

Webster v UDR 10 Hanover LLC
2022 NY Slip Op 30830(U)
March 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 516524/2019
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on 11th the day of March, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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AJA WEBSTER,

Plaintiff,

Index No. 516524/2019

-against-

UDR 10 HANOVER LLC,

DECISION AND ORDER
MS #2

Defendants.

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The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	14-15 _____
Answering Affidavit (Affirmation) _____	26 _____
Reply Affidavit (Affirmation) _____	27 _____
Supplemental Affidavit (Affirmation) Pleadings – Exhibits _____	16-23 _____
Stipulations – Minutes _____	
Filed Papers _____	

This action involves a trip and fall where Plaintiff alleges that she tripped and fell on an uneven sidewalk flag abutting Defendant’s premises located at 10 Hanover Square, New York, New York, 10005 (the Premises) on April 4, 2018.

Defendant moves for an Order pursuant to CPLR §3212 dismissing Plaintiff’s Complaint.

Defendant makes three arguments for dismissal. First, that they had no notice of the sidewalk defect, second that Plaintiff cannot identify what caused her to fall, and third that the sidewalk defect is trivial.

In support of their argument that it had no notice, Defendant submits the testimony and Affidavit of Katherine Ullman, a property manager for Defendant. Ullman testified that she walked on the subject sidewalk daily in March and April of 2018 around 9:30am, passing the area of Plaintiff's accident, and did not observe any mis-leveled or uneven sidewalk flags in 2018 prior to Plaintiff's fall.

Ullman also testified that Defendant's superintendent conducts monthly exterior preventative maintenance inspections on top of regular, less formal inspections and that these inspections include looking for any issues with the sidewalk and there is no record of any problems with the sidewalk in the company records.

Plaintiff concedes that Defendant's employees conducted weekly sidewalk inspections and put out the garbage the day before in the location of the defect. However, Plaintiff argues that just because the defect was not reported does not mean it was not there.

Plaintiff further argues that the nature of the alleged defect, a sidewalk flag raised 1 3/4 inches, is a condition that could not have occurred over night, that it necessarily developed over an extended period of time such that Defendant should have reasonably discovered it.

"A defendant moving for summary judgment in a slip-and-fall case has the burden of demonstrating, prima facie, that it did not create the alleged dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Jeremias v. Lake Forest Estates*, 147 AD3d 742, 742 [2d Dept

2017)). “A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it” (*id.*).

The non-transient nature of the alleged defect, together with the photos submitted by both sides which show that the sidewalk flags were uneven is sufficient to raise a question of fact as to whether Defendant had constructive notice of the alleged defect.

“Photographs that accurately depict the area in which a plaintiff fell may be adequate for a trier of fact to infer that a defendant had constructive notice of the alleged defect” (*Pitt v New York City Transit Authority*, 146 AD3d 826, 829 [2d Dept 2017]). “[I]t has been held that a jury could infer from the irregularity, width, depth and appearance of the defect in a concrete surface ... in a photograph that the condition must have existed over such a length of time that knowledge of the condition should have been acquired by the defendant” (*F.M. by Marchica v North Merrick Union Free School District*, 68 Misc3d 1209(A), 6 [Sup Ct, Nassau County 2020].)

As to Defendant’s second argument that Plaintiff cannot identify what caused her to fall, Plaintiff testified at her deposition that “All of a sudden I felt my foot go uneven, and I stepped, and it seemed like I just stepped on – at that time I didn't know what it was, but it was uneven, so my foot actually just went like this (indicating). Then I fell to the ground”. She then testified that “Yes, it felt like one flag was higher than the other”. The photographs of the sidewalk support Plaintiff’s claim of an uneven sidewalk. The fact that the uneven flag was pointed out to her after the fall merely goes to the weight to be given to Plaintiff’s testimony that she felt an uneven sidewalk flag that caused her to fall.

Defendant’s third argument that the alleged height differential between the flags is trivial presents a question of fact for the jury. Defendant asserts that the height

differential is an inch and a half. Plaintiff submits a photo which he asserts shows that the difference is between 1 1/2 and 1 3/4 inches.

There is no minimal dimension test or per se rule that a defect must be of a certain size in order to be actionable (*Trincere v. County of Suffolk*, 90 NY2d 976, 977 [1997]).

A defendant cannot obtain summary judgment under the trivial defect doctrine solely on the basis of the dimensions of the alleged defect and the court must consider all of the facts and circumstances presented when deciding such a motion (*Hutchinson v. Sheridan Hill House*, 26 NY3d 66 [2015]).

It can not be determined from the photographs submitted, and the parties varying estimates of the height differential, whether the alleged defect was trivial.

WHEREFORE, it is ORDERED that Defendant's motion dismissing Plaintiff's Complaint is DENIED.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.