismissed.

CONCLUSION

Accordingly it is hereby:

ORDERED that third party defendant Radio Star LLC's motion for summary judgment and defendant Ista's motion for summary judgment are granted to the extent of dismissing Plaintiff's action; and it is further

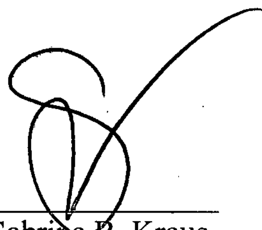
ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that service of this order upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website), and it is further

ORDERED that any relief sought not expressly addresses herein has nonetheless been considered and is denied.

This constitutes the decision and order of the court.

Dated: January 13, 2022



Hon. Sabrina B. Kraus
Acting Supreme Court Justice