

Felton v Village Super Mkt., Inc.
2022 NY Slip Op 35170(U)
October 19, 2022
Supreme Court, Bronx County
Docket Number: Index No. 24722/2020E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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RONALD FELTON,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 24722/2020E

VILLAGE SUPER MARKET, INC., VILLAGE
SUPER MARKET OF NY, LLC, and
UE BRUCKNER PLAZA, LLC,

Motion Sequence No. 2

Defendants.

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GUZMAN, J.

Plaintiff commenced this action to recover damages for personal injuries after he allegedly tripped and fell on an uneven surface of a parking lot adjacent to the premises located at 1994 Bruckner Boulevard in Bronx, New York. Plaintiff alleges that on November 25, 2019, at approximately 5:30 p.m., he was walking from the ShopRite grocery store in the parking lot of the Bruckner Boulevard Mall when he tripped over an uneven part of the asphalt. At his deposition, Plaintiff testified that he was walking from the grocery store in the parking lot when he right foot got caught in a “depression” in the pavement; he fell forward and broke the fall with his hands; and a ShopRite employee helped him up and retrieved his sneaker, which had “flow off” his foot.

Plaintiff initially filed suit solely against Village Super Market Inc. and Village Super Market of New York, LLC, and amended his complaint thereafter to name UE Bruckner Plaza, LLC as a defendant. By stipulation dated January 18, 2021, Plaintiff discontinued his claims against the Village Super Market Defendants. *See* NYSCEF Doc. No. 25.

On the motion now before the Court, UE Bruckner Plaza, LLC (“Defendant”) moves for summary judgment dismissing the complaint on the grounds that the alleged defect in the asphalt is trivial and therefore not actionable as a matter of law, and that in any event it lacked notice of the allegedly defective condition.

In order to make a prima facie showing of entitlement to judgment as a matter of law, the moving party must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). The parties' competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, the existence of disputed issues of material facts for trial. CPLR § 3212 (b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or contentions that are not credible. Issue-finding, not issue-determination, is the role of the court on a motion for summary judgment. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 (1st Dep't 2021). Nevertheless, if the moving party fails to sustain its burden, the court need not address the adequacy of the opposing party's proof. *Licurgo-Cruz v. Ahmed*, 118 A.D.3d 420, 987 N.Y.S.2d 57 (1st Dep't 2014).

A defendant is entitled to summary judgment when it can establish that a defect is trivial, and did not constitute a dangerous or defective condition. *Thomas v. Dever Props, LLC*, 115 A.D.3d 459, 981 N.Y.S.2d 529 (1st Dep't 2014). There is no minimum dimension that automatically qualifies as an actionable defect. *Hutchinson v Sheridan Hill House Corp.*, 26 N.Y.3d 66, 77, 19 N.Y.S.3d 802 (1985). In determining whether a defect is trivial as a matter of law, such that a defendant is entitled to summary judgment, the court must examine all of the facts and circumstances surrounding the accident, including the measurements and appearance of the defect "along with the time, place and circumstances of the injury." *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997); *Bernstein v. Red Apple Supermarkets*, 227 A.D.2d 264 (1st Dep't 1996).

Here, in support of its argument, Defendant has submitted, *inter alia*, a copy of the relevant pleadings, photographs of the alleged defect, Plaintiff's deposition testimony, the testimony of Glen Ward, an employee of the Defendant, and a sworn affidavit from Peter Chen, a licensed professional engineer. See NYSCEF Doc. Nos. 40-52.

In his affidavit, Chen states that he performed a site inspection of the location of the subject accident, and measured the defect in the asphalt, as described and identified by Plaintiff at his deposition. Chen determined that the depth of the alleged defect to be 1/3 of an inch, and

44/100 of an inch at its greatest point. Chen also opines that the sidewalk adjacent to the premises is in compliance with 34 RCNY 2-09 (f)(5)(iv).¹ That section defines a substantial defect as “[a] trip hazard where the vertical differential between adjacent flags is greater than or equal to ½ inch or where a flag contains one or more surface defects of one inch or greater in all horizontal directions and is ½ inch or more in depth.” In any event, Chen concludes, within a reasonable degree of engineering certainty, that the accident location was free of any defects or other dangerous conditions, and that the portion of the parking lot where Plaintiff allegedly fell did not, as of the date of the accident, present a tripping hazard and is compliant with applicable code, rules and regulations, and presents no tripping hazard or defect. *See* NYSCEF Doc. No. 52.

While the affidavit, standing alone, establishes that the alleged defect was physically small and perhaps non-actionable, the applicability of the trivial defect doctrine does not turn solely on the dimensions of the alleged defect.

“A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses.” *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79, 19 N.Y.S.3d 802 (2015). “[A] small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it ‘unreasonably imperil[s] the safety of a pedestrian.’” *Id.* at 78, quoting *Wilson v. Jaybro Realty & Dev. Co.*, 289 N.Y. 410, 412 (1943).

Thus, a jagged edge, a rough, irregular surface, the presence of other defects in the vicinity, poor lighting, or the location of the accident such as a parking lot, the entrance or exit of premises, or heavily traveled walkway where pedestrians are naturally distracted are all factors that may preclude a finding that such a defect is too trivial to trigger liability. *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66. Specifically, a “physically small defect” can be rendered actionable if located in an area where pedestrians are naturally distracted from looking down at their feet. *See Argenio v. Metropolitan Transp. Auth.*, 716 N.Y.S.2d 657, 277 A.D.2d 165 (1st Dep’t 2000) (triable issue of fact raised as to whether ¼ inch depression on heavily traveled walkway at Grand Central Terminal caused plaintiff to fall); *Bolloli v. Waldbaum, Inc.*,

¹ The parties dispute whether this section is applicable to the facts of this case.

71 A.D.3d 618, 896 N.Y.S.2d 400, 401-03 (2d Dep't 2010) (evidence insufficient to demonstrate that alleged defect was trivial as a matter of law where plaintiff fell on a pothole in the parking lot of a supermarket on her way to shop for groceries).

Here, Defendant fails to address the “time, place and circumstances of the injury” to establish that the surrounding circumstances did not increase the risk of the defect, such as the fact that the alleged accident happened at 5:30 p.m. on a weekday in the shopping lot of a large grocery store during Thanksgiving week. Based on all of the facts and circumstances of this case, neither the photographs nor the expert affidavit conclusively establish as a matter of law that the height of the alleged defect or difference in elevation did not constitute “trap for the unwary.” See *Tesoriero v Brinckerhoff Park, LLC*, 126 A.D.3d 782, 5 N.Y.S.3d 261 (2d Dep't 2015); *Glickman v. City of New York*, 297 A.D.2d 220 (1st Dep't 2002).

Even if Defendant had met its prima facie burden, however, the Court would nevertheless find that Plaintiff has raised a triable issue of fact through his submission of a sworn affidavit stating that at the time of the incident, there was vehicle and pedestrian traffic in the parking lot, as vehicles come from all directions and parking spaces, and he had to pay attention to ensure that he would not be hit by a vehicle. Plaintiff further states that it was dark at the time of the accident and he was unable to see the ground clearly. See NYSCEF Doc. No. 32.

Finally, the Court also finds that Defendant has failed to meet its initial burden of establishing that it did not create the allegedly defective condition or lacked actual or constructive notice of the condition. The statements of Defendant's attorney that “there is nothing in the record to suggest that it could have been created by the Defendant” and “there is no visible defect on the parking lot in question” is not evidence. Additionally, the deposition testimony of Glen Ward, the property manager of the subject property, raises an issue of fact as to whether Defendant had notice of the allegedly defective condition of the asphalt. Ward testified that there had been renovations to the parking lot, including work to the subsurface, drainage, electric, water, and placing blacktop pavement on top with striping. See NYSCEF Doc. No. 50. As such, the asphalt was cut and the wiring for the barrier was installed about an inch into the asphalt and sealed with blacktop tar. Ward also had no recollection of when he had last inspected the parking lot. *Id.*

For these reasons, Defendant has failed to establish as a matter of law that the depression in the parking lot was not actionable and that it did not cause, create, or have notice of the

condition. The Court therefore declines to address the remaining arguments raised by the parties. Accordingly, for the foregoing reasons, it is hereby:

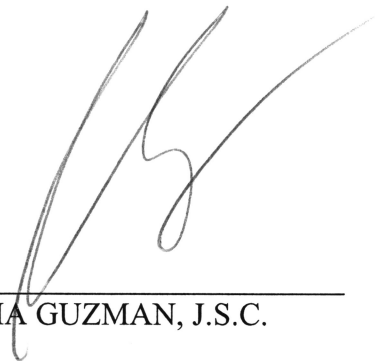
ORDERED AND ADJUDGED that Defendant's motion for summary judgment is denied; and it is further

ORDERED and ADJUDGED that Defendant shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: Bronx, New York

October 17 2022



HON. WILMA GUZMAN, J.S.C.