

Alvarez v W. 205 Realty Co., LLC

2023 NY Slip Op 30838(U)

March 20, 2023

Supreme Court, New York County

Docket Number: Index No. 162288/2019

Judge: David B. Cohen

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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. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 162288/2019

HECTOR ALVAREZ,

MOTION SEQ. NO. 001

Plaintiff,

- v -

W. 205 REALTY CO., LLC, and B & R MANAGEMENT CO.,
LLC,**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for

JUDGMENT - SUMMARY

In this premises liability action defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Factual and Procedural Background

This case arises from an incident in which plaintiff was allegedly injured in front of a building located at 425 West 205th Street in Manhattan (the premises) when he slipped while trying to step over garbage bags on the sidewalk (NYSCEF Doc No. 1). Plaintiff then commenced this action against defendants, alleging that he was injured due to their negligent ownership, control, management, and/or maintenance of the sidewalk in front of the premises (Doc No. 1). Defendants joined issue by their answer dated February 28, 2020, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 5). They now move for summary dismissal of the complaint (Doc Nos. 14-15, 23, 28).

Many of the facts in this case are undisputed (Doc Nos. 16, 27). The premises were owned by defendant W. 205 Realty Co., LLC and managed by defendant B & R Management Co., LLC

(Doc Nos. 16, 27). At the premises superintendent's deposition, he testified that he handled garbage disposal and would regularly place garbage bags on the sidewalk on Tuesday afternoons to be collected on Wednesday mornings by the Sanitation Department (Doc Nos. 16, 27). If they remained uncollected by 10:00 a.m. on Wednesday, he would remove them from the sidewalk (Doc Nos. 16, 27). However, he could not recall if he placed the garbage bags on the sidewalk on Tuesday, November 26th, or if he removed them on Wednesday, November 27th, the day before plaintiff's accident on Thursday, November 28th. He also stated that he cleaned and inspected the sidewalk every morning between 7:00 a.m. and 8:00 a.m., but could not recall whether he did so on the date of plaintiff's accident (Doc Nos. 16, 27).

On the date of his accident, plaintiff came across several garbage bags laying on the sidewalk in front of the premises and injured himself after he slipped while attempting to step over them (Doc Nos. 16, 27). At his deposition, he testified that the garbage bags blocked the entire width of the sidewalk (Doc No. 20).

Legal Analysis and Conclusions

Defendants fail to establish their prima facie entitlement to judgment as a matter of law, as they are unable to demonstrate that the garbage bags on the sidewalk were "both open and obvious and, as a matter of law, not inherently dangerous" (*cf. Boyd v New York City Hous. Auth.*, 105 AD3d 542, 542-543 [1st Dept 2013] [granting summary dismissal of complaint after defendants demonstrated gate on which plaintiff leaned and fell was not open, obvious, and inherently dangerous], *lv denied* 22 NY3d 855 [2013]). Courts have found that garbage bags and other items left purposely on the sidewalk are open, obvious, and not inherently dangerous where the sidewalk was not completely obstructed by such objects (*see Leung v Madison St. Partners, LLC*, 203 AD3d 578, 578-579 [1st Dept 2022] [finding garbage bags next to curb not inherently dangerous because

“there was ample room on the sidewalk for plaintiff to have avoided the bags had he so chosen”]; *Barchi v Rudin E. 55th St. LLC*, 144 AD3d 444, 445 [1st Dept 2016] [finding pile of Christmas trees not inherently dangerous because they “did not dangerously obstruct the sidewalk so as to impede the flow of pedestrian traffic”]; *Ruiz v 221-223 E. 28th St., LLC*, 143 AD3d 553, 553 [1st Dept 2016] [finding unopened garbage bags not inherently dangerous where “there was enough room on the sidewalk for at least one person to pass by, unobstructed”]).

Here, plaintiff’s testimony that the garbage bags blocked the entire sidewalk is uncontroverted. Therefore, although the photographic evidence in the record and plaintiff’s testimony demonstrate that the bags were open and obvious, as they were “readily observable” (*Leung*, 203 AD3d at 578-579), defendants have not established that the bags were not inherently dangerous because they have not shown that plaintiff was able to proceed along the sidewalk unimpeded (*cf. id.*; *Barchi*, 144 AD3d at 445; *Ruiz*, 143 AD3d at 553).

Additionally, defendants have not established that they lacked constructive notice of the garbage bags on the sidewalk. “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 NY2d 836, 837 [1986]; *accord Chianese v Meier*, 98 NY2d 270, 278 [2002]). Defendants’ superintendent could not remember whether he had moved the bags before the accident after they were apparently not collected by the Sanitation Department. Therefore, defendants are unable to establish how long the garbage bags were on the sidewalk prior to plaintiff’s accident, and thus cannot demonstrate that such length of time was short enough to prevent them from having constructive notice. Assuming the garbage bags were placed on the sidewalk on the afternoon of Tuesday, November 26th, over 24 hours passed before plaintiff’s

accident on the morning of Thursday, November 28th. That period of time is sufficient to provide defendants with constructive notice (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985] [finding defendant did not lack constructive notice where aisle of store uninspected for almost one hour prior to plaintiff's accident]).

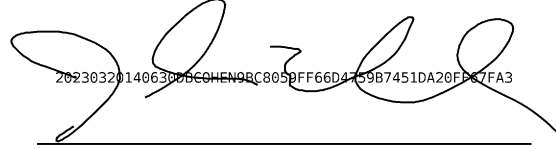
A lack of constructive notice may also be demonstrated “by producing evidence of its maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last inspected or cleaned before the plaintiff fell” (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). However, defendants’ superintendent could not recall whether he inspected the sidewalk on the date of the accident, and defendants produced no other evidence that an inspection schedule was followed. That evidence is insufficient to demonstrate that defendants lacked constructive notice (*see Castillo-Sayre v Citarella Operating LLC*, 195 AD3d 513, 513 [1st Dept 2021] [finding defendant failed to establish prima facie that it lacked constructive notice where manager could not say when sidewalk was last cleaned or inspected and no cleaning logs were produced]).

“Given defendants’ failure to meet their initial burden, this Court need not consider the sufficiency of plaintiff’s opposition papers” (*Mashozhera v El Nuevo JB Bakery Inc.*, 191 AD3d 605, 606 [1st Dept 2021] [citations omitted]).

Accordingly, it is hereby:

ORDERED that the motion by defendants W. 205 Realty Co., LLC and B & R Management Co., LLC for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties shall appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on April 19, 2023, at 11:00 a.m.



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3/20/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE