

Massar v Village View Hous. Corp.

2023 NY Slip Op 32350(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 150468/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

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JAYNATHA MASSAR,

Plaintiff,

- v -

VILLAGE VIEW HOUSING CORPORATION,

Defendant.

-----X

INDEX NO. 150468/2018

MOTION DATE 10/28/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, and 80

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the defendant's motion for summary judgment is denied, for the reasons stated in the opposition papers (NYSCEF Doc. Nos. 68-69), and the exhibits attached thereto, in which the court concurs, as summarized herein.

On January 1, 2017, plaintiff Jaynatha Massar ("plaintiff") tripped and fell outside of defendant Village View Housing Corporation's ("defendant") premises (Massar EBT tr, NYSCEF Doc. No. 52 at 44, 140-141). Plaintiff asserts that he tripped and fell on a portion of the sidewalk flag located at the intersection of 1st Avenue and 4th Street, where the sidewalk flag borders the curb and the pedestrian ramp leading into the intersection, while he was crossing 4th Street (*id.* at 88, 99-100, 102-103, 110; site photograph, NYSCEF Doc. No. 53). He testified that his right foot interacted with a lip between the sidewalk flag and the curb (Massar EBT tr, NYSCEF Doc. No. 52 at 110). The photograph depicting the accident site shows that a height differential exists between the sidewalk flag and the curb in the area in which plaintiff indicated that he tripped (NYSCEF Doc. No. 53).

Defendant now moves for summary judgment dismissing the complaint on the grounds that degradation of the curb or a defect in the ramp caused plaintiff to fall, neither of which are defendant's responsibility. Alternatively, defendant argues that any defect in the sidewalk was open and obvious, precluding liability for plaintiff's injuries.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, defendant fails to make out its prima facie case with respect to its lack of a duty to plaintiff to maintain the curb or ramp. As a general matter, defendant has a "nondelegable duty to maintain its property in a reasonably safe condition, taking into account the foreseeability of injury to others" (*Daly v 9 E. 36th LLC*, 153 AD3d 1145, 1147 [1st Dept 2017], citing *Basso v*

Miller, 40 NY2d 233, 241 [1976]). New York City Administrative Code § 7-210 provides, as specifically relevant herein, that “[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition” (Administrative Code of City of NY § 7-210[a]). “Sidewalk shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians” (Administrative Code of City of NY § 19-101[d]). “[A]butting owners are not obligated to maintain the curb” (*Fernandez v 2265 E. Tremont Realty, LLC*, 188 AD3d 529 [1st Dept 2020]). The parties herein dispute whether plaintiff tripped over a sidewalk flag, which was defendant’s responsibility to maintain, or over the curb and ramp, which were the City of New York’s responsibility. Plaintiff’s deposition testimony that he tripped over the sidewalk, as recited above, is not rebutted by defendant’s submissions. Accordingly, in this regard, defendant has failed to meet its prima facie burden.

Defendant next argues that, assuming it is responsible for the defect which caused plaintiff to fall, said defect was open and obvious, precluding liability. “To establish an open and obvious condition, a defendant must prove that the hazard could not reasonably be overlooked by anyone in the area whose eyes were open” (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014]). “The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses” (*id.*). “Whether a hazard is latent or open and obvious is generally a question of fact for the jury” (*Piluso v Bell Atl. Corp.*, 305 AD2d 68, 70 [1st Dept 2003]).

Here, the court finds that defendant has not established prima facie entitlement to summary judgment, as it has not established that the defect in the sidewalk was in fact open and obvious. In this regard, “[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*Harris v 11 W. 42 Realty Inv'rs, LLC*, 98 AD3d 1084, 1085 [2d Dept 2012]). Plaintiff testified that he was traversing the accident site sometime after 11:00 PM, and that he was on his way to meet a friend (Massar EBT tr, NYSCEF Doc. No. 52 at 65). He also testified that it was cloudy that night (*id.* at 72). The pictures submitted as evidence herein were taken during the day, and thus it is unclear that the same defect pictured would be open and obvious during the time and under the circumstances which Massar tripped and fell. Further, even if the court were to find the defect open and obvious, that would only relieve defendant of its duty to warn of the defect, and not preclude liability for allowing the defect in the first place (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 70 [1st Dept 2004] [“Additionally, we hold that even if a hazard qualifies as ‘open and obvious’ as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition”]). Thus, even were the condition open and obvious defendant would not be entitled to summary judgment dismissing the complaint (*id.* at 74 [“A landlord's duty to maintain premises in a reasonably safe condition . . . is not satisfied by permitting a highly dangerous—but correctable—condition to remain, simply because the dangerous condition is obvious”]).

Accordingly, it is hereby

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Louis L. Nock

7/13/2023

DATE

LOUIS L. NOCK, 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