Garcia v Saint Spyridon Greek Orthodox Church
2023 NY Slip Op 35079(U)
September 6, 2023
Supreme Court, Bronx County
Docket Number: Index No. 26676/2018
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 26676/2018

BRUNILDA GARCIA,

Plaintiff,

-against-

SAINT SPYRIDON GREEK ORTHODOX CHURCH and WASHINGTON HEIGHTS HELLENIC ORTHODOX CHURCH, INC.,

Defendants.

DECISION/ORDER

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

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 (seq. no. 2):

Papers	**Numbered**
Defendant's Notice of Motion, Statement of Undisputed Material Facts by Jennifer Warycha, Esq. dated January 26, 2022, Memorandum of Law by Jennifer Warycha, Esq. dated January 26, 2022, Affidavit of Toby Terpstra dated October 29, 2021 in Support of Motion, Affirmation of Jennifer Warycha, Esq. dated January 26, 2022 in Support of Motion, and Exhibits ("A" through "I")	**1**
Counter-Statement of Facts by Gregory C. McMahon, Esq. dated May 26, 2022, Affirmation of Gregory C. McMahon, Esq. dated May 26, 2022 in Opposition to Motion, and Exhibit ("A")	**2**
Reply Affirmation of Jennifer Warycha, Esq. dated June 22, 2022	**3**

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendants seek an order pursuant to CPLR Rule 3212 granting them summary judgment dismissing the plaintiff's complaint on the grounds that the sidewalk defect she complains of was trivial in nature and, therefore, not actionable. The motion is granted.

The plaintiff ("Garcia") seeks monetary damages for personal injuries allegedly sustained on November 18, 2016 when she tripped and fell on an "uneven" sidewalk adjacent to premises owned

and/or occupied by the respective defendants as a Church. The defendants contend that the defect to which Garcia attributes her fall had minimal dimensions and there is no evidence to indicate that its location, lighting conditions, or other circumstances turned it into a trap for unsuspecting pedestrians.

In support of their motion, the defendants rely on the deposition testimony of John Apostolos ("Apostolos"), Vice-President of the Church's Board. In pertinent part, Apostolos testified that he was unaware of any complaints regarding the condition of the sidewalk. He also averred that no repairs had been made to that location subsequent to the date of Garcia's alleged accident.

The defendants also offer Garcia's own deposition testimony. She testified that the weather was "normal" on the accident date and that she was wearing sneakers and carrying a handbag on her left shoulder. She was walking with her friend, Carmen Brache ("Brache"), when the accident occurred. Garcia stated that she tripped and fell because the "sidewalk was uneven". She had not observed this condition prior to her accident. The defendants also submit Brache's deposition testimony. In pertinent part, she testified that she did not see what caused Garcia to trip and fall.

At her deposition, Garcia marked the location of her accident on two photographs. Brache also identified the location on a photograph used at her deposition. Apostolos acknowledged that the condition of the sidewalk as depicted in one of the photographs marked by Garcia fairly and accurately depicted the sidewalk as it existed in November 2016.

The defendants also provide an affidavit from Toby Terpstra ("Terpstra"), a purported expert in photogrammetry and related forensic analysis. Terpstra was retained by the defendants to examine the alleged height differential for the concrete caulking located between the sidewalk flags in this matter. Terpstra superimposed an image of the tape measure seen in the photographs acknowledged by Garcia in the same orientation as in the photographs and was apparently able to determine the height of the concrete caulking between the sidewalk flags. He concluded that the height differential where Garcia allegedly fell was approximately ¼ inch.

Finally, the defendants note that there is no evidence of other factors, such as inclement weather or poor visibility, that would have impacted the hazard presented by an otherwise *de minimus* defect.

In opposition, Garcia argues that the evidence reveals that the defect was the nearly one inch vertical differential between the sidewalk flags and larger than their one inch horizontal differential. These exceed the ½ inch height differential that requires repair under § 19-152 of the Administrative Code of the City of New York. Garcia contends that this necessitates denial of the defendants' motion. Garcia also notes that Brache did testify that the sidewalk had some parts that were high and some that

were low and contained a "square" that was lifted up from the rest.

Garcia submits an affidavit in opposition to the motion allegedly clarifying her deposition testimony and setting forth information about the size of the alleged defect which supposedly was not elicited during her deposition. Garcia's affidavit avers that her right foot was caught on the raised sidewalk flag, which had an approximately one inch height and width difference with the surrounding flags.

In order to obtain summary judgment, the defendants must demonstrate that there are no material issues of fact in dispute and that they are 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, Garcia 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]).

Here, the defendants have satisfied their initial burden of demonstrating that this defect was trivial as a matter of law (*see Schwartz v. Bleu Evolution Bar & Restaurant Corp.*, 90 AD3d 488 [1st Dept 2011] (gap between sidewalk flags of approximately ½ inch wide and with height differential of also ½ inch was trivial)). Using the same photographs acknowledged as accurate by both Garcia and Apostolos, Terpstra was able to discern only a ¼ inch height differential at the location where Garcia allegedly tripped. Garcia does not challenge Terpstra's credentials. The photographs themselves (*see* Warycha Aff. in Support, Exh. "G" and "H") depict intact and smooth sidewalk flags presenting no cracks. The photographs clearly reveal that the sidewalk flag joint at issue is filled with some sort of caulking material leaving a slight, physically insignificant height and width differential up to the beginning of the adjacent concrete flags, certainly indistinguishable from the remainder of the length of the joint and not difficult to pass over safely on foot (*see Boynton v. Haru Sake Bar*, 107 Ad3d 445 [1st Dept 2013]) and *Haber v. CVS Pharmacy, Inc.*, 217 AD3d 659 [2nd Dept 2023] (photographic evidence of a slight height differential may be used to establish that a defect is trivial). There is no indication that weather, lighting, or other conditions made traversing this spot worse. Moreover, the slight height differential did not run the entire length of the joint (*see Fayolle v. East West Manhattan Portfolio L.P.*, 108 Ad3d 476 [1st Dept 2013] (a ¾ inch expansion joint not filled to grade level and presenting a ¼ inch height differential between slabs was trivial, particularly where the defect did not run along the full width of the sidewalk)).

In opposition, Garcia failed to raise an issue of material fact. While her affidavit includes measurements for the height differential posed by the defect, which were not asked of her at her deposition, she does not give any basis for her estimation of these measurements, including whether she used a ruler or other tool to measure the differentials (*see Augustine v. City of New York*, 188 AD3d 969 [2nd Dept 2020] (expert's affidavit was speculative and conclusory, providing no description of the crack or taking any measurements of it)). Moreover, Garcia does not submit an affidavit from an expert or other person who was able to somehow record a measurement. In any event, her estimation of a one

inch differential is belied by the photographs themselves (*see Sokolovskaya v. Zemnovitsch*, 89 AD3d 918 [2nd Dept 2011]).

Whether a certain defect may satisfy the height differential requiring repair under § 19-152 of the Administrative Code of the City of New York, this alone does not render the defect actionable, but is simply one factor to consider in determining whether a defect is trivial (*see Trinidad v. Catsimatidis*, 190 AD3d 444 [1st Dept 2021]). Garcia's objection to the fact that Terpstra measured from the caulking is unavailing, since she acknowledged that the caulking was present at the time of her accident in verifying the accuracy of the photographs.

Accordingly, it is hereby

ORDERED that the defendants have summary judgment dismissing the plaintiff's complaint against them in its entirety; and it is further

ORDERED that the Clerk of the Court make all necessary entries to reflect this disposition, including entry of judgment(s) of dismissal in favor of the defendants.

The foregoing constitutes the Decision/Order of this Court.

DATED: September 6, 2023
Bronx, New York

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