

Dall v Carnegie Hall Corp.

2022 NY Slip Op 30090(U)

January 14, 2022

Supreme Court, New York County

Docket Number: Index No. 156147/2017

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

GAY E. DALL,

Plaintiff,

- v -

THE CARNEGIE HALL CORPORATION, TEMCO SERVICE
INDUSTRIES, INC., THE CITY OF NEW YORK, TRI STATE
MARBLE LLC

Defendants.

-----X

INDEX NO. 156147/2017
MOTION DATE 01/12/2022
MOTION SEQ. NO. 003, 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 121, 122, 139, 140, 141, 142, 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 168, 169, 170

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 123, 138, 144, 154, 155, 156, 157, 158, 159, 160, 164, 165, 166, 167

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 003 and 004 are consolidated for disposition.

The motion (MS003) by defendants The Carnegie Hall Corporation, Temco Service Industries, Inc. and the City of New York (collectively, "Movants") for summary judgment is granted. The motion (MS004) by defendant Tri State Marble LLC ("Tri State") for summary judgment is granted.

Background

Plaintiff alleges that she tripped and fell on the sidewalk in front of Carnegie Hall on August 28, 2016. She insists that she fell over a Masonite strip that was placed on the sidewalk by Tri State. Plaintiff claimed that these strips were not flush with the sidewalk and so they

created a tripping hazard. Defendant Temco provided building services for the property; defendant Carnegie Hall is the tenant and the City of New York owns the premises. Temco hired Tri State to do caulking work on the sidewalks around Carnegie Hall and the strips allegedly covered up the caulking work.

Tri State argues, in part, that the complaint should be dismissed because it was a trivial and de minimis defect. It claims that Masonite strips that were duct taped to the sidewalk were about a quarter of an inch in height above the sidewalk and that the strips themselves were about an eighth of an inch thick. Tri State also claims it owed no duty to plaintiff, that it cannot be held liable for the action of what it refers to as “independent contractors” who were hired to put down these strips and that the work was not inherently dangerous.

Movants blame Tri State for the accident. The City argues that it should be dismissed from the case because it was an out-of-possession landlord, the lease required defendant Carnegie Hall to maintain the surrounding areas and the accident did not occur because of a structural or design defect. Movants claim that they did not supply these Masonite strips and the caulking work was done exclusively by Tri State so they should not be held liable.

In opposition, plaintiff emphasizes that Carnegie Hall has a duty to maintain the surrounding sidewalk. She testified that “I was walking along, and the next thing my foot felt like it stuck to the cardboard, and I went lunging forward on my hands” (NYSCEF Doc. No. 73 at 12). Plaintiff admitted she did not see the cardboard before she fell on it and that the area was very crowded with pedestrians. She also submitted a video link of the incident. Plaintiff claims that there are issues of fact regarding the defective condition.

She claims the work was inherently dangerous and that defendants had constructive notice of the dangerous condition of the sidewalk. With respect to whether the condition was

trivial, plaintiff argues that there is no specific height differential and the Court should refrain from reaching a conclusion as a matter of law on this issue. Plaintiff asks the Court to consider that her views were obstructed by other pedestrians and so the condition was not open and obvious. She insists defendants had sufficient knowledge of the condition because the project had been ongoing for 9 days before the accident.

In reply, defendants contend that plaintiff failed to rebut their claim that the defect was both trivial and open and obvious.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“[W]hether 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” (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). “Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury” (*id.*). A court must examine “the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury” (*id.* at 978).

“There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises . . . and even a trivial defect may constitute a snare or trap” (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166, 716 NYS2d 657 [1st Dept 2000] [internal citations omitted]). “While a gradual, shallow depression is generally regarded as trivial the presence of an edge which poses a tripping hazard renders the defect nontrivial” (*id.* [internal citations omitted]).

“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” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). “The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances” (*id.* at 80).

As an initial matter, the Court concludes that the defect in question was trivial and grants defendants' motions for summary judgment dismissing the complaint. Myles McDermott, the witness for defendant Tri State, testified that the strips are about a quarter of an inch in height (NYSCEF Doc. No. 86). That combined with the photographs submitted demonstrates that the defect at issue is not actionable (*Boynton v Haru Sake Bar*, 107 AD3d 445 [1st Dept 2013] [finding that a one-half inch differential between the sidewalk and the cellar door hatch was a trivial defect]). Plaintiff did not present any evidence showing that this defect was a significant tripping hazard despite being de minimis (*Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488 [1st Dept 2011] [dismissing a trip and fall case where the height differential between two sidewalk flags was half an inch]). Moreover, plaintiff does not dispute the purported height differential or adequately argue that the alleged defect should be considered a trap or a snare. Simply put, the cardboard (Masonite stripes) was duct taped down and, somehow, plaintiff tripped over them. That plaintiff tripped does not automatically mean that the defect was actionable.

The Court finds that the circumstances also support a finding that the defect was trivial as well as open and obvious. “[A] landowner has no duty to warn of an open and obvious danger. By contrast, a latent hazard may give rise to a duty to protect entrants from that danger. While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion” (*Tagle v Jakob*, 97 NY2d 165, 169, 732 NYS2d 331 [2001] [citations omitted]). Plaintiff submitted a video of the incident that rebuts her claim that the area was so crowded that she could not see the Masonite strips. In fact, there isn't anyone in front of plaintiff before she fell. She had an adequate opportunity to see the alleged

defect, despite it being de minimis, thereby rendering it open and obvious to the extent it posed any danger.

Summary

There is no doubt in this case that plaintiff tripped and fell over Masonite strips. The question for this Court is whether those strips, under all the circumstances, actually constituted a non-trivial defect. A close inspection of the evidence presented here (the video, the photographs and the deposition testimony from the various witnesses) leads to an obvious conclusion. That the strips created only a trivial defect that did not pose a significant hazard to plaintiff.

The Court observes that the video is over fifteen minutes long and contains countless examples of people walking right over and past the alleged defect without incident both before and after plaintiff tripped and fell. While that is not dispositive, it supports a finding that the defect was trivial. And, of course, the small height differential created by the Masonite strips on the sidewalk is tiny (one fourth of an inch) and plaintiff does not dispute this measurement (plaintiff did not, for example, submit an expert's affidavit disputing the height differential). That, combined with the complete absence of other characteristics that would suggest that the strips were a tripping hazard, compels this Court to dismiss the complaint.

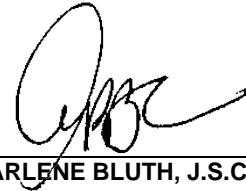
Accordingly, it is hereby

ORDERED that the motion (MS003) by defendants The Carnegie Hall Corporation, Temco Service Industries, Inc. and the City of New York for summary judgment and the motion (MS004) by defendant Tri State Marble LLC for summary judgment are both granted, this case is dismissed and the Clerk is directed to enter judgment accordingly in favor of these defendants

and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

1/14/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE