Sanchez v Perez
2024 NY Slip Op 34743(U)
November 27, 2024
Supreme Court, Queens County
Docket Number: Index No. 719484/2019
Judge: Chereé A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 719484/2019

LUIS SANCHEZ,

Motion Date:
September 30, 2024

Plaintiff,

Motion Cal. No.: 25

-against-

Motion Sequence No.: 3

LOURDES PEREZ, MOISES PEREZ, MALEE CHAISUMAN, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, LUCA ANTONELLI and LUCA ANTONIELLI
d/b/a LUCA ANTONELLI CONTRACTING,

Defendants.

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The following efile papers numbered 61-79, 82-100 submitted and considered on this motion by Defendants Luca Antonelli and Luca Antonelli d/b/a Luca Antonelli Contracting seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 for summary judgment in their favor and dismissing Plaintiff's complaint and all cross-claims. The motion is **denied** in its entirety.

	Papers Numbered
Notice of Motion- Affirmation in Support-Affidavits-Exhibits.....	EF 61-79
Affirmation in Opposition-Affidavits-Exhibits.....	EF 82-98, 99
Reply Affirmation-Affidavits-Exhibits.....	EF 100

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Antonelli seeks an Order pursuant to CPLR 3212 for summary judgment in its favor and dismissing Plaintiff's complaint and all cross-claims. This action arises out of a trip and fall accident that occurred on February 5, 2019 on a sidewalk situated between two premises located at 67-16 Woodside Avenue and 67-10 Woodside Avenue, County of Queens, City and State of New York. Plaintiff Luis Sanchez (hereinafter "Plaintiff") commenced this action with the filing of a

summons and verified complaint on November 18, 2019. Defendant City of New York (hereinafter "City") appeared in the action on December 11, 2019 (although the answer is not efiled) and Defendants Lourdes Perez and Moises Perez (hereinafter "Perez") appeared in the action on December 27, 2019. Defendant Malee Chaisuman (hereinafter "Chaisuman") did not appear in the action and by Order of Hon. Joseph J. Esposito dated February 26, 2020, Plaintiff was granted a default judgment against Chaisuman, with an inquest to be held at the time of trial. On or about July 6, 2020, Plaintiff commenced a second action under Index number 709334/2020 against Antonelli, and Antonelli filed an answer in that action. On October 29, 2020 Hon. Denis J. Butler issued an Order consolidating the two actions for all purposes. After discovery was completed, Plaintiff filed a Note of Issue on January 18, 2024.

Antonelli claimed entitlement to summary judgment under CPLR 3212 as a matter of law, dismissing the complaint and all cross-claims because it asserts that it in performing repairs to the sidewalk, it did not create a dangerous condition and was not on notice of same. Antonelli maintained that it completed its work five years before Plaintiff's accident occurred, and, that the work was approved by the City. Following the completion of its work, it did not receive any notices of violation and was not called back by the owner to repair or alter its work. Antonelli alleged that while a violation was issued following the completion of Antonelli's work, it was issued to the owner of 67-16 Woodside Avenue, Chaisuman, and Antonelli never received notice of same. More significantly, Plaintiff testified it was unevenness in the sidewalk of Perez' property located at 67-10 Woodside Avenue, Queens, New York that caused his accident. Thus, the alleged defect complained of had nothing to do with Antonelli's work. Therefore, Antonelli contends that it cannot be found negligent in this case as a matter of law. In support of the motion, Antonelli submitted the pleadings, photographs, and, party deposition transcripts. Perez (Moises Perez) gave testimony on January 5, 2022, testifying in essential part that they resided in the home for twenty years, and that they and their neighbor were responsible for maintaining the repair of their portion of the shared driveway. Perez recalled that Antonelli was hired about five years prior to Plaintiff's accident by Chaisuman to replace the sidewalk and driveway. Perez related that during the course of the work, the contractor put cement on his side of the property and in performing the work, the contractor did not provide for a curb cut on the sidewalk. According to Perez, the sidewall was not flush with the street, therefore, Antonelli had made the sidewalk uneven. Perez claimed that it had made complaints about the work to the City, and that there was a concern about the uneveness of the sidewalk resulting in a lawsuit.

Antonelli testified that about five years prior to the accident, between July 2014 and August 2014, it was hired by the owner of 67-16 Woodside Avenue to conduct certain sidewalk repairs. In connection with this work, Antonelli was issued Permit # Q04-2014105-A22 from the City. A copy of the Permit was attached to the moving papers. Antonelli stated that he/it is a contractor that replaces sidewalks, brick houses and rebuilds front steps. According to Antonelli, it was hired to replace part of the sidewalk at Chaisuman's property and the work was completed by and approved by City on September 2, 2014. A copy of the New York City Department of Transportation Inspection and approval sheet was attached to the motion. Antonelli claimed that its work did not involve a driveway because there is no driveway between the two properties, and its work took approximately three to four days. Plaintiff testified in part that on February 5, 2019, he tripped at

the curb of the subject sidewalk, situated at or near the property line of the two above referenced properties.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*See Ferrante v Amer. Lung Assn.*, 90 NY2d 623 [1997]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974].) A defendant moving for summary judgment in a premises liability case "has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence" (*see Tamburo v Long Island University*, 229 AD3d 828 [2d Dept 2024]; *see also Cosme v. New York City Dept. of Educ.*, 221 AD3d 857, 859 [2d Dep 2023]). "A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*see Gordon v Am. Museum of Natural History*, 67NY2d 836 [1986]).

In order for a defendant to be held liable in tort, it must be demonstrated that a duty of care was owed to the Plaintiff (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 [1994]; *Suero-Sosa v Cardona*, 112 AD3d 706 [2d Dept 2013]). "The existence and extent of a duty is a question of law" (*Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 876 [2d Dept 2011]). A contractor may be held liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street or sidewalk (*see Brown v Welsbach Corp.*, 301 NY 202 [1950]; *Reyderman v Meyer Berfond Trust #1*, 90 AD3d 633 [2d Dept 2011]; *Minier v City of New York*, 85 AD3d 1134 [2d Dept 2011]). While a contractor can be held liable for an affirmative act of negligence which results in a hazardous condition on a sidewalk, if it is established that the contractor did not create a dangerous condition, then the contractor will not be liable. *(See DeBlasi v. City of New York*, 157 AD3d 656 [2nd Dept 2018]; *Zorin v. City of New York*, 137 AD3d 1116 [2nd Dept 2016]; *Santelises v. Town of Huntington*, 124 AD3d 863 [2nd Dept 2015].)

Based upon the documentary evidence submitted in this case, Antonelli failed to establish that on the date of the Plaintiff's accident, it had not caused or created a defective condition to the sidewalk when it performed construction or repair on the portion of the sidewalk where Plaintiff fell (*see Loughlin v City of New York*, 74 AD3d 757 [2d Dept 2010]; *Considine v Cinganelli*, 280 AD2d 635 [2d Dept 2001];). Antonelli eliminated the curb cut/driveway apron to the shared driveway during the construction which resulted in an elevation at the center of the shared driveway, which Plaintiff alleged caused his accident.

Moreover, assuming Antonelli had established its prima facie case, Plaintiff submitted in his opposition a report from his retained engineer, Adam C. Cassel, P.E. which raised a triable issue of fact. (*See Considine v Cinganelli*, 280 AD2d 635 [2d Dept 2001]; *Baker v Briarcliff School Dist.*, 205 AD2d 652 [2d Dept 1994].)

Therefore, the motion is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: November 27, 2024

Hon. Chereé A. Buggs, JSC