Grullon-Espinal v TI Ozone Park Stor. LLC.
2023 NY Slip Op 35092(U)
August 7, 2023
Supreme Court, Queens County
Docket Number: Index No. 705238/20
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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JULIO GRULLON-ESPINAL,

Plaintiff,

-against-

Index No.: 705238/20
Mot. Date: 5/30/23
Mot. Seq. No: 2

TI OZONE PARK STORAGE LLC.,

Defendants,

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The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3212, granting summary judgment in favor of the plaintiff on the issue of liability; and, the cross-motion by defendant for summary judgment dismissing the plaintiff's complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	EF 48-57
Answering Affidavits-Exhibits.....	EF 59-72
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 88-102
Answering Affidavit-Exhibits to Cross Motion.....	EF 103-104
Replying Affidavit-Exhibits to Motion.....	EF 105-107
Replying Affidavit to Cross-Motion.....	EF 108

Upon the foregoing papers, it is ordered that the motion by plaintiff and the cross-motion by defendant are both denied.

This action arises out of a trip and fall on a public sidewalk, that occurred on September 30, 2017, on 79th Street in Ozone Park, New York. It is undisputed that the sidewalk is adjacent to the premises owned by the defendant. The premises, which consist of a self-storage facility, has the address of 78-02 Liberty Avenue, Ozone Park, New York.

Plaintiff moves for an order, pursuant to CPLR 3212, granting summary judgment in favor of the plaintiff on the issue of liability; and, the cross-motion by defendant for summary judgment dismissing the plaintiff's complaint.

Plaintiff testified that he had been walking on Liberty Avenue and then turned onto 79th Street. While walking on 79th Street, as he walked past a tree, his left foot hit a raised portion of the sidewalk, causing him to fall forward to the ground.

At his deposition, the plaintiff was shown photographs, marked as Defendant's exhibits A through D, which are annexed to the instant motion as Exhibit "4" (*see* NYSCEF Doc No 53). The photographs show a raised portion of the public sidewalk, with a tree well to the left and the defendant's premises to the right, as one is looking at the photographs. Plaintiff testified at his deposition that these photographs show the area where he fell and that they are a fair and accurate depiction of how the area looked at the time of his accident. He testified that he fell "next to the bricks where the sidewalk is raised."

James Coakley, president of Treasure Island Management, which is the defendant's property management company, testified at a deposition. He was shown copies of the aforementioned photographs. He identified them as showing the sidewalk and tree well adjacent to the defendant's premises. He did not recall ever seeing the sidewalk in that condition. He testified that if an employee had observed the condition shown in the photographs, he would have expected the employee to report it to him as a dangerous condition.

Plaintiff also submits five Google Street View images, pursuant to a CPLR 4532-b notice, supposedly captured in: October, 2014; October,2014; and, August, 2011, respectively, as well as images from September 2011 and August 2014. These are offered to show constructive notice. However, it is very difficult to see the sidewalk in question.

Finally, the plaintiff submits a Summons and Verified Complaint, from a lawsuit commenced in Supreme Court, Kings County, under Index No. 3654-18, captioned: "YOLANDA FOLLORS v TI OZONE PARK STORAGE LLC". In the Verified Complaint, that plaintiff alleged that she was injured, on March 6, 2017, due to a defective sidewalk adjacent to defendant TI Ozone Park's premises. Along with the Summons and Complaint is an undated photograph showing a raised sidewalk adjacent to a tree well. The photographs is not authenticated in any manner. There are no landmarks shown in the photograph. The Complaint in the Kings County action , verified by an attorney and not the individual plaintiff, does not reference the photograph of specify the

accident location. Plaintiff does not offer any affidavits, deposition testimony or court decisions from that lawsuit.

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]. The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*see Rodriguez v Parkchester South Condominium, Inc*., 178 AD2d 231 [1st Dept. 1991]). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A party seeking summary judgment may not merely point to gaps in the opponent's proof to obtain relief. Rather, the movant must adduce affirmative evidence of its entitlement to summary judgment (*Torres v Industrial Container*, 305 AD2d 136 [1st Dept. 2003]).

On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, [2011]). Summary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324, [1986]) and then only if, upon the moving party's meeting of this burden, the non-moving party fails "to establish the existence of material issues of fact which require a trial of the action" (*Id*.). 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" (Id). However, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hospital*, *supra*).

The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues. (*see Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *Doyle v Wieber*, 194 AD3d 785

[2d Dept. 2021].) Summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility. (*see Kaziu v Human Care Servs. for Families & Children, Inc*., 167 AD3d 588, 588 [2d Dept. 2018], quoting *Ruggiero v DePalo*, 153 AD3d 870, 872 [2d Dept 2017).

"A plaintiff moving for summary judgment on a cause of action asserted in a complaint generally has the burden of establishing, prima facie, all of the essential elements of the cause of action" (*Poon v Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641, 643 [2d Dept. 2017]). A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Binger Mei v Kim Wan Cheung*, 215 Ad3d 909 [2d Dept. 2023]; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2d Dept. 2018]).

"To establish a prima facie case of negligence in a premises liability action, a plaintiff must demonstrate the existence of a dangerous or defective condition that caused his or her injuries, and that the defendant either created or had actual notice or constructive notice of the condition" (*Robert v Mahopac Cent. School Dist*., 38 AD3d 514, 515 [2d Dept. 2007]).

The issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury*"* (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). Here, viewing the evidence in light most favorably to the defendant**,** there are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether the defendant had either actual or constructive notice of the defective condition, whether the defendant created a defective condition causing plaintiff's accident, and whether the defendant acted reasonably under the circumstances (*see Gonzalez v American Oil Co.*, 42 AD3d 253 [1st Dept. 2007]. Thus, plaintiff's motion for summary judgment on the issue of liability is denied.

Defendant's cross-motion for summary judgment is also denied. It is premised solely on the argument that its management company, Treasure Island Management,

"completely displaced [d]efendant as to all obligations including the inspection, maintenance, repair and operation of [d]efendant's self-storage facility including the sidewalk." This argument is without merit.

Administrative Code §7-210(a) provides, in pertinent part, "[it] shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition."

"By its terms, [s]ection 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure" (*He v Troon Mgt., Inc*., 34 NY3d 167 [2019]); citing *Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 797[2016]). [A] landowner's duty under section 7-210 is an affirmative, nondelegable obligation, *He v Troon Mgt., Inc*, supra, 34 NY3d at 174. Since the defendant cannot delegate its duty to maintain the public sidewalk to its management company, or any other entity, its cross-motion for summary judgment is denied.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that the defendant's cross-motion for summary judgment on the issue of liability dismissing plaintiff's complaint is denied.

Dated: August 7, 2023

TIMOTHY J. DUFFICY, J.S.C.

FILED
8/7/2023 TA
COUNTY CLERK
QUEENS COUNTY