

Frish v Oceana Homeowners Assn., Inc.

2022 NY Slip Op 33671(U)

October 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 515700/2020

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of October, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

OLEG FRISH,

Plaintiff,

DECISION / ORDER

- against-

Index No.: 515700/2020

Mot. Seq. No. 2, 3

Date Sub: 10/13/22

OCEANA HOMEOWNERS ASSOCIATION, INC.,
FIRST SERVICE RESIDENTIAL NEW YORK, INC.
AND OCEANA MANAGEMENT INC.,

Defendants.

-----X

The following e-filed papers were read herein:

NYSCEF Doc. No.¹

Notice of Motion, Affirmation and Exhibits

28-53

Notice of Cross Motion, Affirmation and Exhibits

55-57

Opposing Affirmation and Exhibits

59

Reply

61

Upon the foregoing papers in this personal injury action, plaintiff moves (in motion sequence 2), for an order, pursuant to CPLR 3212 granting him summary judgment on the issue of liability in this action which arises from a trip and fall accident. Defendants Oceana Homeowners Association, Inc. and First Service Residential New York, Inc. cross-move, in

¹ New York State Courts Electronic Filing Document Numbers.

motion sequence 3, for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint. The action was previously discontinued as against defendant Oceana Management Inc.

Factual Background and Procedural History

Plaintiff commenced the action by filing the summons and verified complaint on August 25, 2020 against defendants as owner and management company with regard to the property where plaintiff alleges that he tripped and fell on or about September 12, 2019. Defendants answered the complaint and discovery ensued. The Note of Issue was filed on May 2, 2022.

Plaintiff's complaint alleges that the incident occurred on the sidewalk in front of the management office for this condominium property, known as Oceana Condominiums, which is located in Brighton Beach, Brooklyn. At the time, plaintiff lived at the complex. He claims the sidewalk was defective, uneven, unlevel, chipped and/or otherwise deficient, which was a defective and dangerous condition [Doc 35 Bill of Particulars, ¶7].

Plaintiff's Arguments

Counsel for plaintiff avers that plaintiff "was caused to trip and fall on September 12, 2019 as a result of unsafe conditions in the form of a raised, uneven and unleveled sidewalk flag directly abutting the management office of the gated condominium complex known as Oceana Condominiums and Club." He annexes plaintiff's deposition transcript and supplemental bill of particulars as Documents 37 and 38. He also provides the transcript of a deposition of a superintendent, Mr. Novikov, at Document 39. Plaintiff provides an

affidavit prepared almost a year after his EBT. Counsel claims that these items establish plaintiff's entitlement to summary judgment.

The only other items submitted by plaintiff, which are annoyingly not labeled, are the pleadings, seven items labeled "transcripts" and six labeled "pictures" or "screen shots." Document 38 is plaintiff's EBT transcript. Document 39 is Mr. Yevgeniy Novikov's EBT transcript. Documents 43 and 48 are further copies of plaintiff's EBT transcript. Document 44 is another copy of Mr. Novikov's EBT transcript, as are Documents 45 and 49. Document 41 is a photo of a sign that states that "this space is owned by Oceana Home Owner's Association." Document 42 includes photos of a sidewalk, without any markings or arrows.

Plaintiff's counsel notes that NYC Administrative Code § 7-210 imposes a non-delegable duty upon property owners to maintain and repair the sidewalk abutting their property, and specifically imposes liability upon property owners for injuries resulting from a violation of the statute, citing several cases. He then summarizes the law "In order to set forth a prima facie case of negligence plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury." He concludes that "all of the foregoing elements are met here" and asserts that the defendants breached their duty by failing to "maintain the sidewalk directly abutting their management office in a safe and proper manner as there existed a defective condition in the form of a raised sidewalk flag that created a tripping hazard to the public" [Aff Doc 29 ¶42].

Plaintiff's EBT is not helpful at all in either identifying where he fell or what was wrong with the sidewalk. On Page 42, he is shown a photo and says, "I just made a step and stumbled right at this place, where the elevation is." He continued "I think my -- my -- the edge of my shoe just stopped -- it was actually stopped and stumbled by this -- by the elevation, by the lines. Where the other plate, ground plate is." He said he did not take the photo. The attorney identifies it as "defense exhibit C." The item [NYSCEF Doc 42] called "screenshots" has 8 almost identical pictures, none of which are identified as the defendant's Exhibit C shown to plaintiff at his EBT, none of which are close-ups, nor do they have any marking as to where the plaintiff may have tripped and fell. There is no apparent indication of a defect in the sidewalk. His affidavit, signed almost a year after his vague deposition testimony and three years after his accident, is the first time that he specifies that he "was caused to trip due to a defective raised sidewalk flag that created a height differential of approximately one (1) inch. The sidewalk contained a rubber sealant that was deteriorated and eroded, there was a gap between the panels, and one panel was higher than the other."

Yevgeniy Novikov testified with the assistance of a Russian interpreter via Zoom at a deposition held on February 17, 2022. He said he is employed by Oceana Homeowners Association and is an assistant superintendent. He started working for them in 2005. He said he is the only assistant, and the person he reports to has changed so often he did not know who the superintendent was on the date of the plaintiff's accident. He could not say how many maintenance employees there were at any one time. He said "it was two years ago. I don't remember anything" [Page 10]. He described the premises as having 16 buildings with a "big lawn, inside and outside pool." There is a management office. He

operates under an annual plan which is posted on the wall in the office. He did not remember if part of the annual plan requires inspection of sidewalks [Page 16]. He continued “Well, when we notice some kind of defect, we report it to the management office. It's not included in the annual plan.” Mr. Novikov testified that he did not know that plaintiff had brought a lawsuit until he was asked to appear at a deposition. He was then shown a photo, which was identified as plaintiff's Exhibit 1. He described it as showing him taking plaintiff home after the accident. It apparently was a screen shot from a video of the accident. The attorneys reference a video, but it was not included in the motion. He said, “at one moment I heard somebody screaming ‘oy.’ I turned my head and I saw Mr. Frish lying on the sidewalk” [Page 20]. Asked whether the location where plaintiff fell was in the picture, he answered “I don't remember.” He was then shown something identified as plaintiff's Exhibit 2, also not included in the motion, and when asked about a specific area in the photo, Mr. Novikov identified a white material on the sidewalk as “seasonal rubber” [Page 25]. He described it as something applied when a sidewalk is put down, and not afterwards. It had been installed before he started working there. He was asked if he had completed a written accident report, and he said he reported plaintiff's fall to the management office, but did not remember if he completed a written report. When asked “when you helped Mr. Frish up, did he tell you how he believed that the accident happened?” He answered, “I don't remember.” He was shown photos identified as plaintiff's Exhibit 3, then 4 at the deposition, and he could not say where either one was taken, other than “Oceana premises” but, “to be sure I need a bigger picture” [Page 31]. He said plaintiff's accident took place near a small walkway “it's like a service way and very few

people ever walk there” [Page 36]. When he was asked when he had last seen the plaintiff, he responded “There are 3,500 residents in Oceana, and I am in charge of 1,000 apartments. So, I don't remember when, whom I saw” [Page 38].

Defendants' Arguments

Defendants cross-move for summary judgment dismissing the complaint. The only item submitted in support is an affirmation of counsel. Therein, he avers that the defect was trivial, and that “the plaintiff, it seems, would have the defendants be guarantors of plaintiff's every step. However, the Court of Appeals has ruled on the proper approach to a case involving a trivial defect, such as the one in this case” [Aff ¶8]. He then cites *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 (2015) and concludes “[s]imilar to Hutchinson, all factors in determining a motion for summary judgment are present in the instant case, i.e., a measured, alleged defect presented in a photograph, easily seen and easily passed over safely on foot. The parties agree that the height difference between the sidewalk slabs is one inch. The photographs and video demonstrate that this height difference is clearly visible and not in any way obscured. Moreover, the area where this incident took place is not trafficked by a lot of people, meaning there was no reason for a pedestrian not to be looking where he was walking” [¶10].

Plaintiff's Arguments in Opposition

First, plaintiff erroneously argues that the cross motion is untimely. Next, counsel erroneously states that the cross motion is defective because it only includes an affirmation of counsel. Third, counsel argues that the defect was not trivial, and that defendant's argument that it was is “in error”. He disputes the defendants' position that “the defective

condition, a raised sidewalk flag that had approximately a one-inch height differential, was trivial as a matter of law.”

Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[T]he 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable,

summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power*

Auth., 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

More specifically, "a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (see *Burke v Umbaca*, 163 AD3d 618, 618 [2d Dept 2018]; *Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]).

Discussion

The court finds that neither party has made a prima facie case for summary judgment. The plaintiff seems to have inadvertently omitted the photographs which were shown to the witnesses, and the video of the accident he refers to in his affirmation. The photos provided in the motion are clearly not the ones shown to the plaintiff or the superintendent who was deposed. The photos provided do not show any defect in any sidewalk, nor are they authenticated in the EBT transcripts. In order for the court to watch a video submitted as evidence for a motion, counsel must e-file Form EFM-4 "Notice of Hard Copy Filing" to describe the item which is not electronically filed, and then actually provide the video to the court and serve it on the parties. Plaintiff did neither (see *Amezquita v RCPI Landmark Props.*, 194 AD3d 475 [1st Dept 2021]). Plaintiff's recent affidavit was not considered, as it was clearly tailored to support his motion for summary judgment and considerably elaborates, with new facts, on his deposition testimony. The court is entitled to ignore it (see *Vazquez v Takara Condominium*, 145 AD3d 627 [1st Dept 2016]). Plaintiff may not avoid

the consequences of his vague deposition testimony (*see Peralta-Santos*, 139 AD3d at 537; *Mermelstein v East Winds Co.*, 136 AD3d 505 [1st Dept 2016]; *Sowa v Zabar*, 193 AD3d 664, 664 [1st Dept 2021]). Thus, with only the plaintiff's EBT testimony that the "edge of his shoe stumbled," and the superintendent's testimony that he doesn't remember anything, plaintiff does not demonstrate his entitlement to summary judgement.

In order to establish a prima facie case of negligence, the plaintiff must show that the property owner owed a duty to the plaintiff, that the duty was breached, and that the breach proximately caused his injury (*Guzman v Jamaica Hosp. Med. Ctr.*, 190 AD3d 705, 706 [2d Dept 2021]). Here, there is no evidence in the papers that the defendants' duty was breached. There is nothing that indicates where the plaintiff tripped, or that there was a hazardous or defective condition on the sidewalk.

Turning to the defendants' cross motion, the court notes that defendants' cross motion may be considered, contrary to plaintiff's claim it was untimely made. When a timely motion is made on nearly identical grounds, the issues are already properly before the motion court and constitute the requisite good cause to review the merits of an untimely cross motion. Further, a cross motion is not defective if it solely contains an affirmation of counsel. If all of the evidence is in the first motion, legal arguments may be sufficient.

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 (*Simos v Vic-Armen Realty, LLC.*, 161 AD3d 1023, 1024 [2d Dept 2018]). 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. There is no 'minimal dimension test' or 'per se rule' that the condition must be of a certain height or depth in order to be actionable" (*id.*). Physically small defects may 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" (*id.*).

For the defendants to establish a prima facie case for summary judgment in a trip-and-fall case, they may establish their prima facie entitlement to judgment as a matter of law by submitting evidence that they neither created the hazardous condition that allegedly caused the plaintiff's injuries nor had actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*Belton v Gemstone HQ Realty Assoc., LLC*, 145 AD3d 840, 841 [2d Dept 2016]). Here, counsel instead stipulates that the sidewalk flag height differential was greater than one inch, but concludes, essentially, that it was open and obvious and therefore not inherently dangerous. Counsel essentially admits that there was actual or constructive notice of the condition for a sufficient length of time to discover and remedy it, but contends that they were not required to do so. That analysis is incorrect. NYC Administrative Code §7-210 requires property owners to maintain the sidewalk in a reasonably safe condition. If the height differential is one-half of an inch or more, it is a violation of NYC Administrative Code §19-152, and as such, raises a triable issue of fact as to whether it was trivial or if it was hazardous. To be clear, in New York City, if the height differential is one-half inch or more, the defect, in this writer's mind, cannot be trivial as a matter of law.

The Court of Appeals has held that a defect alleged to have caused injury to a pedestrian may be trivial as a matter of law, but requires a finding that the defect is trivial based on all the specific facts and circumstances of the case, not on the size of the defect alone (*Hutchinson Sheridan House Com.*, 26 NY3d 66, 77 [2015]). Here, the court has no information, no photos, no expert's report, nothing is provided to assist the court in evaluating the allegedly hazardous condition to make such a determination. In addition, with the defendants' concession that the height differential was one-inch, the defect cannot be trivial as a matter of law.

Accordingly, both motions are denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.