

Alvarado v 2013 Amsterdam LLC

2022 NY Slip Op 34194(U)

December 6, 2022

Supreme Court, New York County

Docket Number: Index No 160334/2017

Judge: Dakota D. Ramseur

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

-----X

ANA ALVARADO

Plaintiff,

- v -

2013 AMSTERDAM LLC,

Defendant.

-----X

INDEX NO. 160334/2017
MOTION DATE N/A
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 78, 79, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff, Ana Alvarado (plaintiff), commenced this action for personal injuries against defendant, 213 Amsterdam LLC (defendant), stemming from an alleged October 30, 2017 trip and fall on the sidewalk abutting the premises located at 442 West 160th Street, New York, New York (premises), owned by defendant. Plaintiff now moves pursuant to CPLR 3212 for partial summary judgment on the complaint as to liability only. The motion is opposed. For the following reasons, plaintiff's motion is granted.

FACTS

According to plaintiff, on October 30, 2017, while walking along 160th Street between St. Nicholas and Amsterdam Avenues, plaintiff tripped and fell when her entire left foot went into an approximately two-inch deep hole in the sidewalk directly in front of the premises. No one witnessed her fall. Plaintiff confirmed that a photograph of the sidewalk from October 2017

depicting the subject hole was identical to the condition of the sidewalk at the time of the incident. It is undisputed that the photograph depicts what appears to be a gaping hole in the sidewalk.

Klever Morales, the superintendent of the premises, testified that he was employed by the management company for the premises and that he was responsible for addressing “holes” in the sidewalk outside the premises. The superintendent stated that the hole was approximately one inch deep with a perimeter of four to five inches. He further testified that he performed cement work to repair broken or missing portions of sidewalk near the entrance of the premises on several occasions (NYSCEF doc. no. 65, ¶ 5; doc. no. 71, pp. 60:25-61:14). The superintendent stated that he had to make several repeated repairs to the area because the cement he used would “raise” after each repair (*id.* at 55:8-11). The superintendent further confirmed that the subject hole was approximately one inch deep in October 2017. The superintendent testified that he attempted to repair the subject hole approximately one month prior to the alleged incident (*id.* at 95:2-18).

Vincent Pici, PE (Pici), plaintiff’s expert engineer, opined that the sidewalk “contained an unexpected condition including a large horizontal defect and vertical joint displacement,” which constituted a dangerous tripping hazard (NYSCEF doc. no. 75, ¶ 29). Pici further stated that the sidewalk condition as it existed at the time of plaintiff’s alleged fall did not comply with Sections of the Administrative Code §§ 7-210, 19-152 and 43 NYCRR 2-09, as the sidewalk defects were visible to defendant over an extended period of time, and the superintendent’s repeated patchwork repairs constituted a substantial defect that the property owner failed to have corrected by qualified personnel in a timely manner (*id.* at ¶¶ 27-31). Additionally, plaintiff’s engineer opined that the subject defect would have occurred over an extended period of time given the vertical displacement

DISCUSSION

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N. Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Reslani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Liability for a breach of duty to reasonably maintain premises can only be established where the property owner created the condition or had actual or constructive notice of the condition and had a reasonable opportunity to repair it (*see Litwack v Plaza Realty Investors, Inc.*, 11 NY3d 820, 821 [2008]; *Juarez v Wavecrest Mgt. Team Ltd.*, 88 NY2d 628, 646 [1996]; *Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302, 303 [1st Dept 2006]). “A plaintiff may satisfy his or her burden on notice by producing evidence that an ‘ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord’” (*Talavera v New York City Tr. Auth.*, 41 AD3d 135, 136 [1st Dept 2007], quoting *O’Connor-Miele v Barhite & Holzinger*, 234 AD2d 106, 106-107 [1st Dept 1996]).

“[A]n abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the

and size of the hole shown in the photographs. Thus, Pici states that defendant would have had time to become aware of the defect. Pici further stated that the sidewalk hole contained a “large horizontal defect and vertical joint displacement ... and the defect constituted a dangerous tripping hazard” (*id.* at ¶ 29).

Scott D. Moore P.E., CSP (Moore), defendant’s engineering expert, submitted a report wherein he stated that plaintiff’s expert’s opinions should be rejected as “incomplete and subjective” because Pici did not visit the location in person and his report lacked any engineering or dimensional analysis or quantifiably reliable calculations to support his conclusions (NYSCEF doc. no. 87, ¶¶ 7-8, 11). Further, it was the defense expert’s opinion within a reasonable degree of engineering certainty that defendant acted reasonably in its continued maintenance of the sidewalk by making numerous repairs to the area (*id.* at ¶ 10).

In support of plaintiff’s motion, plaintiff argues that there are no genuine issues of material fact as to defendant’s failure to maintain the sidewalk in a reasonably safe condition and its actual and constructive notice of the defect in the sidewalk that caused plaintiff to trip and fall. In opposition, defendant argues that it acted reasonably in its maintenance of the sidewalk, and there are unresolved questions of fact regarding the depth of the hole in the sidewalk, the timing of the repairs defendant made to the sidewalk, whether a defective trip hazard existed at the location and for how long, and whether plaintiff, whose fall was unwitnessed, was credible in testifying that she did not know about the hole that allegedly caused her to fall as she walked past the building numerous times.

sidewalk” (*Staruch v 1328 Broadway Owners, LLC*, 111 AD3d 698, 698 [2d Dept. 2013]). Administrative Code § 7-210 imposes a duty on property owners to maintain the sidewalks abutting their property. In relevant part 34 RCNY 2-09(f)(4) states that, “[a]ll flags containing substantial defects shall be fully replaced. Patching of individual flags is not permitted. A substantial defect is defined as, “[a] trip hazard where the vertical differential between adjacent flags is greater than or equal to ½” or where a flag contains one or more surface defects of one inch or greater in all horizontal directions and is ½” or more in depth” (34 RCNY 2-09[f][5][iv]; see Admin. Code § 19-152[4][a]).

Here, plaintiff establishes her prima facie showing of entitlement to summary judgment on the complaint. Plaintiff demonstrates that defendant breached its duty to maintain the sidewalk in front of the premises in a reasonably safe condition by submitting the superintendent’s testimony, plaintiff’s expert’s report, and the exhibits of images of the outside of building establishing that the hole on the sidewalk was a substantial defect and in violation of the Administrative Code. Plaintiff also demonstrates that defendant had actual and constructive notice of the alleged defect, as the superintendent admitted that he knew of the “holes” in the sidewalk and had repeatedly attempted, but failed, to repair the hole.

Plaintiff’s uncontroverted testimony that she tripped and fell on the sidewalk in front of defendant’s building was prima facie evidence that the defect in the sidewalk was the proximate cause of plaintiff’s alleged fall. Plaintiff’s description of her trip, fall, and subsequent injuries is consistent with her foot going into a hole or depression in the sidewalk like the defect the superintendent acknowledged existed in the sidewalk abutting the premises, permitting the

inference that plaintiff's fall occurred as she testified (*see Verdon v Port Authority of New York and New Jersey*, 111 AD3d 580, 581 [1st Dept 2013]; *Hartman v Mountain Valley Brew Pub, Inc.*, 301 AD2d 570, 570 [2d Dept 2003] ["proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record"]).

In opposition, defendant fails to raise an issue of fact. Initially, defendant fails to present any facts refuting plaintiff's testimony concerning the nature of her fall. Contrary to defendant's contention, the fact that plaintiff's fall was unwitnessed does not preclude the granting of summary judgment (*see Wise v McDonald Ave., LLC*, 297 AD2d 515, 517 [1st Dept 2002]). Defendant did not present any fact evidence raising a triable issue of fact as to plaintiff's credibility, therefore plaintiff is entitled to summary judgment "even though it is based on plaintiff's own testimony as the sole witness to the accident" (*Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 410 [1st Dept 2013]; *see Klein v City of New York*, 89 NY2d 833, 835 [1996] ["Since neither the defendant nor third-party defendant has presented any evidence of a triable issue of fact relating to the prima facie case or to plaintiff's credibility, summary judgment was properly awarded to the plaintiff"]).

Defendant's assertion that credibility issues are raised by plaintiff's testimony that she had not seen the hole prior to her fall, despite her having walked past the location many times, is mere conjecture, not factual evidence. Furthermore, even if plaintiff had been aware of the hole, her failure to avoid it would be relevant to a determination of comparative negligence, not defendant's liability for plaintiff's fall (*see Rodriguez v City of New York*, 31 NY3d 312, 324–325 [2018]

[plaintiff not required to establish absence of comparative negligence on his part to be entitled to summary judgment on liability]).

The contention that plaintiff's engineer's opinions were "incomplete and subjective" because he did not visit the location is also without merit, as plaintiff's expert report was "[b]ased on a review of the documentary and photographic evidence that plaintiff identified as accurate representations" (*Cuevas v City of New York*, 32 AD3d 372, 374 [1st Dept 2006]).

Moreover, defendant's expert failed to set forth any facts to controvert plaintiff's expert's opinions concerning the defects in the sidewalk, including the estimates about the vertical, horizontal, and depth measurements of the trip hazard (*see Tropper v Henry Street Settlement*, 190 AD3d 623, 624-625 [1st Dept 2021]). Defendant's expert also fails to present any factual support for his statement that defendant's attempted repairs were reasonable, especially in light of the fact repeated failed attempts to adequately repair the defect and by the superintendent's admission that he performed patchwork on the sidewalk, which is expressly prohibited under 34 RCNY 2-09.


Accordingly, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment on the issue of liability is granted; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendant, within notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

12/6/2022
DATE



DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE