

Obey v New York City Hous. Auth.
2023 NY Slip Op 35190(U)
April 14, 2023
Supreme Court, Bronx County
Docket Number: Index No. 24526/2020E
Judge: Alison Y. Tuitt
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 5**

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TASHANTI M. OBEY

Index №. 24526/2020E

Plaintiff,

-against-

Hon. Alison Y. Tuitt

NEW YORK CITY HOUSING AUTHORITY

Justice Supreme Court

Defendants
-----X

The following papers were read on this motion (Seq. No. 2) for **summary judgment** noticed for August 31, 2022, and submitted on January 23, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 29-46
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 49-60
Reply Affirmation and Exhibits	NYSCEF Doc. # 61-62

Upon the foregoing papers, Plaintiff moves this Court for partial summary judgment pursuant to CPLR 3212 on the issue of liability against Defendant, and pursuant to CPLR 3211 to dismiss Defendant's affirmative defenses of culpable conduct, comparative negligence, and implied assumption of risk. The motion is decided in accordance with the reasons set forth herein.

This is an action to recover damages for personal injuries sustained as a result of Plaintiff's alleged trip and fall on a defective cement walkway, between 380 East 143rd Street and 350 East 143rd Street, in the Bronx, which occurred on November 23, 2019. The parties agree that Defendant owns the public walkway between 380 East 143rd and 350 East 143rd Street. Plaintiff commenced this action with the filing of a Summons and Verified Complaint on May 26, 2020. Issue was joined when Defendants filed their Verified Answer on October 21, 2020. Plaintiff filed this summary judgment motion on August 10, 2022. Defendant filed opposition.

Plaintiff moves for summary judgment on the issue of liability arguing that Defendant failed in its duty to maintain the cement walkway in a safe condition. Plaintiff also argues that Defendant is negligent as a matter of law insofar as having actual and constructive notice of the defective condition prior to Plaintiff's trip and fall and failing to remedy it.

"On a motion for summary judgment the court's role is "to determine whether there is a material factual issue to be tried, not to resolve it"' (*S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, 170 A.D.3d 468, 472 [1st Dept 2019], quoting *Sommer v Federal Signal Corp.*, 79 N.Y.2d 540, 554 [1992]). In other words, the court's role "is limited to issue finding, not issue resolution"' (*Dormitory Auth. of the State of N.Y. v Samson*

Constr. Co., 30 N.Y.3d 704, 717 [2018], quoting *Kriz v Schum*, 75 N.Y.2d 25, 33 [1989]). “Summary judgment disposition is inappropriate where varying inferences may be drawn, because in those cases it is for the factfinder to weigh the evidence and resolve any issues necessary to a final conclusion” (*Dormitory Auth. of the State of N.Y.*, 30 N.Y.3d at 717).

“It is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk” (*Smith v Costco Wholesale Corp.*, 50 A.D.3d 499, 500 [1st Dept 2008]). “In order to subject a property owner to liability for a hazardous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition which precipitated the injury” (*id.*).

In this action, Plaintiff does not allege that Defendant affirmatively created the defective condition, and thus, “there must be proof in admissible form that defendant had constructive notice of a defect which ‘must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it’” (*Arnold v New York City Hous. Auth.*, 296 A.D.2d 355 [1st Dept 2002], quoting *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]).

As an initial matter, Plaintiff testified that she did not complain to Defendant about a defect in the location where she fell prior to her fall (Pl. EBT at 61). In addition, Plaintiff admits that she may have slipped on dog feces (*see* Pl. 50-h at 66-68). To begin, Plaintiff stated she was covered in dog feces following her fall (*id.*). When Plaintiff was asked at her 50-h hearing if she “in fact, slip in dog poo,” Plaintiff answered, “I’m not sure” (*id.* at 66). However, Plaintiff also testified that she told hospital personal, while being treated at Lincoln Hospital, that she “slipped on dog poo” (*id.*). When Plaintiff was later asked at her examination before trial if she slipped on dog feces, she denied ever stating that she slipped on dog feces (Pl. EBT at 35). Although Plaintiff now denies ever slipping on dog feces, the Court finds that Plaintiff’s later testimony is contradicted by her earlier testimony. Thus, the Court finds there is an issue of fact as to whether Plaintiff slipped on dog feces along the cement walkway.

Moreover, Plaintiff submitted the deposition testimony of Gregory Williams (“Williams”), an employee of Defendant, who testified that he has been employed by Defendant for approximately twenty-seven years and has worked at the subject incident location for approximately three years (Williams EBT at 7, 25). Williams stated that he is responsible for maintaining and inspecting “the area outside the buildings, parking lots, grass, walkways, playgrounds,” including inspecting “the walkways in particular for cracked, broken pavement” (*id.* at 10, 19). Williams kept a daily logbook and a monthly inspection report (*id.* at 16, 18). The monthly inspection reports for May to December 2019 and the daily logbook for June to November 22, 2019, the day before the subject incident, were discussed and reviewed at Williams’s deposition and submitted by both parties

to this action (NYSCEF Doc Nos. 43-44, 57-58). If Williams observed a defective piece of walkway, he would generate a work order (Williams EBT at 19). Although Williams was not directly asked at his deposition whether he received any earlier complaints relating to the subject incident location where Plaintiff fell, counsel for Defendant argues that Williams's documentary evidence establishes that Defendant "had no record of the alleged condition and no knowledge of any complaints regarding the alleged condition" where Plaintiff fell (Lehman affirmation, ¶9). This argument is unaddressed in reply. Thus, the Court finds there are issues of fact as to whether the cement walkway was defective and whether Defendant was on notice of the alleged defective cement walkway condition (*see e.g., Best v 1482 Montgomery Estates, LLC*, 114 A.D.3d 555, 556 [1st Dept 2014] [Plaintiff's testimony that she called the office of defendant's building manager several times before the ceiling collapse to complain that her ceiling had a crack and leaked water, and the building manager's employee denial receiving any such complaints, created credibility questions for a jury]).

Plaintiff's motion to dismiss Defendant's affirmative defenses of culpable conduct and comparative negligence is denied. Although a plaintiff does not have to demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a Defendant's liability (*see Rodriguez v City of New York*, 31 N.Y.3d 312, 324-325 [2018]), the issue of a plaintiff's culpable conduct and comparative negligence may be decided in the context of a summary judgment motion where, as here, Plaintiff has moved for summary judgment dismissing Defendant's affirmative defenses of culpable conduct and comparative negligence (*Marangoudakis v Suniar*, 208 A.D.3d 1233, 1235 [2d Dept 2022]; *Silverio v Ford Motor Co.*, 183 A.D.3d 470, 471 [1st Dept 2020]). Here, the Court finds that there are triable issues of fact as to whether the alleged accident occurred as asserted in the complaint.

Plaintiff's motion to dismiss Defendant's affirmative defense of implied assumption of risk is granted. The Court finds the "doctrine applies to 'certain types of athletic or recreational activities,' where 'a plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard him or her from the risk'" (*Garnett v Strike Holdings LLC*, 131 A.D.3d 817, 819 [1st Dept 2015], quoting *Custodi v Town of Amherst*, 20 N.Y.3d 83, 87 [2012]). Here, Defendant has failed to support the asserted implied assumption of risk defense with authority or case law as to how it applies in this case where Plaintiff was walking along a cement walkway.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment pursuant to CPLR 3212, on the issue of liability against Defendant, is denied, and it is further,

ORDERED, that Plaintiff's motion for summary judgment dismissing Defendant's affirmative defenses of culpable conduct and comparative negligence is denied, and it is further,

ORDERED, that Plaintiff's motion for summary judgment dismissing Defendant's affirmative defense

of implied assumption of risk, is granted, and that affirmative defense is dismissed, and it is further,

ORDERED, that Defendant shall serve a copy of this Order with Notice of Entry upon Plaintiff within ten (10) days.

This constitutes the Order and Decision of this Court.

Dated: 4/14/23

Hon. *A. Y. Tuitt*

Alison Y. Tuitt, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. PETITION IS..... | ☐ GRANTED | ☐ DENIED ☒ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |