Lie Mei v Cornish Assoc., LLC

2022 NY Slip Op 32395(U)

January 19, 2022

Supreme Court, Queens County

Docket Number: Index No. 704986/2018

Judge: Maurice E. Muir

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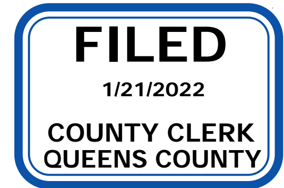
Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR
Justice

LIE MEI,	IAS Part - 42
Plaintiff,	Index No.: 704986/2018
-against-	Motion Date: 5/13/21
CORNISH ASSOCIATES, LLC,	Motion Cal. No. 19
Defendant.	Motion Seq. No. 4

The following electronically filed ("EF") documents read on this motion by Cornish Associates, LLC ("Cornish" or "defendant") for order pursuant to CPLR § 3212 granting it summary judgment and dismissing Lie Mei's ("Ms. Mei" or "plaintiff") complaint in its entirety together with such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion -Affirmation- Exhibit-Service....................	EF 48 - 57
Affirmation in Opposition- Exhibit-Service................................	EF 60 - 63
Affirmation in Reply..	EF 66

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by Ms. Mei, who alleges that on March 22, 2018, she injured herself on the defendant's sidewalk located at 83-03 Cornish Avenue, in the County of Queens, city and state of New York due to the dangerous, defective, hazardous and trap like conditions. As a result, on April 3, 2018, the plaintiff commenced the instant action; and on May 4, 2018, issue was joined where, the defendant interposes an answer. Now, the defendant seeks summary judgment in its favor. The

defendant argues that "[a]t her deposition, the plaintiff testified unequivocally that she did not feel anything happen to either foot immediately before she had her accident. The footage of the accident does not depict any condition of the subject sidewalk causing the plaintiff to fall." As such, the defendant argues that ". . . the testimony of the plaintiff and the footage of the accident are fatal to her claim. Consequently, the complaint . . . must be dismissed. The law is clear that, in a matter involving a trip and fall, the plaintiff's inability to identify the cause of the fall is fatal to the cause of action. This is because a finding that the defendant's negligence, if any, proximately caused the accident would be based on speculation."

In opposition, the plaintiff testified at her deposition that while she was on the ground, she observed a hole or trap in the sidewalk, which cause her to fall. Plaintiff further argues that "[d]efendant erroneously alleges, '[t]he Plaintiff could not describe the cause of her accident. Moreover, the plaintiff argues that "[n]onsensically, the Defendant alleges that the defective condition could not be observed from the camera vantage point and presumably, that because the defect could not be visually observed from the distance that the camera was from the defective condition that is the condition "must not exist".

APPLICABLE LAW

In a slip and fall case, a property owner moving for summary judgment has the burden of making a *prima facie* showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (*Johnson v. 101-105 S. Eight St. Apts. Hous. Dev. Fund Corp.*, 185 AD3d 617 [2d Dept 2020] citing *Parietti v. Wal-Mart Stores, Inc.,* 29 NY3d 1136 [2017]; *see also Bonilla v. Southside United Hous. Dev. Fund Corp.,* 181 AD3d 550 [2d Dept 2020]; *Colini v. Stino, Inc.,* 186 AD3d 1610 [2d Dept 2020]). Moreover, "in a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall" (*Mallen v. Dekalb Corp.*, 181 AD3d 669 [2d Dept 2020]; *Moiseyeva v. New York City Hous. Auth.*, 175 AD3d 1527 [2d Dept 2019]; *see Bilska v. Truszkowski*, 171 AD3d 685 [2d Dept 2019]; *Singh v. City of New York*, 136 AD3d 641 [2d Dept 2016]; *Buglione v. Spagnoletti,* 123 AD3d 867 [2d Dept 2014]; *Diaz v. City of New York*, 190 AD3d 940 [2d Dept 2021]; *see also Cross v. Friendship*, 154 AD3d 917 [2d Dept 2017]). "Where it is just as likely that some other factor,

such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation" (*Mallen v. Dekalb Corp.*, 181 AD3d 669 [2d Dept 2020] citing *Ash v. City of New York*, 109 AD3d 854, 855 [2d Dept 2013]).

DISCUSSION

From the onset, the court finds that the defendant failed to demonstrate that the surveillance video footage was properly authenticated and admissible evidence. (CPLR § 3212(b); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1984]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Ordinarily, videos are admissible if the proponent lays the proper foundation and the probative value of the evidence outweighs any prejudice. (*Caprara v. Chrysler Corp.*, 71 AD2d 515 [3d Dept 1979] *affd* 52 NY2d 114, *reg den* 52 NY2d 1073 [1981]; *People v. Franzese*, 154 AD3d 706 [2 Dept 2017]). Furthermore, a videotape may be authenticated by a witness to the recorded events, testimony by the installer or maintainer of the equipment that the subject matter was accurately recorded, or chain of custody evidence establishing "acceptable inferences of reasonable accuracy and freedom from tampering" (*People v. Patterson*, 93 NY2d 80 [1999]; *see also Zegarelli v. Hughes*, 3 NY3d 64 [2004]; *People v. Ely*, 68 NY2d 520 [1986]; *People v. Franzese*, 154 AD3d 706 [2 Dept 2017]). Here the defendant failed to lay the proper foundation for the admissibility of the surveillance video footage.

Moreover, the evidence submitted in support of the defendant's own motion revealed a triable issue of fact as to whether the plaintiff was unable to identify the cause of her fall. Specifically, the defendant submitted a transcript of the plaintiff's deposition, at which she testified that while she was on the ground, she observed a hole or trap in the sidewalk, which cause her to fall. Therefore, the defendant did not establish its prima facie entitlement to judgment as a matter of law by showing that the plaintiff was unable to identify either the location or the cause of the accident." (*see Davis v. Sutton,* 136 AD3d 731, 732 [2d Dept 2016]; *Gotay v. New York City Housing Auth.*, 127 AD3d 693 [2d Dept 2015]).

Furthermore, the defendant has not established that the defect alleged by the plaintiff was trivial and, hence, not actionable. "Whether 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 [1997] [internal quotation marks omitted], quoting *Guerrieri v. Summa*, 193 AD2d 647 [2d Dept 1993]; *Platkin v. County of Nassau*, 121 AD3d 879 [2d Dept 2014]; *Turuseta v. Wyassup-Laurel Glen Corp.,* 91 AD3d 632, 633 [2d Dept 2012]; *Copley v. Town of Riverhead*, 70 AD3d 623 [2d Dept 2010]). However, a property owner may not be held liable for trivial defects, not constituting a trap, snare, or nuisance, over which a person might merely stumble, stub his or her toes, or trip (*see Trincere v. County of Suffolk*, 90 NY2d at 977; *Platkin v. County of Nassau*, 121 AD3d at 880; *Moses v. T-Mobile*, 106 AD3d 967 [2d Dept 2013]; *Schenpanski v. Promises Deli, Inc.,* 88 AD3d 982, 983 [2d Dept 2011]). In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere v. County of Suffolk*, 90 NY2d at 978 [internal quotation marks omitted]). There is no "minimal dimension test" or "per se rule" that a condition must be of a certain height or depth in order to be actionable (*id.* at 977; *see Platkin v. County of Nassau*, 121 AD3d at 879; *Milewski v. Washington Mut., Inc.,* 88 AD3d 853 [2d Dept 2011]; *Ricker v. Board of Educ. of Town of Hyde Park*, 61 AD3d 735 [2d Dept 2009]). Photographs that fairly and accurately represent the accident site may be used to establish whether a defect is trivial and, therefore, not actionable (*see Platkin v. County of Nassau*, 121 AD3d at 880; *Das v. Sun Wah Rest.*, 99 AD3d 752 [2d Dept 2012]). Here, the evidence submitted by the defendant in support of its motion, including the transcripts of the deposition testimony of the parties, surveillance footage of the sidewalk and Chris Valerakis ("Mr. Valerakis") was insufficient to demonstrate that the alleged defect was trivial as a matter of law and, therefore, not actionable (*see Martyniak v. Charleston Enters. LLC,* 118 AD3d 679 [2d Dept 2014]; *Ortiz v. 82-90 Broadway Realty Corp.,* 117 AD3d 1016 [2d Dept 2014]; *Sahni v. Kitridge Realty Co., Inc.*, 114 AD3d 837 [2d Dept 2014]; *Shmidt v. JP Morgan Chase & Co.*, 112 AD3d 811 [2d Dept 2013]; *Nagin v. K.E.M. Enters., Inc.,* 111 AD3d 901 [2d Dept 2013]; *Brenner v. Herricks Union Free Sch. Dist.*, 106 AD3d 766 [2d Dept 2013]).

Since the defendant failed to meet its initial burden as the movant, it is not necessary to review the sufficiency of the plaintiff's opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1986]). Furthermore, summary judgement should not be granted where the facts are in dispute, where conflicting inference may be drawn from the evidence, or where there are issues of credibility." (*Collado v. Jiacono*, 126 AD3d 927 [2d Dept 2014] citing *Scott v. Long*

Island Power Authority, 294 AD2d 348 [2d Dept 2002]; *see also Bush v. St. Claire's Hospital*, 82 NY2d 738 [1993]; *Fobbs v. Shore*, 171 AD3d 874 [2d Dept 2019]).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment, pursuant to CPLR § 3212, denied in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the plaintiff on or before February 15, 2022.

The foregoing constitutes the decision and order of the court.

Dated: January 19, 2022
Long Island City, NY

MAURICE E. MUIR, J.S.C.

5 of 5