

Norfleet v Bogopa 170th Inc.
2022 NY Slip Op 35151(U)
February 15, 2022
Supreme Court, Bronx County
Docket Number: Index No. 22622/2018E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ASHLEY NORFLEET,

DECISION and ORDER
Index No. 22622/2018E

Plaintiff,

- against -

BOGOPA 170TH INC., ROYAL FARMS, INC.,
WHITE ROSE,

Defendants.
-----X

Paul L. Alpert, J.

Defendants moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against them. Plaintiff opposes the motion.

This action seeks recovery for personal injuries sustained by plaintiff as a result of an accident on December 15, 2017 at approximately 6:00 p.m. when she was caused to trip and fall on an alleged defective condition on the sidewalk on 170th Street between Fulton Avenue and 3rd Avenue, specifically abutting 535 East 170th Street in the Bronx County. Specifically, plaintiff was walking while holding her then 10-month-old daughter when she tripped on a gap on the subject sidewalk. The subject abutting premises was owned by defendant Royal Farms, Inc. and leased by Defendant Bogopa 170th Inc.

Plaintiff testified at her examination before trial that she was caused to fall when her left foot “got struck in like a gap on the sidewalk.” Even though it had, according to her testimony, stopped snowing prior to the accident, she stated that the gap was not covered by snow, and that she did not in any way slip on the snow before falling due to the “gap.” Lincoln Hospital medical notes state that, upon arrival at the ER on the day of the accident, plaintiff reported that she “fell outside [due to] snow...” She further testified as follows:

Q: While you were laying on the ground after the accident happened, did you stop to look around to see what caused you to fall?

A: No, I was only worried about my baby

Q: So from the time that you fell until the time that you left in the ambulance, at that point in time you didn't know what caused you to fall?

A: Yeah, I knew I tripped on something.

Q: But you don't know what you tripped on?

A: No

Q: You didn't actually see it?

A: No.

Q: Before or after you fell?

A: No.

Defendants argue that that plaintiff's accident was in fact caused by the presence of snow, based on her admission at the hospital that snow caused her to fall. They argue that accordingly, as there was a "storm-in-progress" at the time of the accident, defendants cannot be held liable for the happening of the accident. Alternatively, defendants argue that plaintiff did not examine the area where she fell at the time of the accident, and she did not "discover" the cause of her fall until much later. They argue that plaintiff's failure to identify the cause of her fall is fatal to her cause of action.

In opposition, plaintiff submits her affidavit in which she explains while at the hospital immediately following the accident, she called her sister, who then came to the hospital right away to help with her daughter. Plaintiff told her about the subject gap that caused her accident. Plaintiff further notes that her sister knew exactly which defect that she was talking about and had noticed and walked past the wide and deep gap in this sidewalk on several occasions for almost a year prior to her accident. Plaintiff further affirms that her sister stated that when she would walk past this defect, she would make an effort to avoid this tripping hazard. The sister went to the accident site and took a photograph of the gap that caused her accident. Plaintiff confirmed that that was the gap that caused the accident.

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." (*Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted]; *Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 118 A.D.3d 455, 987 N.Y.S.2d 68 [1st Dept. 2014] [defendant failed to establish a lack of constructive notice of the wet condition on steps where the moving papers contained no indication of when the area was last inspected prior to the accident]; *Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)

As reiterated by the Court of Appeals in *Sherman v. New York State Thruway Authority*, "[a]lthough a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter." (27 N.Y.3d 1019, 1020 [2016]; see also *Kantor v. Leisure Glen Homeowners Ass'n, Inc.*, 95 A.D.3d 1177, 1177 [2d Dept. 2012].) On a motion for summary judgment under the "storm in progress" rule, a defendant is required to submit evidence, in admissible form, that a storm was in progress at the time of the accident. The burden then shifts to the plaintiff to raise a triable issue of fact "as to whether the accident was caused by a slippery condition at the location where the [injured] plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition." (*Burniston v. Ranric Enterprises Corp.*, 134 A.D.3d 973, 974 [2d Dept. 2015], quoting *Meyers v. Big Six Towers, Inc.*,

85 A.D.3d 877, 877 [2d Dept. 2011]; *see also Small v. Coney Is. Site 4A-1 Houses, Inc.*, 28 A.D.3d 741, 742 [2d Dept. 2006].)

The defendants have raised a prima facie case. The plaintiff, in opposition, however, raises an issue of fact precluding summary judgment.

The plaintiff apparently concedes that dismissal would be warranted if the accident occurred due to a fall on snow. However, plaintiff steadfastly maintains that the accident was caused by a gap in the sidewalk, evidently between the sidewalk flags.

As to the failure of the plaintiff to observe the condition after she fell, this is not fatal to her claim. “To be sure, a plaintiff’s inability to identify the cause of a fall is fatal to an action because a finding that the defendant’s negligence proximately caused a plaintiff’s injuries would be based on speculation ... However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred ...” (*Haibi v 790 Riverside Dr. Owners, Inc.*, 156 A.D.3d 144, 147, 64 N.Y.S.3d 22, 24-25 [1st Dept. 2017] [citations omitted].) Here, the plaintiff’s testimony that her fall was caused by the condition of the sidewalk, and her explanation of the circumstances, raises an issue of fact for trial. “Although plaintiff was not able to identify the exact cause of her fall, she and her boyfriend, defendants’ porter, testified to several potentially dangerous conditions from which causation could be reasonably inferred...” (*Thompson v. Rodney*, 2022 N.Y. App. Div. LEXIS 53 [1st Dept. 2022].) Here, similarly, where plaintiff maintains that tripping, as opposed to slipping on snow, caused her fall and where the location proved to contain a sidewalk defect, causation can reasonably be inferred so as to raise an issue of fact.

Contrary to the plaintiff’s argument that the hospital admission must be germane to diagnosis and treatment, an inconsistent account of the accident by a party is admissible on the ground that it constitutes an admission by the party, so long as there is clear evidence connecting

the party to the statement (*see Kamolov v BIA Group, LLC*, 79 AD3d 1101, 1102, 915 N.Y.S.2d 588 [2d Dept 2010])["the challenged statements set forth in the ambulance report . . . were admissible on the independent ground that they constituted admissions by the plaintiff, since they are inconsistent with his current account of the accident and the statements were satisfactorily connected to him"]; *Newman v Vetrano*, 283 AD2d 264, 264-265, 724 N.Y.S.2d 414 [1st Dept 2001][finding that Supreme Court erred in striking testimony of a state trooper to the effect that plaintiff reported a different version of the accident than what he testified to at trial, because the "evidence should have been received as an admission contrary to plaintiff's position at trial"]; *Prelidakaj v Alps Realty of NY Corp.*, 69 AD3d 455, 456-457, 894 N.Y.S.2d 21 [1st Dept 2010] [admission against interest may only be admitted if there is clear evidence connecting the party to the entry].) However, the purported admission is not conclusive. Plaintiff explains in her affidavit that she intended to convey that fell into the snow after she tripped, which raises an issue for the trier of fact to resolve.

Accordingly, it is

ORDERED that the motion is denied.

This is the Decision and Order of the Court.

Dated: 2/15/22



Paul L. Alpert, J.S.C.