

Desmond v East Main St. Prop. Inc.
2023 NY Slip Op 35281(U)
November 14, 2023
Supreme Court, Bronx County
Docket Number: Index No. 21234/2019E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-2

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BRUCE R. DESMOND and DOROTHY DESMOND

Plaintiff,

DECISION and ORDER
Index No. 21234/2019E

-against-

EAST MAIN STREET PROPERTY INC. a/k/a
EAST MAIN STREET PROPERTY CO., 401 EAST
MAIN STREET LLC, and 390 EAST MAIN STREET
REALTY CO.,

Defendants.

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HON. ELIZABETH A. TAYLOR :

Upon the foregoing papers, the instant motion seeks summary judgment against Defendants on the issue of liability. After review of the court file and upon due deliberation, the motion is decided as follows:

This is a negligence action to recover damages for injuries sustained by Plaintiff Bruce R. Desmond on April 17, 2018 when he was caused to trip and fall over a defective and/or dangerous condition located outside the Defendants' premises. Plaintiff alleges that he fell while walking from the asphalt driveway to the concrete walkway towards the side doors. It is claimed that the Defendants, the owners and/or operators of the premises, were negligent in failing to maintain the premises in a reasonably safe condition.

In support, plaintiffs submit the deposition testimony of Mr. Petrullo, owner of Defendant East Main Street Property Inc., who testified that he personally managed the premises and performed daily visual checks. He avers that he never hired any vendors to do any maintenance work; instead, Mr. Petrullo had his employees perform any necessary maintenance. In 2014 or 2015, the concrete slab on the walkway became cracked and Mr. Petrullo and his

workers removed the slab and replaced it. He stated that the existing concrete slabs were replaced with new slabs composed entirely of concrete, with an added non-slip feature to the surface. A new metal railing was also added to the walkway, along with new railroad ties. In removing the old slabs, the asphalt driveway became disturbed and jagged, so Mr. Petrullo and his workers patched the area with asphalt. Mr. Petrullo testified that the transition from the asphalt driveway to the concrete slab is not uniform and there is a "decline in the driveway where it meets the concrete" slab. Mr. Petrullo testified that, on the right side of the concrete slab, the asphalt driveway is level, but as the driveway declines to the left, a gap of 2 5/8 inches develops between the concrete slab and the asphalt driveway. Lastly, Mr. Petrullo testified he did not witness the fall and there was no videotape or images of Plaintiff's fall.

In further support, Plaintiff submits the Affidavit of Scott Silberman, an engineer expert who opined that the defective condition of the walkway at the Premises was the proximate cause of Plaintiff's trip and fall of April 17, 2018 and that the hazardous and defective condition of the walkway at the Premises was not only a violation of the codes, rules, standards and regulations, but also a deviation from good and accepted construction and maintenance practices.

In opposition, Defendants agree that the conflicting testimony of Defendant's witness Frank Petrullo as to how and where the accident occurred and the photographs taken by Mr. Petrullo illustrating the location of plaintiff's accident failed to remove all relevant issues of fact. Defendants refer to the deposition testimony of Mr. Petrullo who, although was not a witness of the fall, testified that he arrived almost immediately after the fall and took pictures which Defendants claim depict the area of the fall based on Plaintiff's spilt coffee cup and blood stains closer to the door entrance, several feet from where Plaintiff claims to have fallen. In further support they refer to the deposition testimony of Plaintiff who testified that he believed he lost

consciousness and he could not remember if, upon tripping, he immediately fell to the ground or if he stumbled some distance. Plaintiff testified that after he fell, he struck his head on some unknown object, and that, as a result, he was bleeding and dropped his cup of coffee. Plaintiff further testified that, at the time of the accident, he had difficulty walking. Lastly, movants submit plaintiff's medical records which contain admissions by plaintiff immediately after the accident, that were germane to his treatment, wherein he claimed to strike his head on a railing.

“The proponent of 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” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1st Dept 1986]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227,228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557,562 [1980]). 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” (*Scott v Long Island Power Authority*, 294 AD2d 348,348 [2nd Dept 2002]).

A *prima facie* case for negligence requires plaintiff to show the existence of a duty owing by defendant to the plaintiff, defendant's failure to discharge that duty, and an injury to plaintiff proximately resulting from such failure (*Cruz v Madison Detective Bureau Inc.*, 137 AD2d 86 [1st Dept 1998]). A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances. In order to recover damages, party must establish that the owner created or had actual notice or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967,969 [1994]). “To constitute constructive notice, a defect 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 discovery and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836,837 [1986]).

Here, Plaintiff provided sufficient evidence to demonstrate a *prima facie* showing of entitlement to judgment, as a matter of law. Plaintiff established that Defendants breached their duty by not adequately constructing and/or maintaining the junction between the new concrete slab and adjacent asphalt driveway, leaving a significant portion of the concrete slab inches above the level of the asphalt driveway. In opposition, however, Defendants raised triable issues of fact as to whether Plaintiff actually fell as a result of the hazardous condition. Defense witness, Frank Petruccio, raised issues of fact surrounding the location of plaintiff's accident and whether or not Plaintiff tripped where he claimed. The conflicting evidence presented creates arguable contentions warranting the denial of summary judgment.

Accordingly it is hereby

ORDERED that the plaintiff's motion for summary judgment is **denied**.

This is the Order and Judgment of this Court.

Dated: NOV 14 2023

Hon: 