

Plasencia v Rachel-Oliver Assoc., LLC
2023 NY Slip Op 35074(U)
September 5, 2023
Supreme Court, Bronx County
Docket Number: Index No. 20156/2020
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 20156/2020

RAFAEL PLASENCIA,

Plaintiff,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

RACHEL-OLIVER ASSOCIATES LLC,

Defendant.

Part 6

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment by defendant (seq. no. 4 and 5) and motion for summary judgment by plaintiff (seq. no. 5):

Papers

Numbered

Defendant’s Notice of Motion, Statement of Undisputed Facts by Joel Scott Ray, Esq. dated October 19, 2022, Affirmation of Joel Scott Ray, Esq. dated October 19, 2022 in Support of Motion, Exhibits (“1” through “7”), Affidavit of David E. Behnken dated October 19, 2022, and Exhibits (“1” through “3”)..... 1

Plaintiff’s Notice of Motion, Statement of Undisputed Facts by Mariel Crippin, Esq. dated October 19, 2022, Affirmation of Mariel Crippin, Esq. dated October 19, 2022 in Support of Motion, and Exhibits (“A” through “G”)..... 2

Affirmation of Joel Scott Ray, Esq. dated November 14, 2022 in Opposition to Plaintiff’s Motion and Defendant’s Counter-Statement of Facts..... 3

Affirmation of Mariel Crippin, Esq. dated December 9, 2022 in Opposition to Motion, Exhibit (“A”), and Response to Defendant’s Statement of Facts and Counter-Statement..... 4

Reply Affirmation of Mariel Crippin, Esq. dated January 3, 2023..... 5

Reply Affirmation of Joel Scott Ray, Esq. dated January 4, 2023..... 6

These motions are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on these motions is as follows:

The defendant (“ROA”) seeks an order pursuant to CPLR Rule 3212 granting it summary judgment dismissing the plaintiff’s complaint on the grounds that the sidewalk defect complained of was

trivial in nature and not hazardous. The plaintiff (“Plasencia”) seeks an order pursuant to CPLR Rule 3212 granting him summary judgment on the issue of liability as against ROA. ROA’s motion is denied. Plasencia’s motion is also denied.

The plaintiff served and filed a note of issue on June 21, 2022. Pursuant to CPLR Rule 3212 and the rules of this Court, these motions were then timely brought within 120 days.

Plasencia seeks monetary damages for personal injuries allegedly sustained on July 12, 2019 when he tripped and fell on a broken sidewalk adjacent to premises owned by ROA. ROA contends that the defect was a minor and smooth depression. ROA notes that Plasencia had passed by the defect twice daily for a number of years. ROA also argues that certain photographs depicting the defect, as well as the expert opinion of its engineer, reveal that the defect was not hazardous because the height differential from the surrounding sidewalk was trivial. ROA contends that no one had notified it or complained about the alleged defect prior to Plasencia’s accident. Moreover, ROA argues that it cannot be charged with constructive notice of the alleged defect, since it was so trivial as to be non-hazardous. In addition, ROA contends that dismissal is warranted because Plasencia can only speculate as to what caused him to trip and fall, since he did not see the defect until after he fell and also testified that he had lost his balance at the time.

In support of its motion, ROA relies on Plasencia’s own deposition testimony. In pertinent part, Plasencia testified as follows:

- Q. And what was that that happened?
- A. I tripped. The tip of my sneaker fell into the hole and I fell forward, and I tried to break the fall with my hands, otherwise, I would have broken my face. And the tip of my sneakers got caught inside the hole
- Q. Now, which -- were you walking fast, slow, or normal pace?
- A. Normal pace.
- Q. What caused you to fall?
- A. I tripped.
- Q. What did you trip on?
- A. There was a hole at the corner because the sidewalk was in bad condition
- Q. How far from the corner was the hole?
- A. He was almost right at the corner on Grand Concourse, like I explained to you

before. I fell almost at the curb where people access the sidewalk. I tripped, I tumbled, I tried to regain my balance, but I couldn't.

Q. You said there was a hole. How big was the hole?

A. After I fell, I looked back to see where I had fallen or what caused my fall, and it was a hole, it was about two to three inches in size.

Q. About how deep was this hole?

A. About as deep as a MetroCard. Something like that.

Q. When you say as deep as a MetroCard, you mean the flat side or -- I don't understand what you mean when you say as deep as a MetroCard.

A. I'm talking about the depth.

Q. So was it an inch deep, three inches deep, something else?

A. At the time, I was trying to look back and see where I had fallen or what caused my fall. But I didn't check or notice the depth. Maybe if I saw the hole again, I would be able to tell you if that's the hole.

Q. Did you see the hole when you were going to meet your friends?

A. No.

Q. Before the incident, did you ever see this hole before?

A. No. I saw it after I had fallen, when I looked to see how I fell or what caused my fall.

Q. Does this photograph fairly and accurately depict the hole that you tripped on, on the day of the incident?

A. Yes.

Q. Let's go to photograph 2, here. Do you recognize what's in this photograph?

A. Yes. It was also in bad shape on the side.

Q. What does this photograph depict?

A. It shows the sidewalk deteriorated, in bad shape.

Q. We're looking at photograph two. I'm just zooming out, sir. Does this photograph that's number 2, Exhibit D, does that show the hole that you tripped in?

A. That's right. It was the first hole. The first hole that you showed me.

Q. My question is, looking at what we marked as photograph 2, I'm going to zoom out a little bit more. Just looking at photograph two, here. That's the photograph on the right side of the page. It's an up/down photograph. I rotated so it's orientated correctly.

And looking at the photograph, number 2, does that photograph depict the hole that you tripped over; yes or no?

A. No, no.

Q. Going back to photograph one, I'll Zoom in. You never saw this hole before your incident, correct?

A. No. The hole was there.

Q. But you never saw it before the day of your accident, correct?

A. I never saw it before. I had never seen it before.

Q. And you said earlier, if I understood your testimony correctly, that it was near a curb. Do you want to change -- it doesn't look like it was near the curb?

MR. JAFFE: Note my objection. I didn't hear the word curb. He said it was near the corner, the guy in the orange shirt.

Q. The hole that we're looking at in photograph one, that was near the building, correct?

A. Certainly, yes.

Q. Because there's red in the background where I'm highlighting, pointing. That's building at the corner of Grand Concourse and Echo Place, correct?

A. Correct.

Q. So this didn't happen at the corner of the sidewalk of Grand Concourse and Echo Place, correct?

A. Correct.

Q. And just going back to your Exhibit C, you said it happened about where the gentleman in the orange is, in that screenshot, correct?

A. Yes, yes

Q. Did you ever tell anybody at the building that's adjacent to where the hole is in the sidewalk, that's the building I'm talking about when I say the building. Did you ever tell anyone at that building about the hole empty sidewalk?

A. No.

Q. Do you know if anybody ever told anybody at that building about the hole in the sidewalk?

A. No

- Q. Hi, Mr. Plasencia, good to see you back. I just have to ask you, when you finished talking to your friends and started to walk up Echo, where were you looking?
- A. Normal. I was looking forward.
- Q. The moment before your fall, where were you looking?
- A. Normally, I was walking forward and I was looking forward.
- Q. When you walked from -- while you were walking from where your friends were to where you tripped and fell, did you ever look down at the sidewalk at all?
- A. I was only looking forward. I wasn't focused on looking down
- Q. Going back to the hole for a minute, did your entire foot step into the hole?
- A. The tip of my foot.

In addition, ROA submits an affidavit from David E. Behnken, P.E. ("Behnken"), a professional engineer retained by ROA to conduct a physical inspection of the subject sidewalk. Behnken avers that he inspected the sidewalk on October 12, 2022. However, Behnken concedes that the sidewalk had been replaced prior to his inspection, so his analysis of the height differential posed by the alleged hole is based on measurements of unchanged objects depicted in the photographs acknowledged by Plasencia and a photogrammetric analysis of these photographs. He states that the height differentials in the area of the sidewalk identified by Plasencia range from 0.38 inches to 0.75 inches. Behnken further avers that he sees no "holes" in the photographs, but rather a minor depression in the sidewalk which did not pose a tripping hazard to pedestrians. His conclusion is based on his observation that there is no missing, depressed, or damaged area which contains a vertical edge. Instead, he observes a minor depression with smooth, homogenous sides which gradually slope into and out of the sidewalk. Finally, Behnken notes that the natural illumination existing at the time allowed Plasencia to easily observe any height differential, made further clear by the fact that he traversed this sidewalk regularly.

Plasencia seeks summary judgment on issues of liability on the grounds that ROA's building superintendent created the defect through his negligent repair and/or was aware of the defect for a sufficient period prior to Plasencia's accident to allow for the defect to be remedied. In support of his motion, Plasencia offers the deposition testimony of Jose Brito ("Brito"), the superintendent. Brito acknowledged that he was in charge of covering holes on the sidewalk, among other maintenance tasks regarding the sidewalk. In pertinent part, Brito testified as follows:

Q: And when they say, "correct it," does that mean you make the repair or if it was beyond your expertise, were you to report it to somebody at Morgan who would then hire somebody to do it?

A: I'm normally the one in charge of covering the holes on the sidewalk.

Q: Do you have any specific recollections of making any repairs to the exterior sidewalk of the building prior to the date of July 12, 2019?

A: No, because there were no conditions. The sidewalk was good.

Q: Well, you show me where. You tell me, was a repair made to this portion of the sidewalk before July 12, 2019?

A: The entire area that you see there is where the cement was laid down.

Q: Who did it?

A: Me.

Q: You did it? Okay. And can you tell me why you would place cement in this area before July 12, 2019?

A: To correct the holes that were there, the small crack.

Q: Are you saying that you made a repair to the area that's shown in this particular photo which appears to be right in front of the gentleman who's standing with one leg against the wall and one leg down wearing dungarees and a black shoe, and from his shoe toward the front where the curb is you said a repair was made by you before July 12, 2019; is that correct?

A: Yes, I repair it every year because when snow falls holes come up.

Q: No, I understand you made your repairs on an annual basis, but can you tell me when you would make the repair?

A: By the end of May I'm fixing everything that has to do with that.

Q: So in other words, it's your testimony that the area shown in this particular photo, which your Counsel just identified which photo it is, would have been repaired before July 12, 2019; is that correct?

A: Before July. 19

Q: Okay. But do you see, looking at this particular photo, do you see any condition that exists that warrants repair, where you would have repaired it if you saw it?

A: I don't see any holes.

Q: My client claims that the condition shown in this particular photo caused him to trip and fall back on July 12, 2019. Now I think you had mentioned earlier that you would make repairs. Is there any particular time of the year that you would make repairs to the sidewalk?

A: In the summer when the temperature was going up and there are holes, I repair them. There is cement there that was put there.

Q: You said that you placed the cement, what appears to be cement, towards the top of the photo against the base of the building, correct? Where the pointer is going around in a circle, is that cement that you placed?

A: Yes, and in the hole, too.

Q: Okay. Well, we'll get to that, but did you place that cement there in July of 2019 or beforehand or some other date?

A: That was before, around May.

A party seeking summary judgment must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corporation.*, 18 NY3d 499, 503 [Ct App 2012]). To defeat such a showing, an adversary must present facts in admissible form demonstrating that genuine, triable issues exist which preclude summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). The pertinent facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [Ct App 2011]). In a trip and fall case, a defendant seeking summary judgment must establish that it did not create the hazardous condition that allegedly caused the fall and did not have actual or

constructive notice of the condition for a sufficient period to discover and correct it (*see Javier v. New York City Housing Authority*, 161 AD3d 615 [1st Dept 2018] and *Ash v. City of New York*, 109 AD3d 854 [2nd Dept 2013]). However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip, regardless of his prior knowledge of same (*see Trincere v. County of Suffolk*, 90 NY2d 976 [Ct App 1997]).

While the existence of a dangerous condition on someone's property that creates liability is generally a question of fact for a jury to decide, a Court may find that the defect alleged is so trivial that it is not actionable as a matter of law (*see Powell v. Centers FC Realty, LLC*, 182 AD3d 495 [1st Dept 2020]). There is no minimum height or depth that is required for a defect to be actionable (*see Trincere v. County of Suffolk*, 90 NY2d 976 [Ct App 1997]). To make that showing, a defendant must demonstrate that the defect is physically insignificant under the circumstances and that the defect's characteristics or the surrounding circumstances do not increase the risk that it presents (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66 [Ct App 2015] and *McCabe v. Avalon Bay Communities, Inc.*, 177 AD3d 487 [1st Dept 2019]). Factors to consider include the width, depth, elevation, irregularity, and appearance of the defect, as well as the time, place, and circumstance of the injury (*see Trincere v. County of Suffolk*, 90 NY2d 976 [Ct App 1997]), the plaintiff's familiarity with the location (*see Riley v. City of New York*, 50 AD3d 344 [1st Dept 2008]), and adverse weather or lighting conditions (*see Gaud v. Markham*, 307 AD2d 845[1st Dept 2003]).

ROA's motion is denied. ROA concedes that there is an issue of fact as to the actual size of the defect (*see Ray Aff. in Opp.*, ¶ 2). Moreover, Behnken's admission that the alleged defect might have measured over one-half inch would render it a sidewalk violation under 34 RCNY 2-09(f)(5)(iv), which is a factor to be considered in determining whether a defect is trivial (*see Lopez v. 1675 Realty*, 209 AD3d 407 [1st Dept 2022] and *Trinidad v. Catsimatidis*, 190 AD3d 444 [1st Dept 2021] (whether a defect satisfies the height differential requiring repair under § 19-152 of the Administrative Code of the City of New York is one factor to consider in determining whether a defect is trivial)). In addition, the fact that Brito saw fit to repeatedly address this condition can allow a jury to conclude that he found it hazardous, which can support a finding that the condition was not trivial (*see McCabe v. Avalon Bay Communities, Inc.*, 177 AD3d 487 [1st Dept 2019]).

ROA's argument that Plasencia's action should be dismissed because he is simply speculating that the alleged defect caused him to trip, when he otherwise testified that he lost his balance is

unavailing. During the course of his deposition, Plasencia identifies the hole in the sidewalk as the cause of his trip and fall. His statements about losing his balance all refer to movements occurring after he allegedly tripped.

Plasencia's motion is also defeated by the existence of questions of material fact. That ROA had actual notice of the defect complained of is made clear by Brito's testimony regarding his yearly efforts to remedy this sidewalk condition. He was aware of the existence of this sidewalk condition prior to Plasencia's accident and had repaired the area. However, Plasencia does not offer an opinion from an expert or other evidence that the last repair made by Brito was somehow negligent.

Even if ROA was aware of the condition, an issue of fact remains as to whether the defect is actionable, that is, non-trivial. Plasencia himself concedes that there is an issue of fact whether the alleged defect was or was not trivial that requires resolution by a jury (*see* Crippen Aff. in Opp., ¶ 44). In addition, Plasencia's ability to safely traverse that sidewalk routinely prior to his accident is another factor which can justify a finding that the defect was trivial (*see Riley v. City of New York*, 50 AD3d 344 [1st Dept 2008]). It is generally for a jury to decide whether a sidewalk defect is sufficiently hazardous to impose liability given the unique facts of each case (*see Tineo v. Parkchester South Condominium*, 304 AD2d 383 [1st Dept 2003]).

With respect to the photographs allegedly depicting the sidewalk defect, the Court cannot reach a conclusion, as a matter of law, as to the various factors to be considered, especially the depth determination, from simply looking at these particular photographs.

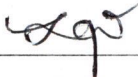
Accordingly, it is hereby

ORDERED that summary judgment is denied to both the defendant and the plaintiff.

The foregoing constitutes the Decision/Order of this Court.

DATED: September 5, 2023

Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.