Spero v 681 Ninth Ave., LLC

2023 NY Slip Op 33822(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156300/2019

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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DIANE SPERO,

Plaintiff,

- v -

681 NINTH AVENUE, LLC, and 679, LLC,

Defendants.

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INDEX NO. 156300/2019

MOTION DATE 08/08/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

679, LLC,

Third-Party Plaintiff,

-against-

PARADISIO 679, INC.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for personal injuries, arising from a trip-and-fall accident on a public sidewalk, the plaintiff moves pursuant to CPLR 3212 for summary judgment against the defendants on the issue of liability. The defendant 681 Ninth Avenue, LLC, opposes the motion, and cross-moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The defendant 679, LLC, opposes the motion, and separately cross-moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The motion and the cross motions are denied.

On March 24, 2019, at approximately 12:15 p.m., the plaintiff tripped and fell on a public sidewalk adjacent both to a building located at 681 Ninth Avenue in Manhattan, which is owned

by the defendant 681 Ninth Avenue, LLC, and a building located at 679 Ninth Avenue in Manhattan, which is owned by the defendant 679, LLC. As a consequence of her fall, she allegedly sustained personal injuries. Specifically, the plaintiff alleged that she tripped when she caught her foot on the lip of a sidewalk flag that was elevated above the abutting flag by 7/8 of an inch. She averred that the greater portion of the higher sidewalk flag was adjacent to 681 Ninth Avenue, while the lower flag was adjacent to 679 Ninth Avenue. She further alleged that the height differential between the two sidewalk flags constituted a tripping hazard for which both of the defendants should be held liable, inasmuch as the dividing line of the two sidewalk flags was partially coterminous with the property line separating the two buildings, as extended.

In support of her motion, the plaintiff submitted the pleadings, the parties' deposition transcripts, an attorney's affirmation, and the expert affidavit of professional engineer Scott Silberman, to which were attached several photographs of the accident site, which she averred constituted a true and accurate depiction of the area where she fell as of the date of the accident. At her deposition, the plaintiff explained that, at the location where she fell, not only was there a vertical elevation differential between the two sidewalk flags, but that the flags were broken and not properly leveled, and that there also were metal ramps installed on the sidewalk in front of both buildings that effectively narrowed the sidewalk, diminishing the area of the sidewalk surface accessible to pedestrians, and making it more likely that a pedestrian would come into contact with the defective portions of the sidewalk surface.

In his affidavit, Silberman asserted that, several months after the accident, he inspected and photographed the accident site. As he described it, "[a]s shown in the photos, the defect is located along the joint between two sidewalk flags and the vertical grade differential between the flags was measured to be at least 7/8 of an inch. Also, the exposed vertical face of the defect had a rough and jagged texture." Silberman went on to aver that

> "as shown in the photograph annexed as Exhibit F taken at my inspection, the subject vertical grade differential was located on the property line between 679 and 681. Any time there is a vertical grade differential between adjacent

> sidewalk flags, as there is here, there is a lower flag and a higher flag. In this case it appears all of the higher flag is in front of . . . 681 and most of the lower flag is in front of 679. However, the defect also could be located along the joint that is shared by both properties. A survey would be needed to verify the precise location of the property line."

He also submitted Google street view photographs, all of which were taken at least more than 15 months prior to the accident, showing the presence of the defects and a vertical grade differential on the sidewalk flags, long before the date of the accident. Silberman also referred to the defendants' deposition testimony, in which a representative of one of the defendants conceded that he had known about the elevation differential between the two sidewalk flags for a significant period of time prior to the date of the accident.

Silberman stated that

> "[a]ccording to the Standard Practice for Safe Walking Surfaces (F1637) published by the American Society of Testing Materials, 5.1.1, walkways shall be stable, planar, flush, and even to the extent possible. This standard is intended to 'provide reasonably safe walking surfaces for pedestrians wearing ordinary footwear.' A 'walkway' is defined in this standard as 'walking surfaces constructed for pedestrian usage including floors, ramps, walks, sidewalks, stair treads, parking lots and similar paved areas that may be reasonably foreseeable as pedestrian paths . . .' While not a mandatory standard, this standard represents what constitutes good and accepted practice for providing a safe walking surface."

