

Jones v BSREP UA Parker LLC

2023 NY Slip Op 30620(U)

March 2, 2023

Supreme Court, New York County

Docket Number: Index No. 152722/2019

Judge: James d'Auguste

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. James E. d'Auguste PART 55

Justice

-----X

DARIUS D. JONES

Plaintiff,

- v -

BSREP UA PARKER LLC,

Defendant.

-----X

INDEX NO. 152722/2019

MOTION DATE 07/01/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for personal injuries, plaintiff Darius Jones (“Jones”), a pedestrian, seeks partial summary judgment on the issue of liability. Jones allegedly suffered injuries on August 23, 2018, resulting from a trip and fall on a defective portion of a sidewalk abutting the subject premises, 1890 Lexington Avenue, admittedly owned by defendant BSREP UA Parker LLC (“BSREP”) (NYSCEF Doc. Nos. 39, 41). Jones asserts he was walking from 125th Street to 116th Street when his foot “went into a missing tile or brick...and hit the inside of where the tile was missing...his ankle shifted causing him to fall” (NYSCEF Doc. No. 39).

Jones was shown photographs, including a Google Maps Street View image of the subject premises captured one year prior to his accident—BSREP’s Exhibits—and stated they fairly and accurately depicted what the sidewalk looked like on the day of his accident [NYSCEF Doc. No. 39, 42, 43]. These photographs, which were taken two years apart, showed the specific location with the missing tile that allegedly caused Jones’ accident.

BSREP opposes Jones’ motion for partial summary judgment arguing the motion is mainly based on Jones’ testimony. BSREP asserts Jones’ memory and/or credibility is called into

question because multiple times Jones replied, “I don’t remember,” to numerous “very basic questions” (NYSCEF Doc. No. 48). BSREP contends that as Jones’ credibility required assessment by a jury, summary judgment is inappropriate. *Sebagh v. Capital Fitness Inc.*, 202 AD3d 853 (2d Dep’t, 2022).

Jones, however, clearly identified where he fell on marked photographs at his deposition and testified BSREP’s exhibits show the area where he fell and fairly and accurately depicted how the sidewalk looked on the day of his accident, including showing the missing tile. Additionally, Jones recalled other pertinent details of the incident. The Court, in *Rodriguez v. Forest City Jay St. Assoc.*, 234 AD2d 68 (1st Dep’t 1996), held that “defendants’ claim that plaintiff was unable to recall certain ‘basic matters’ and of ‘minor, immaterial inconsistencies’ in the testimony of the plaintiff did not preclude granting summary judgment.” Thus, that Court held, “there is no bar to granting partial summary judgment on plaintiff’s testimony alone when no bona fide issue as to his credibility exists.” *Anderson v. International House*, 222 AD2d 237 (1st Dep’t 1995).

While BSREP cites *Sebagh* for the proposition that Jones’ credibility is at issue because of things he could not recall at his deposition, Jones claims his testimony was not incredible, as a matter of law, and a jury would not have to resort to speculation in order to find he fell on the missing paver. BSREP fails to come forward with any evidence that Jones’ accident did not happen the way he testified, and “mere surmise, suspicion and accusation are insufficient to defeat summary judgment.” *Towners Org. v. Glockhurst Corp.*, 160 AD2d 597 (1st Dep’t 1990). Thus, Jones states as no bona fide issue regarding his credibility exists, BSREP fails to raise a triable issue of fact to defeat his motion for partial summary judgment.

Also, Jones argues as the admitted owner of the subject premises, BSREP had a non-delegable duty to maintain the sidewalk abutting its premises in a reasonably safe condition under New York City's Administrative Code §7-210. *Xiang Fu He v. Troon Mgmt. Inc.*, 34 NY 3d 167 (2019). Under Administrative Code §7-210, the owner of commercial property is liable for personal injuries proximately caused by the owner's failure to maintain the sidewalk abutting its premises in a reasonably safe condition, and such duty is non-delegable. *De Felix v. 590 Fordham Rd. Corp.*, 199 A.D. 3d 453 (1st Dep't 2021). Jones further contends New York City Rules & Regulations, Title 34, Department of Transportation, Chapter 2, Highway Rules, imposed a duty on property owners regarding maintenance of their sidewalk, including maintaining in good repair, at their own cost, the sidewalk abutting their properties (NYSCEF Doc. No. 39). Jones claims as BSREP admitted ownership of the subject premises at the time of his accident, it had a legal duty to maintain the sidewalk abutting the premises in a reasonably safe condition.

Jones' expert, engineer Vincent Vici, also a certified New York State Code Enforcement Official, concludes the defective area of the sidewalk Jones identified "contained a significant depression and the surface defects, vertical displacements and a hole at the location due to the missing paver, all of which constituted dangerous tripping hazards" (NYSCEF Doc. Nos. 39, 47). As such, Vici opines there is no dispute the defective condition that caused Jones' accident was an unsafe condition that was a significant contributing factor to his trip and fall incident.

BSREP asserts that Vici's affidavit is not based on any in-person observations, nor any measurements, and on inconclusive photographs not containing any measurements, noting Vici failed to personally visit or inspect the accident location himself or take any measurements of the condition. As such, BSREP claims Vici's affidavit is conclusory and lacks probative value

(NYSCEF Doc. No. 48). *Bacani v. Rosenberg* 74 AD3d 500 (1st Dep't 2010) (Plaintiff's expert was conclusory where his opinion was not based on facts in the record and not within the expert's personal knowledge). While "it is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness," (see *Hambusch v. New York City Transit Auth.*, 63 NY2d 723 (1984)), an expert may rely on photographic evidence to arrive at opinion conclusions and a plaintiff's expert's reliance on photographs of the scene and deposition testimony were found sufficient to support the expert's conclusions. *Tate v. Freeport Union School Dist.*, 7 AD3d 695 (2d Dep't 2003).

Further, BSREP alleges nothing in the record indicates the depth of the condition Jones identified, and when asked at his deposition regarding the depth of the area, Jones stated he did not know. Also, BSREP notes none of the photographs contain any measurements, nor did Vici take any (NYSCEF Doc. No. 48). However, Jones testified the area of the missing tile was a rectangular shape, there were other cracks around the hole, and it was deep enough for him to put his foot in and the foot to turn (NYSCEF Doc. Nos. 42, 49). Vici asserted the defect "consists of a notable depression and notable vertical height difference between the missing paver...and the surface of the adjacent surrounding pavers...resulting in a surface defect of one inch or greater in all horizontal directions and greater than ½" or more in depth" (NYSCEF Doc. Nos. 47, 49). Thus, Jones argues, as in *Tropper v. Henry St. Settlement*, 190 AD3d 623 (1st Dep't 2021) where defendant failed to come forth with any facts to controvert plaintiff's estimate of the size of the defect, and offered nothing to refute plaintiff's estimate, BSREP also fails to come forward with any facts to controvert Jones' and Vici's estimates of the size of the subject defect, proffer anything to refute such estimates, or raise an issue of fact controverting that the condition was hazardous. Hence, as in *Tropper*, where the Court vacated the granting of defendant's

motion for summary judgment and granted plaintiff's motion for partial summary judgment against that defendant, Jones argues partial summary judgment against BSREP is warranted.

Furthermore, Jones asserts that constructive notice is conclusively demonstrated by the Google Street View image from August 2017, a full 12 months before the subject accident in August 2018, showing that the subject defect was visible and in existence at that time and in need of repair. In fact, such one-year period was more than adequate time for BSREP to repair the subject defect, of which it was aware. BSREP's own witness, Doryne Isley, a portfolio manager, testified she recalled conversations with the building manager concerning the need for repairs to the sidewalk in front of the subject premises prior to August 2018 (NYSCEF Doc. Nos. 39, 45). The Court of Appeals ruled "to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History*, 67 N.Y. 2d 836 (1986). On the evidence presented, Jones argues BSREP was on, at least, constructive notice of the defective condition one year before his accident, but failed to remedy it, thus, is negligent.

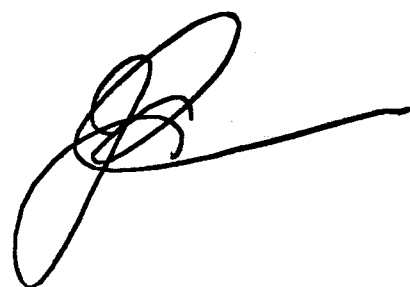
Finally, the Court of Appeals in *Rodriguez v. City of New York*, 31, NY3d 312 (2018), made it clear that "placing the burden on the plaintiff to show an absence of comparative fault is inconsistent with the plain language of CPLR 1412."

The Court considered all other arguments asserted and found them without merit. "A Court need not address, in its decision, ever argument raised by a party." *Ctr. For Jud. Accountability, Inc. V. Cuomo*, 167 AD3d 1406 (3d Dep't 2018).

Given that BSREP was on notice of the subject defect that caused Jones' trip and fall, had adequate time to repair same, but failed to do so, and failed to raise any genuine issues of triable

fact, Jones' motion for partial summary judgment against BSREP on the issue of liability is granted.

This constitutes the decision and order of the Court.



3/2/2023
DATE

James d'Auguste, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE