

Sanchez v 263443 Atl. Ave. LLC

2022 NY Slip Op 34895(U)

February 9, 2022

Supreme Court, Kings County

Docket Number: Index No. 503067/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 503067/2019

Motion Date: 11-8-21

Mot. Seq. No.: 3

-----X
VICTOR DEJESUS SANCHEZ,

Plaintiff,

-against-

DECISION/ORDER

263443 ATLANTIC AVENUE LLC and
ELECTRICO AUTO REPAIR, INC.

Defendants.
-----X

The following papers, which are e-filed with NYCEF as items 60-86, were read on this motion:

In this action to recover damages for personal injuries arising out of a trip and fall on alleged defective sidewalk vault doors, the defendants, 263443 ATLANTIC AVENUE LLC ("ATLANTIC") and ELECTRICO AUTO REPAIR, INC. ("ELECTRICO") move to renew their motion pursuant to CPLR 3212 for an order granting them summary judgment dismissing plaintiff's complaint. Defendants' prior motion for summary judgment was denied, without prejudice to renewal following the completion of discovery.

The plaintiff, VICTOR DEJESUS SANCHEZ, commenced this action claiming that on August 27, 2018, at approximately 12:45 p.m., he was caused to trip and fall as a result of defective sidewalk vault door abutting a building owned by Defendant 263433 ATLANTIC AVENUE and occupied by Defendant ELECTRICO AUTO REPAIR. In support of the motion, the defendants submitted, among other things, plaintiff's deposition testimony. Plaintiff's testimony as to how the accident occurred is far from clear. He testified as follows:

- Q. What caused you to fall?
- A. The door was bad.
- Q. What door?
- A. The door that was - the metal one on the ground.
- Q. Are you talking like a sidewalk cellar door?
- A. That's the ones that they use, yes.
- Q. Did you trip over that door?
- A. Yeah.

(Plaintiff's EBT - p. 51).

Plaintiff went on to testify:

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- Q. Explain to me how the door caused you to fall?
A. It was like fake. (Indicating),
Q. Are you able to explain in words?
A. The door was bad.
Q. Describe the door for me. know you said it was metal. Was it two doors that meet in the middle, one door, something else?
A. I hit the two of them together, yes.
Q. So it's two -
A. That's what I'm saying (indicating). I hit the -
INTERPRETER: He's doing this (indicating).
MR. POMERANTZ: Indicating with his hands, one hand is higher than the other.

(Id. - pp 52 -53).

Plaintiff testified that he hit the metal door with his right foot, and immediately fell forward (Id. - p. 54). When plaintiff was walking towards the cellar doors, they appear to be fine (Id.-pp. 65-66). He then testified:

- Q. You just stated that it was fine. Does that mean you saw the cellar doors as you were walking and they were fine?
MR. POMERANTZ: Just note my objection to form.
A. It was at the moment that I stepped on it that it went down. That's when I fell. But I said it just now that it was while I was walking.

(Id.-p. 66).

Defendants also submitted the deposition of ELECTRICO, by Jonathan Valdez, the manager of ELECTRICO, an auto repair shop located at 3443 Atlantic Avenue, Brooklyn, New York (Valdez EBT - PPP. 5-6). He testified that the sidewalk vault doors at issue are located on Autumn Avenue near the entrance, leading to the shop's basement space (id. - pp. 31-32). He maintained that in August 2018, either he, his father, who was the owner of the shop, or an employee by the name of Manolo Vargas would sweep the sidewalk in front of the shop every day which would include sweeping over the sidewalk vault doors (id. - pp. 8-16). The witness claims that he never stepped on the sidewalk vault doors and found them to be loose or dented (id. - p. 41). He never observed a height discrepancy between the sidewalk flag and the metal vault doors (id. - 43, 45, 46) and the last time he looked at the two doors, he recalled them being flush with one another (Id.-p. 45). He received any complaints about the doors, (id. - 45-46). He

never saw anyone trip or fall on the sidewalk in front of the shop and was not aware of any other reported trip and falls during ELECTRICO's tenancy at the building (id. – 25, 28). He never received any complaints or violations with respect to the condition of the sidewalk (id. – p. 28) and no one ever complained to him about the condition of the sidewalk vault doors at any time in the past four years (id. – 41).

The movants also submitted the affidavit Douglas Peden, a registered architect, who inspected the vault doors on or about October 22, 2020, over two years following the date of the accident. He averred that the sidewalk vault doors deflected by not more than ½ inch when weight was placed upon which was within the permissible parameters set forth in New York City's and New York City's Department of Transportation's Highway Rules as they pertain to the duties and obligations of property owners with respect to sidewalks. His Affidavit also notes that the vault doors had the appropriate tread and skid-resistance pursuant to the Sidewalk Rules and industry standards and opined that both sidewalk vault doors were maintained in reasonably safe condition and were not in violation of the applicable codes.

In opposition to the motion, the plaintiff submitted an affidavit to which two photographs were annexed depicting the sidewalk vault doors and stated that they showed where his accident occurred and were a fair and accurate depiction of how doors appeared on the date of the accident. One of the photographs, a close up, shows that there is a differential in height between the two doors. Interestingly, when Valdez was shown the close-up photograph, he could not say for certain whether it depicted sidewalk vault doors at the shop. (Valdez EBT – p. 42) and that he had never seen the vault doors appear as depicted in the photograph (id. – pp. 42-43).

The plaintiff also submitted an affidavit from the private investigator who took the two photograph. He stated that he took these photographs on September 1, 2018, only a few days after the accident, one of the doors was raised because it was laying on top of the other.

Discussion:

A defendant who moves for summary judgment in a trip-and-fall case can establish, prima facie, its entitlement to summary judgment by submitting admissible proof a dangerous or defective condition did not exist in the location of the accident at the time the accident occurred

(see *McKinney v. Ardee Plaza, LLC*, 36 A.D.3d 868, 868, 827 N.Y.S.2d 873; *Tenenbaum v. Best 21 Ltd.*, 15 A.D.3d 646, 790 N.Y.S.2d 236; *Mansueto v. Worster*, 1 A.D.3d 412, 413, 766 N.Y.S.2d 691; *Tresgallo v. Danica*, 286 A.D.2d 326, 729 N.Y.S.2d 159). Here, the photographs referred to in the affidavits of the plaintiff and the private investigator, together with the plaintiff's deposition testimony of the plaintiff, raise triable issue of fact as to whether the sidewalk vault doors were in dangerous and defective condition at the time of the accident. These photographs show that the sidewalk vault doors were uneven, as plaintiff claims. In the Court's view, the photographs did not demonstrate, as a matter of law, that the conditions shown in the photographs were trivial in nature. Further, in light of plaintiff's testimony and the photographs, Douglas Peden affidavit did not establish, as a matter of law, that the sidewalk vault doors were in a reasonably safe condition at the time of the accident.

A defendant can also demonstrate a prima facie case of entitlement to summary judgment in a trip-and-fall case by submitting evidence demonstrating that it neither created the alleged hazardous condition and did not have actual or constructive notice of its existence for a length of time sufficient to discover and remedy it" (*Arzola v. Boston Props. Ltd. Partnership*, 63 A.D.3d 655, 656, 880 N.Y.S.2d 352; see *Levine v. Amverserve Assn., Inc.*, 92 A.D.3d 728, 729, 938 N.Y.S.2d 593; *Jackson v. Jamaica First Parking, LLC*, 91 A.D.3d 602, 602–603, 936 N.Y.S.2d 278; *Pryzywalny v. New York City Tr. Auth.*, 69 A.D.3d 598, 892 N.Y.S.2d 181). To meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff tripped (see *Tsekhanovskaya v. Starrett City, Inc.*, 90 A.D.3d 909, 910, 935 N.Y.S.2d 128; *Pryzywalny v. New York City Tr. Auth.*, 69 A.D.3d at 599, 892 N.Y.S.2d 181). A defendant fails to satisfy its initial burden as to lack of constructive notice, as defendant ELECTRICO attempted to do in this case, by simply presenting evidence of its general cleaning or inspection practices rather than providing specific evidence as to when the area in question was last cleaned or inspected prior to the plaintiff's fall (see *Jackson v. Jamaica First Parking, LLC*, 91 A.D.3d at 603, 936 N.Y.S.2d 278; *Pryzywalny v. New York City Tr. Auth.*, 69 A.D.3d at 599, 892 N.Y.S.2d 181; *Arzola v. Boston Props. Ltd. Partnership*, 63 A.D.3d at 656, 880 N.Y.S.2d 352; *Feldmus v. Ryan Food Corp.*, 29 A.D.3d 940, 941, 818 N.Y.S.2d 98). The court notes that defendant 263443 ATLANTIC AVENUE LLC do not submit any evidence in support of its motion demonstrating that it lacked actual constructive notice of the conditions shown in

the photograph. The mere fact that it was an absentee owner did not relieve it of the duty of maintaining the sidewalk vault (see *Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 114 N.Y.S.3d 14, 137 N.E.3d 469). For the above reasons, the defendants did not their initial burden of establishing their prima facie entitlement to summary judgment.

Even if the defendants met their initial burden, plaintiff's testimony that the conditions shown in the photographs were in existence at the time of the accident raise triable issue of fact as to the veracity of Valdez's testimony that these conditions did not exist and/or that he lacked notice of them.

Accordingly, it is hereby

ORDRED that the motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: February 9, 2022

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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