He opined that any vertical height differential of 1/2 of an inch or greater is sufficient to cause a trip-and-fall accident, and that most design guidelines consider 1/2 of an inch to be excessive, and require that a transition between the two different walking surfaces be accomplished by means of a ramp, leveling, or beveling, or that the surface be completely replaced. Silberman averred that it is generally accepted in the design and safety engineering profession that any abrupt change in elevation in a walkway, public sidewalk, or any place where people are expected to walk is an inherent and unreasonable danger to pedestrians, and that such a condition is reasonably inexpensive to repair. Silberman asserted that most trip-and-fall accidents are caused by walking over surfaces that evince an abrupt change in elevation, usually a vertical grade differential of 1/2 of an inch or higher. He identified numerous design,

construction, and safety standards and guidelines promulgated by various private organizations and governmental agencies, including the American Society of Testing Materials, Federal Highway Administration, National Fire Protection Association, CNA Insurance Company, and National Safety Council, which provide that a vertical grade differential of 1/2 of an inch between adjoining surfaces constitutes a dangerous condition, and noted that some of those guidelines assert that even a 1/4-inch differential will not assure a pedestrian's safety.

Silberman also cited to Admin. Code of City of N.Y. § 19-152(a)(4) and 39 RCNY 2-09(f)(5)(iv), both of which define a "substantial defect" on a sidewalk to include "[a] trip hazard where the vertical differential between adjacent flags is greater than or equal to 1/2" or where a flag contains one or more surface defects of one inch or greater in all horizontal directions and is 1/2" or more in depth." He noted that Admin. Code of City of N.Y. § 19-152(a) obligates an "owner of any real property, at his or her own cost and expense," to "repave, reconstruct and repair the sidewalk flags in front of or abutting such property" where such a substantial defect is present, while 39 RCNY §2-09(f)(4)(viii) provides that "[a]ll flags containing substantial defects shall be fully replaced." Silberman also cited to New York City Charter § 2904, which essentially reiterates the obligation imposed upon property owners that is articulated in Admin. Code of City of N.Y. § 19-152(a). In addition, he quoted from Admin. Code of City of N.Y. § 7-210(a) and (b), which impose tort liability upon certain property owners who fail to maintain a sidewalk abutting their property in a reasonably safe condition.

In opposition to the plaintiff's motion, both defendants relied upon the plaintiff's submissions, and both cross-moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them. The defendant 681 Ninth Avenue, LLC, also submitted the plaintiff's bill of particulars, an attorney's affirmation, and photographs that had been marked as exhibits at the parties' depositions, as well as the expert affidavit of professional engineer Vincent E. Ettari. The defendant 679, LLC, only submitted an attorney's affirmation, which was virtually identical to the attorney's affidavit submitted by its codefendant.

In his affidavit, Ettari cited to Admin. Code of City of N.Y. § 19-152(a-1), which defines a "substantial" sidewalk defect identically to the definition set forth in Admin. Code of City of N.Y. § 19-152(a), the code provision relied upon by the plaintiff. The court notes, however, that the provision cited by Ettari is applicable only to defects "discovered in the course of a city capital construction project or pursuant to the department's prior notification program." In any event, Ettari contended that the actual vertical discontinuity in this case, as measured by the difference between the walking surface levels, was 3/8 of an inch, and thus less than the 1/2-inch limitation set forth in the Administrative Code. He averred that the sidewalk thus conformed to the Administrative Code, that the edges of the sidewalk flags were not jagged in any event, and that there was sufficient sidewalk surface adjacent to the subject sidewalk flags upon which a pedestrian could walk without being forced to walk over the subject sidewalk flags. He further asserted that the condition of the sidewalk either conformed with the standards and guidelines that Silberman referenced in his affidavit, or that the some of the standards and guidelines were inapplicable. Ettari ultimately concluded that the sidewalk condition, as it existed on the date of the plaintiff's accident, did not present a tripping hazard or a dangerous condition to pedestrians traversing the sidewalk.

681 Ninth Avenue, LLC, argued that the defect alleged to have caused the plaintiff's accident was trivial as a matter of law and, hence, not actionable. It alternatively contended that, even if the condition were not trivial as a matter of law, triable issues of fact remained as to whether the defect constituted a dangerous condition and, hence, whether it maintained the sidewalk in a reasonably safe condition. 679, LLC, also relied upon Ettari's affidavit, and essentially reiterated the arguments propounded by 681 Ninth Avenue, LLC.

In reply, the plaintiff submitted an additional photograph of the defect, depicting a tape measure stretched from the top of the higher, uptown sidewalk flag lip to the bottom of the adjoining surface, which reflected the presence of a vertical height differential of 7/8 of an inch.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]).

Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]). "The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a movant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in its opponent's case. It must affirmatively demonstrate the merit of its claim or defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

To prevail in this action, the plaintiff ultimately must establish that the defendants owed her a duty to provide and maintain a reasonably safe sidewalk adjacent to their buildings, and

that they breached that duty by allowing a dangerous condition to remain thereon despite creating the condition or having actual or constructive notice of the condition for a period of time sufficient for them to remedy it (*see Betances v 185- 189 Audubon Realty, LLC*, 139 AD3d 404 [1st Dept 2016]). The plaintiff made no allegations that the defendants created the condition. Rather, she contended that they had either actual or constructive notice thereof. Constructive notice of a dangerous condition may be established with proof that the condition was visible and apparent for a sufficient period of time so that the defendants had an opportunity to correct it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]). The plaintiff made a prima facie showing that, pursuant to the New York City Administrative Code, the defendants owed her a duty in tort to maintain the sidewalk flags in a reasonably safe condition, and to repair or replace the flags because the height differential between them was 1/2 of an inch or greater. Further, it is undisputed that 679, LLC, had actual notice of the existence of the vertical height differential between the two sidewalk flags, inasmuch as Gianpietro Pecora, who was the office manager for 679, LLC's managing agent, testified at his deposition that he was aware of the condition for at least one year prior to the accident. Moreover, 681 Ninth Avenue, LLC, did not contest the plaintiff's evidence that the condition had been present for at least 15 months, and for perhaps as long as 2½ years prior to the accident, or that the condition was visible and apparent for that length of time.

"Generally, the issue of whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case, and is properly a question of fact for the jury" (Nathan v City of New Rochelle, 282 AD2d 585, 585 [2d Dept 2001]). In opposition to the plaintiff's prima facie showing that the condition of the sidewalk flags and its vicinity presented a dangerous tripping hazard to pedestrians such as herself, due to the vertical height differential, the jagged lip of the higher flag, and the constricted nature of the sidewalk surface accessible to pedestrians, the defendants raised a triable issue of fact with their engineer's affidavit.

Specifically, there is a sharp dispute as to the actual height differential, as measured by the parties' different experts, whether the lip of the higher sidewalk flag was jagged and uneven, whether there was an unreasonable limitation on the surface area of sidewalk space accessible to pedestrians by virtue of the presence of metal ramps installed on the sidewalk that abutted the buildings, and, thus, there is a factual dispute as to whether the condition of the sidewalk constituted a dangerous condition that contributed to the plaintiff's fall (*cf. Lopez v 1675 Realty*, 209 AD3d 407, 408 [1st Dept 2022] [plaintiff's *uncontroverted* expert's report and affidavit demonstrated that the 3/4-to-1-inch deep and 2 1/2 inch-to-4 1/2 inch-wide condition that caused his accident constituted a "substantial defect" and tripping hazard, and violated multiple applicable sidewalk statutes and safety standards]).

Inasmuch as the defendants raised a triable issue of fact in opposition to the plaintiff's prima facie showing of entitlement to judgment as a matter of law, the plaintiff's motion for summary judgment must be denied.

The court, however, rejects the defendants' contention that the subject defect was trivial as a matter of law and, hence, not actionable.

As the defendants correctly noted, "'the owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection'" (*Guerrieri v Summa*, 193 AD2d 647, 647 [2d Dept 1993], quoting *Liebl v Metropolitan Jockey Club*, 10 AD2d 1006, 1006 [2d Dept 1960]). Trivial defects that do not constitute a trap or nuisance are not actionable (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Ambroise v New York City Tr. Auth.*, 33 AD3d 573, 574 [2d Dept 2006]). In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the 'time, place, and circumstance' of the injury" (*Trincere v County of Suffolk*, 90 NY2d at 978, quoting *Caldwell v Village of Island Park*, 304 NY 268, 274 [1952]), and if the alleged defect is

trivial and does not possess the characteristics of a trap or nuisance, it is not actionable (*see Trincere v County of Suffolk*, 90 NY2d at 978). "[T]here is no "minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id*. at 977). Whether a defect is trivial thus must be analyzed "by reason of its location, adverse weather, lighting conditions, or other relevant circumstances, have any of the characteristics of a trap or snare, and was too trivial to be actionable" (*Hawkins v Carter Community Hous. Dev. Fund Corp*., 40 AD3d 812, 813 [2d Dept 2007]).

"While a height differential of one half inch or more is not per se non-trivial, and therefore actionable as a matter of law, violation of Administrative Code § 19-152 is one factor to consider when deciding the issue of triviality" (*Trinidad v Catsimatidis*, 190 AD3d 444, 445 [1st Dept 2021]; *see Gomez v Congregation K'Hal Adath Jeshurun, Inc*., 104 AD3d 456, 456-457 [1st Dept 2013]). The defendants cited to several decisions in which height differentials of one inch or more, or even more than two inches, standing alone, were held to be trivial and, hence, not actionable (*see e.g., Hawkins v Carter Community Hous. Dev. Fund Corp*., 40 AD3d at 813; *see also Dick v Gap, Inc*., 16 AD3d 615, 615 [2d Dept 2005]; *Murray v City of New York*, 15 AD3d 636, 637 [2d Dept 2005]; *Morales v Riverbay Corp*., 226 AD2d 271, 271 [1st Dept 1996]). The court concludes, however, that under the circumstances presented here, where there are triable issues of fact not only as to the height differential, but as to the presence of other contributing defects and obstructions in the sidewalk that may have contributed to the accident (*see Marks v 79th St. Tenants Corp*., 191 AD3d 436 [1st Dept 2021]), it cannot, on this record, conclude that the defect is trivial and not actionable. Where, as here, the elevation differential between the two sidewalk flags may indeed be greater than 1/2 of an inch, and thus statutorily defined as a "substantial defect," the court must, in light of all of the circumstances presented here, reject the defendants' contention that the defect was trivial as a matter of law and, hence, not actionable (*see Tropper v Henry St. Settlement*, 190 AD3d 623, 624-625 [1st Dept 2021]).

Consequently, the defendants' separate cross motions for summary judgment must be denied.

The parties' remaining contentions are without merit.

Accordingly, it is,

ORDERED that the plaintiff's motion is denied; and it is further,

ORDERED that the cross motion of the defendant 681 Ninth Avenue, LLC, is denied; and it is further,

ORDERED that the cross motion of the defendant 679, LLC, is denied; and it is further,

ORDERED that the parties are directed to appear before the court at 71 Thomas Street, Room 304, New York, New York 10013, on December 19, 2023, at 2:00 p.m., for a pretrial conference, at which the parties shall be expected to discuss settlement and at which a jury selection date shall be scheduled.

This constitutes the Decision and Order of the court.

10/26/2023
DATE

JOHN J. KELLEY, J.S.C.

MOTION:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X]	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**
CROSS MOTION 1:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X]	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**
CROSS MOTION 2:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X]	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**