

Mercede v Unisource Corp.
2022 NY Slip Op 35191(U)
October 24, 2022
Supreme Court, Bronx County
Docket Number: Index No. 27541/2019E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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DARLENI MERCEDE,

Plaintiff,

DECISION and ORDER

Index No. 27541/2019E

-against-

UNISOURCE CORP. and GIANT UNISOURCE

CORP.,

Defendants.

-----X
HON. MARY ANN BRIGANTTI

Upon the foregoing papers, the plaintiff Darleni Mercedes ("Plaintiff") moves for an order pursuant to CPLR 3212 (a) granting her partial summary judgment on the issue of liability on her claims against the defendants Unisource Corp. ("Unisource") and Giant Unisource Corp. ("Giant") (collectively "Defendants"), as no factual issues exist warranting a liability trial in this matter; and (b) pursuant to CPLR 3211, dismissing Defendants' affirmative defense of Plaintiffs contributory negligence and assumption of risk, and for such other and further relief as this court deems just and proper. Defendants oppose the motion.

This matter arises out of an alleged trip-and-fall accident that occurred on December 7, 2018, on the sidewalk adjacent to Defendants' premises located at 2232 Pitkin Avenue, Brooklyn, New York. At the time of the accident, the premises was owned by defendant Unisource and leased to defendant Giant.

Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100

NY2d 72 [2003]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once a movant meets their initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Applicable Law and Analysis

Landowners have a duty to maintain the sidewalk abutting their property in a reasonably safe condition (*Xiang Fu He v. Troon Mgt., Inc.*, 34 N.Y.3d 167, 171 [2019]; New York City Administrative Code §7-210). That duty extends to a commercial tenant occupying the property where the controlling lease confers the tenant with comprehensive and exclusive sidewalk maintenance responsibilities (*see Abramson v. Eden Farm, Inc.*, 70 A.D.3d 514, 514 [1st Dept. 2010]). A plaintiff establishes their prima facie cause of action in a “trip and fall” accident by demonstrating that the defendants either created the injury-causing dangerous condition or had actual or constructive knowledge of it (*Lemonda v. Sutton*, 268 A.D.2d 383, 384 [1st Dept. 2000]). To constitute constructive notice, the defective condition must be “visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owners’] employees to discover and remedy it” (*id.* [cleaned up]). To obtain partial summary judgment on the issue of a defendant’s liability in a “trip-and-fall” accident, a plaintiff need only demonstrate that the defendant’s negligence was a proximate cause of his or her accident (*Benny v. Concord Partners 46th LLC*, 192 A.D.3d 531, 531-32 [1st Dept. 2021]).

In this case, Plaintiff’s deposition testimony and the authenticated photographs of the sidewalk depicting a visibly cracked, broken, and mis-leveled condition that Plaintiff testified was 1-2 inches wide and 1-2 inches deep, established prima facie that Defendants violated their duty to maintain the sidewalk abutting their property in a reasonably safe condition (*Tropper v. Henry St. Settlement*, 190 A.D.3d 623, 624 [1st Dept. 2021]; *Xiang Fu He v. Troon Mgt. Inc.*, 34 N.Y.3d 167 [2019]). On the issue of notice, Plaintiff submits the deposition testimony of Defendants’ witness Ken Lee (“Lee”), who acknowledged that the photographs of the defect showed cracks that were in existence around the time of the accident. When specifically asked if the photograph of the injury-causing defect accurately depicted the condition as it existed in December 2018, Lee responded that it appeared “almost the same” (Lee EBT at 38) (*see Salvia v. Hauppauge Rte. 111 Assoc.*, 47 A.D.3d 791, 791-92 [2d Dept. 2008])[photographs can prove

constructive notice of a defect if they were taken reasonable close to the time of the accident and there is testimony that the conditions at the time of the accident were similar to the conditions shown in the photographs]). While Lee did not feel that the conditions in the photographs showed a hazardous or dangerous defect, he did not submit any testimony refuting Plaintiff's testimony that the crack or hole was 1-2 inches wide and deep. On this record, therefore, there is no evidence refuting Plaintiff's testimony and photographs establishing that the defect was not trivial (*Abraham v. Dutch Broadway Associates, L.L.C.*, 192 A.D.3d 550, 551 [1st Dept. 2021]).

In addition, Plaintiff submits a report from an engineer who reviewed the photographs, performed a site inspection, and Google Maps images of the area from years prior to the accident. He opined *inter alia* that the accident was caused by an unsafe condition on the sidewalk, and this injury-producing condition took several months if not years to develop. The above establishes that the defect was visible and apparent and existed for a sufficient length of time prior to the accident to permit defendants to have discovered and remedied it, therefore Defendants had constructive notice of the defect (*Tropper*, 190 A.D.3d at 625; *see generally Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 83 [2015], citing *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]).

In opposition to the motion, Defendants fail to raise any triable issue of fact as to their liability. Even if Plaintiff's engineer did not establish definitively that the injury-producing condition existed as of 2013 or 2011 (the dates of the Google Maps images), he sufficiently opined that the condition as depicted in authenticated photographs must have taken months if not years to develop, thus establishing Defendants' constructive notice. The engineer's opinion was not speculative as it was based on his site inspection and review of the testimony and photographs (*see, e.g., Cuevas v. City of New York*, 32 A.D.3d 372, 374 [1st Dept. 2006]). Plaintiff's own testimony as to the dimensions of the hole or crack at the time of her accident are unrefuted and Defendants present no evidence that her estimations were incredible or unbelievable as a matter of law. Defendants present no evidence supporting its contentions that the defect may not have existed. Plaintiff is therefore entitled to summary judgment on the issue of Defendants' liability (*Tropper*, 190 A.D.3d at 625; *Derix v. Port Auth. of N.Y. and N.J.*, 162 A.D.3d 522 [1st Dept. 2018]; *Chavez v. Prana Holding Co., LLC*, 200 A.D.3d 449 [1st Dept. 2021]).

Plaintiff, however, failed to establish entitlement to dismissal of Defendants' affirmative

defense alleging comparative negligence and/or contributory negligence. Plaintiff testified that she was walking at a normal pace, holding her 1 ½ year old daughter and a shoulder bag and she was looking “straight” (Pl. EBT at 28-30; 31), but she admitted that she did not see the sidewalk where she had her accident and any time prior to her trip and fall (*id* at 30). Plaintiff submits no testimony that the defect was obscured or that she otherwise had no reasonable opportunity to avoid it. While Plaintiff’s engineer opined that shadows could camouflage the defect’s presence, Plaintiff did not testify that she was unable to see the defect prior to her accident. On this record, Plaintiff failed to eliminate material issues of fact as to her lack of comparative negligence (*see, e.g., Natoli v. Trader Joe’s E. Inc.*, 198 A.D.3d 572, 573 [1st Dept. 2021]).

The defense of assumption of risk, however, must be dismissed as it is inapplicable to these facts (*Custodi v. Town of Amherst*, 20 N.Y.3d 83, 89 [2012])[assumption of risk doctrine should not extend to cases involving persons injured while traversing streets and sidewalks]).

Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff’s motion for summary judgment on the issue of Defendants’ liability is granted, and it is further,

ORDERED, that Plaintiff’s motion to strike Defendants’ affirmative defense of assumption of risk is granted, and that affirmative defense is dismissed, and it is further,

ORDERED, that Plaintiff’s motion to strike Defendants’ affirmative defense of Plaintiff’s comparative and/or contributory negligence is denied.

This constitutes the Decision and Order of this Court.

E N T E R

Dated: October 24, 2022



Mary Ann Brigantti, J.S.C.