

Sosa v 49 W. 126th St., Inc.

2024 NY Slip Op 33339(U)

September 23, 2024

Supreme Court, New York County

Docket Number: Index No. 161672/2018

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

PETER SOSA,

Plaintiff,

- v -

49 WEST 126TH STREET, INC., LEWIS A. ROBINSON,
WINNIFRED ROBINSON, SHAMOL C MAZUMDER, GITA
CONSTRUCTION CO.,

Defendants.

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INDEX NO. 161672/2018

MOTION DATE 01/16/2024

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this personal injury action, defendants 49 East 126th Street Inc., Lewis and Winnifred Robinson (collectively the “ownership defendants”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes.

I. Pertinent Background

Plaintiff alleges that on November 3, 2018, he suffered personal injuries after a trip and fall on an uncovered utility shaft in the floor of the garden-level mailroom at the premises located at 49 West 126th Street, New York, New York 10027.

49 West 126th Street, Inc. is the owner of the premises and Lewis A. Robinson and Winnifred Robinson both have an interest in the corporate entity. The ownership defendants hired defendant/third-party defendant Mazumder, owner of Gita Construction Co., to perform work on the backyard patio of the building.

At the time of accident, plaintiff was employed as a mail carrier for the United States Postal Service and had delivered mail to the premises regularly for ten years. In order to deliver mail at the premises, a mail carrier had to gain access through two exterior garden-level gates; one from the sidewalk to the front patio, and another that functioned as a locked door to where the mailboxes are located, the site where the accident occurred. To access the mailboxes, a mail carrier had to either unlock or otherwise be admitted to the garden-level mailroom.

On all prior occasions, plaintiff would approach the interior locked gate, ring a bell, and someone would come and open the gate in order for him to access the mailboxes. However, on the day of the incident, the gates from the street to the front yard and from the front yard to the mailroom were both propped open.

Plaintiff testified that upon arriving at the premises, he walked through both open gates and when taking his first step past the interior gate into the mailroom, he stepped directly into an uncovered utility shaft and his leg sunk down into the shaft without ever hitting any solid ground. At the time of fall, plaintiff was carrying multiple packages in each hand. Plaintiff's right leg and entire right side went into the hole while his left leg remained at ground level. On all prior instances when plaintiff had delivered mail to the premises, there was always a metal plate covering the shaft. There was no light inside the mail room vestibule.

Lewis Robinson testified he was not aware that the shaft had been left uncovered, nor did he know of any reason why Gita would have removed the metal plate for any work related to their contract. He was out of the country at the time of the accident and had been so for some time before the accident, although his daughter lived in the building and had assumed some duties related to the building. Lewis also testified that the only reason the shaft would typically be uncovered would be for utility companies to perform readings.

Mazumder testified he was working at the premises on the day of the incident but did not witness anyone trip and fall into the utility shaft, nor did he remove the metal plate covering the shaft.

II. Contentions

Defendants contend that there is no issue of material fact, and they are entitled to judgment as a matter of law, as they lacked actual or constructive notice of the uncovered utility shaft that created the open hole into which plaintiff fell, a condition they also collectively deny creating.

Plaintiff opposes and contends that defendants failed to meet their burden of showing both that they did not create the subject condition and that they lacked notice of it. Plaintiff further contends that defendants failed to provide a statement of material facts required by 22 NYCRR 202.8-g(a). Lastly, plaintiff asserts that a question of fact exists under Multiple Dwelling Law § 78, which provides that an owner of a multiple dwelling owes a nondelegable duty to persons on its premises to maintain them in a reasonably safe condition.

III. Analysis

Section 22 NYCRR 202.8-g of New York's Administrative Code requires that any motion for summary judgment¹ shall have a short and concise statement, in numbered paragraphs, of material facts as to which the moving party contends there is no genuine issue. This allows an opposing motion to respond to such facts. If the proponent of a motion for summary judgment fails to include such statement of undisputed facts, the court may order compliance, deny the motion without prejudice, or take any other action that may be just and appropriate (22 NYCRR 202.8- g). Here, defendants failed to include a statement of undisputed

¹ Other than a motion made pursuant to CPLR 3213.

facts in their initial motion for summary judgment. However, defendants subsequently provided a statement of facts to which plaintiff had adequate time to respond, and did respond, and thus there is no need for further action on this issue.

The “movant bears the heavy burden of establishing ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The moving party's “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez*, 68 NY2d at 324). Only if movant's burden is met does the burden then shift to the opposing party to demonstrate the existence of a triable issue of fact (*Alvarez* 68 NY2d at 320,324; *Zuckerman*, 49 NY2d at 557).

“On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). “[S]ummary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues” (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]).

A defendant property owner moving for summary judgment in a trip and fall case has the initial burden of showing that it neither created the alleged hazardous condition nor had actual or constructive knowledge of its existence for a length of time sufficient to discover and remedy it (*Rodriguez v Kwik Realty, LLC*, 216 AD3d 477, 478 [1st Dept 2023]; *Velocci v Stop and Shop*, 188 AD3d 436 [1st Dept 2020]; see *Grossman v TCR*, 142 AD3d 854 [1st Dept 2016]; NY PJ13d

2:90 at 461 [2022]). “[I]t is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law (*Giuffrida v Metro N. Commuter R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). “A defendant establishes that it lacked actual notice when it produces a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell” (*Velocci v Stop and Shop*, 188 AD3d 436 [1st Dept 2020]).

“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 discover and remedy it” (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836 [1986]); *Gomez v Samaritan Daytop Vil., Inc.*, 216 AD3d 456, 457 [1st Dept 2023]; *Harrison v New York City Tr. Auth.*, 113 AD3d 472, 473 [1st Dept 2014]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]). To sustain the burden of showing lack of constructive notice, the defendant must offer some evidence as to when the accident area was last inspected relative to the accident (*Ruiz v Stop 1 Gourmet Deli*, 185 AD3d 496, 550 [1st Dept 2020]; *Dylan P. v Webster Place Associates, L.P.*, 132 AD3d 537 [1st Dept 2015], *aff'd* 27 NY3d 1055 [2016]; *Buffalino v XSport Fitness*, 202 AD3d 902 [2d Dept 2022]). Thus, a defendant that provides evidence that the area in which the accident occurred was monitored or inspected prior to the accident may be entitled to summary judgment. In contrast, where no evidence is presented as to the last inspection of the accident locale, the defendant fails to satisfy its prima facie burden.

In the case at bar, Lewis Robinson testified he did not cause or create the hazardous condition because he was out of the country on the date of incident and accordingly had no

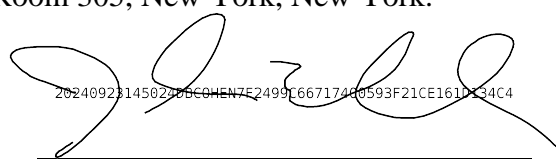
actual knowledge of the shaft being uncovered. He lacked actual notice because no complaints had been made regarding the uncovered utility shaft, and no prior accidents had occurred in the mailroom in a similar manner. However, no records have been produced by any defendant to show when the area in question was last inspected to support a lack of constructive notice. Moreover, Lewis Robinson’s absence made it impossible for him to personally perform any routine inspections, and his daughter, who lived in the building and assumed some duties related to managing the premises while he was away, testified she was absent at the time of the incident as well. Nor did Lewis Robinson offer any evidence to establish that Gita monitored the premises while working. To the contrary, Gita denied removing the metal plate covering the shaft or witnessing it uncovered at any point.

As the moving defendants have failed to offer any evidence as to when the mailroom was last inspected relative to the accident, they did not meet their burden of showing they lacked constructive knowledge of the uncovered shaft. Accordingly, defendants motion must be denied (*Dylan*, 132 at 537 [1st Dept 2015]).

Accordingly, it is hereby

ORDERED, that defendants 49 East 126th Street Inc., Lewis A. Robinson and Winnifred Robinson’s motion for summary judgment is denied; and it is further

ORDERED, that the parties appear for a settlement/trial scheduling conference on November 20, 2024, at 10:30 a.m., 71 Thomas Street, Room 305, New York, New York.



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DAVID B. COHEN, J.S.C.

9/23/2024
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: