

Marinbach v New IG 79th LLC
2022 NY Slip Op 33937(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 152832/2020
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 152832/2020

ANDREA MARINBACH and MYRON COHEN,

MOTION SEQ. NO. 001

Plaintiffs,

- v -

NEW IG 79TH LLC and BUILDING MANAGEMENT CO.
LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 109, 110, 111, 112, 113, 114, 115, 116, 117, 120, 122, 123 were read on this motion to/for JUDGMENT - SUMMARY.

In this premises liability action commenced by plaintiffs Andrea Marinbach (“Marinbach”) and Myron Cohen (collectively “plaintiffs”), defendants New IG 79th LLC (“New IG”) and Building Management Co., Inc. (“Building Management”) (collectively “defendants”) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint in its entirety. Plaintiffs oppose the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

Factual and Procedural Background

This case arises from an incident on September 10, 2019 in which Marinbach was allegedly injured in front of a building located at 435 East 79th Street in Manhattan (“the premises”) when she tripped on a defective slab of concrete while walking on the sidewalk (NYSCEF Doc No. 2 at 2-4). The premises were owned by New IG and managed by Building Management (Doc No. 85 at 2). The premises were also split into two portions, one containing residential tenants and another containing commercial tenants (Doc No. 116 at 8-9, 94-95); Marinbach tripped in front of the

commercial portion (Doc No. 80 at 12-15, 22). Plaintiffs then commenced the captioned action against defendants alleging that Marinbach was injured due to the negligent ownership, control, management, and/or maintenance of the premises (Doc No. 2 at 3-4). Defendants joined issue by their answer filed June 11, 2020, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 4).

Defendants now move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint in its entirety, arguing that the alleged defective condition of the sidewalk is trivial as a matter of law and not actionable (Doc Nos. 69-70). In support of their motion, they submit, among other things, several images taken from an engineering report written by Adam Cassel, a professional engineer licensed in New York, and deposition testimony from Marinbach, Johnny Rivera, a Building Management employee, and Nelson Cruz, a Senior Branch manager from the Chase Bank operating in the commercial portion of the premises (Doc Nos. 79-80, 82-83).

Marinbach's Deposition Testimony

At her deposition, Marinbach testified that, on the day of the alleged incident, she tripped after catching her foot on an uneven slab of concrete in the center of the sidewalk in front of the commercial portion of the premises (Doc No. 80 at 12-15, 22). Immediately prior to the alleged incident, she did not feel dizzy or lightheaded and had no issues with her sight or balance (Doc No. 80 at 73). She was looking “[s]traight ahead” when she tripped and was not looking at her phone or wearing headphones at that time (Doc No. 80 at 17-19, 58). The sidewalk was not crowded, but there were some people walking nearby (Doc No. 80 at 18). She was unaware of any prior complaints about the condition of the sidewalk and never previously noticed uneven slabs despite walking past the premises “all of the time” (Doc No. 80 at 16, 22, 32, 60-61).

Deposition Testimony of Johnny Rivera of Building Management

Johnny Rivera, a property manager for Building Management, testified that he managed the commercial portion of the premises, which involved handling commercial tenant complaints and making sure rents were paid (Doc No. 82 at 9-16). He last visited the premises in July 2019, several months prior to the date of the incident, but did not inspect the sidewalk at that time (Doc No. 82 at 20-21). When shown photographs depicting the allegedly defective sidewalk, he had no recollection of seeing it in that condition and had no opinion as to whether or not it was defective (Doc No. 82 at 27-32). He was also unaware of any accidents at the premises before or after plaintiff's incident (Doc No. 82 at 38). Last, he found no complaints related to the sidewalk in the "lease file" that Building Management maintained for the premises (Doc No. 82 at 48-53).

Deposition Testimony of Nelson Cruz of Former Third-Party Defendant Chase Bank

Nelson Cruz, a senior branch manager for the Chase Bank located at the premises, testified that he never noticed the allegedly defective condition, never inspected the sidewalk, never saw anybody trip at the premises, and never tripped on the sidewalk himself (Doc No. 83 at 16, 38-40). Nor did he ever hire any contractors to repair the sidewalk or witness any repairs being made (Doc no. 83 at 14, 25, 41-42). He also testified that he was not aware of any complaints about the condition of the sidewalk (Doc No. 83 at 6-9, 16-17).

Engineering Report Images

The images submitted by defendants were taken by Cassel in January 2020 when he performed his inspection of the sidewalk and were later included in his engineering report drafted shortly thereafter (Doc Nos. 79, 114). They contain various views of the sidewalk slabs in front of the commercial portion of the premises (Doc No. 79). Two are screenshots of the sidewalk as viewed through Google Maps (Doc No. 79 at 1-2). Another two are photographs of the sidewalk

slabs, one taken from eye level and one from ground level (Doc No. 79 at 3). Lastly, two more are photographs of a ruler held up against the slabs to show the height differential between them (Doc No. 79 at 4). The measurements appear to show a height differential between 5/8” and 7/8” (Doc No. 79 at 4).

Plaintiffs oppose the motion, contending that defendants have not made a prima facie showing that they are entitled to judgment as a matter of law and, alternatively, that questions of fact exist regarding whether the allegedly defective condition was trivial as a matter of law and whether defendants had notice of such condition (Doc No. 111). In support of their opposition, they submit an affidavit from Cassel and deposition testimony from Luis Solano, another Building Management employee (Doc Nos. 114, 116).

Affidavit of Adam Cassel

In his affidavit, Adam Cassel, a professional engineer licensed in New York, averred that he inspected the sidewalk in January 2020, several months after the alleged incident, and prepared a report detailing his findings and conclusions, which was annexed to his affidavit (Doc No. 114 at 2-3, 8-16). The sidewalk had two adjacent slabs that were not flush with each other, which caused the edge of one slab to be raised relative to the edge of the other slab (Doc No. 114 at 8-9). He measured the difference in height between the raised edge and the unraised edge to be between 5/8” and 7/8” (Doc No. 114 at 9).¹

He opined that “[s]uch an abrupt difference” in height between the slabs posed “an inherent tripping hazard to pedestrians” walking along that stretch of the sidewalk (Doc No. 114 at 9). He

¹ Cassel’s engineering report contained the same collection of images submitted by defendants, including those images of the ruler against the raised edge of the slab demonstrating how he obtained his measurements of 5/8” and 7/8” (Doc No. 114 at 10-13).

further opined that such a height difference constituted a “substantial defect” under 34 RCNY 2-09(f)(5)(iv) and the Administrative Code of the City of New York § 19-152 (Doc No. 114 at 9).

Deposition Testimony of Luis Solano of Building Management

Luis Solano, a building superintendent for Building Management, testified that he lived in the residential portion of the premises and was responsible for maintaining such portion (Doc No. 116 at 8-9, 29). This involved inspecting the sidewalk in front of the residential portion of the premises, but never the commercial portion (Doc No. 116 at 34-35). However, he did testify that he previously walked past the commercial portion and saw the sidewalk in the allegedly defective condition, although he did not believe it was a tripping hazard (Doc No. 166 at 29, 82). He was not aware of any other accidents on either the residential or commercial portion, and was unaware of any repairs performed on the commercial portion of the sidewalk (Doc No. 116 at 52, 95).

Legal Conclusions

“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. Only then does the burden shift to the plaintiff to establish an issue of fact” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015] [citations omitted]). “[T]here is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable” and “granting summary judgment to a defendant based exclusively on the dimensions of the defect is unacceptable” (*Arpa v 245 E. 19 Realty LLC*, 188 AD3d 479, 480-481 [1st Dept 2020] [internal quotation marks, brackets, ellipsis, and citations omitted]; accord *Camara v Costco Wholesale Corp.*, 199 AD3d 509, 510 [1st Dept 2021]; see *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). “The relevant inquiry is whether

the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot” (*Trinidad v Catsimatidis*, 190 AD3d 444, 445 [1st Dept 2021] [internal quotation marks and citations omitted]).

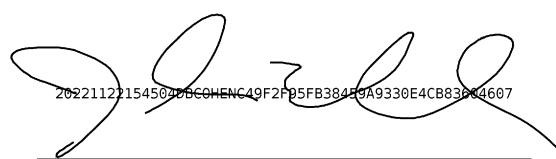
Here, defendants fail to satisfy their burden of demonstrating entitlement to judgment as a matter of law. “[Section 19-152 of the Administrative Code of the City of New York] requires remediation for sidewalk [slabs] with a height differential of [1/2”] or more” (*id.*). Defendants do not provide any evidence that the height differential between the slabs of concrete at issue here is less than 1/2”. Despite their submission of images pulled from Cassel’s engineering report (Doc No. 79), and their argument that the images depict a height differential of “approximately” 1/2” (Doc No. 70 at 5; Doc No. 85 at 3), they clearly misinterpret Cassel’s finding that the height differential is between 5/8” and 7/8”, as well as the report images, which clearly indicate that the height differential is between that range (Doc No. 79), thereby exceeding the 1/2” measurement claimed by defendants. Although the size of the height differential and a violation of Administrative Code § 19-152 are not determinative of whether an alleged defect is trivial as a matter of law, they are factors to be considered and weigh in favor of plaintiff here (*see Trinidad*, 190 AD3d at 445). Further, defendants’ reliance on the dimensions of the alleged defect, and their conclusory contention that the sidewalk was “open and obvious and not inherently dangerous” (Doc No. 70 at 13), are insufficient to satisfy their burden (*see Trincere*, 90 NY2d at 977-978; *Camara*, 199 AD3d at 510; *Arpa*, 188 AD3d at 480-481). Thus, defendants fail to establish that the defect is trivial and not actionable as a matter of law (*see Trinidad*, 190 AD3d at 445; *Suarez v Emerald 115 Mosholu LLC*, 164 AD3d 1130, 1131 [1st Dept 2018]).

Even if defendants had satisfied their burden, plaintiffs’ expert’s opinion, based on his measurement of the defect after the accident, that the height differential between the slabs

constituted an inherent tripping hazard and was a substantial defect, suffices to demonstrate a triable issue of fact. (*see Suarez*, 164 AD3d at 1131; *Gomez v Congregation K’Hal Adath Jeshurun, Inc.*, 104 AD3d 456, 456-457 [1st Dept 2013]; *D’Amico v Archdiocese of N.Y.*, 95 AD3d 601, 601 [1st Dept 2012]). Even assuming further that defendants satisfied their burden of “establishing the absence of notice as a matter of law” (*George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003]; *see Castillo-Sayre v Citarella Operating LLC*, 195 AD3d 513, 513 [1st Dept 2021]), plaintiffs raised questions of fact as to whether defendants had “constructive notice of the defect by virtue of it having been visible and apparent and in existence for a sufficient length of time prior to the accident” to permit discovery and remediation (*George*, 306 AD2d at 161 [internal quotation marks, brackets, and citations omitted]). Although Rivera, Solano, Cruz, and Marinbach all testified that they were not aware of any complaints related to the allegedly defective sidewalk, Solano stated that he had seen the sidewalk in the allegedly defective condition but never reported it to his supervisors (Doc No. 116 at 29-30). Thus, there is a question of fact as to whether the defect existed long enough to put defendants on notice of the defective condition (*see Gomez*, 104 AD3d at 456-457; *George*, 306 AD2d at 161).

The parties remaining contentions are either without merit or need not be addressed in light of the findings above. Accordingly, it is hereby:

ORDERED that defendants’ motion for summary judgment dismissing the complaint as against them pursuant to CPLR 3212 is denied.



2022112215450306COHENC49F2F95FB38499A9330E4CB83084607

DAVID B. COHEN, J.S.C.

11/22/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: