Brady v Jocee Realty Corp.
2022 NY Slip Op 34305(U)
December 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 507730/2017
Judge: Ingrid Joseph
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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 12th day of December 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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Index No: 507730/2017

TERRELL BRADY,

Plaintiff(s)

-against-

ORDER

JOCEE REALTY CORP., ARLENE RICHMAN, and ANDREA SHULMAN,

Defendant(s)

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JOCEE REALTY CORP., ARLENE RICHMAN, and ANDREA SHULMAN,

Third-Party Plaintiff(s)

-against-

RAINBOW USA, INC. and AIJJ ENTERPRISES INC.,

Third-Party Defendant(s)

--X

The following e-filed papers considered herein:	**NYSCEF E-filed docs**
Notice of Motion/Affirmation in Support/Statement of Material Facts/Exhibits Annexed/ Affirmation in Opposition/Reply.....	176-197; 212-214; 219-221
Affirmation in Opposition/Notice of Cross Motion/Exhibits Annexed..	200-201; 202-207; 222
Affirmation in Opposition/Memorandum of Law..............	208; 215-217

In this matter, Terrell Brady ("Plaintiff") moves (Motion. Seq. 10) pursuant to CPLR § 3212 for partial summary judgment on the issue of liability with respect to Jocee Realty Corp., Arlene Richman, and Andrea Schulman's ("Defendants") negligence. Third-Party Defendants, Rainbow USA ("Rainbow") and AIJJ Enterprises Inc. ("AIJJ") have opposed this motion on the grounds that Plaintiff failed to establish if the alleged dangerous condition existed, and if it did, whether or not it was a "substantial" dangerous condition. Defendants also cross-move (Motion Seq. 11), for partial summary judgment dismissing Plaintiff's Complaint on the grounds that Plaintiff is unable to identify where he fell, and that Plaintiff's own negligence caused his injuries.

This action arises out of a trip-and-fall accident that occurred on November 28, 2016, at 10:00 p.m. in front of the premises located at 1440 Rockaway Parkway, Brooklyn, New York ("The Premises"). The sidewalk where the accident occurred is adjacent to a commercial property used for retail purposes by

Motion #10 and Motion #11

Rainbow. Defendants Richman and Schulman were owners of the Premises at the time of Plaintiff's accident, who leased it to Jocee Realty Corp. Jocee Realty Corp then sublet the ground floor of the commercial premises to Rainbow USA Inc.

In his EBT, Plaintiff states that as he and his brother were walking along Rockaway Parkway, Plaintiff was walking and looking forward and down when he stepped into a crack on the sidewalk, rolled his ankle and fell (testimony of Terrell Brady, October 14, 2020, at 26 lines 18-23; at 28 lines 24-25; at 29 lines 2-5; at 30 lines 19-25; at 31 lines 2-7). Plaintiff states that the Rainbow store and his brother were to his left when the accident occurred, and the street was to his right (testimony of Terrell Brady, October 14, 2020, at 27 lines 15-21; at 28 lines 2-3). Additionally, Plaintiff states that the lighting on the street was adequate and that he was able to see (testimony of Terrell Brady, October 14, 2020, at 104 lines 12-25; at 105 line 2). Plaintiff estimated that the hole he tripped over was an inch and a half to two inches wide (testimony of Terrell Brady, October 14, 2020, at 30 lines 12-16).

During his EBT, Plaintiff was asked to review photographs marked as Defendants' exhibits for identification (testimony of Terrell Brady, October 14, 2020, at 117-136). Plaintiff testified that all the photographs that he was able to identify were fair and accurate depictions of the area where he fell (testimony of Terrell Brady, October 14, 2020, at 135 lines 21-25; 136 lines 2-4) [1]. In support of his motion, Plaintiff submits three Google Street View images from August 2013, September 2014, and October 2014, which depicted the state of the defect in the sidewalk at various times prior to the accident. Plaintiff also submits an affidavit from his expert Vincent Pici, ("Pici"), a professional engineer who reviewed the Bill of Particulars, Plaintiff's EBT transcript, and Defendants' photographs marked for identification. Pici states that the photographs are consistent with Plaintiff's testimony and that "deteriorated and broken concrete, loose gravel and dirt in the area of depression are clear and visible in the marked exhibits" (aff of Pici at 11). Pici also claims that based upon his review of the photographs, the subject defect was a substantial defect as defined by the Administrative Code since the defect was larger than one inch in any direction and had a clearly discernible height difference (aff of Pici at 17, 44). Based on the Google Street View images, Pici states that the conditions at issue not only existed prior to the accident, but also developed over a prolonged period of time, was readily observable, and that no extraordinary efforts by the owner would have been required to repair the defective sidewalk (aff of Pici at 20).

In opposition, Defendants argue that the photographs submitted by Plaintiff fail to establish that any crack existed or alternatively that the crack was a dangerous condition since Plaintiff's photographs

[1] Plaintiff testified that Exhibits C and D show the defect in the sidewalk but there is water inside the hole that was not present at the time of the accident (testimony of Terrell Brady, October 14, 2020, at 124 lines 9-22; at 125 lines 15-22).

depicted a hole with a puddle in it thus obscuring what the interior of the hole looked like on the date of the accident. In support of its cross-motion, Defendants argue that Plaintiff's testimony that the hole that he stepped in was large and that he was looking down and straight ahead with adequate street lighting concedes the fact that Plaintiff's own negligence was the cause of his injuries.

Third-Party Defendants Rainbow and AIJJ have also opposed the motion arguing that Plaintiff's motion is premature since there are issues of material facts as to how the accident occurred and outstanding discovery including EBTs of Defendants Richman and Schulman. Therefore, Third-Party Defendants argue that they are unable to refute the motion without the necessary discoverable information about Defendants' maintenance records and their knowledge of defects in the sidewalk. Third-Party Defendants also assert that Plaintiff has failed to establish a claim for negligence as he has failed to proffer admissible evidence of any actual notice of the defect to Defendants and Plaintiff's argument that constructive notice exists, relies solely on evidence from Google images. Additionally, Third-Party Defendants also maintain that Plaintiff's inconsistent testimony about falling despite walking carefully and having adequate lighting, raises a genuine question as to how the accident occurred.

It is well established that "the 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v Nassau County*, 111 AD2d 212, [2d Dept 1985]; *Steven v Parker*, 99 AD2d 649, [2d Dept 1984]; *Galeta v New York News, Inc.*, 95 AD2d 325, [1st Dept 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]; *Rebecchi v Whitemore*, 172 AD2d 600 [2d Dept 1991]). To be entitled to summary judgment on the issue of liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Higashi v M & R Scarsdale Restaurant, LLC*, 176 AD3d 788 [2d Dept 2019]; *Webb v Scharf*, 191 AD3d 1353 [4th Dept 2021]). When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries -- if so, the comparative fault of each party is then apportioned by the jury (*Rodriguez* at 324).

NYC Administrative Code §7-210 imposes liability against a real property owner for failure to maintain sidewalks abutting their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk (*Kellman v 45 Tieman Assoc.*, 87 NY2d 871 [1995]; *Basso v Miller,* 40 NY2d 233, 241 [1976]; *Giulini v Union Free School Dist. No. 1,* 70 AD3d 632 [2d Dept 2010]; *Doyle v State,* 271 AD2d 394 [2d Dept 2000]; *see also* Rules of City of New York Dept of Transportation [34 RCNY] § 2-09[f][1]). The scope of a landowner's duty to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition (*Tagle v Jakob,* 97 NY2d 165 [2001]; *Cupo v Karfunkel,* 1 AD3d 48 [2d Dept 2003]).

In a premises liability case, the plaintiff must establish the existence of a defective condition and that the defendant either created or had actual or constructive notice of the defect (*Ingram v Costco Wholesale Corp.,* 117 AD3d 685 [2d Dept 2014]; *Caldwell v Pathmark Stores, Inc.*, 29 AD3d 847 [2d Dept 2006]; *Crawford v Pick Quick Foods*, 300 AD2d 431 [2d Dept 2002]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the owners time to discover and remedy it (*Gordon v American Museum of Natural History,* 67 NY2d 836 [1986]; *Kiskiel v Stone Edge Management, Inc.,* 129 AD3d 672 [2d Dept 2015]). If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger (*Cupo* at 51*; Kastin v Ohr Moshe Torah Institute, Inc.,* 170 AD3d 697 [2d Dept 2019]; *Fishelson v Kramer Properties, LLC,* 133 AD3d 706 [2d Dept 2015]). However, proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence (*Cupo* at 52; *Russo v Home Goods, Inc.,* 119 AD3d 924 [2d Dept 2014]; *Gradwolh v Stop & Shop Supermarket Co., LLC,* 70 AD3d 634 [2d Dept 2010]). At the outset, the question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion (*Tagle* at 72; *Stoppeli v Yacenda,* 78 AD3d 815 [2d Dept 2010]; *Shah v Mercy Med. Ctr.,* 71 AD3d 1120 [2d Dept 2010]; *Mazzarelli v 54 Plus Realty Corp.,* 54 AD3d 1008 [2d Dept 2008]).

Additionally, a property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance (*Trincere v County of Suffolk,* 90 NY2d 976 [1997]*; DeLaRosa v City of New York,* 61 AD3d 813 [2d Dept 2009]; *Taussig v Luxury Cars of Smithtown, Inc.,* 31 AD 3d 533 [2d Dept 2006]). A condition that is ordinarily apparent to a person making reasonable use of their senses nevertheless may be considered a trap when the condition is obscured or the plaintiff is distracted (*Mazzarelli* at 1009; *Villano v Strathmore Terrace Homeowners Assn. Inc.,* 76 AD3d 1061 [2d Dept 2010]). A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must

make a prima facie showing that under the circumstances, the defect is physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; citing *Alvarez* at 324). This burden cannot be satisfied merely by pointing to gaps in the plaintiff's case (*Gregg v Key Food Supermarket*, 50 AD3d 1093 [2d Dept 2008]; *Stroppel v Wal-Mart Stores, Inc.*, 53 AD3d 651 [2d Dept 2008]; *DeFalco v BJ's Wholesale Club, Inc.*, 38 AD3d 824, 825 [2d Dept 2007]). Only after the defendant has satisfied its threshold burden does the burden then shift to the plaintiff to establish an issue of fact (*Hutchinson* at 79; *see also Tropper v Henry Street Settlement,* 190 AD3d 623 [1st Dept 2021]).

Generally, whether a dangerous or defective condition exists is a question of fact for the jury unless the defect is demonstrated to be trivial as a matter of law (see *Trincere*; *Fisher v JRMR Realty Corp.,* 63 AD3d 677 [2d Dept 2009]; *Hymanson v A.L.L. Assoc.,* 300 AD2d 358 [2d Dept 2002]). The determination of whether a condition is trivial does not rest exclusively upon the dimension or depth of the sidewalk defect in inches but must be made upon an examination of all 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* at 978 quoting *Caldwell v Village of Island Park,* 304 NY 268 [1952]). The "trivial defect doctrine" stands for the proposition that a defendant cannot use the doctrine to prevail on a summary judgment motion solely on the basis of the dimensions of an alleged defect (*Hutchinson* at 84). In deciding whether a defendant has met its burden of showing prima facie triviality, a court must, except in unusual circumstances, avoid interjecting the question of whether the plaintiff might have avoided the accident simply by placing his feet elsewhere (*id.*).

Plaintiff, Defendants, and Third-Party Defendants rely on *Robinson v Hess Retail Stores,* 197 AD3d 517 [2d Dept 2021], to support their positions that Plaintiff's Google Street View images are both sufficient and insufficient to establish constructive notice of the alleged defect. The court in *Robinson,* denied summary judgment on constructive notice established by Google Street View images because they were of poor quality in conjunction with an affidavit of an expert who never visited the accident site and relied on the Google images to demonstrate constructive notice. *Robinson* did not hold that Google images can never be used to establish constructive notice, but rather that the Google images used in that case were of poor quality and thus did not establish constructive notice.

In the case at bar, it is undisputed that Plaintiff was able to identify the defect in the sidewalk that caused his fall. Defendants argument that Plaintiff's use of the word "crack" as opposed to "hole" demonstrates Plaintiff's inability to identify the cause of his fall is without merit since Plaintiff sufficiently identified the location of the defect as being in front of the Rainbow store and sufficiently identified and described the cause of his fall, to wit, as stepping into a crack or hole in the sidewalk which was at least an inch and a half to two inches wide.

Additionally, the Court takes judicial notice of the Google Street View images submitted pursuant to CPLR § 4532-b. Plaintiff timely provided notice of his intention to offer these images more than 30 days before the hearing. Unlike the photographs submitted in *Robinson,* which were of poor quality and could not give the court an accurate depiction of the sidewalk defect, the photographs annexed to Plaintiff's motion are in color and clearly show the defective sidewalk.

Here, the Defendants have failed to establish that it did not have constructive notice of the alleged dangerous condition that caused the Plaintiff to fall. A review of the Google images and Pici's affidavit demonstrate that the condition of the sidewalk was visible and apparent and had existed since at least August 2013, twenty-five months prior to the accident. Defendants, have failed to proffer any admissible evidence to establish maintenance or inspection records pertaining to the sidewalk. The argument that Plaintiff's motion should be denied as premature on the grounds that Defendants have not been deposed is ineffectual since the defective condition existed for such a prolonged period that Defendants should have known that it posed a danger to pedestrians and moreover, Defendants, who already have personal knowledge of the relevant facts, had the opportunity to submit affidavits to establish that they did not have constructive notice of the defect. The bare affirmation of an attorney who demonstrated no personal knowledge of the manner in which the accident occurred, is without evidentiary value and is thus unavailing.

Furthermore, Defendants' argument that the Plaintiff's complaint must be dismissed because the alleged defect was trivial, is rejected. It is Defendants' burden in moving to dismiss a complaint on the basis that the alleged defect is trivial to show that under the circumstances, the defect is physically insignificant and that the characteristics of it or the surrounding circumstances do not increase the risk it poses. While there 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, Defendants have failed to proofer evidence to demonstrate that the alleged defect is trivial, and therefore not actionable. Defendants argue that the Court cannot determine the condition of the sidewalk or whether the alleged defect was trivial, because the photographs produced by Plaintiff depict a puddle inside of the hole. However, Defendants have not proffered their own photographs or expert to establish what they believe the condition of the alleged defect to be. Instead, Defendants point to parts of Plaintiff's EBT in which he states he is unsure of the exact dimensions of the defect to conclusory state that the defect is trivial, which alone is insufficient to establish that the defect was trivial.

Defendants' alternative argument that they are not liable because the defect was open and obvious is also rejected. An open and obvious condition only relieves the property owner of a duty to warn but the landowner's duty to maintain premises in a reasonably safe condition still applies. To the extent that Defendants argue that Plaintiff was a proximate cause of his own accident, the comparative fault of each

party is a question for a jury. Defendants have raised sufficient issues of fact regarding Plaintiff's potential comparative negligence.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (Motion. Seq. 10) for partial summary judgment on the issue of liability with respect to Arlene Richman, and Andrea Schulman's negligence is granted; and it is further

ORDERED, that the issue of Plaintiff's comparative negligence is to be determined at trial; and it is further

ORDERED, that Defendants' cross motion (Motion Seq. 11) for partial summary judgment dismissing Plaintiff's complaint is denied.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice