

D.A. v 1683 Unico, L.L.C.
2022 NY Slip Op 35149(U)
February 25, 2022
Supreme Court, Bronx County
Docket Number: Index No. 20735/2016E
Judge: Andrew Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 4**

**D.A., an infant by his mother and natural guardian,
ROSA CRUZ and ROSA CRUZ, individually,**

Plaintiff,

DECISION AND ORDER

Index No. 20735/2016E

-against-

**1683 UNICO, L.L.C. and TRYAX REALTY
MANAGEMENT, INC.,**

Defendants.

The following papers, numbered 1-4 were considered on the motion for summary judgment:

PAPERS

NUMBERED

Notice of Motion, annexed Exhibits and Affidavits, Memorandum of Law1, 2
Answering Affidavits and Exhibits.....3
Reply Affirmation.....4

Upon the foregoing papers, it is ordered that the motion for summary judgment is denied.

The action was commenced to recover damages for injuries the infant plaintiff (hereinafter, plaintiff) allegedly sustained when he tripped on a crack in the sidewalk adjacent to the premises located at 1681-1689 University Avenue in Bronx County (premises). Defendant 1683 UNICO, LLC (Unico) is the owner of the premises and defendant Tryax Realty Management, Inc. (Tryax) manages the premises (collectively, defendants).

Defendants move for summary judgment, pursuant to CPLR 3212, for an order to dismiss plaintiff's complaint on the grounds that: 1) the defective condition in the sidewalk was trivial, and open and obvious; and 2) plaintiff was the sole proximate cause of his fall. In support of their motion, defendants tender, *inter alia*, the deposition testimonies of plaintiff, the plaintiff's mother, the superintendent of the premises, and photographs taken approximately a week and a half after the accident. Plaintiff opposes the motion.

It is well established that the proponent of a summary judgment motion must make a prima facie case showing of entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992], citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]).

A party moving for summary judgment in a trip and fall action must demonstrate that it did not create or have actual or constructive notice of the dangerous condition (*see Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]). Here, defendants fail to satisfy their prima facie burden with regards to constructive notice (*see Sada v August Wilson Theater*, 140 AD3d 574 [1st Dept 2016]). “A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011] [internal citations omitted]). Notably, defendants produced no evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell (*Quitana v TCR, Tennis Club of Riverdale, Inc.*, 118 AD3d 455 [1st Dept 2014]). Although the superintendent testified that his duties and responsibilities included inspecting and sweeping of the sidewalk, there is no evidence of what the inspection or sweeping routine was, if any, and whether such routine was followed on the day of the accident. The mere assertion of routine inspection of the sidewalk is insufficient to satisfy their burden as to whether defendants had constructive notice of the hazardous condition (*see Williams v New York City Housing Authority*, 99 AD3d 613 [1st Dept 2012]).

Defendants' contention that the defective condition is open and obvious, and therefore nonactionable, is unavailing. Even if a hazard qualifies as open and obvious as a matter of law, that characteristic merely eliminates the property's owner's duty to warn of the hazard but does not eliminate the broader duty to maintain the premises in a reasonably safe condition (*see Matos v Azure Holdings II, L.P.*, 181 AD3d 406 [1st Dept 2020]). Such evidence would go toward the issue of comparative negligence (*Garcia v Mack-Cali Realty Corp.*, 52 AD3d 420, 421 [1st Dept. 2008]). The issue of whether the defective condition in the sidewalk was open and obvious is generally a jury question and should only be resolved as a matter of law when the facts compel such a conclusion (*Westbrook v WR Activities-Cabrera Markets*, 5 A.D.3d 69 [1st Dept 2004]). Consequently, defendants' argument that the condition was open and obvious does not mean that it was not dangerous, and is therefore, not a basis for summary judgment.

The Court further finds that defendants did not establish that the defect was trivial as a matter of law. A defendant seeking dismissal based on a trivial defect must demonstrate that "the defect is, under the circumstances, 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, 79 [2015]). Generally, whether a dangerous condition or defective condition exists depends on the particular circumstances of each case and is an issue of fact for the jury to determine (*Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]). The court should consider whether other conditions exist, such as weather, location, or adverse lighting, that make would make an apparently trivial defect, nonetheless a tripping hazard (*Menendez v Dobra*, 301 AD2d 453, 453 [1st Dept 2003]). The court must also look at the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997] [internal citation omitted]).

Here, defendants' own submissions raise an issue of fact as to whether the defect in the sidewalk was trivial. The photographs taken a week and a half after plaintiff's accident reflect a crack with jagged edges surrounded by smaller chipped portions of the sidewalk which could constitute a tripping hazard (*see Munasca v Morrison Mgt. LLC*, 111 AD3d 564 [1st Dept

2013]). In viewing the evidence in the light most favorable to plaintiff (see *Garcia v J.C. Duggan, Inc.*, 180 AD2d at 580), the Court finds that there exist triable issues of fact as to whether the defective condition constituted a trap or a nuisance.

Defendants' failure to meet their *prima facie* burden on summary judgment warrants denial of the motion regardless of the sufficiency of plaintiff's opposition (see *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

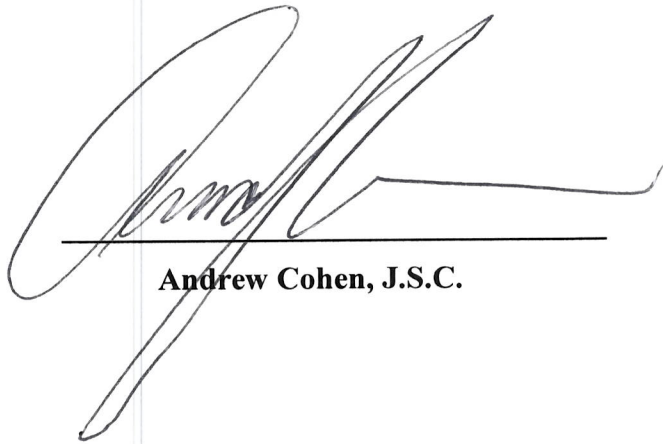
Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED, that defendants shall serve a copy of this order with notice of entry within 45 days.

This constitutes the decision and order of this court.

Dated: February 25, 2022



Andrew Cohen, J.S.C.