

Kacki v 56th & Park (NY) Owner, LLC
2022 NY Slip Op 35125(U)
July 26, 2022
Supreme Court, Queens County
Docket Number: Index No. 707071/2016
Judge: Lance Evans
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. LANCE EVANS
Justice

PART 32

-----X
JERZY KACKI,

Plaintiff,

Index No.: 707071/2016

-against-

Mot. Seq. 6

56TH AND PARK (NY) OWNER, LLC and
56TH AND PARK (NY) HOLDINGS, LLC,Defendants.
-----X

The following papers numbered EF to EF read on this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment, dismissing the plaintiff's complaint and all cross-claims as against them; and a cross-motion by the plaintiff for an Order pursuant to CPLR §3126 precluding Defendants from submitting into evidence any photographs or inspection reports, precluding defendants from presenting testimony of their previously undisclosed witnesses; imposing sanctions against Defendants and, pursuant to CPLR 8303-a(a) awarding Plaintiff costs and attorney's fees.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits	EF 105 - EF 122
Notice of X-Motion-Affirmation-Exhibits	EF 123 - EF 131
Affirmation in Opposition-Exhibits	EF 135 - EF 138
Reply Affirmation-Exhibits.....	EF 133 - EF 134
Reply Affirmation- Exhibits.....	EF 139

Upon the foregoing papers, it is ordered that the motion by defendants is **GRANTED** in all respects, and the cross-motion by the plaintiff is **DENIED** in all respects.

FACTS AND PROCEDURAL HISTORY

The plaintiff brings this action seeking damages for personal injuries allegedly sustained in a trip and fall on the sidewalk adjoining premises located at 432 Park Avenue, in New York County. This action dates back to 2016. There was a preliminary conference on 11/14/16, a compliance conference on 5/3/17, and a note of issue was due on 10/6/17. Plaintiff was deposed on 12/19/17. Plaintiff was deposed again on 8/15/19, and on 8/5/20, due to supplemental bills of particulars pertaining to alleged injuries and damages, and was accordingly limited to those subjects. In addition, a deposition of plaintiff's employer, Todt Services Corp., as a non-party, was taken on February 27, 2020, pursuant to subpoenas served in June 2019, by the defendants and in response to their motion for an order holding Todt Services Corp. in contempt, brought by order to show cause in October 2019. On January 3, 2020, the Court issued an order (NYSCEF Doc. No. 81) directing that "all discovery having been completed," the plaintiff was to file a note of issue. On January 7, 2020, plaintiff filed a note of issue with a certificate of readiness and an affirmation of compliance, both dated January 6, 2020. (NYSCEF Doc. No. 78). In the certificate of readiness counsel for plaintiff declared that discovery proceedings now known to be necessary had been completed, and that "There are no outstanding requests for discovery." The premises is allegedly owned by co-defendant 56TH AND PARK (NY) OWNER, LLC ("Owner"). Co-defendant 56TH AND PARK (NY) HOLDINGS, LLC ("Holdings"), apparently is a legal vehicle which neither owns nor maintains the premises. Defendant Owner moves for summary judgment, dismissing the complaint, and all cross claims insofar as asserted against it, contending that they had no duty to the plaintiff. Defendant Holdings moves on the same grounds. Plaintiff cross-moves for an Order precluding Defendants from presenting testimony of their previously undisclosed witnesses; for sanctions against Defendants and, pursuant to CPLR 8303-a(a) awarding Plaintiff costs and attorney's fees.

SUMMARY JUDGMENT STANDARD

"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 eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186

[1st Dept 2006] [*internal quotation marks and citation omitted*]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

STANDARD FOR LIABILITY

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Denker v Century 21 Dept. Stores, LLC*, 55 AD3d 527, 528, 866 NYS2d 681 [2d Dept 2008]; *see Starling v Suffolk County Water Auth.*, 63 AD3d 822, 823, 881 NYS2d 149 [2d Dept 2009]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence (*see Rivera v J. Nazzaro Partnership, L.P.*, 2014 N.Y. Misc. LEXIS 1821, *7-8, 2014 NY Slip Op 31012(U), 3 ; *Starling v Suffolk County Water Auth.*, 63 AD3d 822, 823, 881 NYS2d 149; *Noia v Maselli*, 45 AD3d 746, 747, 846 NYS2d 326 [2d Dept 2007]; *Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 620, 793 NYS2d 61 [2d Dept 2005]). "[A] plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Capasso v Capasso*, 84 AD3d 997, 998, 923 NYS2d 199 [2d Dept 2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]; *see, also, Dennis v Lakhani*, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]).

Administrative Code - Abutting Landowner

The Appellate Division in *Nisimova v. City of New York*, 145 A.D.3d 1023 (2nd Dept. 2016) stated as follows:

Section 7-210 of the Administrative Code of the City of New York (hereinafter the Administrative Code) imposes tort liability upon certain owners of real property ...

for injuries proximately caused by the failure of such owners to maintain the sidewalks abutting their property in a reasonably safe condition Section 7-210 of the Administrative Code does not, however, impose strict liability upon landowners for injuries arising from allegedly dangerous conditions on a sidewalk abutting their property.... Rather, the injured party has the obligation to prove the elements of negligence to demonstrate that the landowner is liable under this section of the Administrative Code.... Specifically, the injured party must establish (1) the existence of a duty on the landowner's part as to the injured party, (2) a breach of this duty, and (3) a resulting injury to the injured party.... In support of a motion for summary judgment dismissing a cause of action pursuant to Section 7-210 of the Administrative Code, the landowner has the initial burden of demonstrating, prima facie, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.... [*Citations omitted*].

ANALYSIS

The plaintiff alleges that he fell on the sidewalk due to a defective condition in front of 432 Park Avenue. At his deposition, he was somewhat equivocal as to the precise instrumentality that caused his fall. He could not identify the defect in photographs. Notwithstanding, the Court will state, for the sake of argument, that there is enough evidence to narrowly escape dismissal on the issue of awareness of the cause of the fall.

That cannot be gainsaid as to the issue of notice. Defendant has established that it neither created nor has actual or constructive notice of the condition allegedly involved. This is successfully accomplished through the affidavit of Scott Hayner, Vice President of Development of CIM Group, who visited the site several times each week, and received no complaints regarding the condition of the sidewalk. It is further supported by the affidavit of James Fallon, who was employed as construction manager of Lend Lease, the construction manager on the project, averring that the sidewalk was inspected daily and found to be safe. Finally, the affidavit and daily site inspection logs supplied by Frank Marino, Vice-President of Construction and Realty Safety Group state that there were no defects in the sidewalk at the location of the plaintiff's occurrence.

Defendant has met its *prima facie* burden of demonstrating its entitlement to judgment as a matter of law, dismissing the complaint and all cross claims insofar as asserted against it. It has proven to this Court's satisfaction that defendant did not create the condition or have actual or constructive notice of same.

In opposition, the plaintiff failed to raise a triable issue of fact. Plaintiff failed to take the deposition testimony of the defense witnesses or the non-party witnesses, and chose instead to twice file his note of issue and certificate of readiness indicating that all discovery was concluded and this matter was ready for trial. In so doing, he charted his own course in this matter.

THE CROSS-MOTION BY THE PLAINTIFF

While depositions of the defendants were referenced in the Preliminary Conference Order and the Compliance Conference Order, dating from 2016 and 2017, thereafter during the remaining four years to the present plaintiff never sought to arrange a date for any such deposition. Instead of seeking the defendants' deposition counsel for plaintiff filed a note of issue in September 2017, and only thereafter produced his client for the initial deposition in this case, with the action on the trial calendar and the defendants' motion to vacate pending. Thereafter, in December 2019, plaintiff filed a second note of issue again declaring that discovery was complete, without deposing anyone. Plaintiff, further, opposed the defendants two motions to vacate without raising the need for any deposition of the defendants, or anyone else. Plaintiff's actions constitute a waiver of any discovery from the defendants or nonparties. Moreover, there is no basis for the assessment of costs or sanctions in this matter.

CONCLUSION

Accordingly, based upon the foregoing, it is,

ORDERED, that the defendants are granted summary judgment in all respects; and it is further,

ORDERED, that the plaintiff's complaint, and all cross-claims are dismissed as

against all of the defendants in this matter; and it is further

ORDERED, that the plaintiff's cross-motion is denied in all respects; and it is further

ORDERED, that any other applications not specifically addressed herein are denied; and it is further

ORDERED, that any other applications for reargument, renewal or reconsideration shall be ONLY made by Order to Show Cause returnable to the undersigned.

This constitutes the opinion, decision and order of the Court.

Dated: July 26, 2022





LANCE EVANS, J.S.C.