

Hawkins v Terence Cardinal Cooke Health Care Ctr.
2022 NY Slip Op 33914(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 157079/2019
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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DOROTHY HAWKINS,

Plaintiff,

- v -

TERENCE CARDINAL COOKE HEALTH CARE CENTER,

Defendant.

-----X

INDEX NO. 157079/2019

MOTION DATE 10/19/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144

were read on this motion to/for SUMMARY JUDGMENT

BACKGROUND

Plaintiff commenced this action and alleged damages for personal injury as a result of a trip and fall on a sidewalk. Plaintiff alleges that she was walking on the sidewalk on Fifth Avenue early in the morning and she fell. Initially, plaintiff alleged the fall took place at 1259 Fifth Avenue, later, defendant denied ownership of said premises, plaintiff amended her pleadings to allege the fall took place several blocks away at 1249 Fifth Avenue.

Pursuant to a decision and order issued May 23, 2022, this court denied plaintiff's motion for summary judgment holding that there are material questions of fact which must be determined at trial including, but not limited to, the time and location of the accident as well as the issue of constructive notice.

Now defendant moves for summary judgment alleging that plaintiff can not identify where she fell, nor the defect that caused her accident.

For the reasons stated below the motion is denied.

DISCUSSION

In *Tiles v. City of New York*, 262 A.D.2d 174 (1st Dept. 1999), the First Department held that defendant was not entitled to summary judgment simply because plaintiff, at his deposition, was unable to say with certainty that the reason for his fall was the elevation in the sidewalk, which was observed by plaintiff after he fell and photographically documented. Indeed, its existence and dangerous nature were not disputed on the motion, and it was not plaintiff's burden in opposing defendant's motion for summary judgment to show that he fell over the elevation; rather, it was defendant's burden to show that the alleged sidewalk defect was not the cause of plaintiff's fall. *Id.*

Likewise, in *Narvaez v. 2914 Third Ave. Bronx, LLC*, 88 A.D.3d 500, 501 (1st Dept. 2011), plaintiff, an elderly woman with limited education, had difficulty articulating her thoughts during her deposition but her testimony, as a whole, was consistent with her claim that she tripped and fell on a raised sidewalk flag in front of 2914 Third Avenue. The maps submitted by defendant supported plaintiff's claims as to the location of the accident. *Id.* Any discrepancies in her testimony raise credibility issues for the trier of fact. *Id.* Defendant's motion for summary judgment was denied and the denial was affirmed. *Id.*

Any inconsistencies in plaintiff's evidence regarding the time and location of the fall, are, as previously held by this Court, material questions of fact which must be determined at trial.

Section 7-210 requires the owner of real property abutting a sidewalk to maintain same in a "reasonably safe condition" and renders that owner liable for "any injury to property or personal injury" which is proximately caused by the failure to reasonably maintain the sidewalk. See New York City Admin. Code § 7-210(a) and (b). Failures to maintain the sidewalk to that

“reasonably safe condition” standard include the negligent failure to install, construct, reconstruct, repave, repair the sidewalk. See New York City Admin. Code § 7-210(a) and (b).

The duty proscribed by 7-210 is nondelegable. *Xiang Fu He v. Troon Mgmt.*, 34 N.Y.3d 167 (2019). As the Court of Appeals held in *Xiang Fu, supra*, “While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7–210.” See *Xiang Fu He*, 34 N.Y.3d at 174; See also *LaRosa v. Corner Locations, II, L.P.*, 169 A.D.3d 512 (1st Dept. 2019). 3

Moreover, the New York City Department of Transportation Highway Rules (“NYC Highway Rule”) § 2-09(5)(iv) and a further provision of the New York City Administrative Code, Section 19-152 all govern the seriousness of sidewalk defects. Turning first to the NYC Highway Rule, the statute defines a “substantial defect” as follows: A trip hazard where the vertical differential between adjacent flags is greater than or equal to 1 /2" or where a flag contains one or more surface defects of one inch or greater in all horizontal directions and is 1 /2" or more in depth.

Likewise, the New York City Administrative Code § 19-152 defines a “substantial defect” identically to the NYC Highway rule as follows: 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. See New York City Admin. Code § 19-152. 34. Courts routinely have stated that with respect to a defendant’s motion for summary judgment, it is defendants’ burden to show, in the first instance, that the alleged sidewalk defect was not the cause of plaintiff’s fall. *Tiles*, 262 A.D.2d at 175. See also *Buckle v. Buhre Ave. Foods*, 232

A.D.2d 232 (1st Dept. 1996). No such *prima facie* showing having been made, defendant is not entitled to summary judgment regardless of the sufficiency of plaintiff's opposing papers.

In addition to the testimony and affidavit of Ms. Hawkins as well as the affidavits of witnesses to the accident described above, plaintiff's expert engineer, Robert Fuchs, PE, submits an affidavit and report. He describes that the photographs of the sidewalk flag abutting Defendant's premises utilized in his report showed a 2¼ inch height difference in the flags where Ms. Hawkins alleges she was injured.

To Mr. Fuchs, these abrupt height changes violate New York City Department of Transportation Highway Rules § 2-09(f)(5)(iv)2 as well as the Administrative Code § 19-152.

This court has already held that the issue of constructive notice is a material fact to be determined at trial.

WHEREFORE it is hereby:

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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11/21/2022

DATE

SABRINA KRAUS, 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